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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	E. MACLEAY BLADES, ROCKING P RANCH LTD., JOHN SMITH and PLATEAU CATTLE CO. LTD.
RESPONDENTS	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and THE MINISTER OF ENERGY FOR THE PROVINCE OF ALBERTA

Special Application

BRIEF AND AUTHORITIES OF THE APPLICANTS

Wilson Laycraft
Attn: Richard E. Harrison
James B. Laycraft, Q.C.
Suite 1601, 333 11th Ave SW
Calgary, AB T2R 1L9
T: 403.290.1601
F: 403.290.0828
Counsel for the Applicants

Alberta Justice
Attn: Melissa N. Burkett
Andrea M. Simmonds
1710, 639 – 5th Ave SW
Calgary, AB T2P 0M9
T: 403.297.2001
F: 403.662.3824
Counsel for the Respondents

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INTRODUCTION

1. This is the Brief and Authorities in reply to the Respondents' interlocutory application to strike and/or summarily dismiss the Applicants' Amended Originating Application.

2. In order to succeed in its Application, the Respondents would require this court to deny its constitutionally protected jurisdiction to support the rule of law. The Alberta Court of Appeal framed a superior court's jurisdiction as follows:

> [14] But maintaining the integrity of the system of administrative justice is not the only value at play. Judicial review was originally formulated by the common law courts in support of the rule of law, a constitutional principle of the first order. Indeed, the Supreme Court of Canada has noted that this principle is so important, that it might well be unconstitutional for a legislative body to attempt to abolish judicial review: *Crevier v Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 SCR 220 at p. 236; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras. 31, 52, [2008] 1 SCR 190.

Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City), 2015 ABCA 85; overturned 2016 SCC 47 on different grounds [Tab 1]

3. The Respondents have placed considerable weight on two arguments that they submit support their application to strike:

    a. Despite being enforced by the Respondents for 44 years and incorporated into *ALSA* regulations, the 1976 *A Coal Development Policy for Alberta* (the "**Coal Policy**") is unenforceable policy and its rescission is not justiciable; and

    b. The *Alberta Land Stewardship Act* ("***ALSA***") is inapplicable and contains language in section 15 removing this court's jurisdiction to review the rule of law.

4. The Respondents' submissions cannot succeed.

5. The Applicants' claim is reviewable by this Court. The Coal Policy was adopted by the Respondents following extensive consultation and it was followed and relied upon for 44 years. The Coal Policy has since been incorporated into the *South Saskatchewan Regional Plan* ("***SSRP***"), the *Livingstone-Porcupine Hills Sub-Regional Integrated Resource Plan* ("***LPHP***") and the *Livingstone-Porcupine Hills Land Footprint Management Plan* ("***LPHFP***") (collectively, the "***Plans***"). Both the *SSRP* and the *LPHP* are enforceable

regulations pursuant to the express provisions of *ALSA*. The *LPHFP* was continued and remains active pursuant to the express provisions of the *SSRP*.

6. The language in section 15 of *ALSA* can be interpreted in one of two ways. First, as a privative clause. If the Court interprets section 15 as a privative clause, then pursuant to the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, section 15 has no utility.

7. The other way to interpret section 15 of *ALSA* is to close this Court's jurisdiction to its constitutionally protected function of supporting the rule of law. That argument must fail.

8. Otherwise, the Coal Policy represents a 'true incorporation' into the *Plans*. Using accepted rules of statutory interpretation, the Respondents were required to abide by the express provisions in *ALSA* prior to rescinding the Coal Policy.

9. In applying to summarily dismiss, the Respondents' base their position on a cherry-picked portion of the record without providing the rest of the record to the Applicants or the court. Even undertakings taken under advisement following cross examination of the Respondents' witness have not been produced.

10. The Respondents' approach is patently unfair and completely ignores the role of the Record of Proceedings in ensuring government accountability and meaningful judicial review.

FACTS

a) A Note on the Parties' Ability to Rely Upon Facts

11. The Respondents have presented two bases to strike the Applicants' Amended Originating Application.

12. First, the Respondents have alleged that the Amended Originating Application discloses no cause of action pursuant to *Rule* 3.68(2)(b). Evidence is not permitted in support of that Application. The facts as stated in the Amended Originating Application are presumed to be true and the Court is required to assess whether there is a cause of action based upon those facts.

Alberta Rules of Court, Alta Reg 124/2010 at Rule 3.68(3) [***ARC***] [Tab 2]

13. Second, the Respondents have alleged that the Court has no jurisdiction (justiciable or non-justiciable) to consider the matters raised in the Applicants' Amended Originating Application pursuant to *Rule* 3.68(2)(a). Evidence is permitted to establish whether the Court has jurisdiction.

14. The parties are permitted to rely upon any facts associated with the Respondents' Application for Summary Dismissal.

b) The Role of the Environment Conservation Authority

15. In the early 1970s, the Government of Alberta began a four-year period of consultation and study on development in the Eastern Slopes. The consultations were conducted by the Environment Conservation Authority (the "**Authority**") and were done "to identify the priorities and concerns of Albertans for the region".

Affidavit of David Luff, sworn and filed November 17, 2020 at para 11

16. The Authority "was established as a Crown Corporation under the *Environment Conservation Amendment Act, 1977*." The Authority's role is described as follows:

> At the time it was established, the Environment Conservation Authority was without precedent, either within or outside Alberta. In its initial incarnation through *An Act respecting Environment Conservation, 1970* (S.A. 1970, chapter 36), the Environment Conservation Authority was responsible for conducting continual reviews of policies and programs of the Government and government agencies on matters pertaining to environment conservation, and for investigating into and reporting on matters pertaining to environment conservation at the request of the Lieutenant Governor. As well, they were able to inquire into issues relating to environment conservation, and to hold hearings to receive briefs and submissions about matters relating to environment conservation, making their recommendations to the Lieutenant Governor. The Authority became a corporation under the *Department of the Environment Act, 1971* (S.A. 1971, chapter 24, section 18), reporting to the Minister of the Environment. The Authority's functions continued when the Environment Conservation Authority became the Environment Council of Alberta in 1977 through the *Environment Conservation Amendment Act*, which effectively renamed the Environment Conservation Act the *Environment Council Act*. The mandate remained virtually unchanged, the major change being with regards to the structure of the board, which was replaced with a permanent Chief Executive Officer and temporary panels.

Environment Council of Alberta, ***Environment Council of Alberta records,*** online: Heritage Resources Management Information System - Provincial Archives of Alberta <https://hermis.alberta.ca/paa/Reports/ViewReport.aspx?ObjectID=GR0053.0001F&dv=True&deptID=1&ReportType=PDF>. [Tab 3]

17. The Authority was first established by *The Environment Conservation Act*. The purpose of the Authority was set out in section 7 of the Act. Section 7 makes clear that the Authority's express purpose is to "matters pertaining to environment conservation". The Authority was under the purview of the Lieutenant Governor in Council.

An Act Respecting Environment Conservation, 1970 c 36 [Tab 4]

18. *The Environment Conservation Act* was amended in 1972. The amendments subjected the Authority to the Minister of the Environment, newly established the previous year (1971) pursuant to *The Department of Environment Act*.[1]

The Environment Conservation Amendment Act, Ch 38 [Tab 5]
The Department of Environment Act, Ch 24 [Tab 6]

19. One of the Authority's earliest acts was to develop a "method by which resources were to be managed by the Government of Alberta in the Eastern Slopes Region".

Affidavit of David Luff, *supra* at para 14

20. To accomplish its statutory mandate, the Authority began public consultations in 1973 "in order to identify the priorities and concerns of Albertans for the region". The consultations were titled *Land Use and Development in the Eastern Slopes* (the "**Hearings**").

Affidavit of David Luff, *supra* at para 11

21. The Hearings were transcribed and are available for review in a ten-volume series. Each volume in the series represents a unique location in which the hearings were held. For example, Part I in the series is the record of hearings in Coleman, Alberta conducted June 11 and 12, 1973.

Affidavit of David Luff, *supra* at Ex 'A'

[1] The Authority appears to have been continued at least until 1984 when the *Environment Council Act* was enacted, continuing the Authority pursuant to section 3.

Environment Council Act, Chap E-13 [Tab 7]

22. The Hearings are remarkable in both their scope and relevance to current issues.

23. Mr. Luff's Affidavit attaches three volumes most relevant to the Applicants—Coleman (Part I), Lethbridge (Part II) and portions of Calgary (Part IIIB). Those portions of the Hearings concern land use around the Applicants' grazing leases and in the South Saskatchewan region.

24. The Authority heard from a variety of constituents, including first nations, coal development proponents, environmental NGOs and ranchers. It received written and oral submissions from those groups and persons interested in development along the Eastern Slopes. At the commencement of the record of proceedings, the Authority noted as follows:

> …land in the Eastern Slopes is now used or is proposed for use for such purposes as tourism, urban development, forest utilization, mineral resources industries, surface mining, oil and gas development, underground coal mining, agriculture, watershed conservation, domestic water supplies, hydroelectric power developments, wildlife and fishing management, wilderness and natural areas, institutional use by charitable, religious and other groups, archaeological sites, research, Indian reservations and national and provincial parks.
>
> …
>
> In order to publicly explore these interests and discover the concerns they generate, the Environment Conservation Authority was requested on behalf of the Government of Alberta to hold comprehensive and wide-ranging hearings on land Use and Resource Development in the Eastern Slopes.
>
> …
>
> A total of 308 submissions was made as well as 14 commercial recreational proposals.

Affidavit of David Luff, *supra* at Ex 'A' p iii and XV

25. Although the scope assigned to the Hearings is itself notable, most significant is likely the issues considered in the Hearings. In brief, the same issues considered by the Hearings remain issues today.

26. The Applicants outlined two concerns they have with coal development in their grazing allotments: water allocation and non-aquatic environmental impacts. Those two concerns were repeated in almost every submission in the Hearings. Then, as now, water allocation and loss of native grasses were of significant concern to those making submissions.

8

Affidavit of Macleay E Blades, sworn July 12, 2020, filed July 14, 2020 at paras 20 – 27
Affidavit of John Smith, sworn September 14, 2020 and filed September 18, 2020 at para 5

27. As a result of the Hearings, the Authority issued 232 recommendations. The following year, in 1974, the Authority conducted a review of coal mining in the Eastern Slopes. The report and recommendations were published as *Review of Coal Exploration Policies and Programs in the Eastern Slopes of Alberta: Report and Recommendations* (the "**Review**").

Affidavit of David Luff, *supra* at Ex 'B'

28. The Review was a direct result of the Hearings:

> In the summer of 1974…a resolution was passed in which the Public Advisory Committee on the Environment urgently requested the Environment Conservation Authority to fulfill its statutory duties and conduct a review of the Coal Exploration Permit Program, dating from the announcement of the Eastern Slopes Hearing.

Affidavit of David Luff, *supra* at Ex 'B' at p 4

29. The Review's recommendations range from the specific (reclamation of water ways following coal exploration) to the general (the role of the Energy Resources Conservation Board in permitting coal projects).

c) The Applicants' Role in Developing the Coal Policy

30. Although there is no evidence the Applicants themselves directly contributed to the Hearings or the Coal Policy's development, their interests were represented throughout. The area subject to their grazing leases were considered in at least the following submissions:

a. Ken Dezall, Cowley, Alberta: "This brief is confined to my own views and opinions about the forestry or trunk road";

Affidavit of David Luff, *supra* at Ex 'A' p 31

b. C. H. Allen, Crowsnest Guest Ranch: "At this time, we also propose an area on the north side of Highway #3, bordered on the south and north by the Crowsnest Forest Reserve, on the east by the Kananaskis Highway and the west by the B.C. border";

Affidavit of David Luff, *supra* at Ex 'A' p 91-1

c. Charlie Russell, Pincher Creek, Alberta: "My name is Charlie Russell and I am a member of the ranching community";

Affidavit of David Luff, *supra* at Ex 'A' p 95

d. Andy Russell, Foothills Protection Association: "I speak on behalf of the Foothills Protective Association which is concerned with the surface rights of land. So I too represent ranchers…In the case of strip mines, to claim that reclamation is possible is purely theoretical because it has not been proven possible…"; and

Affidavit of David Luff, *supra* at Ex 'A' p 102

e. M. Edey, The Stampede Ranch: "We have a very direct interest in the future of the Eastern Slope as our ranches border this area, therefore any major change in policy has a direct bearing on our operation…We just represent the people who graze the upper Highwood, that is in the corridor on the headwaters of the Highwood. They are Mr. Dave Deeble, our ranching company and the Eden Valley Indian people.".

Affidavit of David Luff, *supra* at Ex 'A' p 365-1, 366

31. The Applicants' interests were represented and spoken to in the course of the Hearings. Specifically, the Stampede Ranch, in representing the interests of ranchers "who graze the upper Highwood", would have represented the grazing allotments and leases the Applicants now hold.

Affidavit of Macleay E Blades, *supra* at paras 11 and 12
Affidavit of John Smith, *supra* at para 4

d) Developing the Coal Policy

32. It was within the context of the Hearings and the Review that the Department of Energy and Natural Resources released a "statement of a coal development policy for Alberta", i.e. the Coal Policy.

Affidavit of Macleay E Blades, sworn July 12, 2020, filed July 14, 2020 at Ex 'A', p i

33. The Coal Policy is best divided into two categories: unenforceable statements of policy and enforced directives.

34. In the latter category of enforced directives were the following: a) a royalty regime that was put in place "without change for a ten-year period" and b) the "classification [of] Provincial lands into four categories with respect to coal exploration and development".

Affidavit of Macleay E Blades, *supra* at Ex 'A' at p 9 – 11, 14 – 18 and A1 – A2

35. The royalty regime issued by the Coal Policy appears to have been in place until September 18, 1992. On that date, the Respondents issued Information Letter 92-21 establishing a new royalty regime. The new regime appears to have been established by the adoption of a new set of regulations, bearing the same name as the former regulations. Section 12 of the new *Coal Royalty Regulation* expressly repealed the former *Coal Royalty Regulations*.

Coal Royalty Regulation, AR 295/1992 at s 12 [Tab 8]

36. The former *Coal Royalty Regulations* were filed just over one month from the release of the Coal Policy. The regulations adopt the royalty rate set out in the Coal Policy as well as other elements of the Coal Policy.

Coal Royalty Regulations, Alta Reg 193/176 [Tab 9]
Regulations Act, Index of Regulations, December 31, 1991 at p 42 [Tab 10]

37. The second enforced directive in the Coal Policy are the coal categories. The categories divided the Eastern Slopes into four distinct regions. Each category established different criteria relating to exploring and developing coal resources.

38. In brief, the four categories were as follows:

    a. Category 1: "no exploration or commercial development will be permitted";

    b. Category 2: "limited exploration is desirable and may be permitted under strict control but in which commercial development by surface mining will not normally be considered at the present time";

    c. Category 3: "exploration is desirable and may be permitted under appropriate control but in which development by surface or underground mining or in-situ operations will be approved subject to proper assurances respecting protection of the environment and reclamation of disturbed lands"; and

d. Category 4: "exploration may be permitted under appropriate control and in which…mining…may be considered".

Affidavit of Macleay E Blades, *supra* at Ex 'A' at p 14 – 18

39. Like the royalty regime, the coal categories were enforced.

i) Directive 061

40. *Directive 061: How to Apply for Government Approval of Coal Projects in Alberta* appears to have been adopted in September 1978 by the Energy Resources Conservation Board (the "**ERCB**").

Transcript of Questioning of Michael Moroskat, held December 21, 2020 and yet unfiled at Ex 'A', p 8

41. The Alberta Energy Regulator (the "**AER**") implemented Directive 061 June 17, 2013 when it succeeded the ERCB. The AER's jurisdiction to implement Directive 061 is borne out of the regulator's general powers set out in section 9 of the *Coal Conservation Act*. For example, section 9 provides that:

> 9(1) The Regulator may make rules
>
> …
>
> (d) restricting or prohibiting the development of a mine, mine site, coal processing plant or in situ coal scheme at any point within a stated distance of a boundary, road, road allowance, lake, river, stream, pipeline or other public or private works;
>
> …
>
> (u) generally, prescribing measures to conserve coal or to prevent its waste or improvident disposition, and stipulating any other provisions reasonably incidental to the efficient development of mines, mine sites, coal processing plants and in situ coal schemes, and to production from them;

Coal Conservation Act, RSA 2000, c C-17 at s 9 [***Coal Conservation Act***] [Tab 11]

42. The coal categories were incorporated into Directive 061 and governed the approval process by which coal projects were approved within the four regions.

ii) Alberta Energy

43. In addition to enforcement mechanisms with the AER, the Coal Policy was enforced by Alberta Energy. Under cross examination, the Respondents' affiant, Michael Moroskat, testified that the coal categories were relied upon to decide "how [the Respondents] issue tenure" and restrictions on accepting new lease "applications for coal".

Transcript of Questioning of Michael Moroskat, *supra* at P 7 L 7 – P 13 L 4

44. Mr. Moroskat testified that the Respondents specifically enforced the Coal Policy as follows:

> Page 12
>
> Q So the coal policy was relied upon to establish databases to not issue mineral leases for Category 1 lands. That's correct?
>
> A It was used to establish a restriction to restrict the issuance of coal rights in those areas, yes.
>
> Q Okay, and then for category 2 lands, you referenced 'published information letters'. Do you recall that?
>
> A I do, yeah.
>
> Q And you said, we issue published information letters to restrict mineral development in Category 2 lands. Do you recall that?
>
> A Yes.

Transcript of Questioning of Michael Moroskat, *supra* at P 12 L 7 – 19

45. The Respondents' authority to restrict coal rights is born out of sections 21 and 24 of the *Coal Conservation Act*. Those provisions make the Lieutenant Governor in Council's authorization a condition precedent to obtaining a permit from the AER.

Coal Conservation Act, *supra* at s 21 and 24 [Tab 11]
L. Douglas Rae, ***The Legal Framework for Coal Development in Alberta***, [Vol XX No 1 1982] at p 124 [***Rae***] [Tab 12]

iii) Overall Regulatory Process

46. The proposed intervenors, Atrum Coal Limited and Elan Coal Ltd., filed the Affidavit of Tony Mauro in support of their Application to intervene. Mr. Mauro swore as follows:

19. Accordingly, the Coal Policy permitted limited coal exploration in Category 2 lands but 'normally' would not consider commercial development by surface mining. To develop the Elan Project, Atrum would have required an exemption under the Coal Policy.

Affidavit of Tony Mauro, sworn December 14, 2020 at para 19

47. The procedure for obtaining an exemption outlined by Mr. Mauro is consistent with the Coal Policy. As noted by the Coal Policy itself:

> The government will consider documented applications for reclassification of lands from any interested person…

Affidavit of Macleay E Blades, *supra* at Ex 'A' p 17

48. Directive 061 provided the method to obtain a reclassification.

Transcript of Questioning of Michael Moroskat, *supra* at Ex 'A' p 9 – 10

e) Rescinding the Coal Policy

49. On May 15, 2020 Alberta Energy rescinded the Coal Policy.

Affidavit of Macleay E Blades, *supra* at Ex 'C'
Affidavit of Michael Moroskat, sworn November 30, 2020 at Ex 'B'

50. The fact that the Coal Policy, active and relevant for 44 years, was rescinded on the Friday of the May long weekend in the middle of a global pandemic (as courts sat silent and judicial processes largely waned), sits in stark contrast to the effort taken by the Authority in conducting the Hearings upon which the Coal Policy was adopted.

51. An example of the effort at consultation made by the Authority in 1973 is the following hearing notice:

> As background to the hearings the Environment Conservation Authority released a series of 12 Information Bulletins; five of these pertained specifically to the separate watershed basins and were prepared by the individual planning commissions.
>
> Hearings were held (during June and July of 1973) in each of the watershed basins as well as in the five major cities.

Affidavit of David Luff, *supra* at Ex 'A' p iv

52. Alberta Energy was directed to rescind the Coal Policy pursuant to a March 31, 2020 decision of the Honourable Minister Savage. On that date, Minister Savage communicated the direction to Alberta Energy by checking the box for 'Option A':

> Option A: The Minister directs Alberta Energy to rescind the 1976 coal policy immediately, and undertake a 120 day process to resolve existing held coal lease applications before issuing newly available coal rights.

Affidavit of Micheal Moroskat, sworn November 30, 2020 at Ex 'A'

53. Nine days later, on April 08, 2020, the AER rescinded Directive 061. The AER announced its decision by issuing Bulletin 2020-07.

Transcript of Questioning of Michael Moroskat, *supra* at Ex 'B' and 'C'

54. The Coal Policy rescission appears coordinated with the AER's decision to rescind Directive 061. For example, the only individual Mr. Moroskat remembered contacting following the Coal Policy rescission was Shaunna Cartwright, director with the AER responsible for coal:

> Page 68
>
> Q You recall providing evidence earlier about a Shaunna Cartwright?
>
> A Yes.
>
> Q And you phoned her to advise of the decision once a decision to rescind the policy was made?
>
> A That is what I recall. As I recall, I phoned her to let her know that a decision was made.
>
> Q Okay. Who is Ms. Cartwright?
>
> A I can't recall her specific title, but she's, I believe, a director with the AER responsible for coal in some respect of, like, our policy or an advisory capacity of some sort. I -- I -- I don't recall her specific job title and -- and roles.
>
> …
>
> Q Okay. So what was discussed on this phone call with Ms. Cartwright, then?
>
> A To my recollection, it was just simply that -- that the policy -- a decision had been made to rescind the coal policy.
>
> Q And why did you decide to phone her? Why not, for example, phone my clients?

A The AER is a -- has an active role in regulating coal development, and we often communicate between each other on a number of issues.

Transcript of Questioning of Michael Moroskat, *supra* at P 68 L 4 – P 71 L 15

55. The relationship between the AER and Alberta Energy on the topic of rescinding the Coal Policy remains a mystery. That part of the record is incomplete and unavailable to the parties as at the date this Brief was filed.

56. The decision to rescind the Coal Policy contains two variables requiring analysis: who made the decision and what are the reasons for the decision. Each will be analyzed in turn.

i) Who Made the Decision to Rescind the Coal Policy?

57. The decision to rescind the Coal Policy was announced in the Respondents' Coal information Bulletin 2020-23. The Information Bulletin was authorized by Martin J. Chamberlain, Q.C., Deputy Minister of Energy Policy. The Information Bulletin states that the Coal Policy "has been rescinded effective June 1, 2020." No other context as to the decision maker was provided by Mr. Chamberlain.

Affidavit of Macleay E Blades, *supra* at Ex 'B'

58. It appears that Minister Savage also had a role to play in rescinding the Coal Policy. Her decision "directs Alberta Energy to rescind" the Coal Policy. The act of rescinding the Coal Policy therefore remained with Alberta Energy, as delegated by the Minister[2].

Affidavit of Michael Moroskat, *supra* at Ex 'A'

59. Finally, only three options were provided to Minister Savage, each of which rescinds the Coal Policy. Mr. Moroskat testified that he did not know who made the decision to only present options A, B or C to Minister Savage.

Transcript of Questioning of Michael Moroskat, *supra* at P 55 L 5 – 10

ii) What are the Reasons for the Decision to Rescind the Coal Policy?

60. Each decision maker has relied upon separate reasons to rescind the Coal Policy.

[2] Note that this evidence is unavailable to the Respondents in establishing whether the Deputy Minister properly delegated her authority. See *Rule* 3.68(3).

61. In rescinding the Coal Policy, Mr. Chamberlain states:

> The coal categories are no longer required for Alberta to effectively manage Crown coal leases, or the location of exploration and development activities, because of decades of improved policy, planning, and regulatory processes.

Affidavit of Macleay E Blades, *supra* at Ex 'B'

62. That is the extent of the reasons provided by Mr. Chamberlain.

63. By contrast, when Minister Savage made her decision to direct Alberta Energy to rescind the Coal Policy, it was based upon the following advice:

> Despite existing land use policies, there is a risk that rescission could result in policy gaps because several Integrated Resource Plans that remain active within the Eastern Slopes rely on the coal categories to establish baseline conditions (mostly in the South Saskatchewan Region, but also a portion of the Upper Athabasca Region).
>
> > The full extent of the policy gap risk will not be quantified until Alberta Energy completes its review of the coal categories with input from Environment and Parks. This work is expected to be complete in summer 2020.

Affidavit of Michael Moroskat, *supra* at Ex 'A' p 2

64. Mr. Moroskat testified that he was unaware whether the work to determine the full extent of the policy gap risk was ever completed.

Transcript of Questioning of Michael Moroskat, *supra* at P 26 L 12 – 22

65. The reasons for decision sit in contrast to each other. Where Mr. Chamberlain says, "the coal categories are no longer required", the Minister notes that the "rescission could result in policy gaps".

66. Silent in either decision are details relating to consultations or why the decision was made not to consult. Mr. Moroskat testified that he was "not aware of any consultation regarding rescinding the coal policy".

Transcript of Questioning of Michael Moroskat, *supra* at P 58 L 14 – 18

67. Mr. Moroskat's statement on consultation, however, stands in contrast to his other testimony:

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A I can't recall any specific meetings, but I know they happened fairly regularly. As a matter of – of our business, the department staff meet with a wide variety of stakeholders that we have that are related to our business. So I -- I don't recall the specifics of any one meeting.

Q But there were multiple meetings – multiple letters, multiple meetings?

A There would've been multiple meetings with multiple companies on a variety of different subjects, yes.

Q Including the rescission of the coal policy?

A I'm not aware of one that specifically focused on the rescission of the coal policy, but concerns that industry has with the coal policy would've come up in these discussions.

Transcript of Questioning of Michael Moroskat, *supra* at P 62 L 9 – 23

68. The Respondents had "multiple" discussions with rescission advocates. Prior to rescinding the Coal Policy, the Respondents never contacted the Applicants or any of the intervenors supportive of the Applicants' position.

Transcript of Questioning of Michael Moroskat, *supra* at P 65 L 2 – 26
Affidavit of MacLeay E Blades, *supra* at para 17
Affidavit of John Smith, *supra* at para 5(c)

69. The basis for the Respondents' decision not to contact the Applicants or the various intervenors is contained in the Advice to Minister:

> However, [rescinding the Coal Policy] will draw criticism from environmental groups and other user groups active within Alberta's Eastern slopes, particularly if the decision is made without prior public consultation.

Affidavit of Michael Moroskat, *supra* at Ex 'A' p 2

70. The Respondents pre-determined the result of public consultation. They held that the Applicants would be critical of the decision and therefore (this Court may infer) determined there was no merit in pursuing public consultation.

71. Had they consulted with the Applicants, the Respondents may have discovered that they are generally not opposed to development and are supportive of sustainable development and exploration generally. Rather, the Applicants are concerned that the planned development is neither sustainable nor merited on their grazing allotments.

Affidavit of Macleay E Blades, *supra* at para 19
Affidavit of John Smith, *supra* at paras 12 – 13

72. Any chance of consultation and creating a framework knowing the Applicants' positions was taken away by the Respondents' unilateral decision to pre-determine the results of consultation.

iii) Conclusion on Rescission

73. The Respondents have argued that rescission was done because the Coal Policy was no longer necessary. This submission is made despite the Respondents' not knowing the policy gaps that were in place when the policy was rescinded.

74. However, one crucial fact cannot be emphasized enough. Before rescission, the Applicants' properties and grazing leases were secure. There was no exploration and there was no prospect of development.

Affidavit of Macleay E Blades, *supra* at para 15
Affidavit of John Smith, *supra* at para 11

75. Since the Coal Policy was rescinded, the Applicants' properties and grazing leases are now subject to exploration and the prospect of significant development—development not characterized by shaft mines with restricted impact on surface rights but instead open pit mines where mountains are scraped off the surface of land and replaced with 250 meter pits.

Affidavit of Macleay E Blades, *supra* at paras 15 – 18
Affidavit of John Smith, *supra* at para 11

76. The before and after change affecting the Applicants is something that cannot be ignored, despite the Respondents' best attempts to do so in their submissions. Above all else, it is that fact that makes the rescission justiciable and reviewable by this Court.

ISSUES

77. The following issues are before this Court:

    a. Whether the decision to rescind the Coal Policy is justiciable having regard to:

i. Whether the rescission was based in law;

ii. Whether the Applicants are directly affected; and

iii. Whether the Applicants had a legitimate expectation of procedural fairness;

b. Whether *ALSA* applies to the Coal Policy;

c. Whether the Respondents acted in accordance with the express requirements of *ALSA* when rescinding the Coal Policy; and

d. Whether, notwithstanding *ALSA*, the Respondents' had the authority to unilaterally rescind the Coal Policy.

78. The issues are framed by the Respondents' underlying Applications to summarily dismiss and strike the Applicants' claim.

LAW & ANALYSIS

Issue #1: Whether the Decision is Justiciable

79. The role of courts in judicial review is to ensure that the executive has acted reasonably, "i.e. within a range of acceptability and defensibility":

> [78] In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Put another way, all holders of public power are to be accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of law: *Slansky* at paras. 313-315.
>
> ***Tsleil-Waututh Nation v. Canada (Attorney General)***, 2017 FCA 128 at para 78 [Tab 13]

80. Judicial review, however, is "subject to any concerns about justiciability". If a government decision is not "justiciable", courts will properly not exercise their discretionary powers to judicially review it.

81. The distinction between justiciable and non-justiciable is stated as follows:

> [J]usticiability may be defined as a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable. The criteria used to make this determination pertain to three factors: (1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court.

Mathur v Ontario, 2020 ONSC 6918 at para 103 (citing: Sossin, D., *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012)) [Tab 14]

82. The first step in determining whether the decision to rescind the Coal Policy was justiciable is to establish the correct test for justiciability.

a) Test for Justiciability

83. In *Black v Canada (Prime Minister)*, the Ontario Court of Appeal articulated the distinction between justiciable and non-justiciable (political) decisions. The Court was asked to judicially review a decision by the then Prime Minister of Canada to intervene with the Queen to block the Applicant/Appellant's appointment as a "peer" in the United Kingdom. Being so appointed would have permitted the Appellant from sitting in the House of Lords. The Court ultimately held that justiciable decisions are those that are not "purely political":

> [50] At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. See *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604; *Thorne's Hardware Ltd. v. R.*, 1983 CanLII 20 (SCC), [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577. Only those exercises of the prerogative that are justiciable are reviewable. The court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch": *Reference re Canada Assistance Plan (British Columbia)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525 at p. 545, 58 B.C.L.R. (2d) 1.
>
> [emphasis added]

Black v Canada (Prime Minister), 2001 CanLII 8537 (ON CA) at paras 1 and 50 [***Black***] [Tab 15]
Canada (Prime Minister) v Khadr, 2010 SCC 3 at para 35 [***Khadr***] [Tab 16]
Engel v Alberta (Executive Council), 2019 ABQB 490 at paras 75 – 79 [Tab 17]

84. The Court in *Black* adopted the following test to determine justiciability:

> [51] Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.
>
> [emphasis added]

Black, *supra* at para 51 [Tab 15]
Stagg v Canada (Attorney General), [2019] FC 630 at para 50 [***Stagg***] [Tab 18]
Tesla Motors Canada ULC v Ontario (Ministry of Transportation), [2018] OJ No 4394 at paras 43 – 47 [***Tesla Motors***] [Tab 19]

85. More recently, the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall* favoured a contextual approach to determining justiciability:

> [34] There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see *Sossin*, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid*.).

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26 at para 34 [***Wall***] [Tab 20]

86. Following the decision in *Wall*, the "directly affected" test articulated in *Black* appears to no longer be valid. Rather, the Supreme Court of Canada appears to have expanded justiciable decisions by shifting the focus away from a party's rights and instead focusing on a) the nature of the claim being raised and b) a Court's competence to adjudicate that claim.

Wall, *supra* at para 34 [Tab 20]

87. The Applicants submit that this contextual approach is consistent with the Supreme Court of Canada decision in *Khadr*. In that decision, the Supreme Court of Canada considered whether the Canadian government was required to request Mr. Khadr's return to Canada following his detention in Guantanamo Bay, Cuba.

Khadr, *supra* at para 1 [Tab 16]

88. In determining whether the relief requested by Mr. Khadr was justiciable, the Court focused not on whether Mr. Khadr was directly affected by the government's decision, but instead focused on whether:

    a. The remedy sought "is sufficiently connected to the breach"; and

    b. The remedy sought is "a judicial one which vindicates the right while invoking the function and powers to a court".

Khadr, *supra* at paras 29 and 33 [Tab 16]

89. Focusing on the claim and a court's ability to accede to an applicant's requested relief instead of whether an applicant is directly affected is supported by the wider jurisprudence.

90. In *Stagg*, the Court held as follows:

> "…[W]here "high policy" issues are not at stake, 'the executive of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual' (*Black v Chretien*, at paras 246-247) … [T]he evolution of administrative law in recent decades has resulted in a widening of the grounds on which administrative decisions may be reviewed. Thus, the decisive factor is not the political implications of the matter or the decision's discretionary component, but the fact that the question "has a sufficient legal component to warrant the intervention of the judicial branch": *Reference Re Canada Assistance Plan (BC)*; see also Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012)".

91. In *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, the Federal Court of Appeal held as follows:

> 63 Whether the question before the Court is justiciable bears no relation to the source of the government power: *R. v. Ministry of Defence*, *ex parte Smith*, [1995] 4 All E.R. 427, aff'd [1996] Q.B. 517, [1996] 1 All E.R. 257 (C.A.). For some time now, it has been accepted that for the purposes of judicial review there is no principled distinction between legislative sources of power and prerogative sources of power: Council of Civil Service Unions, supra. I agree with the following passage from Lord Roskill's speech in that case (at page 417 A.C.):
>
> > If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may be challenged on one or more...grounds... If the

> executive instead of acting under a statutory power acts under a prerogative power...I am unable to see...that there is any logical reason why the fact that the source of the power is the prerogative and not statute should deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.
>
> 64 I also agree with the Court of Appeal for Ontario in *Black*, supra at paragraph 44 that "the source of the power -- statute or prerogative -- should not determine whether the action complained of is reviewable."

Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada), 2015 FCA 4, at paras 59 – 70 [***Hupacasath***] [Tab 21]

92. Finally, in considering the current test for justiciability, the Federal Court recently held as follows:

> (2) Law of Justiciability
>
> (a) Test for Justiciability
>
> 27 Justiciability is concerned with the Court's proper role within Canada's constitutional framework and the "time-honoured" demarcation of powers between the Courts and the other branches of government. It relates to the subject matter of a dispute and whether the issue is appropriate for a Court to decide *(Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 32 [*Highwood*]; *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 62 [*Hupacasath*]). The inquiry into justiciability was described in *Canada (Auditor General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49 at 90-91, as:
>
> > 50 ... first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead, deferring to other decision making institutions of the polity.
>
> 28 In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, Lorne M. Sossin defines justiciability as:
>
> > ... a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.
> >
> > [Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 7 [*Sossin*], cited in *Highwood*, above at para 33]

> 29 The question to be decided is whether the Court has the institutional capacity and legitimacy to adjudicate the matter. Or, more generally, is the issue one that is appropriate for a Court to decide (*Highwood* at paras 32, 34). The terms "legitimacy" and "capacity" can also be understood as the "appropriateness" and "ability" of the Court to deal with a matter (*Hupacasath*, above at para 62).
>
> 30 There is no single set of rules delineating the scope of justiciability, the approach to which is flexible and to some degree contextual. Courts have often inquired whether there is a sufficient legal component to warrant judicial intervention, "[s]ince only a court can authoritatively resolve a legal question, its decision will serve to resolve a controversy or it will have some other practical significance" (*Highwood* at para 34; *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 546).
>
> 31 In determining whether it has the institutional capacity and legitimacy to adjudicate the matter, the Supreme Court in *Highwood* provides that a Court should consider that the matter before it "would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*Sossin*, above at 294, cited in *Highwood* at para 34).

Luciuk (Guardian ad litem of) v. Canada, 2020 FC 1008 at paras 26 – 38 [*Luciuk*] [Tab 22]

93. On the issue of whether pure government policy was justiciable, the Court in *Luciuk* held that "to engage the Court's adjudicative functions, the question must be one that can be resolved by the application of law".

Luciuk, *supra* at para 34 [Tab 22]

94. The Applicants submit that the test for justiciability requires a Court to examine the remedy sought by an applicant to determine whether it is one in which a Court may review. Consistent with the narrow scope of justiciable decisions (discussed immediately below), the Court may consider numerous factors to determine whether the context within which a decision was made is justiciable.

95. It should, however, not be lost on this Court that a consistent holdover from the decision in *Black* is that if a decision directly affects a party, that decision is justiciable.

b) The Scope of Justiciable Decisions

96. At paragraph 43 of their submissions, the Respondents cited the Ontario Divisional Court in *Hamilton-Wentworth* as limiting the scope of prerogative powers subject to judicial review.

Following the Ontario Court of Appeal's ruling in *Black v Chretien* the holding from *Hamilton-Wentworth* is no longer valid.

97. The Ontario Superior Court of Justice in *Tesla Motors* recently reviewed the holdings from *Hamilton-Wentworth* and *Black v Chretien*, concluding as follows:

> [46] Under this test, matters of high policy i.e. purely political matters, like a decision to sign a treaty, or to declare war, or to cancel a subsidy program, affect no one's individual rights or legitimate expectations and, as such, are not subject to judicial review. I would add that, like the decision to cancel windmill subsidies in *Skypower*, the decision to cancel the cap-and-trade program and the electric car subsidy program are such decisions. At the opposite end of the spectrum, Justice Laskin [in *Black v Chretien*] referred to more mundane executive decisions such as issuing a passport. He wrote:
>
> > A passport is the property of the Government of Canada, and no person, strictly speaking, has a legal right to one. However, common sense dictates that a refusal to issue a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable.
>
> [47] I note that in *Hamilton-Wentworth*, the Divisional Court had determined that the "doctrine of legitimate expectations" was not itself a basis to make government decisions justiciable. It is apparent that *Black* has changed the law in that regard and narrowed the class of non-justiciable activities to those which do not affect the rights or reasonable expectations of a person. The doctrine of legitimate expectations, as recognized in *Black*, does not create substantive rights. That is, as noted above, no one has a right to receive government subsidies generally. But, as found by the Court of Appeal, in appropriate cases the court will review executive action taken "**for improper reasons or without affording the applicant procedural fairness**."
>
> [**emphasis in original**]
>
> [emphasis added]

Tesla Motors, *supra* at paras 46 – 47 [***Tesla Motors***] [Tab 19]

98. *Tesla Motors* summarized the executive decisions not subject to judicial review: declarations of war, cancelling subsidies or signing treaties. They are decisions that do not affect a specific individual's rights.

Tesla Motors, *supra* at para 46 [Tab 19]
Black, *supra* at para 52 [Tab 15]

99. In furtherance to the above, the decision in *Hamilton-Wentworth* is distinguishable. It was decided on the basis that a Court will not interfere with policy decisions concerning funding.

100. In *Bowman v Ontario (Minister of Children, Community and Social Services)*, the Court relied on *Hamilton-Wentworth* and distinguished *Tesla* on the basis that *Tesla* involved regulatory details on how the funding program was going to operate, not the decision to cancel a program itself.

Bowman v Ontario (Minister of Children, Community and Social Services), 2019 ONSC 1064 at para 48 [***Bowman***] [Tab 23]

101. In both *Hamilton-Wentworth* and *Bowman*, the Courts held that they had no authority to quash the government's decision because overturning the decision would require the government to continue spending money.

Bowman, *supra* at para 38 [Tab 23]

102. In the case at bar, the Applicants' seek remedies requiring the Respondents to adhere to their responsibilities under *ALSA* and their common law right to procedural fairness, founded in legitimate expectation.

103. Non-justiciable decisions are narrow and narrowing. So called matters of "high policy" (non-justiciable) are few.[3] This statement of law is supported in *Tesla Motors* and in the wider jurisprudence. In the recent decision of *Mathur v Ontario*, the Ontario Superior Court of Justice held as follows:

> [121] The Applicants also submit that non-justiciable cases are rare, especially when Charter rights are involved. They cite *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, a case I will discuss further below, where the Supreme Court stated, at para. 107:

[3] "High policy" decisions are still justiciable, insofar as they relate to constitutional rights: see *Guérin v Canada (Attorney General)* at para 34. The Supreme Court of Canada has repeatedly noted the import of environmental concerns. In *British Columbia v Canadian Forest Products Ltd.*, the Court held that: "…[A]s the Court observed *in R v Hydro-Quebec*, legal measures to protect the environment 'relate to a public purpose of superordinate importance.'" In *Friends of the Oldman River Society v Canada (Minister of Transport)*, the Court held: "[t]he protection of the environment has become one of the major challenges of our time." When determining the justiciability of the Coal Policy rescission, the import placed on environmental matters generally should not be lost on this Court, particularly with clear authority permitting judicial review of high policy on Charter challenges.

British Columbia v Canadian Forest Products Ltd., [2004] SCC 38 at para 7 [Tab 24]
R v Hydro-Quebec, [1997] 3 SCR 213 [Tab 25]
Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3 at p 16 [Tab 26]
Guérin v. Canada (Attorney General), 2018 FC 94 at para 34 [Tab 27]

> The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for Charter compliance when citizens challenge it. In such circumstances, it is the court's obligation to decide the matter.
>
> …
>
> [125] As the Federal Court of Appeal has noted, the category of non-justiciable cases is very small: *Hupacasath First Nation*, at para. 67. The court also noted that even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a "very large margin of appreciation": *Hupacasath First Nation*, at para. 67.
>
> [emphasis added]

Mathur v Ontario, *supra* at paras 121 – 140 [Tab 14]
Stagg, *supra* at para 50 [Tab 18]

104. The Court in *Mathur v Ontario* ultimately concluded that Applications for judicial review are "*prima facie* justiciable".

Mathur v Ontario, *supra* at paras 140 [Tab 14]

c) The Decision to Rescind is Different from Other Non-Justiciable Actions

105. The Respondents have relied upon the Supreme Court of Canada decision in *Knight v Imperial Tobacco Canada Ltd.* as supporting their submission that the decision to rescind the Coal Policy is non-justiciable.[4] That decision is, however, distinguishable.

Knight v Imperial Tobacco Canada Ltd., 2011 SCC 42 at paras 72 – 96 [***Knight***] [Tab 28]

106. In *Knight*, the Defendant, Imperial Tobacco Canada Ltd., issued a third party proceeding against the Government of Canada, alleging that if the tobacco companies were held liable to the Plaintiffs, they were entitled to compensation from the Government of Canada for negligent misrepresentation, negligent design and failure to warn.

Knight, *supra* at para 2 [Tab 28]

107. The Court ultimately held as follows:

[4] See paragraph 42 of the Respondents' submissions.

> [95] In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

Knight, *supra* at para 87 [Tab 28]

108. The decision in *Knight* is distinguishable to the case at bar. The Applicants are not seeking compensation for negligent misrepresentation; rather, they are seeking judicial review of a decision in which they had a statutory right to consultation as well as a legitimate expectation of consultation. Further, in differentiating a pure public policy decision from a discretionary decision, the Court in *Knight* held as follows:

> [88] Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.
>
> [emphasis added]

Knight, *supra* at para 88 [Tab 28]

109. In the case at bar, the Coal Policy was a discretionary decision pursuant to the *Coal Conservation Act*. Ministers used their discretion granted under the Act to provide authorization to coal development in accordance with the Coal Policy.

110. Another decision deemed non-justiciable is *Tanudjaja v Canada (Attorney General)* from the Ontario Court of Appeal. In *Tanudjaja*, the Court held that the remedy sought "did not challenge a specific state action or a specific law":

> [19] I would uphold the motion judge's conclusion that this application is not justiciable. In essence, the application asserts that Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing.

…

> [27] In this case, unlike in *PHS Community Services* (where a specific state action was challenged) and *Chaoulli* (where a specific law was challenged) there is no sufficient legal component to engage the decision-making capacity of the courts.

Tanudjaja v. Canada (Attorney General), 2014 ONCA 852 at paras 19 – 36 [***Tanudjaja***] [Tab 29]

111. In the case at bar, unlike in *Tanudjaja*, there is a specific decision that is being challenged: the rescission to the Coal Policy. Further, there is sufficient legal component to the challenge. Not only was the Coal Policy enforced through the Minister's discretionary powers in the *Coal Conservation Act*, the Coal Policy was also enforced by the AER and, as will be discussed below, within various regional plans adopted under *ALSA*, the amendments of which required, *inter alia*, consultation.

112. In another recent decision, the Federal Court in *La Rose v Canada* considered the justiciability of a Statement of Claim challenging the Government of Canada's response to climate change. The Court in *La Rose* held as follows:

> [33] Policy and political questions are not a bar to judicial involvement, however, "[s]ome questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and other branches of government" (*Hupacasath* at para 62). Questions in the realm of policy and political issues must be demonstrably unsuitable for adjudication (*Sossin* at 162):
>
> > Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.
>
> [34] To engage the Court's adjudicative functions, the question must be one that can be resolved by the application of law.

La Rose v. Canada, 2020 FC 1008 at paras 33 – 34 [***La Rose***] [Tab 30]
Hupacasath, *supra* at paras 59 – 70 [Tab 21]

113. The Court in *La Rose* determined that the claim was non-justiciable: "The Plaintiffs' position fails on the basis that there are some questions that are so political that the Courts

are incapable or unsuited to deal with them." This determination is distinguishable from the case at bar, given the overtly political and non-legal issues before the Court in *La Rose*.

La Rose, *supra* at para 44 [Tab 30]

d) The Decision to Rescind is Justiciable

114. The case at bar is distinguishable from others in which the courts have ultimately ruled were non-justiciable. The Applicants submit that three features of the Coal Policy rescission make that decision justiciable:

a. The Coal Policy is based in law;

b. The Coal Policy affects the Applicants; and

c. The Applicants had a legitimate expectation of consultation.

115. It is the Applicants' submission that any one of the above factors make the decision to rescind the Coal Policy justiciable. Each factor will be analyzed in turn.

i) The Coal Policy and Its Rescission are Based in Law

116. The contextual approach embedded within the test for justiciability necessitates that any analysis begin with examining whether an impugned decision is based in law, meaning whether there is a legal component to the decision that is reviewable by a court.

Highwood, *supra* at para 34 [Tab 20]

117. In *Tesla Motors*, the impugned Minister was vested with a purely discretionary authority to subsidize "specific projects the Minister considers to be of provincial significance".

Tesla Motors, *supra* at para 7 [Tab 19]

118. The discretionary power granted the Minister in *Tesla Motors* is akin to the purely discretionary power to approve or refuse coal development under the *Coal Conservation Act*.

Coal Conservation Act, *supra* at s 21 and 24 [Tab 11]
Rae, *supra* at p 124 [Tab 12]

119. In *Tesla Motors*, the Minister applied its discretion to grant funding to electric cars priced lower than $75,000.

Tesla Motors, *supra* at para 9 [Tab 19]

120. In the case at bar, the Minister applied its discretion to grant authorizations in accordance with the coal categories under the Coal Policy.

Rae, *supra* at p 124 [Tab 12]
Affidavit of Tony Mauro, *supra* at para 19
Transcript of Questioning of Michael Moroskat, *supra* at P 7 L 7 – P 13 L 4

121. In *Tesla Motors*, the Minister decided to end funding for electric cars. However, the Minister announced that it was creating a transition period to permit subsidies for certain cars. The criteria for funding excluded Tesla.

Tesla Motors, *supra* at para 11 [Tab 19]

122. The Court in *Tesla Motors* characterize the Minister's decision to rescind funding and establish a transition period as follows:

> 39 But then the cabinet or the Minister made a third decision. They actually established the terms and conditions of the electric vehicle subsidy transition. They looked at the program under the environmental regime and under the power to set terms and conditions in the *Public Transportation and Highway Improvement Act* and they designed program terms so as to include only franchised dealers and to exclude Tesla.
>
> 40 In my view, in setting the operative terms of the transition program, the government changed its role from policy-setting at a high level of abstraction to executive program administration. Cabinet descended from its high core policy role as priority-setter into the field of discretionary decision-maker under the environmental regulatory regime and discretionary term-setter under s. 118 (2) of the *Public Transportation and Highway Improvement Act*. It effectively told the Ministry to design a program to exclude from environmental subsidies non-franchise dealers i.e. Tesla. [footnote omitted] It is the legality of that decision under the *Public Transportation and Highway Improvement Act* and the applicable environmental laws that is the subject of this application.

Tesla Motors, *supra* at paras 39 – 40 [Tab 19]

123. The circumstances in *Tesla Motors* are analogous to the case at bar. The Minister directed Alberta Energy to rescind the Coal Policy. In so doing, the Minister and Alberta Energy established new terms and conditions by which the Minister's discretionary authority would

operate. Those terms included a 120-day moratorium on new coal applications and an alteration to the exercise of the Minister's discretion.

124. Potentially most damning is the Minister's June 4, 2020 correspondence to Mr. Blades. In that correspondence, the Minister:

a. Acknowledges that projects are proceeding as a result of the rescission: "As you know, a number of projects to extract and export the province's bituminous coal are either pursuing drilling exploration programs or going through the regulatory approval process"; and

b. Acknowledges consulting with the AER: "I consulted with the AER regarding your concerns and am pleased to provide you with the following information about the application review process…"

Affidavit of Macleay E Blades, *supra* at Ex 'E'

125. By re-writing the Minister's discretion, the Respondents "changed [their] role from policy setting at a high level of abstraction to executive program administration".

Tesla Motors, *supra* at para 40 [Tab 19]

126. There are additional indicia that the decision to rescind the Coal Policy is based in law.

127. The Coal Policy was enforced by the Respondents for 44 years. It was not a policy that changed each time a new government came to power[5]–rather, it was continuously enforced during its 44-year history.

128. The Coal Policy was considered by the Alberta Energy and Utilities Board (the "**EUB**") decision relating to the Cheviot Coal Project.[6] In *Cheviot*, the EUB considered an Application for an approval under section 23 of the former *Coal Conservation Act*, the same provision as section 23 in the current *Coal Conservation Act*.

Coal Conservation Act, RSA 1980, c C-14 at s 23 and 24 [Tab 31]

[5] Respondents' submissions at paragraph 45.
[6] The Applicants understand the decision was judicially reviewed and quashed on different grounds but have not been able to find record of that review.

Coal Conservation Act, *supra* at s 23 and 24 [Tab 11]

129. In considering whether to grant an approval, the EUB was required to consider the Coal Policy, holding that a "fundamental principle of the" Coal Policy was to restrict development based on the ability to reclaim any disturbed land. The EUB noted that the method by which the government chose to determine development restrictions was by application of the Coal Policy.

Cardinal River Coals Ltd. (Cheviot Coal Project), Decision 97-08 at 1.2.1, 6.1.1 and 6.1.3 [***Cheviot***] [Tab 32]

130. The EUB in *Cheviot* ultimately held that the lands considered for development "were classified under the *Coal Conservation Act* as Category 4 lands". The only relationship between the Coal Policy and the *Coal Conservation Act* is the exercise of the Minister's discretion to authorize a coal development under section 24 of the Act. That authorization is a precondition to approving a coal development.

Cheviot, *supra* at 6.1.1 [Tab 32]
Coal Conservation Act, *supra* at s 24 [Tab 11]

131. The EUB ultimately found that the Cheviot Coal Project was "consistent with the Alberta coal Development Policy" and determined that an approval was merited.

Cheviot, *supra* at 6.1.3 [Tab 32]

132. The Applicants have noted above the other methods the Coal Policy has been enforced, namely Directive 061 and the Respondents' 44 years of enforcing the statement under section 24 of the *Coal Conservation Act*. These methods are in addition to the various regional plans that have incorporated the Coal Policy, discussed further below.

133. This 44-year history of enforcement confirms that the Coal Policy is based in law. Its rescission is therefore also necessarily based in law. It is not a political decision, nor is the Court "incapable" of reviewing the government's decision to rescind the policy. By altering the exercise of the Minister's discretion, the Respondents have descended into the fray and changed their role from "from policy-setting at a high level of abstraction to executive program administration".

Tesla Motors, *supra* at para 39 [Tab 19]
La Rose, *supra* at paras 33 – 34 [Tab 30]

ii) The Decision Affects the Applicants

134. Keeping within the four corners of the test set out in *Black*, the decision to rescind the Coal Policy "affects the rights or legitimate expectations" of the Applicants. Those rights are affected in a way that is different from every other Albertan.

135. Category 2 lands now subject to development are literally in the Applicants' backyard. The project proposed by Atrum Coal Ltd. is situated on a geological formation known as Cabin Ridge; Cabin Ridge forms the backdrop to Mr. Blades's property and is situated within his grazing allotment.

Affidavit of Macleay E Blades, *supra* at Ex 'M', 'N' and 'O'

136. The Respondents have not argued that the Applicants don't have standing, likely conceding that issue.

137. There are two types of standing available to a party: private interest standing or public interest standing. In this case, the Applicants' standing is founded in private interest standing.

138. The test for private interest standing is the same for justiciability: whether a party has "a personal basis where [their] legal rights have been or are likely to be affected" [emphasis added].

Alberta (Attorney General) v Malin, 2016 ABCA 396 at paras 18 – 49 [Tab 87]

139. The supreme Court of Canada adopted the following test for private interest standing:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

Finlay v Canada (Minister of Finance), [1986] 2 SCR 607 at paras 17 – 22 [***Finlay***] [Tab 88]

140. In this case, there is little doubt that the Applicants would meet the threshold for standing. By analogy, the issue for which they seek standing must also be justiciable because both standing and justiciability rely on the same finding of fact: whether the issue directly

affects the party. By not contesting the Applicants' standing, the Respondents must be seen to have also conceded the issue of justiciability.

141. What is more, and an issue that will be covered further below under 'legitimate expectation', the Respondents met, discussed and consulted with Atrum Coal Ltd. prior to coming to their decision to rescind the Coal Policy.

Transcript of Questioning of Michael Moroskat, *supra* at P 64 L 7 – 13

142. The Respondents knew that rescinding the Coal Policy would directly affect Atrum Coal Ltd. They are the proponents behind the Cabin Ridge project. That is why they met with them to discuss the rescission. In so doing, the Respondents acknowledged the obvious: that the rescission also directly affects the project's opponents, in this case the Applicants. The Applicants' *inter alia* property rights are clearly affected by the rescission.

iii) The Decision Breached the Applicants' Legitimate Expectations

143. Remaining within the four corners of the test for justiciability established in *Black*, the decision to rescind the Coal Policy breached the Applicants' legitimate expectations of procedural fairness.

144. In this case, the Applicants were never consulted, their perspectives were never sought and they were never notified that a decision removing all protections over their grazing leases and adjacent landholdings was made.

Transcript of Questioning of Michael Moroskat, *supra* at P 58 L 14 – 18 and P 65 2 – 26
Affidavit of Macleay E Blades, *supra* at para 17
Affidavit of John Smith, *supra* at para 6(c)

145. By contrast, the Respondents had numerous meetings to discuss the rescission with rescission proponents, including Atrum Coal Ltd. The Respondents also took the steps of coordinating their decision to rescind with the AER.

Transcript of Questioning of Michael Moroskat, *supra* at P 64 L 7 – 13

146. The extensive consultation that went into creating the Coal Policy is an important fact militating in favour of procedural fairness in rescinding the document.

147. These facts suggest a legitimate expectation for consultation.

148. The doctrine of legitimate expectation was aptly summarized by Justice Romaine in *Calgary (City) v Alberta (Municipal Government Board)*:

> [33] [I]n *Baker v. Canada (Minister of Citizenship and Immigration)*…the Supreme Court of Canada commented on the doctrine of legitimate expectations, at para. 26:
>
> > [...] the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights [citations omitted]. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: [citations omitted]. Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded [citations omitted]. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain....
>
> [34] The doctrine of legitimate expectations provides that a certain process will be followed rather than assuring a particular result. Further, in certain cases, more extensive procedural rights are afforded, however, the doctrine of legitimate expectations does not produce or deal with substantive rights. Put another way, a decision maker's discretion to reach a certain result is unfettered by the doctrine of legitimate expectations. Examples of procedural rights arising from this doctrine include the right to make representations and the right to be consulted: *Moreau-Bérubé v. New Brunswick (Judicial Council)...The City cites Edison v. Canada*…at para. 23 which confirms that legitimate expectations arise "where an individual relies on procedural norms established by past practice or published guidelines...".
>
> …
>
> [155] The legitimate expectations of the City do not give rise to a right to a particular substantive result or determination by the MGB, but rather enhanced procedural rights: *Moreau-Bérubé*, *Baker*.
>
> [emphasis added]

Calgary (City) v Alberta (Municipal Government Board), 2010 ABQB 719 at paras 33 – 35 and 154 – 157 [Tab 33]
Bowman, *supra* at paras 44(b), 46 and 48 [Tab 23]
Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36 at paras 93 – 97 [Tab 34]

149. Justice Romaine held that the City was relying on the doctrine of legitimate expectation substantively. Legitimate expectation may only be applied procedurally such that a party has a legitimate expectation that, for example, it will be consulted prior to a decision.

150. The doctrine that legitimate expectation does not create substantive rights is widely accepted. What the doctrine does permit is for a court to "review executive action taken 'for improper reasons or without affording the applicant procedural fairness.'"

Tesla Motors, *supra* at paras 46 – 47 [Tab 19]

151. Legitimate expectation applies to delegated legislative powers, such as those delegated powers under review in the case at bar. In *Apotex Inc. v Canada (Attorney General)*, the Federal Court of Appeal held as follows:

> [126] Therefore, in the absence of binding authority to the contrary, I conclude that the doctrine of legitimate expectations applies in principle to delegated legislative powers so as to create participatory rights when none would otherwise arise, provided that honouring the expectation would not breach some other legal duty, or unduly delay the enactment of regulations for which there was a demonstrably urgent need (see *R. v. Lord Chancellor's Department, ex parte Law Society* (Q.B.D. Crown Office List; June 22, 1993; CO/991/93)).
>
> [127] A court may set aside, or declare invalid, subordinate legislation made in breach of a legal duty to consult: *R v Secretary of State for Health, ex p US Tobacco International Inc*, [1992] 1 All ER 212 (Q.B.D.), at page 225. For this purpose it should not matter whether the duty arose from statute or by virtue of a promise that created a legitimate expectation of consultation…

Apotex Inc. v. Canada (Attorney General), [2000] 4 FC 264 (FCA) at paras 126 – 127 [Tab 35]
Czerwinski v Mulaner, 2007 ABQB 536 at paras 31 – 32 [Tab 36]

152. An expectation of procedural fairness may legitimately arise in one of two ways: "by an express promise made by a public authority responsible for the decision, or by a regular course of conduct that shows a well-defined practice of consultation".

Office and Professional Employees' Int'l Union et al v B.C. Hydro et al, 2004 BCSC 422 at paras 111 – 113 [Tab 37]

153. In the case at bar, the Applicants rely upon the latter in establishing their legitimate expectation of procedural fairness. Factors creating this legitimate expectation include:

a. The commitment to an "integrated review" of the coal categories in the *SSRP* and *LPHFP*;

b. The consistent 44-year enforcement of the Coal Policy;

c. The effect of the decision to rescind the Coal Policy on the Applicants;

d. The extensive consultation and review that took place in creating the Coal Policy;

e. That the grazing leases now controlled by the Appellants were represented in the Hearings which ultimately led to the Coal Policy;

f. Consultation prior to the adoption of other land use policies, such as the *Plans*; and

g. Consultation by the Respondents with other actors, including Atrum Coal Ltd. and the AER.

154. Each of these factors militate in favour of a legitimate expectation of procedural fairness on the part of the Applicants. The Respondents provided none.

e) Conclusion on Justiciability

155. The decision to rescind the Coal Policy is justiciable and therefore reviewable by this Court.

156. The scope of decisions that do not meet the threshold of justiciable is narrow and narrowing. In this instance, there are numerous bases supporting the justiciability of the decision: its legal framework, the direct effect on the Applicants and the Applicants' legitimate expectations.

Issue #2: Whether ALSA *is Applicable to the Decision*

157. The Applicants' *ALSA* claim has two components:

a. The decision to rescind the Coal Policy nullified and therefore effectively amended provisions of the Plans that adopted the Coal Policy and committed to a review of the Coal Policy; and

b. The amendments to the *SSRP* and *LPHFP* violated sections 4, 5 and 13 of *ALSA*, thereby making the decision to rescind *ultra vires* the Respondents.

158. The results of these two components are as follows:

a. The Coal Policy should be considered to remain in effect in the South Saskatchewan region because of the nature of the SSRP's references to the Coal Policy and because the Respondents lacked authority to amend those references; and

b. The amendments are *ultra vires*, notwithstanding the relevant parts of the SSRP are non-binding.

159. The Applicants submit that if *ALSA* is another basis for making the rescission justiciable.

a) LPHP

160. The *LPHP* was incorporated into the *SSRP* as follows:

> The following Integrated Resource Plans have provided resource objectives and operational guidance within their planning areas for over 30 years. These plans have represented the Government of Alberta's resource management policy for public lands and resources within the defined area and have been intended to be a guide for decision-makers. They will remain in effect until they have been reviewed for their relevance and incorporated as appropriate under the implementation strategies of this regional plan or future subregional or issue-specific plans within the region:
>
> …
>
> - Livingstone Porcupine Hills Subregional Integrated Resource Plan
>
> …
>
> Provisions of the plans that have already been incorporated into the regulatory system, as amended or replaced from time to time, will continue to provide operational guidance. Decisions on Crown lands shall be aligned with the regional plan to achieve the regional outcomes established in the plan.
>
> The Government of Alberta recognizes that a coherent planning hierarchy from regional plans, to subregional, issue-specific and local plans is necessary to ensure efficiencies, effectiveness and clarity for decisionmakers, stakeholders and Albertans. Implementation of the SSRP will involve delivering on this intent, recognizing that there are legacy plans (e.g., Integrated Resource Plans) to incorporate into new subregional or issue specific plans.

Affidavit of Macleay E Blades, *supra* at Ex 'G' p 4 – 5

161. The Applicants contend that the *LHPH* is truly incorporated into the *SSRP*. The effect of true incorporation is detailed below.

b) Differences between Binding and Non-Binding ALSA *Plans*

162. The *SSRP* states that its "Regulatory Details" section is legally binding, but that all its other parts—including the Implementation Plan—are "not intended to have binding legal effect and are statements of policy to guide the Crown, decision-makers and local government bodies..."

Affidavit of Macleay E Blades, *supra* at Ex 'G' p 8, 42 and 164

163. In its broadest sense, government "policy" refers to a generally applicable rule, principle, or objective. Under this definition, the issuance of a permit to a specific party is not a policy, because the permit itself is not generally applicable. However, the reasons for issuing the permit may include policy that was previously developed or that was developed in that permit proceeding. For example, if the permit is to emit a carcinogenic air pollutant at a specified level, subject to monitoring and other conditions, the permit may be based on a policy prescribing an acceptable level of risk, and a policy prescribing an acceptable frequency for monitoring the emission levels.

Knight, *supra* at para 87 [Tab 28]

164. Statements of government policy can occur in different types of instruments—statutes, regulations, decisions in proceedings and in other government documents.

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 130 [***Vavilov***] [Tab 38]

Ruth Sullivan, ***Statutory Interpretation***, 3d ed (Toronto, Ontario: Irwin Law, 2016) at p 11 – 12 [***Sullivan***] [Tab 39]

165. The *ultra vires* concept is one aspect of the legally enforceable character of statutes and regulations. If a front-line decision (e.g., issuance of a permit) is subject to a statute or regulation, and the decision conflicts with the statute or regulation, a court may exercise its discretion to judicially review the decision and vacate it on *ultra vires* grounds.

166. 'Legislative policies' are clear rules of conduct enforceable like regulations. Part 3.13 of the Coal Policy is an example of this type of policy, because it contains rules clearly precluding coal exploration and development on Category 1 lands and coal development on Category 2 lands.

167. Non-binding policies, like legislative policies', can still have significant legal and practical implications. A front-line decision that fails to follow an applicable policy is indicative that the decision is 'unreasonable' or 'incorrect' and therefore might not pass judicial scrutiny. The higher the level of government official who adopted the policy, the more weight the policy has as a benchmark of the reasonableness for front-line decisions.

Vavilov, *supra* at paras 94, 130 and 303 [Tab 38]
Mathur v Ontario, *supra* at para 67 [Tab 14]
Sullivan, *supra* at p 11 – 12 [Tab 39]
Manitoba Metis Federation Inc. v. The Government of Manitoba et al., 2018 MBQB 131 at para 65 [Tab 40][7]

168. The coal categories are an example of the importance of non-binding government policy. In 44 years, the coal categories were honoured by the province's coal leasing and regulatory officials. This is true even though the coal policy is not a legally binding regulation.

169. Under subsection 13(1) of *ALSA*, a regional plan is an "expression of the public policy of the Government and therefore the Lieutenant Governor in Council has exclusive and final jurisdiction over its contents." Subsection 13(2) adds that regional plans are "legislative instruments and, for the purposes of any other enactment, are considered to be regulations."

Alberta Land Stewardship Act, SA 2009, c A-26.8 at s 13 [***ALSA***] [Tab 41]

170. Read by themselves, these provisions suggest that regional plans are legally binding. However, in the 2011 amendments to *ALSA*, the Legislature added subsection 13(2.1) which states that, "[n]otwithstanding subsection (2)," a regional plan may state which of its parts are "enforceable as law" and which parts are "statements of public policy or a direction of the Government that is not intended to have binding legal effect."

[7] The Court held that the government policy lacked clear criteria to review the challenged government decision to forego entering into funding agreements. The rationale implies that had the policy contained clear criteria, it may have been a basis to review the government's decision.

ALSA, *supra* at s 13 [Tab 41]
Tokio Marine & Nichido Insurance Company v Security National Insurance Company, 2020 ABCA 402 at para 99 [Tab 42]

171. Use of the term 'notwithstanding' in legislative drafting denotes priority: the provision containing the term 'notwithstanding' generally has priority over other provisions.

Sullivan, at p 326 [Tab 39]
Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 RCS 27 at para 21 [Tab 43]

172. The binding/non-binding distinction in subsection 13(2.1) suggests the Legislature was referring to the general distinction between policies, which are generally non-binding, and regulations, which are generally binding. Importantly, nothing in *ALSA* subsection 13(2.1) suggests that the non-binding policy portions of regional plans were meant to have less legal and practical import than any other government policy.

ALSA, *supra* at s 13 [Tab 41]
Sullivan, *supra* at p 11 – 12 [Tab 39]

173. Rather, non-binding policy portions of regional plans have more weight than other policies adopted under other acts. As noted above, under *ALSA* s. 13(1), all regional plans are "an expression of the public policy of the Government" [emphasis added]. The *Interpretation Act* sets out that references to 'government' means 'Her Majesty in right of Alberta'.

Interpretation Act, RSA 2000, c I-8 at s 28(1)(r) [Tab 44]

174. Policies contained in regional plans are government-wide policies, rather than just departmental, divisional or office policies. Similarly, subsection 13(2) states that regional plans are "legislative instruments". This is further basis of the Legislature's sense of the importance of regional plans.

ALSA, *supra* at s 13 [Tab 41]

175. Notably, the characterizations in subsection 13(1) and (2) apply, on their face, to all "regional plans". There is no exemption from those characterizations, for the portions of regional plans that are non-binding under subsection 13(2.1).

ALSA, *supra* at s 13 [Tab 41]

176. Similarly, section 62 of *ALSA* provides a process for any person to complain, to the Land Use Secretariat, that a regional plan "is not being complied with." Nowhere does this section indicate that it is inapplicable to the portions of regional plans designated as non-binding statements of policy, under section 13(2.1) of the Act. This section is yet another indication of the Legislature's view that even the policy portions of regional plans are important.

ALSA, *supra* at s 62 [Tab 41]

177. Finally, the *SSRP* itself makes it clear that its non-binding portions must still be considered by municipal and provincial regulators even though they are non-binding. This intent is shown in section 4(1) of the *SSRP's* Regulatory Details section, which requires local governments and provincial "decision-makers" to "consider" the *SSRP's* non-binding policy portions, including the Implementation Plan, when they are "carrying out any function in respect of the powers, duties and responsibilities" in the South Saskatchewan region.[8]

Affidavit of Macleay E Blades, *supra* at Ex 'G' p 8

178. The above interpretation of *ALSA* meets fundamental rules of statutory interpretation. It incorporates long standing principles that planning documents created through a consultative process, like the *Plans*, carry weight akin to "quasi constitutional documents" when they are arrived at through consultation.

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 SCR 1170 at p 1207 (dissent) [Tab 45]
Reference Re Canada Assistance Plan (B.C.), [1991] 2 SCR 525 at p 561 – 564 [Tab 46]

179. It provides a purposive approach "with consideration of the legislative intent" (see also the Hansard discussion below).

Nature Conservancy of Canada v Waterton Land Trust Ltd, 2014 ABQB 303 at para 385 [Tab 47]

[8] The Regulatory Details are the binding portions of the *SSRP*. 'Decision-maker' is defined in *ALSA* as "a person who, under an enactment or regulatory instrument, has authority to grant a statutory consent, and includes a decision-making body".

ALSA, *supra* at s 2(1)(e) [Tab 41]

c) The Coal Policy in the Plans[9]

180. There are two methods by which a legal instrument can be incorporated into a document: incorporation for background purposes and incorporation by reference. The Supreme Court of Canada described the distinction as follows:

> Some documents are simply mentioned in legislative instruments; they need not be consulted before the operation of the instrument in question can be understood. Others are "incorporated by reference" in the sense that they are an integral part of the primary instrument as if reproduced therein. It is this latter type of incorporation that can be termed "true incorporation" and that potentially attracts translation obligations under s. 23.

Reference re Manitoba Language Rights, 1992 CanLII 115 (SCC), [1992] 1 SCR 212 at p 228 [Tab 48]

181. The Coal Policy is 'truly incorporated' into the *Plans* because the document needs to be consulted before the legislative instrument can be understood. Consider, for example, the following reference in the *LPHP*:

> All proposals for coal exploration and development must be processed in accordance with A Coal Development Policy for Alberta.

Affidavit of Macleay E Blades, *supra* at Ex 'F' p 26

182. When a "true incorporation" occurs, the referenced source is considered part of the legal instrument referencing it, as if the referenced source had been copied word for word into the referencing instrument. This rule is reflected in the Latin maxim: "*verba relata hoc maxime operantur per referentiam rit it eis inesse videntur* (words to which reference is made in an instrument have the same operation as if they were inserted in the instrument referring to them)."

Tsai v Atlas Anchor Systems (BC) Ltd., 2016 BCPC 406 at paras 26 – 31 [***Tsai***] [Tab 49]
R v St Lawrence Cement Inc, 2002 CanLII 45010 (ONCA) at paras 14 and 18 [***St Lawrence***] [Tab 50]
R v Sims, 2000 BCCA 437 (CanLII) at para 20 [Tab 51]

[9] This analysis is similarly applicable to the *LPHP*'s incorporation into the *SSRP*.

183. Through true incorporation, the referenced source takes on the legal character of the referencing instrument, for purposes of that instrument. The effect is to elevate "a direction or policy to the status of a law or regulation".

NOV Enerflow ULC (NOV Pressure Pumping ULC) v Enerflow Industries Inc, 2020 ABQB 347 at para 505 [Tab 52]
St Lawrence, *supra* at paras 14 and 18 [Tab 50]

184. Section 33 of the *Interpretation Act* supports this judicial rule: if an "enactment provides that another enactment of Alberta, Canada or another province or territory applies, it applies with the necessary changes and so far as it is applicable."

Interpretation Act, *supra* at s 33 [Tab 44]

185. This interpretive rule applies to references in statutes, regulations, contracts, by-laws and other legal instruments. The referenced sources do not have to have the same legal status, on their own, as the instrument referencing them.

UBC v Assn of Administrative and Prof Staff on Behalf of Bill Wong, 2006 BCCA 491 at paras 30 – 31 [Tab 53]
Tsai, *spura* at paras 26 – 31 [Tab 49]
R v Blackbird, 2003 CanLII 72340 (ON SC) at p 6 [***R v Blackbird***] [Tab 54]

186. There are two types of true incorporations. A "rolling" or "ambulatory" reference to a source is to the most current version of that source. By contrast, "fixed" or "static" references are to a specific publication of the referenced source. Absent specific wording indicating a rolling reference (e.g., "as amended from time to time"), a reference to a source is generally construed to be a fixed or static reference to that source.[10]

Cobb v Long Estate, 2017 ONCA 717 at para 118 [Tab 55]
R v Blackbird, *supra* at p 6 [Tab 54]
St Lawrence, *supra* at para 20 [Tab 50]
Mainwaring v Mainwaring, [1942] 2 DLR 377 (BCCA) at p 377 and 380 [Tab 56]

[10] Section 31 of the *Interpretation Act* creates an ambulatory presumption. That section, however, only applies to "enactments" and not to legislative tools generally.

Interpretation Act, *supra* at s 31 [Tab 44]
587901 Alberta Ltd. v. Calgary (City), 2007 ABCA 421 at paras 18 – 19 [Tab 61]

187. When one instrument incorporates a section of another instrument by reference, that referenced section remains in effect for purposes of the referencing instrument, even if the referenced section is repealed.[11]

E.A. Driedger, ***Construction of Statutes***, 1st ed (Toronto, Butterworths, 1974) at p 189 – 190 and supplement at p 23 [***Construction of Statutes***] [Tab 57]
Wilson v Albert, [1943] 3 DLR 129 (ABCA) at p 133 [***Wilson v Albert***] [Tab 58]
R v C (WJ), 2008 MBCA 11 (CanLII) at paras 26 – 37 [***R v C (WJ)***] [Tab 59]
Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd (No. 3), 1992 CanLII 7090 (NL CA) at para 108 [***Bow Valley Husky (Bermuda) Ltd***] [Tab 60]
St Lawrence, *supra* at para 20 [Tab 50]

188. For example, if a regulation incorporates by reference a specific edition of an industry association's code of practice. The regulation's reference is still in effect even if the association repeals that edition. In other words, while the association has authority to repeal its own code, it lacks authority to repeal the regulation's reference to that code.

d) References to the Coal Policy in the Plans

189. The *SSRP* refers to the Coal Policy both directly, and indirectly (through its references to sub-regional IRPs which in turn reference the Coal Policy).

i) References to the Coal Policy in the LPHP *and* LPHFP

190. Page 61 of the *SSRP* reads as follows:

> Currently in the region, there are a number of **Integrated Resource Plans**, a number of **Public Land Use Zones**, **surface requirements** under the *Public Lands Act*; **subsurface restrictions** on sales of mineral rights; and **voluntary practices** such as integrated land management to support minimizing land disturbance. The Integrated Resource Plans will remain in effect until they have been reviewed for their relevance and incorporated as appropriate under the implementation strategies of this regional plan or future subregional or issue-specific plans within the region.
>
> [emphasis added]
>
> [**emphasis in original**]

[11] Section 36(2) of the *Interpretation Act* rebuts this rule. Section 36(2), however, only applies to references to "a repealed statute or regulation" and requires substituted provisions. In the case of the Coal Policy, no substitute has been adopted nor is the policy a "repealed statute or regulation".

Interpretation Act, *supra* at s 36 [Tab 44]

191. The reference to the Integrated Resource Plans is a true incorporation into the *SSRP*.

192. Section 10 of *ALSA* supports the submission that the Integrated Resource Plans are true incorporations into the *SSRP*. Section 10 expressly authorizes regional plans to provide for the development of sub-regional and issue-specific plans, and to authorize a "Designated Minister" to "adopt by incorporation or reference, rules, a code of practice, guidelines, best practices or any other instrument on matters described in the regional plan for the purpose of advancing or implementing an objective or policy in the regional plan." Under section 10(3), when such a sub-regional plan (or issue-specific plan or adopted source) comes into effect, it "becomes part of the regional plan that authorized it…"

ALSA, *supra* at s 10 [Tab 41]

193. Two of the *SSRP*'s sub-regional IRPs refer to the Coal Policy. At page 26, the *LPHP* states that "[a]ll proposals for coal exploration and development must be processed in accordance with" the Coal Policy. The *LPHP* lists this rule as one of three "broad resource management guideline" for minerals. The *LPHP* (p. 3) defines a "resource management guideline" as a "statement of direction which guides resource use and management action toward the achievement of resource management objectives."

Affidavit of Macleay E Blades, *supra* at Ex 'F' p 3 and 26

194. Similarly, page 19 of the Ghost River IRP lists the following, as one of several "Broad resource management objectives and guidelines": "All proposals for coal exploration and Development will be processed in accordance with A Coal Development Policy for Alberta (1976)."

Forestry, Lands, and Wildlife (1986-1993), ***Ghost River Sub-Regional Integrated Resource Plan***, (7 June 1988), online: Alberta Government <https://open.alberta.ca/dataset/f7a84ed9-612f-4f34-9dc3-99680f3d833a/resource/bdd76c75-5ed4-4ecd-b9d3-31e9f5d0b48b/download/1988-ghostriversubregionalplan-1988.pdf >. at p 19 [Tab 62]

195. The Integrated Resource Plans are true, static incorporations of the Coal Policy. Through its incorporation, the SSRP has indirectly incorporated the Coal Policy by reference.

ii) References to the Coal Policy in the SSRP

196. Page 61 of the SSRP states that the sub-regional Integrated Resource Plans will "remain in effect" pending a future "review". The *SSRP* then explains that this review:

> will include direction for key industrial sectors such as coal, oil and gas, industrial minerals and aggregates. **As part of reviewing and incorporating the Integrated Resource Plans, the government will integrate a review of the coal categories, established by the 1976 A Coal Development Policy for Alberta to confirm whether these land classifications specific to coal exploration and development should remain in place or be adjusted. The review of the coal categories will only be for the South Saskatchewan planning region. The intent is for the SSRP and implementation strategies of the regional plan or future associated subregional or issue-specific plans within the region to supersede the coal categories for the purposes of land use decisions about where coal exploration and development can and cannot occur in the planning region**.
>
> [emphasis in original]
>
> [**emphasis added**]

Affidavit of Macleay E Blades, *supra* at Ex 'G' p 61

197. This reference on page 61 has two salient aspects. First, there is a clear commitment to review the coal categories in an integrated process that includes the previously mentioned review of the Integrated Resource Plans. This is a cabinet-level commitment because it is in the *SSRP*—a regulation, approved by cabinet and considered a statement of Alberta government policy.

198. Second, the reference reflects an intention that the coal categories—as adopted in 1976—will remain in effect (for purposes of the South Saskatchewan region) pending that integrated review. This intent is implicit in the *SSRP*'s commitment to review the coal categories. This review would be pointless if the coal categories had already been rescinded before the review had started. This intent is confirmed by the stated purposes of the integrated review—to decide whether the coal categories should "remain in place or be adjusted" (not rescinded) and whether future *SSRP* implementation strategies or issue-specific plans or sub-regional Integrated Resource Plans should "supersede" the coal categories.

199. The term "remain in place" would be meaningless if the coal categories could be rescinded before the integrated review was conducted. Similarly, there would be no point determining whether issue-specific or sub-regional plans should "supersede" the coal

categories, unless the *SSRP* considered those categories as staying in effect pending their integrated review.

200. As with the *SSRP*'s reference to the sub-regional Integrated Resource Plans, the *SSRP*'s intent that the coal categories "remain in place" pending the integrated review is not simply descriptive. Rather, this intent makes sense only if it is considered a true, static incorporation of the coal categories by reference.

e) Effect of the Rescission on the SSRP*'s references to the Coal Policy*

201. If one instrument has a true, static incorporation of a second instrument by reference, that incorporation remains in effect even if the second instrument has been lawfully repealed.

Construction of Statutes, *supra* at p 189 – 190 and supplement at p 23 [Tab 57]
Wilson v Albert, *supra* at p 133 [Tab 58]
R v C (WJ), *supra* at paras 26 – 37 [Tab 59]
Bow Valley Husky (Bermuda) Ltd, *supra* at para 108 [Tab 60]
St Lawrence, *supra* at para 20 [Tab 50]

202. Applying this rule here, the coal categories should be considered to still be in effect in the South Saskatchewan region, because of the *SSRP*'s direct and indirect incorporations of the coal categories by reference (pending an integrated review that has not yet occurred). Under this rule of construction, Alberta Energy's rescission of the coal policy does not affect the *SSRP*'s incorporation of the Coal Policy by reference. This outcome is especially true given that the Respondents lack authority to amend the *SSRP*, as explained below.

f) The Respondents' Decision is Ultra Vires

203. The Applicants submit that the Coal Policy remains active within the South Saskatchewan region. In this, the Applicants would concur with the Respondents that the rescission did not amend the *Plans*. They will accordingly seek a further amendment to their Amended Originating Application to provide as a remedy sought a declaration by this Court that the coal categories remain in effect in the *SSRP*.

204. However, in the alternative, should this Court conclude that rescission also rescinded the references to the Coal Policy in the *Plans*, that decision is *ultra vires* because it was done contrary to the express requirements in *ALSA*.

205. An enactment is amended when the substance of the rule is changed. The Applicants submit that the effect of rescinding the Coal Policy amended the *Plans*. Amendments were described in *Sullivan* as follows:

> Amending legislation adds new provisions to the statute book or substitutes new provisions for existing ones. Insofar as the new provisions make substantive changes to the law, they operate as amendments rather than re-enactments.

Sullivan, *supra* at p 22 – 25 [Tab 39]

206. An example in *Sullivan* of an amendment is the act of adding the words "gender, sexual orientation" to an enumerated ground of discrimination in human rights legislation.

207. The Applicants submit that the effect of rescinding the Coal Policy in the *Plans* was to amend them. The substance of the *Plans* has now changed because:

a. The coal categories can no longer either "remain in place or be adjusted";

b. They can no longer be reviewed; and

c. Energy projects are no longer subject to the coal categories.

208. Each of the foregoing are examples of how the coal categories were incorporated into the *Plans*.

209. The Applicants submit that *ALSA* contains two express requirements before a regional plan can be amended: *who* can adopt or amend a regional plan and *how* can a regional plan be amended.

i) The Who Requirement

210. *ALSA* section 4(1) sates that the Lieutenant Governor in Council (Cabinet) "may make or amend regional plans for planning regions." No other provision of *ALSA* authorizes anyone

other than cabinet to amend a regional plan or authorizes cabinet to delegate its amendment authority to anyone else.[12]

ALSA, *supra* at s 4 [Tab 41]

211. Cabinet has sole authority to amend regional plans. This is confirmed by section 13(1), which states: a regional plan is an "expression of the public policy of the Government and therefore" cabinet has "exclusive and final jurisdiction over its contents". This section's reference to cabinet's "exclusive" authority suggests that cabinet cannot even delegate its authority to adopt and amend regional plans.[13]

ALSA, *supra* at s 13 [Tab 41]

ii) The How Requirement

212. *ALSA* has several requirements for how a regional plan can be amended. Under section 5 of the Act, before a regional plan can be amended, the Stewardship Minister must ensure that "appropriate consultation" on a proposed amendment has occurred and must provide cabinet with a report of the consultation, and the proposed amendment must be tabled before the Legislature.

ALSA, *supra* at s 5 [Tab 41]

g) ALSA*'s Amendment Requirements are Binding, Even for Amendments to Non-Binding Portions of Regional Plans*

213. If a single Minister amended a regional plan without conducting public consultation, the Minister's actions would be *ultra vires ALSA*. First, they lack the express authority to amend. Second, they failed to abide by the *inter alia* consultation requirement.

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[12] *ALSA* section 8(2)(m)(i) allows a regional plan to delegate authority under the plan "except authority … to make a regional plan or amend a regional plan…" *ALSA* sections 26, 52, and 53 enable cabinet to delegate functions under specific sections of the act to the Stewardship Minister, but none of those functions include adopting or amending a regional plan.

ALSA, *supra* at s 8, 26, 52 and 53 [Tab 41]

[13] Section 21(2) of the *Interpretation Act* states that statutory words "empowering a person to do something" include "a person acting for that person or appointed to act in the office" and that person's "deputy or a person appointed as that person's acting deputy". It is unclear whether this section gives cabinet authority to delegate its amendment power under *ALSA* section 4(1). However, even if it does, there is no indication that the Respondents were "acting for cabinet" or otherwise appointed by cabinet to act for it.

Interpretation Act, *supra* at s 21(2) [Tab 44]

52

214. *ALSA* is binding even if the regional plan's contents that were amended are non-binding policy under *ALSA* subsection 13(2.1). The *ALSA* requirements in ss. 4, 5 and 13(1) apply, on their face, to all parts of all regional plans. Nowhere do these requirements distinguish between parts of regional plans that are designated as binding and parts that are non-binding, under section 13(2.1) of the Act.

215. A plain reading of these sections suggests that only Cabinet can amend the policy portions of regional plans and only following the consultation requirements in those sections and introduction to the Legislature.

216. There is a significant distinction between the *ALSA* requirements for cabinet approval and consultation, which are binding, and the content of regional plans, some of which can be non-binding. This distinction is meaningful because, as with policies generally, even non-binding parts of regional plans matter (discussed above). This is especially true for non-binding parts of regional plans given that, as discussed above, they are policy expressions of the entire provincial government and are "legislative instruments" and "regulations" for purposes of other enactments.

ALSA, *supra* at s 13 [Tab 41]

217. The cabinet approval requirements in sections 4 and 13 were in the original version of *ALSA*, but not the consultation requirements.

Alberta Land Stewardship Amendment Act, 2011, SA 2011, c 9 at s 5 and 10 [Tab 89]
Alberta Land Stewardship Act, SA 2009, c A-26.8 (amended May 13, 2011) at s 1, 4, 5 and 13 [Tab 90]

218. The Hansard debates on the 2011 *ALSA* amendments indicate that there was considerable public distrust and dissatisfaction with the top-down approach reflected in these provisions. In response, the Legislature retained the cabinet-level approval, but added the public consultation process in a new version of section 5. There do not appear to be any Hansard statements addressing the interplay of those consultation requirements and the non-binding policy features enabled by new subsection 13(2.1).

Alberta, Legislative Assembly, ***Hansard***, 27th Leg, 4th Sess, (March 8 – May 10, 2011), at 252-53 (Mason), 882 (Anderson), 883-84 (Taylor), 879 (MacDonald), 912 (Swan), 914-15 (Hinman), 921 (Blakeman), 923 (Kang), 924 (Blakeman), 932 (Hinman), 939-40 (Notley) and 946 (Hinman), 1073 (Kang), 1077-78 (Hinman), 1079-80 (Anderson), and 1082 (Notley)
SA 2011, c 9, s 5 [Tab 63]

219. However, the Hansard debates have numerous statements attesting to the importance of the new consultation requirements. The comments of Minister Knight, Sustainable Resource Minister at the time, are noteworthy.

220. Minister Knight acknowledged the "concern" that a regional plan could be "established without consultation" but he assured that, under Bill 10, "[b]efore a plan or an amendment is made…that consultation is most certainly required. So, there's a legal requirement for consultation." He added later that, under Bill 10, *ALSA*:

> [M]ost certainly creates some new checks and balances for cabinet, and it starts with the requirement to consult. It moves into an era, I think, where we'll be placing draft plans before the Legislative Assembly before they can be approved by the cabinet.

Alberta, Legislative Assembly, ***Hansard***, 27th Leg, 4th Sess, (March 8 – May 10, 2011), at 248, ibid at 251 (Berger), 878 (Knight), 911 (Danyluk), 917 (Ouelette), 938-39 (Campbell), and 1072 (Chase) [Tab 63]

221. These Hansard statements, and the Legislature's insistence on retaining the cabinet-level approval element, suggest that courts should be especially careful to avoid construing them in a way that renders them meaningless or that reduces their applicability. Treating these requirements as optional, for amendments to non-binding portions of regional plans, would render these *ALSA* requirements meaningless.

222. If *ALSA*'s "who and how" requirements were inapplicable to the non-binding parts of a regional plan then any provincial Minister (or possibly any assistant deputy minister) could, without conducting any consultation, unilaterally delete the entire text of the *SSRP*, except the *SSRP*'s Regulatory Details section. This scenario flies in the face of cabinet's "exclusive jurisdiction" over regional plans, as provided in *ALSA* sections 4 and 13(1), and the above-noted Hansard statements stressing the importance of the consultation requirements in *ALSA* section 5.

223. By contrast, and in response to the Respondents' submissions, enforcing these requirements would not render *ALSA* section 13(2.1) meaningless, because that section relates only to the content of regional plans; it does not purport to address who can adopt and amend that content and the consultation procedures that apply when it is amended.

i) Other Noteworthy Amendments to ALSA

224. In addition to the foregoing, Bill 10 amended *ALSA* by adding subsection 1(1) as the first provision in the Act's purpose clause.

225. The current iteration of the purpose clause outlines the following:

a. "The Government must respect the property and other rights of individuals and must not infringe those rights except with due process of law";

b. "To provide a means to plan for the future";

c. "To create legislation and policy that enable sustainable development"; and

d. To co-ordinate and given directions concerning, *inter alia*, environmental matters.

226. Purpose statements are fundamental to properly interpreting a statute:

> Like preambles, purpose statements reveal the purpose of legislation and draw attention to the principles and policies that should inform the exercise of discretion conferred by the Act. However, unlike preambles, purpose statements are set out in the body of the statute as a numbered provision (or part of a numbered provision), and they unquestionably form an integral part of the legislation in which they appear. They are to be relied on in every interpretive exercise.
>
> [emphasis added]

Sullivan, *supra* at p 165 – 167 [Tab 39]

227. The Respondents' ask this Court to interpret *ALSA* and the *Plans* in a manner that is contradictory to *ALSA*'s express purpose. The Coal Policy is the essence of long-term planning. Ignoring the *Plans* and rescinding the Coal Policy disregards the Applicants' property rights, both their real property and their grazing leases.

228. The Coal Policy had a fundamental role in the *Plans*. Its inclusion in the *Plans* was not by accident and ignoring its role in interpreting the *Plans* is contrary to the express purposes of *ALSA*.

h) Conclusion on ALSA*'s Applicability*

229. As a legislative instrument and a true incorporation, the Coal Policy is an integral piece to each of the *Plans*. Its unqualified rescission was *ultra vires* the Respondents because:

a. They failed to comply with the legislated requirements for amendments in *ALSA*; and

b. They do not have the delegated authority to amend the *Plans*.

230. The Hansard extracts add further weight to the Applicants' submissions in this regard. *ALSA* was meant to include the citizens of Alberta in any decision regarding regional plans. The Respondents breached their statutory obligations by running roughshod over the Legislature's intent.

231. Finally, this analysis is just as applicable to the non-binding portions of the *Plans* as it is to the binding portions. Any suggestion that the Legislature intended to allow a single Minister to amend an entire non-binding regional plan is erroneous.

Issue #3: Whether Alberta Energy had the Unilateral Authority to the Make the Decision

232. As noted above under Issue #2, the Respondents did not have the authority under *ALSA* to amend the *Plans*.

233. Even if *ALSA* is inapplicable, the Respondents still did not have the unilateral authority to rescind the Coal Policy.

234. When the Respondents rescinded the Coal Policy, they communicated that decision to the AER. The AER responded by rescinding Directive 061.

235. When the Respondents communicated their decision to the AER, they did so with the purpose of "ensuring the work of the [AER] is consistent with the programs, policies and work of the Government".

Responsible Energy Development Act, SA 2012 c R-17.3 at s 1(n) and 67 [***REDA***] [Tab 64]

236. If the purpose of rescinding the coal policy was to remove the applicability of the coal categories at the AER, then the decision to rescind was made subject to section 67 of *REDA*.

237. Under section 67 of the *Responsible Energy Development Act*, the "Minister" has the authority to "give directions" to the AER.

REDA, *supra* at s 1(n) and 67 [Tab 64]
Government Organization Act, RSA 2000, c G-10 at s 16 [***GOA***] [Tab 65]
Designation and Transfer of Responsibility Regulation, Alta Reg 44/2019 at s 9(3)(a) [Tab 66]

239. "Minister" in *REDA* incorporates section 16 of the *GOA*. Section 16(4) of the *GOA* reads:

> (4) Two or more Ministers may be given common responsibility for the same Act, and in that case any reference in the Act or a regulation under that Act to a Minister, the Minister's deputy or the Minister's department is to be read as a reference to any of those Ministers and their deputies and departments.

GOA, *supra* at s 16(4) [Tab 65]

240. In their submissions, the Respondents accept that directions given under section 67 need to be given "jointly with the Minister of Environment and Parks"[14]

241. At this stage, the nexus between the AER and the decision to rescind is unknown due to the unavailability of the record.

242. More importantly, in the case at bar, there is no basis to suggest that the Respondents acted jointly with the Minister of Environment and Parks. The decision to rescind was issued by Alberta Energy and the decision to direct Alberta Energy to rescind was issued by the Minister of Energy.

243. The evidence before this Court is that the Coal Policy was within the exclusive purview of the Minister of Environment and Parks. The Coal Policy was adopted due to the work done by the Authority, which was under the purview of the Department of Environment and the Minister of Environment at the time.

[14] Respondents' submissions at paragraph 31.

244. Whether the Minister of Energy may then issue a direction that fell within the exclusive purview of the Minister of Environment and Parks without consulting him or without his authorization is a justiciable issue that should not be decided without the benefit of a full and complete record.

245. Giorilyn Bruno noted that section 67 of *REDA* "leaves open significant questions about the scope, legal status, and procedural requirements of directives issued under section 67".

Giorilyn Bruno, ***Section 67 of the Responsible Energy Development Act: Seeking a Balance Between Independence and Accountability***, online: Alberta Law Review <https://www.albertalawreview.com/index.php/ALR/article/view/290/288>. at p 865 [Tab 67]

246. In this case, the direction issued to the AER appears designed to bring the AER into conformity with the government's decision to rescind. What is not clear, based on the current state of the record, is whether:

a. The decision to rescind was for the purposes of directing the AER to rescind mention of the coal categories in Directive 061;

b. The Minister of Environment and Parks had any participation in rescinding the Coal Policy or directing the AER; and

c. The Minister of Energy can rescind the Coal Policy without consulting the Minister of Environment and Parks.

247. One of the undertakings requested was that the Respondents provide the correspondence between them and the AER, as that correspondence is referenced in the Minister's decision. The Applicants submit that this correspondence is potentially a further indication of direction being provided the AER under section 67. A complete record is required in order to properly adjudicate this issue and the Applicants reserve the right to further amend the Amended Originating Application to allege failed compliance with section 67.

248. The Applicants submit that the Respondents acted without jurisdiction in rescinding the Coal Policy. Under section 67 of *REDA*, the Minister of Environment and Parks ought to have been part of the decision.

Issue #4: Test for Summary Dismissal and Its Applicability to the Respondents' Application

249. The foregoing sets out the Applicants' bases for its claim that the Coal Policy ought to be restored and the decision to rescind ought to be quashed.

250. In assessing whether any of the aforementioned grounds merit summary dismissal, this Court is required to consider a number of factors, including the overall merit of the Applicants' claims.

a) Standard of Review

251. The Applicants' Judicial Review Application is proceeding on procedural and substantive grounds; i.e. that the procedure used in making the decision failed to meet the requirements of transparency, fairness and consultation with all affected parties that would be expected in the circumstances of the rescission of the Coal Policy. The correctness/reasonableness dichotomy does not necessarily apply to procedural fairness. If a breach of procedural fairness exists, the decision will be set aside. Questions of *vires* arise that are jurisdictional in nature. The reasonableness standard of review does not empower statutory delegates to expand their powers Where a statutory delegate lacks the authority to make a decision that decision will necessarily be unreasonable.

252. The Applicants submit that the appropriate standard of review for procedural fairness is akin to correctness as are questions of *vires*. Any presumption of reasonableness concerning the merits of the decision is rebutted in the within case. Even on a reasonableness standard if a substantive decision is reached on an improper basis the decision cannot stand. This said the decision to rescind the Coal Policy also lacks the transparency, justifiability and intelligibility required by law.

i) Procedural Fairness

253. As your Lordship noted in *Calgary (City) v Renfrew Chrysler Inc*, the standard of review on questions of procedural fairness is "whether the conduct of the tribunal having regard to all of the circumstances, conformed to the standards expected". In this respect, either the procedure selected conformed to the standards expected, or it did not:

[20] Procedural fairness is not subject to assessment under the correctness versus reasonableness dichotomy discussed in *Dunsmuir v New Brunswick*, 2008 S.C.R. 190. Instead, the issue is whether the conduct of the tribunal having regard to all of the circumstances, conformed to the standards expected. In *Thomas v Alberta (Transportation and Safety Board*, 2003 ABCA 256 (Thomas) Paperny JA discussed the flexible nature of that standard, as follows:

> 61. The content of the duty of fairness is flexible and variable depending upon the context of the particular statute involved and the rights, privileges or interests affected. "[T]he purpose of the participatory rights contained within the duty is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker." *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para 22.
>
> 62. The several criteria to determine what procedural rights the duty of fairness requires in the circumstances of the operation of this civil law program, as set out in *Baker* at paras. 23-28, include: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. The list is not exhaustive.
>
> [emphasis added]

Calgary (City) v Renfrew Chrysler Inc, 2017 ABQB 197 at para 20 [Tab 68]
Vavilov, *supra* at para 23 [Tab 38]

254. So long as the decision to rescind is justiciable, the Applicants are owed a duty of procedural fairness. As noted in *Baker v Canada (Minister of Citizenship and Immigration)*, "the fact that a decision is administrative and affects 'the rights, privileges or interests of an individual' is sufficient to trigger the application of the duty of procedural fairness."

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 20 [Tab 69]

255. In this case, the Respondents have acknowledged that no procedural fairness was provided to the Applicants on the basis no duty of fairness was owed.

256. As a result of the foregoing, conducting a *Baker* analysis into the extent of procedural fairness owed to the Applicants is unnecessary. If a duty is owed, then the Respondents have breached that duty.

257. In the alternative, and should this Court deem it necessary to conduct a *Baker* analysis, the Applicants submit as follows.

258. An inquiry into procedural fairness is contextual in nature. An inquiry into procedural fairness is "eminently variable, inherently flexible and context-specific" informed by the non-exhaustive list of factors identified in *Baker.*

Vavilov, *supra* at para 77 [Tab 38]

259. In the within matter the Respondents embark on what appears to be an extensive consultation process with the proponents of coal development. That choice of procedure by the Respondents, which also excluded any consultation whatsoever with the Applicants, goes beyond being inherently unfair bordering on egregious. The very individuals have made a livelihood on lands protected by the Coal Policy were give no notice and no opportunity to be heard.

Tesla, *supra* at para 63 – 64 [Tab 19]

260. The nature of the statutory scheme provided for in *ALSA*, inclusive of the regional plans, calls out for consultation with all stakeholders before amendments are made. Similar to the extensive consultation undertaken with the land owners and grazing lessees in the adoption of the Coal Policy, the Applicants had a legitimate expectation not only that they would be consulted, but also that if the Respondents chose to consult, as they appeared to have, it would not have been one-sided. The Applicants are the very group of persons whose property rights are directly impacted in the within case and were owed a duty of fairness.

ii) Standard of Review of the Decision

261. The Applicants have alleged that the decision to rescind ought to be quashed on its merits. The standard of review applicable to the Respondents' decision is correctness:

> [6] In my view, no deference is owed to the Minister as to the interpretation of the relevant provisions of the SARA or of the *Fisheries Act*. The Minister's interpretation of the Supreme Court's most recent pronouncements is erroneous as it fails to consider the context in which they were developed and the reasons which may warrant deference to an administrative tribunal when it interprets its enabling statute. The reasonableness standard of review does not apply to the interpretation of a statute by a minister responsible for its implementation unless Parliament has provided otherwise. I thus conclude – as did the Federal Court judge in this case – that where an application for judicial review of a decision as to the implementation of the SARA is based on an allegation that the Minister has misinterpreted a provision of the SARA – or of the *Fisheries Act* as it relates to the SARA – the Minister's interpretation must be reviewed on a standard of correctness. The courts owe no deference to the Minister in that respect.

Canada (Fisheries and Oceans) v. David Suzuki Foundation, 2012 FCA 40 at para 6 [***Georgia Straight***] [Tab 70]
Environmental Defence Canada v. Canada (Fisheries and Oceans), 2009 FC 878 at para 31 [Tab 71]

262. The recent Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov* does not change that correctness is the appropriate standard of review. First, the Court noted that the presumption towards reasonableness is rebuttable:

> [17] The presumption of reasonableness review can be rebutted in two types of situations...The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47, see also *Dunsmuir*, at paras. 62-64; *McLean*, at para. 22) in order to identify the appropriate standard.

Vavilov, *supra* at para 17 [Tab 38]

263. Whether an issue on judicial review is a general question of law "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" remains a basis for rebutting the presumption in favour of a reasonableness standard.

Vavilov, *supra* at paras 58 – 62 [Tab 38]

264. Questions of law of general importance are before this Court. They include:

a. Whether non-binding portions of regional plans are subject to *ALSA* requirements;

b. Whether subsections 13(1) and 15(3) of *ALSA* preclude this Court's jurisdiction to review decisions made under *ALSA*; and

c. Whether the Respondents had the authority to rescind the Coal Policy or otherwise effectively amend *ALSA*.

265. The Court noted that one key reason in favour of a presumption towards reasonableness is the "expertise" of administrative decision makers. As noted by the Court in *Georgia Straight*, the Respondents have no specialized expertise to make the decision to rescind the Coal Policy and they have no specialized expertise to answer the aforementioned questions.

Vavilov, *supra* at para 27 [Tab 38]
Georgia Straight, *supra* at para 6 [Tab 70]

266. Additionally, the issues before this court call into question the Respondents' jurisdiction to rescind the Coal Policy. The jurisdictional question arising requires the correctness standard because "the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions". In this case, the issue of whether the Respondents properly overtook the jurisdiction of another Ministry (Parks and Environment) is a question of pure jurisdiction.

Vavilov, *supra* at paras 63 – 68 [Tab 38]

267. Finally, the reasons provided by the Respondents do not meet the standard articulated in *Vavilov*. The Court noted that:

> [98] …deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

Vavilov, *supra* at para 98 [Tab 38]

268. Vavilov also speaks to judicial review in the absence of reasons. A reviewing court should look to the record as a whole, which may allow the Court to discern the rationality for a decision:

> [137] … Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason …
>
> …
>
> [138] … But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

Vavilov, *supra* at paras 137 – 138 [Tab 38]

269. Absent the full record it is submitted the Court should not entertain either of the Respondents' applications.

270. In the case at bar, the reasons provided by either decision maker leave much to the imagination. In the case of Alberta Energy, the single paragraph appears to base the decision on the apparent fact that the Coal Policy is somehow no longer required. This was contradicted by the Minister in her decision, which confirmed there will be gaps due to the rescission.

271. In the case of the Minister's decision to direct the rescission of the policy, there is no discussion on why the Minister decided to direct the rescission in the absence of any procedural fairness to those directly affected by her decision, namely the Applicants.

272. The reasons also suffer from a lack of transparency. As noted above, the reasons were released on the Friday of May long weekend in the middle of a global pandemic without notice to any affected party.

273. In short, the reasons do not meet the standard established by *Vavilov*, the result of which is that: "where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable".

Vavilov, *supra* at para 136 [Tab 38]

274. The correct standard applicable to the merits of the decision to rescind is correctness. However, the Applicants note that even on a reasonableness standard, the Respondents failure to consider a subregional plan would be unreasonable following the regional plan's express incorporation of the subregional plan.

Fort McKay First Nation v Prosper Petroleum Ltd, 2020 ABCA 163 at paras 59 – 61 [Tab 72]

b) Role of the Stewardship Commissioner

275. The Respondents have relied upon section 15 of *ALSA* to submit that this Court lacks the jurisdiction to judicially review any decision related to *ALSA*. Insofar as that is the position articulated by the Respondents, it is unconstitutional.

Crevier v Attorney General of Quebec, [1981] 2 SCR 220 at p 236 [Tab 73]
Dunsmuir v New Brunswick, 2008 SCC 9 at paras 31 and 52 [Tab 74]
Capilano, *supra* at para 14 [Tab 1]

276. The requirement to obey the law extends to the highest reaches of government and no legislation can be shielded from judicial review. Devlin J. of this Court succinctly summarized the law as follows:

> [55] Elizabeth and the MSGC argue that section 245 absolutely precludes the Applicant taxpayers from challenging the legality of the Property Tax Bylaw, even for non-compliance with mandatory pre-conditions imposed by the enabling legislation. This interpretation asks what the legislature cannot give, namely insulation from judicial review of the basic legality of executive or legislative action. As the Supreme Court of Canada has commented:
>
> > 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 (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, 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*...: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 31.
>
> [56] Simply put, the Superior Courts always retain the constitutional power and obligation to ensure the foundational lawfulness of governmental actions. No legislation can abrogate this authority: *Crevier v Québec (Attorney General)*, [1981] 2 SCR 220 at 234-38; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 40; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ["*Vavilov*"] at para 24.

[57] Even if section 245 were interpreted as erecting an absolute bar on parties such as the Applicants from challenging the lawfulness of bylaws which impact them, constitutionally it cannot have this effect. The Supreme Court of Canada has repeatedly made clear that:

> In the presence of a full privative clause, judicial review exists not by reason of the wording of the statute (which is, of course, fully preclusive) but because as a matter of constitutional law judicial review cannot be ousted completely...: *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd*, [1993] 2 SCR 316 at 333.

[58] The rationale underlying the courts' abiding jurisdiction to review state acts for foundational lawfulness was well-articulated by Stratas JA in *Fisher-Tennant v Canada (Minister of Citizenship and Immigration)*, 2018 FCA 132 at paras 23-24, where he explained that:

> 23 "L'etat, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them--the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on--must obey the law: Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385; United States v. Nixon, 418 U.S. 683 (1974); Marbury v. Madison, 5 U.S. 137 (1803); Magna Carta (1215), art. 39. From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed...
>
> 24 Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power--no matter how lofty, no matter how important--must be subject to meaningful and fully independent review and accountability.

[59] Irrespective of the interpretation given it, section 245 of the *MSA* cannot have the effect of ousting this Court's jurisdiction to review a bylaw enacted under its delegated authority for compliance with the legal preconditions permitting that authority to flow-through to the delegate. Therefore, section 245 cannot bar this Application or deprive the Applicants of standing to bring it, irrespective of the interpretation given it.

Canadian Natural Resources Ltd. v Elizabeth Métis Settlement, 2020 ABQB 210 at paras 56 – 59 [Tab 75]

Fisher-Tennant v Canada (Minister of Citizenship and Immigration), 2018 FCA 132 at paras 23 – 24 [Tab 76]

Vavilov, *supra* at para 24 [Tab 38]

277. The Applicants will therefore not proceed with an analysis into whether this Court does not have the authority to review the Respondents compliance with *ALSA* because the Legislature is presumed to act within its constitutional authority.[15]

Sullivan, *supra* at p 307 – 310 [Tab 39]

278. The Applicants submit that, if constitutional, section 15 of *ALSA* is at most a privative clause. The Court in *Vavilov* held that because of the presumption towards reasonableness, "privative clauses serve no independent or additional function in identifying the standard of review". This is likely because there is only one reasonableness standard.

Vavilov, *supra* at paras 49 and 88 – 90 [Tab 38]

279. The role of the Stewardship Commissioner in section 15 bears mention. The proposed intervenor, Backcountry Hunters and Anglers, issued a complaint to the commissioner. The complaint was based upon the same grounds articulated in the present matter.

Affidavit of Neil Keown, sworn December 14, 2020 at paras 47 – 48 [Tab 77]

280. The Stewardship Commissioner has since issued a decision refusing jurisdiction over the complaint. The commissioner acted properly given the Applicants' concerns extend beyond issues relating to *ALSA*.

Decision of Stewardship Commissioner, December 22, 2020 [Tab 78]

281. Further, a review of section 15 of *ALSA* indicates that the section is intended to deal with operational or compliance aspects of *ALSA* and provide a right of complaint to the Stewardship Commissioner on such matters. It could never have been the intent that section 15 was to foreclose review by the Court for matters of *vires*, legality and interpretation of legislative authority.

---

[15] The Respondents have cited the Honourable Madam Jutsice Hunt McDonald's decision in *Keller v Municipal District of Bighorn No. 8* in supporting their submission that section 15 disposes of a court's ability to consider decisions under *ALSA*. The Applicants submit that her Ladyship's decision is incorrect insofar as it proposes to remove this Court's constitutional responsibility to review government acts. However, the decision is also distinguishable: the decision concerns the impact of conservation tools (such as transfer development credits) on the validity of municipal bylaws; there were no regional plans in existence at the time her Ladyship's decision was made; and the section 15 analysis was limited in scope. Finally, the section 15 analysis was *obiter*, as the decision was made on other grounds.

Keller v Municipal District of Bighorn No. 8, 2010 ABQB 362 [Tab 79]

c) Whether the Respondents Have Met the Test for Summary Adjudication

282. The Applicants advance the following grounds for judicial review: that the decision to rescind the Coal Policy was:

a. Unreasonable/incorrect on its merits;

b. *Ultra vires* the Respondents by operation of *ALSA*;

c. *Ultra vires* the Respondents by operation of *REDA*; and

d. Procedural unfair to the Applicants and breached the Applicants' legitimate expectation of procedural fairness.

283. The Alberta Court of Appeal articulated the following test for summary adjudication:

> [47] The proper approach to summary dispositions, based on the *Hryniak v Mauldin* test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> > a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
> >
> > b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
> >
> > c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
> >
> > d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

Weir-Jones Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA 49 at para 47 [***Weir-Jones***] [Tab 80]

284. Two out of the four considerations outlined by the Court in *Weir-Jones* require a court to satisfy itself that it can confidently summarily adjudicate a matter given the record before it.

285. In this case, there is no record from the Respondents. This alone is grounds for refusing the Application, particularly since the Respondents have attempted to handcuff the Applicants' ability to respond by cherry-picking the record through Mr. Moroskat's Affidavit.

Warman v Law Society of Alberta, 2015 ABCA 368 at para 8 [Tab 81]
LNR v Mountview Pharma Corp, 2017 ABQB 730 at para 38 [Tab 82]

286. The only documents produced by the Respondents were selected from the record and sworn into Mr. Moroskat's Affidavit. Those documents are the two decisions from the Respondents.

287. There are instances when the dispute is "of such a nature that the parties must be allowed to access every procedural stage that the civil process offers and make unlimited use of it to ensure that justice is done. Disputes on complex material facts and those in which one or both of the parties do not abide by the rules or court orders are two obvious examples of this type of dispute." This is one such dispute.

Hannam v Medicine Hat School District No. 76, 2020 ABCA 343 at para 183 [Tab 83]

288. As at the date of this brief, the Respondents still have not furnished the undertakings from Mr. Moroskat's Questioning. The record is far from complete in other areas. There is insufficient information to adjudicate the following issues, *inter alia*:

a. Whether the Coal Policy was reviewed prior to rescission;

b. Adoption of the Coal Policy;

c. Consultation done before rescinding the Coal Policy;

d. Respondents' basis for not consulting the Applicants;

e. Involvement of the Minister of Environment and Parks in the rescission;

f. Current policy gaps and those policy gaps in place at the time of rescission;

g. Authority who drafted the Advice to Minister; and

h. Directions issued to the AER relating to rescission.

289. Assuming there is sufficient legal basis for the Applicants to proceed, there is insufficient factual basis for this Court to be able to make a determination.

290. The Record of Proceedings is one of the only pieces of evidence available to a court hearing a judicial review application. It is integral to making substantive determinations.

ARC, *supra* at Rule 3.22(a) [Tab 2]
Alberta's Free Roaming Horses Society v Alberta, 2019 ABQB 714 at paras 22 – 26 [Tab 84]

Issue #5: Test for Striking and Its Applicability to the Respondents' Application

291. The Applicants generally agree with the test for striking a pleading under *Rule* 3.68[16], except for the following: this Court cannot consider evidence when deciding under *Rule* 3.68(2)(b).

Manson (Estate) v Obsidian Energy Ltd, 2020 ABQB 370 at para 41 [Tab 85]
Kniss v Stenberg, 2014 ABCA 73 at para 21 [Tab 86]
ARC, *supra* at Rule 3.68 [Tab 2]

292. As noted above, the parties are only permitted to rely upon evidence to establish whether the within Action is justiciable. They are not permitted to rely upon evidence to determine if the Applicants' have a cause of action.

a) Whether the Applicants' are Foreclosed by ALSA

293. The Respondents are not permitted to rely upon evidence in support of their claim the Applicants are incapable of relying upon *ALSA*. They must rely upon the facts as stated in the Amended Originating Application.

[16] The Applicants agree that paragraphs 21 and 22 of the Respondents' submissions are proper.

294. The sole basis (as stated in the Respondents' Application) for submitting that there is no cause of action under *ALSA* is that "the Applicants are foreclosed by [*ALSA*] from bringing any proceeding in the nature of certiorari, prohibition or mandamus, or any application for declaratory relief".

295. The Applicants' bases for supporting their submission are as follows:

a. There is no requirement for the Coal Policy to remain in effect pending a review of the coal categories. This submission completely ignores the Integrated Resource Plans associated with the *SSRP*. The *SSRP* expressly requires those plans to remain in effect until further review. Further, one cannot review a document that has been rescinded. The clear implication is that the Coal Policy will remain in effect until the review is complete;

b. The Coal Policy references are in non-binding sections of the *SSRP*; therefore, they can be rescinded without consequence. This submission overrules the clear intent of *ALSA* to avoid top down government policy making. *ALSA* intended that regional plans be based on consultation. Interpreting *ALSA* such that non-binding portions of regional plans may be amended or rescinded without consultation completely disregards the Legislature's intent;

c. Section 15 of *ALSA* precludes judicial review. This submission was considered above. Any interpretation of *ALSA* precluding this Court from judicially review a decision under *ALSA* is unconstitutional. The only other interpretation is that section 15 is a privative clause, which no longer has any effect following *Vavilov*; and

d. The Deputy Minister did not make the decision. The Applicants have sworn into evidence the Advice to Minister. They cannot rely upon that evidence for supporting their contention that the Deputy Minister did not make the decision. Based on the facts deemed true in the Amended Originating Application, if the Deputy Minister decided to rescind the Coal Policy, he did so without authority.

b) Whether the Action is Justiciable

296. The Parties may rely upon evidence in establishing whether the Action is justiciable.

297. Based on the foregoing analysis under justiciability, the Applicants submit that the Action is justiciable.

298. If the Action is justiciable, then the Applicants were owed procedural fairness because they were directly affected by the decision.

CONCLUSION

299. As noted above, the Applicants advance the following grounds for judicial review: that the decision to rescind the Coal Policy was:

a. Unreasonable/incorrect on its merits;

b. *Ultra vires* the Respondents by operation of *ALSA*;

c. *Ultra vires* the Respondents by operation of *REDA*; and

d. Procedural unfair to the Applicants and breached the Applicants' legitimate expectation of procedural fairness.

300. Each ground is meritorious and founded in principles of justiciability.

301. Should this Court deem that the decision to rescind was justiciable and that section 15 of *ALSA* does not preclude judicial review, the Respondents' application to strike is necessarily defeated.

302. Should this Court find merit to the Applicants' claims and/or find that it is unable to determine the factual matrix underpinning the Respondents' decision to rescind, the Respondents' application to dismiss is necessarily defeated.

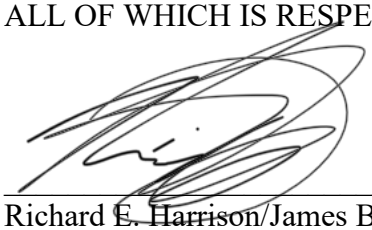
303. As remedies sought, the Applicants seek the following from this Court:

a. Amending their Amended Originating Application to allow the Applicants to add, as a remedy sought, a declaration that the Coal Policy remains in effect in the South Saskatchewan region;

b. Dismissal of the Respondents' Application to summarily dismiss or strike; and

c. Costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF JANUARY, 2020.



Richard E. Harrison/James B. Laycraft, Q.C.[17]
Counsel for the Applicants (Respondents on this Application)

[17] Much of the analysis performed under Issue #2 was done by Michael Wenig, counsel for Backcountry Hunters and Anglers, and we credit him accordingly.

TABLE OF AUTHORITIES

24. *British Columbia v Canadian Forest Products Ltd.*, [2004] SCC 38

25. *R v Hydro-Quebec*, [1997] 3 SCR 213

26. *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3

27. *Guérin v. Canada (Attorney General)*, 2018 FC 94

28. *Knight v Imperial Tobacco Canada Ltd.*, 2011 SCC 42

29. *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852

30. *La Rose v. Canada*, 2020 FC 1008

31. *Coal Conservation Act*, RSA 1980, c C-14

32. *Cardinal River Coals Ltd. (Cheviot Coal Project)*, Decision 97-08

33. *Calgary (City) v Alberta (Municipal Government Board)*, 2010 ABQB 719

34. *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36

35. *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 FC 264 (FCA)

36. *Czerwinski v Mulaner*, 2007 ABQB 536

37. *Office and Professional Employees' Int'l Union et al v B.C. Hydro et al*, 2004 BCSC 422

38. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

39. Ruth Sullivan, *Statutory Interpretation*, 3d ed (Toronto, Ontario: Irwin Law, 2016)

40. *Manitoba Metis Federation Inc. v. The Government of Manitoba et al.*, 2018 MBQB 131

41. *Alberta Land Stewardship Act*, SA 2009, c A-26.8

42. *Tokio Marine & Nichido Insurance Company v Security National Insurance Company*, 2020 ABCA 402

43. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 RCS 27

44. *Interpretation Act*, RSA 2000, c I-8

45. *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 SCR 1170

46. *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525

47. *Nature Conservancy of Canada v Waterton Land Trust Ltd*, 2014 ABQB 303

48. *Reference re Manitoba Language Rights*, 1992 CanLII 115 (SCC), [1992] 1 SCR 212

49. *Tsai v Atlas Anchor Systems (BC) Ltd*., 2016 BCPC 406

50. *R v St Lawrence Cement Inc*, 2002 CanLII 45010 (ONCA)

51. *R v Sims*, 2000 BCCA 437 (CanLII)

52. *NOV Enerflow ULC (NOV Pressure Pumping ULC) v Enerflow Industries Inc*, 2020 ABQB 347

53. *UBC v Assn of Administrative and Prof Staff on Behalf of Bill Wong*, 2006 BCCA 491

54. *R v Blackbird*, 2003 CanLII 72340 (ON SC)

55. *Cobb v Long Estate*, 2017 ONCA 717

56. *Mainwaring v Mainwaring*, [1942] 2 DLR 377 (BCCA)

57. E.A. Driedger, *Construction of Statutes*, 1st ed (Toronto, Butterworths, 1974)

58. *Wilson v Albert*, [1943] 3 DLR 129 (ABCA)

59. *R v C (WJ)*, 2008 MBCA 11 (CanLII)

60. *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd (No. 3)*, 1992 CanLII 7090 (NL CA)

61. *587901 Alberta Ltd. v. Calgary (City)*, 2007 ABCA 421

62. Forestry, Lands, and Wildlife (1986-1993), *Ghost River Sub-Regional Integrated Resource Plan*, (7 June 1988), online: Alberta Government

63. Alberta, Legislative Assembly, *Hansard*, 27th Leg, 4th Sess, various issues (March 8 – May 10, 2011)

64. *Responsible Energy Development Act*, SA 2012 c R-17.3

65. *Government Organization Act*, RSA 2000, c G-10

66. *Designation and Transfer of Responsibility Regulation*, Alta Reg 44/2019

67. Giorilyn Bruno, *Section 67 of the Responsible Energy Development Act: Seeking a Balance Between Independence and Accountability*, online: Alberta Law Review

68. *Calgary (City) v Renfrew Chrysler Inc*, 2017 ABQB 197

69. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

70. *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40

71. *Environmental Defence Canada v. Canada (Fisheries and Oceans)*, 2009 FC 878

72. *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163

73. *Crevier v Attorney General of Quebec*, [1981] 2 SCR 220

74. *Dunsmuir v New Brunswick*, 2008 SCC 9

75. *Canadian Natural Resources Ltd. v Elizabeth Métis Settlement*, 2020 ABQB 210

76. *Fisher-Tennant v Canada (Minister of Citizenship and Immigration)*, 2018 FCA 132

77. Affidavit of Neil Keown, sworn December 14, 2020

78. Decision of Stewardship Commissioner, December 22, 2020

79. *Keller v Municipal District of Bighorn No. 8*, 2010 ABQB 362

80. *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49

81. *Warman v Law Society of Alberta*, 2015 ABCA 368

82. *LNR v Mountview Pharma Corp*, 2017 ABQB 730

83. *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343

84. *Alberta's Free Roaming Horses Society v Alberta*, 2019 ABQB 714

85. *Manson (Estate) v Obsidian Energy Ltd*, 2020 ABQB 370

86. *Kniss v Stenberg*, 2014 ABCA 73

87. *Alberta (Attorney General) v Malin*, 2016 ABCA 396

88. *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607

89. *Alberta Land Stewardship Amendment Act,* 2011, SA 2011, c 9

90. *Alberta Land Stewardship Act*, SA 2009, c A-26.8 (amended May 13, 2011)

TAB 1

In the Court of Appeal of Alberta

Citation: Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City), 2015 ABCA 85

Date: 20150227
Docket: 1303-0283-AC
Registry: Edmonton

2015 ABCA 85 (CanLII)

Between:

Edmonton East (Capilano) Shopping Centres Limited (as Represented by AEC International Inc.)

Respondent (Applicant)

- and -

The City of Edmonton

Appellant (Respondent)

- and -

The Assessment Review Board for the City of Edmonton

Respondent (Respondent)

and The Minister of Justice and Attorney General of Alberta

Not a Party to the Appeal (Respondent)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Mr. Justice Berger
Concurred in by the Honourable Madam Justice Rowbotham

Appeal from the Order by
The Honourable Justice J.D. Rooke, Associate Chief Justice
Dated the 13th day of September, 2013
Filed on the 5th day of November, 2013
(2013 ABQB 526; Docket: 1103 13687)

2015 ABCA 85 (CanLII)

The implementation of direct appeals to the Court of Queen's Bench was undoubtedly a recognition of the fact that the "no appeal" provision previously in place did not prevent judicial review. Intermediate appeals to the Municipal Government Board were replaced by direct appeals to the Court of Queen's Bench, subject to the screening mechanism of "leave to appeal". Any decision of the Court would be subject to further appeal to the Court of Appeal.

[10] In accordance with the post-2010 regime, the appellant initially brought its complaint before the Assessment Review Board. The Court of Queen's Bench granted leave to appeal, and subsequently adjudicated the appeal on its merits. This appeal followed.

Standard of Review

[11] The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review. Today is not that day.

[12] Judicial review has evolved, starting in the 1970s and 1980s, from its foundation in the idiosyncratic vagaries of the "prerogative writs" and the companion concept of "jurisdictional error". It evolved through a hoary "functional and pragmatic" search for an appropriate balancing of the role in the superior courts in the system of administrative justice. Today's philosophical foundation is "deference" and the companion "standard of review analysis".

[13] The concept of the "standard of review" is not a value unto itself. The underlying value is maintaining the integrity of the system of administrative justice, illustrated by the need to extend deference to the decisions of administrative tribunals: ***Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc.***, 2013 FCA 250 at paras. 35-6, [2014] 2 FCR 557.

[14] But maintaining the integrity of the system of administrative justice is not the only value at play. Judicial review was originally formulated by the common law courts in support of the rule of law, a constitutional principle of the first order. Indeed, the Supreme Court of Canada has noted that this principle is so important, that it might well be unconstitutional for a legislative body to attempt to abolish judicial review: ***Crevier v Attorney General of Quebec***, [1981] 2 SCR 220 at p. 236; ***Dunsmuir v New Brunswick***, 2008 SCC 9 at paras. 31, 52, [2008] 1 SCR 190.

[15] There are other values at play, and a second one worth emphasizing is "legislative intent". The Supreme Court of Canada has stated on numerous occasions that the ultimate objective of the standard of review analysis is to ascertain the intent of the legislature:

> The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed. (***Pushpanathan v Canada (Minister of Citizenship and Immigration)***, [1998] 1 SCR 982 at para. 26)

2015 ABCA 85 (CanLII)

TAB 2

Alberta Rules of Court, Alta Reg 124/2010

Alberta Regulation 124/2010

Judicature Act

Alberta Rules of Court

Subdivision 2
Additional Rules Specific to Originating Applications for Judicial Review

Evidence on judicial review

3.22 When making a decision about an originating application for judicial review, the Court may consider the following evidence only:

(a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;

Division 5
Significant Deficiencies in Claims

Court options to deal with significant deficiencies

3.68 **(1)** If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

(a) that all or any part of a claim or defence be struck out;

(b) that a commencement document or pleading be amended or set aside;

(c) that judgment or an order be entered;

(d) that an action, an application or a proceeding be stayed.

(2) The conditions for the order are one or more of the following:

(a) the Court has no jurisdiction;

(b) a commencement document or pleading discloses no reasonable claim or defence to a claim;

(c) a commencement document or pleading is frivolous, irrelevant or improper;

(d) a commencement document or pleading constitutes an abuse of process;

(e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

(4) The Court may

(a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;

(b) strike out all or any pleadings if a party without sufficient cause does not

(i) serve an affidavit of records in accordance with *rule 5.5*,

(ii) comply with *rule 5.10*, or

(iii) comply with an order under *rule 5.11*.

TAB 3

Descriptive Report (RAD)

GR0053.0001F

The Department of Environment fonds

Title

Environment Council of Alberta records

Date Range 1958-1994

Extent 34.38 m of textual records. -- 119 audiotape reels.

Creator

Environment Council of Alberta

Administrative history

Dates of Founding and/or Dissolution:
The Environment Council of Alberta was established as a Crown Corporation under the Environment Conservation Amendment Act, 1977 (S.A. 1977, chapter 66). As a result of the restructuring in 1994, the Environment Council of Alberta was phased out as an agency of the Department of Environmental Protection. The Environment Council Act was repealed by the Environmental Protection Statutes Repeal Act, 1995 (S.A. 1995, chapter 15), which came into force July 14, 1995.

Functional Responsibility:
At the time it was established, the Environment Conservation Authority was without precedent, either within or outside Alberta. In its initial incarnation through An Act respecting Environment Conservation, 1970 (S.A. 1970, chapter 36), the Environment Conservation Authority was responsible for conducting continual reviews of policies and programs of the Government and government agencies on matters pertaining to environment conservation, and for investigating into and reporting on matters pertaining to environment conservation at the request of the Lieutenant Governor. As well, they were able to inquire into issues relating to environment conservation, and to hold hearings to receive briefs and submissions about matters relating to environment conservation, making their recommendations to the Lieutenant Governor. The Authority became a corporation under the Department of the Environment Act, 1971 (S.A. 1971, chapter 24, section 18), reporting to the Minister of the Environment. The Authority's functions continued when the Environment Conservation Authority became the Environment Council of Alberta in 1977 through the Environment Conservation Amendment Act, which effectively renamed the Environment Conservation Act the Environment Council Act. The mandate remained virtually unchanged, the major change being with regards to the structure of the board, which was replaced with a permanent Chief Executive Officer and temporary panels.

Administrative Relationships:
Under the initial legislation, the Environment Conservation Authority was to report to the Lieutenant Governor. With the Environment Conservation Amendment Act, 1972 (S.A.1972, chapter 125), the Authority was instead to report to the Minister of the Environment. The Environment Council of Alberta continued to report to the Minister of the Environment.

Administrative Structure:
When first established, the Environment Conservation Authority consisted of three members, who were

appointed by the Lieutenant Governor (S.A. 1970, chapter 36, section 4.1). One of these would be designated chairman by the Lieutenant Governor, and another vice-chairman. The Environment Conservation Amendment Act, 1972 (S.A. 1972, chapter 38) increased the number to four members. The Environment Conservation Amendment Act, 1977 replaced the four members with a single permanent Chief Executive Officer to be appointed by the Lieutenant Governor in Council, and a succession of temporary panels for each public hearing.

Names of Corporate Bodies:
The Environment Council of Alberta was incorporated as a continuation of the Environment Conservation Authority. The Environment Conservation Authority was created under An Act respecting Environment Conservation, 1970 (S.A. 1970, chapter 36, section 4).

Names of Chief Officers:

W.R. Trost (chairman)	1970-1976
Julian Kinisky (acting chair)	1977
Margaret Noble (acting chair)	1977
Alistair D. Crerar (CEO)	1977-1988
Vacant	1989
Dr. Natalia Krawetz(CEO)	1989-1992
Vacant	1993
David Anderson (acting CEO)	1994-1995

Custodial History

Scope and content

The series consists of the administrative and operation records of the Environment Council of Alberta.

Notes

Source of Supplied Title Proper

Physical Description

Physical Condition

Immediate source of acquisition

Restrictions on access

Remarks (from Access cond.)

Restrictions on use

Finding aids

Inventories are available.

Remarks (from Finding aids)

Accession numbers

Accruals

Further accruals are not expected.

Subject Headings

Schedule Numbers

n/a

Language

The material is in English

TAB 4

1970

CHAPTER 36

An Act respecting Environment Conservation

(*Assented to April 15, 1970*)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Alberta, enacts as follows:

Short title

1. This Act may be cited as *The Environment Conservation Act.*

Definitions

2. In this Act,

(*a*) "Authority" means the Environment Conservation Authority established under this Act;

(*b*) "Conservation and Utilization Committee" means the Conservation and Utilization Committee established under this Act;

(*c*) "government agency" means

(i) a corporation that is an agent of the Crown in right of Alberta, or

(ii) any corporation, commission, board or other body empowered to exercise quasi-judicial or governmental functions and whose members are appointed by an Act of the Legislature, the Lieutenant Governor in Council, or a Minister of the Crown, or any combination thereof;

(*d*) "natural resources" means land, plant life, animal life, water and air;

(*e*) "public advisory committee" means a public committee on environment conservation appointed by the Lieutenant Governor in Council under this Act.

Environment conservation

3. For the purposes of this Act, the following are matters pertaining to environment conservation:

(*a*) the conservation, management and utilization of natural resources;

(*b*) the prevention and control of pollution of natural resources;

(*c*) the control of noise levels resulting from commercial or industrial operations in so far as they affect the environment in the vicinity of those operations;

(*d*) economic factors that directly or indirectly affect the ability of persons to carry out measures that relate to the matters referred to in clauses (*a*), (*b*) and (*c*);

(*e*) any operations or activities, whether carried on for commercial or industrial purposes or otherwise,

(i) that adversely affect or are likely to adversely affect the quality or quantity of any natural resource, or

(ii) that destroy, disturb, pollute, alter or make use of a natural resource or are likely to do so;

(*f*) the preservation of natural resources for their aesthetic value;

(*g*) laws in force in Alberta that relate to or directly or indirectly affect natural resources.

Environment Conservation Authority

4. (1) There is hereby established the "Environment Conservation Authority" consisting of three members appointed by the Lieutenant Governor in Council.

(2) The Lieutenant Governor in Council shall designate one of the members of the Authority as chairman and another as vice-chairman.

(3) The vice-chairman is the acting chairman of the Authority in the event of the absence or inability to act of the chairman or in the event that the office of chairman is vacant.

(4) Members of the Authority

(*a*) shall be paid salaries in accordance with a schedule of salary rates prescribed by the Lieutenant Governor in Council, and

(*b*) shall be paid their reasonable travelling and living expenses while absent from their ordinary places of residence and in the course of their duties as members of the Authority, at rates prescribed by the Lieutenant Governor in Council.

(5) *The Public Service Pension Act* applies to the members of the Authority.

Meetings

5. (1) The Authority shall meet at the call of the chairman.

(2) Two members of the Authority constitute a quorum.

(3) The Authority may make rules respecting the calling of meetings of the Authority and the conduct of business thereat, and generally as to the conduct of the business and affairs of the Authority.

Employees

6. In accordance with *The Public Service Act, 1968* there may be appointed a secretary and any other employees as may be required for the purpose of providing clerical and secretarial services to the Authority.

Functions of Authority

7. (1) The Authority

(*a*) shall conduct a continuing review of policies and programs of the Government and government agencies on matters pertaining to environment conservation and shall report thereon to the Lieutenant Governor in Council;

(*b*) may inquire into any matter pertaining to environment conservation and make its recommendations and report thereon to the Lieutenant Governor in Council;

(*c*) shall, when required to do so by an order of the Lieutenant Governor in Council, inquire into any matter pertaining to environment conservation that is specified in the order and make its recommendations and report thereon to the Lieutenant Governor in Council;

(*d*) may require any officers or employees of any department of the Government or any government agency to provide information that, in the opinion of the Authority, is necessary for the purposes of enabling it to carry out its responsibilities;

(*e*) may, and when required to do so by an order of the Lieutenant Governor in Council shall, hold public hearings for the purpose of receiving briefs and submissions on any matter pertaining to environment conservation, and shall report thereon to the Lieutenant Governor in Council;

(*f*) may from time to time as it considers necessary, but at least once a year, hold joint meetings with the public advisory committees;

(*g*) may refer any matter pertaining to environment conservation to the Conservation and Utilization Committee for its recommendations and report thereon;

(*h*) may engage the services of persons having special technical or other knowledge in connection with an inquiry of any matter pertaining to environment conservation that the Authority has undertaken or proposes to undertake;

(*i*) in co-operation with and primarily through the medium of the Conservation and Utilization Committee, shall use its best efforts to achieve co-ordination of policies, programs and administrative procedures of the Government and government agencies relating to matters pertaining to environment conservation;

(*j*) shall make a report in each year to the Lieutenant Governor in Council

(i) summarizing generally its activities and affairs in the preceding year,

(ii) summarizing the recommendations made by it to the Lieutenant Governor in Council and to the Conservation and Utilization Committee in the preceding year, and

(iii) showing any reports or studies prepared in the preceding year at the request of the Lieutenant Governor in Council.

(2) When a report by the Authority under subsection (1), clause (*j*) is received by the Lieutenant Governor in Council, the President of the Executive Council shall lay a copy of it before the Legislative Assembly if it is then in session and if not, within 15 days after the commencement of the first session in the next ensuing year.

Conservation and Utilization Committee

8. (1) There is hereby established a committee called the "Conservation and Utilization Committee" consisting of not less than 12 members appointed by the Lieutenant Governor in Council in accordance with subsection (2).

(2) The members of the Conservation and Utilization Committee shall consist of employees of the Government or members or employees of a government agency with at least one member from each of the following, namely,

(*a*) the Department of Agriculture,

(*b*) the Department of Health,

(*c*) the Department of Highways and Transport,

(*d*) the Department of Industry and Tourism,

(*e*) the Department of Lands and Forests,

(*f*) the Department of Mines and Minerals,

(*g*) the Department of Municipal Affairs, and

(*h*) the Oil and Gas Conservation Board.

(3) The Lieutenant Governor in Council shall designate one of the members of the Committee as its chairman.

(4) Notwithstanding subsections (1) and (2), each member of the Conservation and Utilization Committee appointed under subsection (2) may appoint in writing a person to be an alternate member of the Committee to act in his stead as a member of the Committee in the event of his absence or inability to act.

Meetings

9. (1) The Conservation and Utilization Committee

(*a*) may appoint a vice-chairman, and

(*b*) may make rules governing the calling of its meetings, the conduct of its meetings and any other matters pertaining to the conduct of its business and affairs.

(2) A majority of the members of the Conservation and Utilization Committee or their respective alternate members constitutes a quorum.

Functions

10. The Conservation and Utilization Committee

(*a*) shall, at the direction of the Lieutenant Governor in Council, inquire into and study any matter pertaining to environment conservation and shall submit a report and recommendations thereon to the Lieutenant Governor in Council and to the Authority;

(*b*) shall be responsible for maintaining a continuing liaison between all departments of the Government and all government agencies for the purpose of co-ordinating the implementation of the programs of those departments and agencies on matters pertaining to environment conservation;

(*c*) shall, at the request of the Authority, hold a joint meeting with the Authority to discuss any matters pertaining to environment conservation.

(*d*) may appoint a sub-committee to conduct any specified inquiry or study in connection with an inquiry or study of a matter pertaining to environment conservation that the Committee itself has undertaken or has been required to undertake.

Public advisory committees

11. The Lieutenant Governor in Council may

(*a*) appoint one or more public advisory committees on environment conservation,

(*b*) prescribe the duties and functions of a public advisory committee, and

(*c*) prescribe the rates of remuneration to be paid to members of a public advisory committee for their travelling and living expenses incurred in the course of their duties as members of a committee.

Regulations

12. The Lieutenant Governor in Council may make regulations

(*a*) providing for any procedure or matter for the purpose of facilitating the functions of the Authority, the Conservation and Utilization Committee or a

public advisory committee and the relations between them, and

(*b*) providing for any other matter considered necessary to carry out the purposes of this Act.

Repeal

13. *The Utilization of Lands and Forests Act*, being chapter 354 of the Revised Statutes, is repealed.

Coming into force

14. This Act comes into force on July 1, 1970.

TAB 5

1972

CHAPTER 38

THE ENVIRONMENT CONSERVATION AMENDMENT ACT, 1972

(Assented to June 2, 1972)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

R.S.A. 1970, c. 125

1. The Environment Conservation Act is hereby amended.

Amends s. 2

2. Section 2 is amended

(a) by adding the following clause after clause (c):

(c1) "Minister" means the Minister of the Environment;

(b) by striking out clause (e) and by substituting the following:

(e) "public advisory committee" means a public committee on environment conservation appointed under section 11.

Amends s. 4

3. Section 4, subsection (1) is amended by striking out the words "three members" *and by substituting the words* "four members".

Amends s. 5

4. Section 5 is amended by striking out subsection (2) and by substituting the following:

(2) A quorum of the Authority shall consist of two members, one of whom shall be the chairman or the vice-chairman.

Amends s. 7

5. Section 7, subsection (1) is amended

(a) as to clause (a) by striking out the words "Lieutenant Governor in Council" *and by substituting the word* "Minister",

(b) by striikng out clause (b) and by substituting the following:

(b) may, after consultation with the Minister, inquire into any matter pertaining to environment conservation and make its recommendations and report thereon to the Minister;

(c) by striking out clause (e) and by substituting the following:

(e) may, and when required to do so by an order of the Lieutenant Governor in Council or of the Minister shall, hold public hearings for the purpose of receiving briefs and submissions on any matter pertaining to environment conservation, and shall report thereon to the Lieutenant Governor in Council and the Minister;

(d) as to clause (h) by adding after the words "the Authority" *the words* ", with the approval of the Minister,",

(e) as to clause (i) by striking out the words "in co-operation with and primarily",

(f) as to clause (j) by striking out the words "Lieutenant Governor in Council" *where they occur in the portion of the clause preceding subclause (i) and by substituting the word* "Minister",

(g) as to clause (j), subclause (iii) by adding at the end thereof the words "or of the Minister".

Amends s. 7

6. Section 7 is amended by striking out subsection (2) and by substituting the following:

(2) When a report by the Authority under subsection (1), clause (j) is received by the Minister, the Minister shall lay a copy of it before the Legislative Assembly if it is then in session and if not, within 30 days after the commencement of the first session in the next ensuing year.

Amends s. 8

7. Section 8, subsection (1) is amended by striking out the words "The Authority" *and by substituting the words* "Subject to the approval of the Minister, the Authority".

Amends s. 11

8. Section 11 is amended by adding after the words "The Authority" *the words* ", after consultation with the Minister,".

Coming into force

9. This Act comes into force on the day upon which it is assented to.

TAB 6

1971

CHAPTER 24

BILL 32

THE DEPARTMENT OF THE ENVIRONMENT ACT

(Assented to March 31, 1971)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1. In this Act

(a) "Authority" means the Environment Conservation Authority;

(b) "Co-ordinating Council" means the Natural Resources Co-ordinating Council;

(c) "Department" means the Department of the Environment;

(d) "government agency" means

(i) a corporation that is an agent of the Crown in right of Alberta, or

(ii) any corporation, commission, board or other body empowered to exercise quasi-judicial or governmental functions and whose members are appointed by an Act of the Legislature, the Lieutenant Governor in Council, or a Minister of the Crown, or any combination thereof;

(e) "Minister" means the Minister of the Environment;

(f) "natural resources" means land, plant life, animal life, water and air.

Environment conservation

2. For the purposes of this Act, the following are matters pertaining to the environment:

(a) the conservation, management and utilization of natural resources;

(b) the prevention and control of pollution of natural resources;

(c) the prevention of noise and the control of noise levels resulting from commercial or industrial operations in so far as they affect the environment in the vicinity of those operations;

(d) economic factors that directly or indirectly affect the ability of persons to carry out measures that relate to the matters referred to in clauses (a), (b) and (c);

(e) any operations or activities

(i) that adversely affect or are likely to adversely affect the quality or quantity of any natural resource, or

(ii) that destroy, disturb, pollute or alter or make use of a natural resource or are likely to do so;

(f) the preservation of natural resources for their aesthetic value;

(g) laws in force in Alberta that relate to or directly or indirectly affect the ecology of the environment or natural resources.

Establishment of Department

3. There shall be a department of the public service of the Province called the Department of the Environment over which shall preside the member of the Executive Council appointed by the Lieutenant Governor under the Great Seal of the Province as Minister of the Environment.

Employees

4. In accordance with The Public Service Act there shall be appointed a Deputy Minister of the Environment and such other employees as are required to carry on the business of the Department.

Services of experts, etc.

5. (1) The Minister may from time to time engage the services of experts or persons having special technical or other knowledge to advise him or to inquire into and report to him on matters under the Minister's administration.

(2) A person whose services are engaged under this section may be paid such remuneration and expenses as the Minister may prescribe.

Boards, committees and councils

6. (1) The Minister may establish such boards, committees or councils as he considers necessary or desirable to act in an advisory or administrative capacity in connection with any of the policies, programs, services or other matters under his administration.

(2) The Minister may, with respect to any board, committee or council established under this section,

(a) appoint or provide for the manner of appointment of its members,

(b) prescribe the term of office of any member,

(c) designate a chairman, vice-chairman and secretary, and

(d) authorize, fix and provide for the payment of remuneration and expenses to its members.

(3) A board, committee or council established pursuant to this section may make rules of procedure, subject to the approval thereof by the Minister, governing the calling of meetings, the procedure to be used at and conduct of the meetings, reporting and such other matters as required.

(4) A board, committee or council established pursuant to this section may exercise such powers and shall perform such duties and functions as the Minister may approve, confer or impose upon it.

Annual report

7. The Minister shall after the end of each year prepare a general report summarizing the transactions and affairs of the Department in that year and upon its completion, shall lay the report before the Legislative Assembly if it is then in session, and if not, within 15 days after the commencement of the first session next following the completion of the report.

Powers and duties of Minister

8. The Minister, in consultation with the Co-ordinating Council,

(a) is responsible for the co-ordination of the policies, programs and services of and administrative procedures of, departments of the Government and of government agencies in matters pertaining to the environment;

(b) may, as the representative of the Government of Alberta, maintain a continuing liaison with the Government of Canada and agencies thereof, the governments of other provinces and territories and agencies thereof, and municipal corporations in Alberta, in relation to matters under the administration of the Minister;

(c) may, on behalf of the Government of Alberta and with the approval of the Lieutenant Governor in Council, enter into an agreement relating to any matter pertaining to the environment with the Government of Canada, the government of any proince or territory of Canada, an agency of any of those governments, any municipal corporation in Alberta, or any other person;

(d) shall compile, study and assess information directly or indirectly related to matters pertaining to the environment with a view to using the results of such study and assessment for the purpose of better

carrying out his functions and responsibilities under this or any other Act and with a view to providing such information, or the results of such study and assessment, to departments of the Government and to government agencies, and to the public by way of publications, films, radio or television broadcasts or otherwise;

(e) may carry out research projects related to matters pertaining to the environment;

(f) shall conduct a continuing review of research related to any matter pertaining to the environment being carried out by the Government or government agencies or by others and shall promote the coordination of such research and of facilities used for such research;

(g) may enter into an agreement with any person to carry out a research project related to a matter pertaining to the environment;

(h) may make grants to any person or organization engaged in research in matters pertaining to the environment or in the promotion or encouragement of the improvement of the environment in Alberta or the prevention of the pollution, deterioration or impairment of the environment in Alberta;

(i) may, generally, do such acts as he considers necessary to promote the improvement of the environment for the benefit of the people of Alberta and future generations.

Acquisition of land

9. (1) The Minister may, with the approval of the Lieutenant Governor in Council, purchase any estate or interest in land and any personal property in conjunction therewith

(a) for the purpose of implementing or carrying out the provisions of any agreement or arrangement entered into between the Government of Canada and the Minister on behalf of the Government of Alberta, or

(b) for the purpose of any program or development project relating to the conservation, utilization or management of natural resources, or

(c) for the purposes of environmental conservation or improvement, the abatement or prevention of pollution of a natural resource, research or the disposal of toxic materials or for any other purpose in relation to a matter under the administration of the Minister.

(2) Land acquired under this section shall be under the administration of the Minister of Lands and Forests unless

the order of the Lieutenant Governor in Council specifies that it is under the administration of the Minister of the Environment.

Natural Resources Co-ordinating Council

10. (1) There is hereby established the "Natural Resources Co-ordinating Council" consisting of

(a) the Deputy Minister of the Environment, who shall be chairman,

(b) the Deputy Minister of Agriculture,

(c) a Deputy Minister of the Department of Health and Social Development designated by the Minister of Health and Social Development,

(d) the Deputy Minister of Highways and Transport,

(e) the Deputy Minister of Industry and Tourism,

(f) the Deputy Minister of Lands and Forests,

(g) the Deputy Minister of Mines and Minerals,

(h) the Deputy Minister of Municipal Affairs, and

(i) the chairman of the Energy Resources Conservation Board.

(2) Notwithstanding subsection (1), each member of the Co-ordinating Council may appoint in writing a person to be an alternate member of the Co-ordinating Council to act in his stead as a member of the Co-ordinating Council in the event of his absence or inability to act.

(3) The chairman of the Conservation and Utilization Committee shall be secretary of the Co-ordinating Council.

(4) The Co-ordinating Council

(a) may appoint a vice-chairman, and

(b) make rules governing the calling of its meetings, the conduct of its meetings and any other matters pertaining to the conduct of its business and affairs.

(5) A majority of the members of the Co-ordinating Council or their respective alternate members constitutes a quorum.

(6) The Co-ordinating Council

(a) may inquire into any matter pertaining to the environment,

(b) may review any policies, programs, services or administrative procedures of departments of the Government or of government agencies in matters pertaining to the environment,

and shall make its recommendations and report thereon to the Minister.

(7) The Co-ordinating Council may refer any matter pertaining to the environment to the Conservation and Utilization Committee for its recommendations and report thereon.

Conservation and Utilization Committee

11. (1) There is hereby established a committee called the "Conservation and Utilization Committee" consisting of not less than 12 members appointed by the Minister in accordance with subsection (2).

(2) The members of the Conservation and Utilization Committee shall consist of employees of the Government or members or employees of government agencies, with at least one member from each of the following, namely,

(a) the Department of Agriculture,

(b) the Department of the Attorney General,

(c) the Department of the Environment,

(d) the Department of Health and Social Development,

(e) the Department of Highways and Transport,

(f) the Department of Industry and Tourism,

(g) the Department of Lands and Forests,

(h) the Department of Mines and Minerals,

(i) the Department of Municipal Affairs,

(j) the Energy Resources Conservation Board, and

(k) the Research Council of Alberta.

(3) The Minister shall designate as chairman of the Committee one of the members who is an employee of the Department of the Environment.

(4) Notwithstanding subsections (1) and (2), each member of the Conservation and Utilization Committee appointed under subsection (2) shall appoint in writing a person to be an alternate member of the Committee to act in his stead as a member of the Committee in the event of his absence or inability to act.

(5) The Conservation and Utilization Committee

(a) shall, at the direction of the Co-ordinating Council, inquire into and study any matter pertaining to the environment, and

(b) shall submit its recommendations and report thereon to the Co-ordinating Council.

Restriction on powers

12. (1) Notwithstanding any other Act, the Lieutenant Governor in Council, upon the recommendation of the Minister, may by regulation require that the Minister of the Crown, government official or the government agency

specified therein shall not exercise any specified power in all or any specified part of Alberta unless

(a) the Minister of the Environment has first made a report to the Lieutenant Governor in Council as to the advisability of the action, having regard to its effects or possible effects on the environment, and

(b) the Lieutenant Governor in Council consents to the power being exercised.

(2) The Lieutenant Governor in Council, in giving any consent referred to in subsection (1), clause (b), may make the consent subject to such conditions as he may prescribe.

(3) The Minister, before making a report to the Lieutenant Governor in Council under subsection (1), clause (a), may refer the matter to the Authority or the Co-ordinating Committee for its report and recommendations thereon.

Plans for emergencies

13. The Minister may, in co-operation with representatives of other departments of the Government of Alberta and of government agencies and, where advisable, with other persons including representatives of other governments, municipal corporations or organizations, formulate plans for effective co-ordinated action in cases of emergency to prevent, alleviate, control or stop the destruction or loss of, or damage to, a natural resource or to human beings as a result of the pollution of a natural resource.

Declaration of state of emergency

14. (1) Upon the report of the Minister

(a) that circumstances exist whereby a natural resource in any part of Alberta has been or is being destroyed or damaged or is being or is likely to be polluted, and

(b) that urgent co-ordinated action is required for the purpose of preventing, alleviating, controlling or stopping the destruction, damage or pollution,

the Lieutenant Governor in Council may by order declare that a state of emergency exists with respect to those circumstances for the purposes of this section.

(2) Where the Lieutenant Governor in Council has made an order under subsection (1), the Minister or any employee of the Department authorized by him for the purpose, may

(a) require any officer or employee of the Government or a government agency to provide his services, or

(b) require any municipal corporation or any other corporation or organization to provide its services, or

(c) require any other person not exempted by the regulations to provide his services,

for the purposes of preventing, alleviating, controlling or stopping the destruction, damage or pollution referred to in the order.

(3) A person who refuses or neglects to comply with any request directed to him under subsection (2) is guilty of an offence and liable on summary conviction to a fine of not less than $25 and not more than $300 and in default of payment to imprisonment for a term of not more than 90 days or to both fine and imprisonment.

(4) The Lieutenant Governor in Council may make regulations

(a) exempting any persons or classes of persons from the operation of subsection (2), clause (c);

(b) prescribing rates of pay or remuneration to be paid to persons who provide services pursuant to subsection (2);

(c) prescribing the rates of remuneration to be paid to persons who furnish or permit the use of equipment pursuant to subsection (2).

(5) This section does not apply to the prevention, control and suppression of forest and prairie fires.

Restricted Development Areas

15. (1) The Lieutenant Governor in Council may by regulation establish any part or parts of Alberta as a "Restricted Development Area" (in this section called "the Area") upon the report of the Minister that the establishment of the Area is necessary in the public interest to co-ordinate and regulate the development and use of the Area for the purpose of

(a) preventing, controlling, alleviating or stopping the destruction, damage or pollution of any natural resources in the Area, or

(b) protecting a watershed in the Area, or

(c) retaining the environment of the Area in a natural state or in a state suitable for recreation or the propagation of plant or animal life, or

(d) preventing the deterioration of the quality of the environment of the Area by reason of the development or use of land in the Area incompatible with the preservation of that environment.

(2) Notwithstanding any other Act, where the Lieutenant Governor in Council establishes a Restricted Development Area, he may, in the same regulation or in any subsequent regulation, provide for

(a) the control, restriction or prohibition of any kind of use, development or occupation of land in the Area prescribed in the regulations;

(b) the control, restriction or prohibition of the exercise of any power specified in the regulations by any specified Minister of the Crown, government official or government agency;

(c) the removal of any buildings, improvements, materials or animals from the Area, and the payment of compensation by the Crown for any loss resulting therefrom;

(d) the control, restriction or prohibition of the dumping, deposit or emission within the Area of any substance specified in the regulations;

(e) the authorizing of the acquisition by purchase or expropriation by the Minister of any estate or interest in land in the Area;

(f) making any or all of the provisions of The Right of Entry Arbitration Act inapplicable to lands of the Crown in the Area;

(g) making any or all of the provisions of Part 3 of The Expropriation Procedure Act inapplicable to lands of the Crown in the Area;

(h) any other matter or thing necessary or incidental to the protection or improvement of the environment of the Area.

Stop orders

16. (1) Where the Minister is satisfied that any person

(a) has contravened or is contravening this Act or a regulation or order under this Act, or

(b) has contravened or is contravening any other Act or any regulation or order thereunder and the contravention, in the opinion of the Minister, is causing or is likely to cause the destruction, damage or pollution of a natural resource,

the Minister may issue an order (in this section called a "stop order") to that person in accordance with subsection (2).

(2) In a stop order, the Minister may require that the person to whom it is directed

(a) cease the contravention specified in the order, and

(b) stop any operations or shut down or stop the operation of any plant, equipment or structure either permanently or for a specified period,

and the stop order shall contain the reasons for making it.

(3) Not less than 48 hours after making a stop order, the Minister shall cause a copy of it to be served on the person to whom it is directed, and upon receipt of such copy, the person to whom the stop order is directed shall comply with the order forthwith.

(4) A person to whom a stop order is directed and who fails to comply with the order forthwith upon service of a copy of it upon him or subsequently, is guilty of an offence and liable on summary conviction to a fine of not more than $10,000 for each day that the offence continues or to a term of imprisonment of not more than 12 months or to both the fine and imprisonment.

(5) Where the person to whom a stop order is directed fails to comply with the order forthwith upon service of a copy of it upon him or subsequently, the Minister may apply to the Supreme Court of Alberta by way of originating notice of motion for an order of the Court directing that person to comply with the stop order.

(6) Where the person to whom a stop order is directed fails to comply with the stop order forthwith upon service of a copy of the order of the Supreme Court under subsection (5) upon him or subsequently,

(a) the failure to comply with the stop order may be dealt with by the Court as in the case of a civil contempt of the Court,

(b) an officer of the Department authorized by the Minister for the purpose and any other persons assisting that officer, may, without further leave of the Court and without incurring liability therefor, enter upon any land and do any acts that are necessary to carry out the stop order,

(c) the sheriff, the sheriff's bailiff and any other person under the written direction of the sheriff may assist the officer of the Department and other persons in enforcing their powers and duties under clause (b), and

(d) the Minister may recover by action any expenses incurred by the Government in carrying out the stop order pursuant to clause (b) from the person to whom the stop order was directed.

(7) A person to whom a stop order is directed may, within 15 days after service upon him of a copy of the stop order, appeal to the Minister in accordance with the regulations for an inquiry into the stop order.

(8) Where an appeal is made under subsection (7), the Minister shall refer the appeal and the stop order to the Authority for an inquiry.

(9) The Authority shall

(a) hold a hearing to inquire into all matters leading to the making of the stop order, and

(b) determine whether, in its opinion, there were sufficient grounds for the making of the stop order,

and upon completion of the inquiry the Authority shall report its findings to the Minister together with any recommendations it wishes to make in regard to the confirmation, amendment or revocation of the stop order.

(10) Upon receipt of the report of the Authority the Minister shall either confirm, amend or revoke the stop order and shall notify accordingly the person to whom it is directed.

(11) The Minister may

(a) amend a stop order if he considers it advisable in the circumstances to do so, or

(b) revoke a stop order,

and shall notify accordingly the person to whom the stop order was directed.

(12) This section applies whether or not the contravention of the Act, regulation or order concerned constitutes an offence, and whether or not a conviction has been adjudged for the offence.

(13) This section does not apply to contraventions of The Clean Air Act or The Clean Water Act or of regulations or orders under either of them.

Regulations

17. The Lieutenant Governor in Council may make regulations

(a) prohibiting, regulating or requiring the doing of any act for the purpose of preventing, alleviating or stopping soil erosion or anything detrimental to the protection or preservation of a watershed;

(b) requiring persons owning, possessing or having rights in respect of land to refrain from using that land in any manner detrimental to the environment of that land and other lands in the vicinity thereof;

(c) prescribing the duties of any person conducting sand or gravel removal operations, or any kind of operations that result in the destruction or disturbance of the surface of land, with respect to conservation of the soil and the reclamation of the surface of that land, and conferring powers on the Minister relating to such soil conservation and reclamation;

(d) controlling, restricting or prohibiting any actions of any person for the purpose of abating noise or controlling noise levels;

(e) authorizing the payment of compensation by the Crown to any person for loss or damage to that person as a result of the application of any regula-

tion under this Act to him or an order under this Act directed to him, prescribing the cases in which the compensation shall be paid and the loss or damage for which the compensation is to be paid, and conferring jurisdiction on the Supreme Court of Alberta, the district courts or the Public Utilities Board in connection with settlement of the compensation to be paid;

(f) authorizing the Minister to expropriate on behalf of the Crown any estate or interest in land if he considers it necessary to do so for the purpose of enforcing or carrying out the provisions of this Act or the regulations or an order under this Act;

(g) prohibiting or restricting the manufacture, sale or use of any substance that is or may be detrimental to the quality of the environment by reason of its toxicity or otherwise;

(h) prescribing procedures for the disposal of any substance that is or may be detrimental to the quality of the environment;

(i) providing the procedures in respect of appeals under section 16 and of inquiries held under that section;

(j) prescribing, with respect to any provision of any regulations under this Act, that its contravention constitutes an offence;

(k) prescribing penalties for offences against any regulations under this Act;

(l) empowering the Minister to prescribe forms for any document used in the course of administering this Act or any other Act administered by the Minister;

(m) generally, providing for any procedure or matter incidental to the carrying out of the provisions of this Act or any regulations under this Act.

Consequental Amendments

R.S.A. 1970, c. 125

18. The Environment Conservation Act is amended

(a) as to section 2 by striking out clause (b),

(b) as to section 7, clauses (g), (i) and (j) by striking out the words "Conservation and Utilization Committee" *wherever they occur and by substituting the words* "Department of the Environment",

(c) as to section 4, subsection (1) by adding after the words "there is hereby established" *the words* "a corporation called",

(d) by striking out sections 8, 9 and 10 and by substituting the following:

Banking arrangements

8. (1) The Authority may make such banking arrangements as are necessary for the carrying out of its duties and functions.

(2) The fiscal year of the Authority is the period from April 1st to the next succeeding March 31st.

(3) The Authority is in respect of its accounts and financial transactions subject to audit by the Provincial Auditor from time to time and at least once every year.

(4) The Provincial Treasurer shall pay to the Authority the moneys appropriated by the Legislature for the purposes of the Authority (except the moneys appropriated for the salaries payable to the members and employees of the Authority) in equal monthly instalments unless otherwise agreed between the Authority and the Provincial Treasurer.

(5) Subsistence and travelling allowances payable to the employees of the Authority under the regulations under The Public Service Act shall be paid by the Authority from its funds.

(e) as to section 11,

(i) by striking out the words "Lieutenant Governor in Council" *and by substituting the word* "Authority",

(ii) by adding the word "and" *at the end of clause (a) and by striking out the word* "and" *at the end of clause (b),*

(iii) by striking out clause (c),

(f) as to section 12

(i) in clause (a) by striking out the words ", the Conservation and Utilization Committee",

(ii) by striking out the word "and" *at the end of clause (a) and by adding after clause (a) the following:*

(a1) prescribing the rates of remuneration to be paid to members of a public advisory committee for their travelling and living expenses incurred in the course of their duties as members of a committee, and

R.S.A. 1970, c. 294

19. The Public Health Act is amended

(a) as to section 3, subsection (1), clause (b) by striking out the words "Division of Environmental Health of the Department of Health" *and by substituting the words* "Division of Pollution Control of the Department of the Environment",

(b) as to section 3 by striking out subsection (3) and by substituting the following:

(3) In accordance with The Public Service Act there shall be appointed a Director of the Provincial Laboratory of Public Health.

(c) by adding the following section after section 10:

Abatement of Nuisances

Abatement of nuisances

10.1 (1) The Provincial Board may inquire into and hear and determine any complaint made by or on behalf of any person in respect of a nuisance.

(2) The Provincial Board may make a report upon such complaint and as to what remedial measures, if any, that it considers are required in respect of the nuisance complained of.

(3) Where the report of the Provincial Board recommends the removal of any thing causing a nuisance or the abatement of a nuisance, the Minister or the complainant may apply to the Supreme Court or to a district court by way of originating notice of motion for an order

(a) for the removal of the cause of the nuisance or abatement of the nuisance in terms of the report of the Provincial Board, and

(b) to restrain the persons from continuing the nuisance, or any other persons from continuing the acts complained of, until the nuisance has been abated, or the cause of the nuisance removed, to the satisfaction of the Provincial Board.

(4) The judge may, upon the report of the Provincial Board, or upon such further evidence as he thinks necessary, make such order and on such terms and conditions as he considers proper.

Coming into force

20. This Act comes into force on April 1, 1971.

TAB 7

ENVIRONMENT COUNCIL ACT

CHAPTER E-13

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) ''Council'' means the Environment Council of Alberta;

(b) ''government agency'' means

(i) a corporation that is an agent of the Crown in right of Alberta, or

(ii) a corporation, commission, board or other body empowered to exercise quasi-judicial or governmental functions and whose members are appointed by an Act of the Legislature, the Lieutenant Governor in Council, or a Minister of the Crown, or any combination of them;

(c) ''Minister'' means the Minister of the Environment;

(d) ''natural resources'' means land, plant life, animal life, water and air;

(e) ''public advisory committee'' means a public committee on environment conservation appointed under section 10.

RSA 1970 c125 s2;1971 c24 s18(a);1972 c38 s2;1977 c66 s4

Environment conservation

2 For the purposes of this Act, the following are matters pertaining to environment conservation:

(a) the conservation, management and utilization of natural resources;

(b) the prevention and control of pollution of natural resources,

(c) the control of noise levels resulting from commercial or industrial operations in so far as they affect the environment in the vicinity of those operations;

(d) economic factors that directly or indirectly affect the ability

of persons to carry out measures that relate to the matters referred to in clauses (a), (b) and (c);

(e) any operations or activities, whether carried on for commercial or industrial purposes or otherwise,

(i) that adversely affect or are likely to adversely affect the quality or quantity of any natural resource, or

(ii) that destroy, disturb, pollute, alter or make use of a natural resource or are likely to do so;

(f) the preservation of natural resources for their aesthetic value;

(g) laws in force in Alberta that relate to or directly or indirectly affect natural resources.

RSA 1970 c125 s3

Incorporation of council

3(1) The Environment Conservation Authority is continued as a corporation called the "Environment Council of Alberta" and consisting of the persons appointed from time to time by the Lieutenant Governor in Council as members of the Council.

(2) The Lieutenant Governor in Council

(a) shall designate one of the members as chief executive officer, and

(b) may prescribe the term of office of any of the members.

(3) The chief executive officer of the Council

(a) shall provide his services on a full-time basis, and

(b) may exercise the powers of the Council and shall perform the duties and functions of the Council other than those that are to be performed by a panel of the Council under section 4.

(4) The Minister may appoint a member of the staff of the Council as acting chief executive officer of the Council.

(5) In the event of the absence or inability to act of the chief executive officer of the Council, the acting chief executive officer may exercise the powers and shall perform the duties and functions of the chief executive officer except that the acting chief executive officer may not sit as a member of a panel of the Council in the stead of the chief executive officer.

(6) Members of the Council

(a) shall be paid remuneration at the rates prescribed by the Lieutenant Governor in Council, and

(b) shall be paid their reasonable travelling and living expenses

while absent from their ordinary places of residence and in the course of their duties as members of the Council, at the rates prescribed by the Lieutenant Governor in Council.

RSA 1970 c125 s4,1971 c24 s18(c),1972 c38 s3,1977 c66 s5

Panels of Council

4(1) The Lieutenant Governor in Council may constitute 3 or more members of the Council as a panel for the purpose of

(a) performing the duties and functions of the Council under an order of the Lieutenant Governor in Council made pursuant to section 7(1)(d),

(b) performing the duties and functions of the Council under the following provisions whenever an appeal and stop order is referred to the Council for an inquiry:

(i) section 10 of the *Beverage Container Act*,

(ii) section 14 of the *Clean Air Act*,

(iii) section 15 of the *Clean Water Act*,

(iv) section 17 of the *Department of the Environment Act*, or

(v) section 9 of the *Land Surface Conservation and Reclamation Act*,

or

(c) performing the duties and functions of the Council under an order of the Lieutenant Governor in Council made pursuant to the *Wilderness Areas Act*.

(2) When a panel of the Council is constituted under subsection (1), the Lieutenant Governor in Council

(a) shall designate one of the members of the panel, other than the chief executive officer of the Council, as its chairman, and

(b) may prescribe the name of the panel.

(3) Notwithstanding subsection (1), the chief executive officer of the Council is, by virtue of his office, a member and vice-chairman of each panel constituted under subsection (1).

(4) If at a meeting of a panel of the Council the chairman is absent or is unable to act, the chief executive officer of the Council, as vice-chairman of the panel, shall preside at that meeting.

(5) If at a meeting of a panel of the Council both the chairman of the panel and the chief executive officer of the Council are absent or unable to act, the remaining members of the panel shall elect one of their number to preside at that meeting.

(6) Any act done by a panel of the Council is the act of the Council.

RSA 1970 c125 ss4,5,1971 c24 s18,1972 c38 ss3,4,1977 c66 s5

Panel quorum and rules

5(1) A quorum of a panel of the Council consists of 2 members.

(2) Subject to the regulations, a panel of the Council may make rules respecting the calling of its meetings and the conduct of business at its meetings and generally as to the conduct of its business and affairs.

RSA 1970 c125 s5,1972 c38 s4,1977 c66 s6

Employees

6 In accordance with the *Public Service Act* there may be appointed a secretary and any other employees required for the purpose of providing clerical and secretarial services to the Council.

RSA 1970 c125 s6,1977 c66 s9

Functions of Council

7(1) The Council

(a) shall conduct a continuing review of policies and programs of the Government and government agencies on matters pertaining to environment conservation and shall report on them to the Minister;

(b) shall, on being requested to do so by the Minister, investigate any matter pertaining to environment conservation specified in the request and make its report on the matter to the Minister;

(c) may require any officers or employees of any department of the Government or any government agency to provide information that, in the opinion of the Council, is necessary for the purposes of enabling it to carry out its responsibilities;

(d) shall, on being requested to do so by an order of the Lieutenant Governor in Council, hold public hearings for the purpose of receiving briefs and submissions on the matter pertaining to environment conservation specified in the order, and shall make its report on the matter to the Lieutenant Governor in Council and the Minister;

(e) may from time to time as it considers necessary, but at least once a year, hold joint meetings with the public advisory committees;

(f) may refer any matter pertaining to environment conservation to the Department of the Environment for its recommendations and report on it;

(g) may engage the services of persons having special technical or other knowledge in connection with an inquiry of any matter pertaining to environment conservation that the Council, with the approval of the Minister, has undertaken or proposes to undertake;

(h) through the medium of the Department of the Environment,

shall use its best efforts to achieve co-ordination of policies, programs and administrative procedures of the Government and government agencies relating to matters pertaining to environment;

(i) shall make a report in each year to the Minister

(i) summarizing generally its activities and affairs in the preceding year, and

(ii) showing the reports made by it under clauses (b) and (e) in the preceding year.

(2) When a report by the Council under subsection (1)(i) is received by the Minister, the Minister shall lay a copy of it before the Legislative Assembly if it is then in session and if not, within 30 days after the commencement of the first session of the next ensuing year.

RSA 1970 c125 s7,1971 c24 s18(b),1972 c38 ss5,6,1977 c66 ss7,9

Financial arrangements

8(1) Subject to the approval of the Minister, the Council may make any banking arrangements that are necessary for the carrying out of its duties and functions.

(2) The fiscal year of the Council is the period from April 1 to the next following March 31.

(3) The Provincial Treasurer shall pay to the Council the money voted by the Legislature for the purposes of the Council (except the money voted for the salaries payable to the members and employees of the Council) in equal monthly instalments unless otherwise agreed between the Council and the Provincial Treasurer.

(4) Subsistence and travelling allowances payable to the employees of the Council under the regulations under the *Public Service Act* shall be paid by the Council from its funds.

1971 c24 s18(d),1972 c38 s7,1977 c66 s9

Audit

9 The Auditor General is the auditor of the Council.

1977 c56 s32(19)

Public advisory committees

10 The Council, after consultation with the Minister, may

(a) appoint one or more public advisory committees on environment conservation, and

(b) prescribe the duties and functions of a public advisory committee.

RSA 1970 c125 s11,1971 c24 s18(e),1972 c38 s8,1977 c66 s9

Regulations

11 The Lieutenant Governor in Council may make regulations

(a) providing for any procedure or matter for the purpose of facilitating the functions of the Council or a public advisory committee and the relations between them;

(b) prescribing the rates of remuneration to be paid to members of a public advisory committee for their travelling and living expenses incurred in the course of their duties as members of a committee;

(c) prescribing rules respecting the calling of meetings of panels of the Council and the conduct of business at those meetings and generally as to the conduct of the business and affairs of those panels;

(d) providing for any other matter considered necessary to carry out the purposes of this Act.

RSA 1970 c125 s12,1971 c24 s18(f),1977 c66 ss8,9

TAB 8

Coal Royalty Regulation, Alta Reg 295/1992

ALBERTA REGULATION 295/92

Mines and Minerals Act

COAL ROYALTY REGULATION

…

Repeal

12 The *Coal Royalty Regulations* (Alta. Reg. 193/76) are repealed.

TAB 9

ALBERTA REGULATION 193/76

(Filed July 22, 1976)

THE MINES AND MINERALS ACT

(O.C. 811/76)

Approved and Ordered,

W. A. McGILLIVRAY,

Administrator. Edmonton, July 20, 1976.

Upon the recommendation of the Honourable the Minister of Energy and Natural Resources, the Lieutenant Governor in Council, pursuant to section 78 of The Mines and Minerals Act, makes the regulations in the attached Appendix, being the Coal Royalty Regulations.

HUGH M. HORNER (Acting Chairman)

COAL ROYALTY REGULATIONS

1. The royalty to be computed, levied and collected by the Crown in right of Alberta on coal won, worked, recovered or obtained pursuant to an agreement granting coal rights shall be that part of the marketable coal or products of coal obtained from each coal project or new coal project during each calendar month calculated, free and clear of any deductions, in accordance with section 3 and Schedule A.

2. In these regulations,

(a) "coal" has the same meaning as given in The Coal Conservation Act;

(b) "coal mine" means any working from which coal is or could be extracted, whether commercially or otherwise, and includes an "open pit mine", a "strip mine" or an "underground mine" as those terms are defined in The Coal Conservation Act;

(c) "coal project" means any project for the extraction and recovery of coal approved by the Energy Resources Conservation Board as a coal project and includes

(i) a coal mine or mines located in Alberta,

(ii) any installation in Alberta for upgrading the quality of coal directly associated with a coal mine or mines, and

(iii) any coal storage and delivery facilities located in Alberta and directly associated with the coal mine or mines;

(d) "marketable coal" means coal that is suitable for the purposes of sale or consumption other than for consumption in the operation of a coal project or new coal project;

(e) "new coal project" means any expansion of a coal project which is considered by the Minister to result in production of coal from the coal project at a rate of 25 per cent or greater than the corresponding production prior to expansion.

(f) "ton" means 2,000 pounds.

3. (1) In this section "commencement date" means the first day of the month following the date determined by the Minister as the date on which a coal project or a new coal project has attained a cumulative production of marketable coal

(a) of 20 per cent of the annual production of marketable coal authorized pursuant to The Coal Conservation Act, or

(b) where the annual production is not specified pursuant to that Act, then at a cumulative production in an amount specified by the Minister.

(2) The Minister may determine for a coal project or a new coal project

(a) a commencement date or,

(b) a date prior to which the commencement date occurred.

(3) Where the Minister determines a commencement date or a date pursuant to subsection (2) for a coal project or a new coal project producing or capable of producing marketable coal at a rate of more than 100,000 tons in a calendar year, the royalty payable on the coal obtained from the coal project or the new coal project is

(a) with respect to each of the first twelve months after the commencement date, one-quarter of the percentage computed in accordance with Schedule A,

(b) with respect to each of the next twelve months after the twelve-month period in clause (a), one-half of the percentage computed in accordance with Schedule A,

(c) with respect to each of the next twelve months after the twelve-month period in clause (b), three-quarters of the percentage computed in accordance with Schedule A, and

(d) for each month thereafter, the percentage computed in accordance with Schedule A

of any marketable coal and other products obtained from the coal.

(4) Where the Minister determines a commencement date or a date pursuant to subsection (2) for a coal project or a new coal project producing or capable of producing marketable coal at a rate of 100,000 tons or less in a calendar year, the royalty payable on the coal obtained from the coal project or the new coal project is

(a) with respect to each of the first twelve months after the commencement date, 1.25 per cent,

(b) with respect to each of the next twelve months after the twelve-month period in clause (a), 2.5 per cent,

(c) with respect to each of the next twelve months after the twelve-month period in clause (b), 3.75 per cent, and

(d) for each month thereafter, 5 per cent

of any marketable coal and other products obtained from the coal.

(5) Notwithstanding subsections (3) and (4), where the Minister determines a commencement date after July 1, 1976, the royalty payable on coal obtained from any coal project or new coal project prior to the commencement date of that coal project or new coal project, shall be 1.25 per cent of the marketable coal and other products obtained from the coal.

(6) Where in his opinion it is necessary or desirable in the interests of conservation and the prevention of waste or the loss of recovery of marketable coal or products of the coal, the Lieutenant Governor in Council may by order

(a) prescribe a royalty payable with respect to the marketable coal or products of the coal that is less than the royalty that would otherwise be payable under these regulations, and

(b) prescribe the period in respect of which the order is to apply.

4. No royalty shall be payable on any coal or products obtained from coal used or consumed in the operation of a coal project or a new coal project.

5. Any sale of marketable coal or other products obtained from a coal project or a new coal project on a location, shall, until otherwise ordered by the Minister, include the royalty share thereof belonging to the Crown.

6. Where a coal project relates

(a) partly to the location of one or more agreements granting coal rights, and

(b) partly to coal rights held in fee simple,

the lessee shall determine, subject to the approval of the Minister, the portion of the production of marketable coal and other products attributable to the location or locations of the agreement.

7. The operator of a coal project shall, on or before the last day of each month following the month of production,

(a) file with the Department on forms prescribed by the Minister, a full report of the production and disposition of marketable coal and products of the coal and computation of royalty for that month, and

(b) remit to the Department the royalty payable for that month.

8. Where any question arises pertaining to the interpretation of these regulations, the decision of the Minister thereon is final.

9. These regulations apply with respect to coal and products of coal marketed in the month of July, 1976 and subsequent months.

SCHEDULE A

The rate of royalty for a month shall be calculated in accordance with the following equation:

$$X = K\left(1 - \frac{C}{R}\right)^2 \text{ or}$$

5 per cent,

whichever percentage is the greater

where X is the rate of royalty payable expressed as a percentage of marketable coal and products obtained from coal;

K is the project factor for a coal project or new coal project as determined in accordance with the following equation:

$$K = \frac{50}{1 + \frac{C}{R}\left(0.30\,\frac{I}{C} - 1\right)}$$

where I is the annual investment allowance of a coal project or new coal project;

C is the annual cost allowance of a coal project or new coal project;

R is the annual revenue from a coal project or a new coal project.

ALBERTA REGULATION 194/76

(Filed July 22, 1976)

THE MINES AND MINERALS ACT

(O.C. 812/76)

Approved and Ordered,

W. A. McGILLIVRAY,

Administrator. Edmonton, July 20, 1976.

Upon the recommendation of the Honourable the Minister of Energy and Natural Resources, the Lieutenant Governor in Council, pursuant to section 14, clause (g.4) and section 40 of The Mines and Minerals Act (as enacted by The Mines and Minerals Amendment Act, 1976), makes the regulations in the attached Appendix, being the Interest Rate Regulations.

HUGH M. HORNER (Acting Chairman)

INTEREST RATE REGULATIONS

1. For the purposes of section 40 of The Mines and Minerals Act, the rate of interest to be charged under that section shall be 11.25 per cent per annum.

2. These regulations apply with respect to money owing under any disposition in the month of July, 1976 and in subsequent months.

ALBERTA REGULATION 195/76

(Filed July 22, 1976)

THE MINES AND MINERALS ACT

(O.C. 813/76)

Approved and Ordered,

W. A. McGILLIVRAY,

Administrator. Edmonton, July 20, 1976.

Upon the recommendation of the Honourable the Minister of Energy and Natural Resources, the Lieutenant Governor in Council, pursuant to section 14, clause (f) of The Mines and Minerals Act, makes the regulations in the attached Appendix, being the Tariff of Fees Established under The Mines and Minerals Act.

HUGH M. HORNER (Acting Chairman)

TARIFF OF FEES

ESTABLISHED UNDER THE MINES AND MINERALS ACT

1. Application

(a) for a lease	$ 50.00
(b) for a geophysical licence	25.00

2. Transfer

(a) of a lease, licence, reservation, permit or other agreement	25.00

TAB 10

INDEX OF REGULATIONS

FILED UNDER THE REGULATIONS ACT

Subsisting on December 31, 1991

TAB 11

Coal Conservation Act, RSA 2000, c C-17

COAL CONSERVATION ACT

Chapter C-17

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

…

Part 3
Powers and Duties of the Regulator

Rules

9 (1) The Regulator may make rules

(a) prescribing the manner in which an application under this Act or the rules is to be made;

(b) specifying the information that is to be included in or to accompany an application under this Act or the rules;

(c) requiring that an applicant deposit a specified performance bond with the Regulator as a guarantee of proper operations and prescribing the form of the deposits;

(c.1) requiring the holders of approvals for in situ coal schemes to provide to the Regulator deposits, letters of credit or other forms of security to guarantee the proper and safe suspension and abandonment of in situ coal schemes and the carrying out of any other activities necessary to ensure the protection of the public and the environment, including rules respecting the amount and form of those deposits, letters of credit and security and how they may be used, retained, forfeited and returned;

(d) restricting or prohibiting the development of a mine, mine site, coal processing plant or in situ coal scheme at any point within a stated distance of a boundary, road, road allowance, lake, river, stream, pipeline or other public or private works;

(e) restricting or prohibiting mining within any city, town or village or within a hamlet designated or continued under the *Municipal Government Act*;

(f) requiring notice to the Regulator, and Regulator approval, of

(i) a suspension of normal operations at a mine, mine site or coal processing plant, or

(ii) a resumption of operations in a previously closed or abandoned mine, mine site or coal processing plant;

(f.1) respecting the suspension and abandonment of in situ coal schemes, including, without limitation, rules respecting

(i) applications for suspension and abandonment,

(ii) the circumstances under which an in situ coal scheme must be suspended or abandoned,

(iii) the timing of the suspension or abandonment of an in situ coal scheme,

(iv) the manner in which suspension and abandonment are to be carried out, and

(v) measures required to ensure that

(A) an abandoned in situ coal scheme is left in a permanently safe and secure condition, and

(B) a suspended in situ coal scheme is left in a safe and secure condition;

(g) requiring the Regulator's approval of any mining machinery, transportation equipment and electric apparatus or devices intended for use in a mine or at a mine site;

(h) prescribing what inspections are to be made in a mine or at a mine site or an in situ coal scheme and by whom the inspections are to be carried out and reported;

(i) prescribing the data and samples that must be taken, the manner in which they are to be taken, and the methods by which samples are to be tested or analyzed;

(j) requiring the submission to the Regulator of samples, cores, test data, survey logs, geophysical logs and other relevant data or information;

(k) designating and registering coal seams, coal deposits, coal fields and coal-bearing zones;

(l) prescribing the manner in which measurements are to be taken and the units in which measurements are to be expressed;

(m) prescribing the manner and form of records to be kept, the persons by whom and the place at which they are to be kept, the length of time for which they are to be kept, and providing for their submission to the Regulator;

(n) specifying what reports are to be made, the persons who are to make them, the authority or person to whom they are to be submitted, the times at which they are to be made, and their form, nature and extent;

(o) specifying which records, reports or information submitted to, or otherwise acquired by, the Regulator under this Act shall be confidential, and when and to whom the information contained in them may be made available;

(p) with respect to small mines

(i) exempting small mines from the rules or any part of the rules, and

(ii) prescribing particular rules in respect of small mines;

(p.1) exempting all or parts of experimental in situ coal schemes from some or all of the provisions of this Act or the rules except provisions respecting the approval of experimental in situ coal schemes;

(q) prescribing the measures that the holder of a permit, licence or approval under this Act must take at a mine site, coal processing plant or in situ coal scheme to prevent pollution of air, water and land;

(r) prescribing the manner in which land and bodies of water disturbed by mine site development, mining, coal processing or in situ coal scheme development must be reclaimed or restored;

(r.1) respecting the entitlements that a person is required to hold to apply for a permit, licence or approval under this Act and prescribing other eligibility requirements for applying for or holding a permit, licence or approval under this Act;

(s) prescribing forms to be used under this Act or the rules;

(t) establishing a schedule of fees

(i) pertaining to an application under this Act or the rules,

(ii) for any map, report, document or other record of the Regulator, or

(iii) for any other service provided by the Regulator;

(u) generally, prescribing measures to conserve coal or to prevent its waste or improvident disposition, and stipulating any other provisions reasonably incidental to the efficient development of mines, mine sites, coal processing plants and in situ coal schemes, and to production from them;

(v) respecting compliance with and enforcement of ALSA regional plans.

(2) When rules pursuant to subsection (1) authorize the Regulator to issue a permit or licence or to approve an operation, the Regulator may prescribe particular conditions under which it grants the permit, licence or approval.

(3) Notwithstanding any rules under subsection (1)(b) that specify the information that must be included with or accompany an application under this Act or the rules, the Regulator may act on an application that does not contain all that information, or may require additional information.

(3.1) Rules made pursuant to subsection (1)(o) respecting confidentiality of records, reports or information submitted to or acquired by the Regulator under this Act prevail despite the *Freedom of Information and Protection of Privacy Act*.

(4) Where no form has been prescribed pursuant to subsection (1)(s) for use under this Act or the rules, the Regulator may accept any form or format of submission it considers adequate.

RSA 2000 cC-17 s9;2002 c12 s1;2006 c23 s19;
2009 cA-26.8 s73;2011 c11 s2(6);2012 cR-17.3 s86

…

Part 4
Development, Operation and Abandonment of Mines

General

Authorization required

21(1) When an application is made under section 10(1)(b) with respect to a mine or proposed mine that is or will be capable of producing more than 45 000 tonnes of coal per year by normal operations, the Regulator shall not grant the permit unless the Lieutenant Governor in Council has first authorized the granting of the permit.

(2) The Lieutenant Governor in Council may make the Lieutenant Governor in Council's authorization under subsection (1) subject to any terms and conditions the Lieutenant Governor in Council considers necessary or desirable.

(3) The authorization of the Lieutenant Governor in Council is not required in respect of

(a) an amendment to a permit issued under this section, or

(b) a consolidation of a permit issued under this section and one or more amendments to that permit.

RSA 2000 cC-17 s21;2011 c11 s2(12);2012 cR-17.3 s86

Part 5
Operation and Abandonment of Coal Processing Plants

Coal processing plants

23(1) No person shall

(a) construct or begin operations at a new coal processing plant,

(b) resume operations at a previously shut-in or abandoned coal processing plant,

(c) resume normal operations at an extensively rebuilt, modified or re-equipped coal processing plant, or

(d) operate facilities directly connected with a coal processing plant,

without applying for, and obtaining, an approval from the Regulator.

(2) An application under subsection (1) shall include

(a) a map or plan showing the exact location of the coal processing plant and all connected facilities in relation to

(i) the mine or mines from which the plant draws coal,

(ii) all nearby bodies of water, and

(iii) inhabited buildings and other private or public works,

(b) an outline of what steps are proposed for controlling pollution from the coal processing plant and its connected facilities, and

(c) any further information the Regulator requires.

RSA 20000 cC-17 s23;2012 cR-17.3 s86

Authorizations and approvals required

24(1) No approval relating to a coal processing plant capable of treating more than 45 000 tonnes of coal per year by normal continuous working shall be issued by the Regulator pursuant to this Part unless the Lieutenant Governor in Council has first authorized the issue of the approval.

(2) The Lieutenant Governor in Council may make the Lieutenant Governor in Council's authorization under subsection (1) subject to any terms and conditions the Lieutenant Governor in Council considers necessary or desirable.

(3) The authorization of the Lieutenant Governor in Council is not required in respect of

(a) an amendment to an approval issued under this section, or

(b) a consolidation of an approval issued under this section and one or more amendments to that approval.

RSA 2000 cC-17 s24;2009 c20 s2;2012 cR-17.3 s86

TAB 12

THE LEGAL FRAMEWORK FOR COAL DEVELOPMENT IN ALBERTA

L. DOUGLAS RAE*

This paper examines the legal and regulatory regime that has been developed by the government of the Province of Alberta in order to implement the specific aspects of the Alberta coal policy.

I. INTRODUCTION

In June of 1976 the government of the Province of Alberta, through the Department of Energy and Natural Resources, issued a landmark document which was to be the basis for coal development in the province from that time forward. Entitled "A Coal Development Policy for Alberta"[1] it is commonly referred to as the "coal policy". In the five years since the document's issuance, the Alberta government has, for the most part, implemented both the general and specific aspects of the policy. It is the purpose of this paper to outline the legislative and regulatory framework through which the coal policy is currently being implemented.

The coal policy purports to govern the extraction of coal resources by all methods, including surface mining, underground mining and *in situ* processes yet to be developed. It must be remembered that the coal policy not only governs the exploration for and extraction of coal resources, but also designates those areas which for the foreseeable future are to be untouched by coal development.

Coal deposits in Alberta underlie large areas of the plains, foothills and Rocky Mountains. The coal policy, as it relates to deposits found in the foothills and Rocky Mountains, must be applied in conjunction with the land use zones specified in "A Policy for Resource Management of the Eastern Slopes,"[2] which has direct impact on the manner and method of coal development in those areas.

It should be emphasized at the outset that the coal policy in both its theoretical basis and its implementation and administration was not designed to be a legal document, but rather an administrative one. While portions of it have been legislated into existence, many aspects of the coal policy are enforced through administrative dictates rather than through any legal sanctions. In many instances discretion and flexibility take precedence over legal rights.

The procedure for government consideration of applications for new coal developments is a four-step screening and evaluation process[3] consisting of the following:

1. Preliminary disclosure of a development proposal to the government and the government's initial response thereto.[4]

* Vice President Legal, Asamera Inc., Calgary.

1. Alberta. Department of Energy and Natural Resources, "A Coal Development Policy for Alberta" (15 June 1976).
2. Alberta. "A Policy for Resource Management of the Eastern Slopes" (July 1977).
3. *Supra* n. 1 at 4.
4. This is strictly an administrative procedure whereby the government through the Cabinet, has undertaken to advise a prospective developer at an early date whether it has any objections to his pursuing plans for the development. There is no legal requirement to make a preliminary disclosure, nor is there any obligation for the government to respond to it. Theoretically, a developer could proceed to apply for a mine permit even though he had been advised that the government would not approve it.

2. Disclosure and detailed description of the proposal by the applicant to the public.[5]

3. Consideration through a public hearing before the Energy Resources Conservation Board (E.R.C.B.) of the formal aspects of the application, including the basic technical application, the cost-benefit and social impact analysis, the environmental impact assessment and a land surface reclamation plan.[6]

4. A final decision by the Lieutenant Governor in Council in light of the findings of the E.R.C.B. and the various government departments concerned.[7]

It is not the purpose of this paper to conduct a detailed examination of the administrative process required for approval of a coal development project. This matter has been thoroughly covered in the E.R.C.B. publication entitled "How to Apply for Government Approval of Mining Activities in Alberta."[8]

II. ELEMENTS OF THE COAL POLICY

The coal policy consists of twenty-four specific elements:

A. *Protection of the Environment*

> The Government's environmental protection policy for surface and subsurface operations applies equally to public and private land, whether located on the Plains, in the Foothills or in the Mountains.
>
> The Government is committed to maintaining a balance between resource development and environmental protection in order to maintain a desirable quality of life for future Albertans.
>
> Reconnaissance surveys will only be permitted in environmentally sensitive areas under carefully controlled conditions. Detailed exploration and development operations will not be permitted in areas where the environment and plant and wildlife cannot be properly protected and where reclamation of any disturbed land is not possible.
>
> Environmental impact assessments will be required from those proposing major developments and these will be available to public scrutiny and discussion at both specially convened public disclosure meetings and formal public hearings conducted by the Energy Resources Conservation Board. All operations will be subject to the environmental standards and conditions of The Clean Air Act, The Clean Water Act, The Land Surface Conservation and Reclamation Act and The Water Resources Act. Approvals under environmental legislation will be granted only under conditions where all appropriate measures are taken for the protection of the environment and where environmental standards and criteria are not exceeded. A developer will be expected to absorb all costs attributable to his project of protecting the environment both during and upon completion of operations."[9]

As is the case with most matters concerning the biophysical environment in Alberta, the Department of the Environment has general jurisdiction over the environmental aspects of coal development. However, since the coal policy encourages a "one window" approach to the public hearing process and since this one window is before the

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5. The coal policy states that this is "required", but there is no specific legislative authority to order such a public disclosure meeting. The author is not aware of any coal development proposals that have not been preceded by a public disclosure meeting.

6. The actual application for a mine permit is made to the E.R.C.B. pursuant to s. 10(1)(b) of The Coal Conservation Act, S.A. 1973, c.65, as am., and a hearing is held pursuant to s. 29 of The Energy Resources Conservation Act, S.A. 1971, c. 30, as am.. The public hearing is not mandatory.

7. This is only required for mines capable of producing more than 45,000 tonnes of coal per year. The Lieutenant Governor in Council can also attach conditions to his approval. *See* Coal Conservation Act, *id.*, s. 21.

8. Energy Resources Conservation Board, Guide G-2, "How to Apply for Government Approval of Mining Activities in Alberta" (September 1978).

9. *Supra* n. 1, s. 3.1.

E.R.C.B., that Board also has certain jurisdiction to consider matters concerning the environment, if not to rule upon them.[10] The Board, in effect, is delegated responsibility for devising and administering the ways and means required to ensure that environmental standards are met. The general nature of the respective mandates of the E.R.C.B. and the Department of the Environment has resulted in some dispute and confusion as to the respective jurisdictions of each body. They have consequently attempted to remedy the situation by reaching a ministerial accord whereby jurisdiction is "divvied-up".[11] In spite of this accord, clearly an interested third party could raise matters of an environmental nature at the E.R.C.B. hearing rather than relying upon the Department of the Environment, since this is the only public scrutiny of these matters and since environmental matters are within the jurisdiction of the E.R.C.B. The E.R.C.B. has oftentimes appointed a senior staff person of the Department of the Environment to sit on specific hearing panels.[12]

Some areas of the province are totally out of bounds to coal development.[13] The Land Surface Conservation and Reclamation Act gives the Minister of the Environment the power to remove specified areas from exploration potential.[14] As well, certain areas have already been removed by regulation from exploration potential.[15]

The environment protection portion of the coal policy is applicable to both public and privately owned land and both surface and subsurface disturbances. Since coal mines by their nature involve a disturbance to the land, they fall within the ambit of s. 23 of The Land Surface Conservation and Reclamation Act[16] by virtue of s. 3 of The Regulated Coal Surface

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10. The Board is governed by the purposes of The Energy Resources Conservation Act, S.A. 1971, c. 30, as am., s. 2(d): "to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy"; by the purposes of The Coal Conservation Act, S.A. 1973, c. 65, as am., s. 4(e): "to assist the Government to control pollution and ensure environment conservation in the development of the coal resources of Alberta"; and by The Coal Conservation Regulations, Alta. Reg. 229/74, s. 25: "An operator shall institute and carry out a program of environment management, including pollution control and surface reclamation, satisfactory to the Board."

11. Alberta Environment, "Accord Between Alberta Environment and the ERCB on Procedures for Energy Related Projects that have a Significant Environmental Impact" (May 29, 1980). *See also* Energy Resources Conservation Board Informational Letter IL 80-19, "Environmental Impact Assessments."

12. *See* Energy Resources Conservation Board and Alberta Department of Environment, ERCB-AE Report 77-AA, *In The Matter Of Applications By Calgary Power Ltd. For The Extension Of The Highvale Mine And The Construction And Operation Of A Proposed South Sundance Thermal Power Plant* (August 1977).

13. *See* section M, *infra.*

14. The Land Surface Conservation and Reclamation Act, S.A. 1973, c. 34, as am., s. 10:
    The Minister may by order
    (a) establish specified areas within which any type of exploration operations may be prohibited or curtailed, or
    (b) establish specified areas within which any type of exploration operations may be prohibited during a specified period of the year.

    and *see also*

    Exploration Regulation, Alta. Reg. 423/78, s. 5(1):
    No person shall conduct a type of exploration within an area while that method of exploration is prohibited in that area by an order of the Minister of the Environment under section 10 of The Land Surface Conservation and Reclamation Act.

15. Exploration Regulation, Alta. Reg. 423/78, s. 4(1).

16. S.A. 1973, c. 34, as am.

Operations Regulations.[17] Consequently, a development and reclamation permit must be applied for, pursuant to s. 8 of The Regulated Coal Surface Operations Regulations,[18] prior to the commencement of any coal development. Procedurally, the development and reclamation permit is applied for at the same time as the actual mine permit is applied for.[19]

Under s. 8 of The Land Surface Conservation and Reclamation Act, the Minister of the Environment may order that an environmental impact assessment be conducted.[20] This is apparently the only authority for ordering the conduct of such assessments under provincial legislation.[21] Although the Department of the Environment has issued Environmental Impact Assessment Guidelines, currently under revision,[22] there is no legislation nor are there regulations governing the contents and the preparation of such assessments. The E.R.C.B. publication, "How to Apply for Government Approval of Mining Activities in Alberta,"[23] sets out the purpose of an environmental impact assessment: "The purpose of an EIA is to provide comprehensive information, to both the public and government, to allow early identification and resolution of potentially significant adverse environmental effects of the proposed development."[24] The coal policy states that such assessments will be made available to public scrutiny at the public disclosure meetings contemplated under the policy. However, not only is such public scrutiny of the impact assessments at these meetings not legislated, the holding of such disclosure meetings itself is not legislated. In practice environmental impact assessments have not always been available at these public disclosure meetings.[25] There have even been instances where the final form of environment impact assessment has not been available at the formal E.R.C.B. hearing.[26]

Coal mining operations in Alberta are subject to the pollution standards and emission limits established pursuant to The Clean Air Act and The Clean Water Act.[27] As well, the use of ground water and surface water resources is governed by The Water Resources Act and, when water is required in sufficient quantities, permits under that Act must be acquired.[28] It should be pointed out that The Clean Air Act and The Clean Water Act primarily provide for limitations of point specific effluent emissions. They do not expressly provide for "all appropriate measures"

17. Alta. Reg. 170/74.
18. *Id.*
19. *Supra* n. 8.
20. *Supra* n. 13.
21. Land Conservation Regulations, Alta. Reg. 125/74, s. 12.
22. Alberta Environment, "Review of Alberta's Environmental Impact Assessment System, Report and Recommendations" (June 1980).
23. *Supra* n. 8 at 5-18.
24. *See also* Alberta Environment. "Environmental Impact Statement Guidelines for Clean Air Act Application," (16 May 1974) Foreward:
    It is intended that these guidelines should delineate and emphasize the various aspects of environmental management which should be considered in the planning stage in order that plant design will ensure the preservation of the ecologic integrity of the area of impact.
25. *E.g.* the Obed Marsh Project public disclosure meeting.
26. *E.g.* Esso Resources Cold Lake Project.
27. The Clean Air Act, S.A. 1971, c. 16, as am.; The Clean Water Act, S.A. 1971, c. 17, as am..
28. R.S.A. 1970, c. 388, as am..

required for the protection of the environment, although there is a general ministerial discretionary authority under other legislation.[29]

The Clean Air Act requires a permit for construction of any coal processing plant.[30] Although processing plants must comply with the emission standards set by regulation, the Director of Standards and Approvals also has wide latitude to attach additional terms and conditions.[31] Subsequent to construction, a licence to operate is also required[32] and once again the Director of Standards and Approvals has wide discretion to impose terms and conditions.[33] The Minister of the Environment has the power to "issue a certificate of variance to vary a term, condition or requirement of a permit or licence or a requirement of the regulations".[34] The Director of Pollution Control also has the power to issue "emission control orders" where emission standards are being exceeded or where an air contaminant is likely to be detrimental to life or health or to adversely affect property.[35] An emission control order can be issued notwithstanding that a plant is operating pursuant to an operating licence.[36] Finally, the Minister of the Environment has wide discretion to issue a "stop order" pursuant to s. 7 of the Act. If the Act, Regulations, orders or directions of the Director of Pollution Control or a term or condition of a licence are being contravened, or if there is an immediate danger to human life or property, the Minister may shut down the operation of the plant. The issuance of stop orders is one area where elaborate appeal procedures have been set out in the legislation. In addition, practice has shown that the Minister of the Environment issues stop orders only as a last resort.[37]

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29. *E.g.* the ability to attach conditions to a coal plant approval or to a development and reclamation approval.
30. S.A. 1971, c. 16, as am., s. 4.
31. *Id.*, s. 4(5).
32. *Id.*, s. 4.1.
33. *Id.*, s. 4.1(6).
34. *Id.*, s. 4.8(1):
    The Minister may issue a certificate of variance if he is of the opinion that
    (a) the plant, structure or thing is operating or is likely to operate in contravention of a term, condition or requirement of a permit or licence or a requirement of the regulations as a result of factors beyond the control of the applicant,
    (b) the variation is not likely to result in air pollution of a degree that could be detrimental to life or health or adversely affect property, and
    (c) a refusal to grant a certificate of variance would result in serious hardship to the applicant without an offsetting benefit to others.
35. *Id.*, s. 6.
36. *Id.*, s. 6(5).
37. It does not appear that a stop order has ever been issued for a coal processing plant operation. The Department of the Environment has implied that it will only issue a stop order when "the frequency of violations" is deemed excessive. (*See supra* n. 12 at 12-9) *See also* s. 9, Land Surface Conservation and Reclamation Act, *supra* n. 17, which provides for the issuance of a stop order where there are reasonably unforeseen "surface disturbance or other damage or consequences". However, it does not appear that a stop order can be issued for a violation of conditions imposed pursuant to ss. 21 or 24 of The Coal Conservation Act, *supra* n. 6. In other words, the Minister of the Environment may impose conditions but may not have the power to issue a stop order pursuant to s. 9 of The Land Surface Conservation and Reclamation Act if they are breached. In view of the wide latitude to direct reclamation procedures under Part 2 of The Land Surface Conservation and Reclamation Act, however, this inability to issue stop orders may not prove to be a serious impediment to ministerial discretion.

The Department of the Environment has authority to prepare and publish guidelines and standards for the construction and operation of coal processing plants.[38] It is not clear what status such guidelines and standards would have. It is also not clear whether a construction permit issued pursuant to s. 4 of the Act is the permission of the Director of Standards and Approvals required for the release of toxic air contaminants into the atmosphere.[39] Section 12 of The Clean Air (General) Regulations requires the reporting of uncontrolled or unauthorized releases of air contaminants. The Clean Air Regulations set forth the requirements for construction permits and operating licences necessary for compliance with the Act.

A permit under The Clean Water Act must be obtained by a coal processing plant.[40] As under The Clean Air Act, the Director of Standards and Approvals has wide latitude under The Clean Water Act.[41] Likewise, an operating licence is required and the Director of Standards and Approvals has broad discretionary powers.[42] "Certificates of variance", "water quality control orders" and "stop orders" are also provided for.[43] Section 9.1 prohibits the deposit of a deleterious substance in surface water, on a watercourse, or in any place where it may enter a watercourse or surface water. However, this section does not apply to an approval, permit or licence issued by the E.R.C.B..[44] Presumably, E.R.C.B. approvals for the mine and processing plant would therefore take a coal mine and processing plant outside the ambit of this section.[45] Section 12 of The Exploration Regulation[46] issued under The Mines and Minerals Act[47] also provides for a referral to the Department of the Environment if an exploration program involves a watercourse or water body.

The Department of the Environment has also issued the "Alberta Coal Mining Waste Water Effluent Guidelines."[48] They are to apply to all new coal mines. "Permits to construct or licences to operate under The Clean Water Act will be issued provided that the provisions of these guidelines have been considered and adequate waste water management provided to comply with the standards."[49] The guidelines are quite comprehensive and come complete with definitions. If clean water permits and licences are subject to these guidelines, one wonders why they have not been promulgated in regulation or legislative form. Presumably the guidelines

38. Clean Air (General) Regulations, Alta. Reg. 216/75, s. 4.
39. Clean Air Regulations, Alta. Reg. 33/73, s. 5.
40. Clean Water Act, S.A. 1971, c. 17, as am., s. 4.
41. *Id.*, s. 4(5).
42. *Id.*, ss. 4.1 and 4.4.
43. *Id.*, ss. 4.9, 6 and 7.
44. *Id.*, s. 9.1.
45. *See*, however, Clean Water (General) Regulations, Alta. Reg. 35/73, s. 11.
46. *Supra* n. 18.
47. R.S.A. 1970, c. 238, as am..
48. Alberta Environment. "Alberta Coal Mining Waste Water Effluent Guidelines" (January, 1978).
49. *Id.* Preface.

have been issued pursuant to s. 6 of The Clean Water (General) Regulations.[50]

In addition, ss. 30 and 31 of The Coal Conservation Regulations[51] empower the E.R.C.B. to direct the method of disposal of liquid and solid wastes. Should a conflict arise between an order of the Board in regard to waste disposal and a direction of the Department of the Environment, the E.R.C.B.'s statements and policies suggest that the Board would defer to the Department of the Environment.[52] It must be kept in mind that both the E.R.C.B. and the Department of the Environment can attach environmental conditions to a mine permit or a processing plant approval issued under The Coal Conservation Act.[53] The E.R.C.B. also has power to require security deposits in amounts up to $1,000 per acre directly affected by the proposed development.[54] These deposits can be utilized to ensure environmental protection.

Under the Historical Resources Act, the Minister of Culture may order proponents of a coal development to prepare historical resources impact assessments and to undertake directed conservation measures prior to development.[55] The E.R.C.B. Mining Guide, "How to Apply for Government Approval of Mining Activities in Alberta", sets out the purpose for the legislation and the contents that Alberta Culture feels should be in any historical resources impact assessment.[56]

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50. *Supra* n. 45:
> The preparation, publication and sale of such criteria and guidelines with respect to the construction or operation of any water facility as the Minister thinks fit is authorized.

51. Alta. Reg. 229/74.

52. *Supra* n. 8. *See also* the Board's deferral to the Department of the Environment in regard to the siting of ancillary facilities.(*e.g.* Energy Resources Conservation Board and Alberta Department of Environment, ERCB-AE Report 79-AA, *In The Matter Of Applications By Alberta Power Limited, Forestburg Collieries Limited And Manalta Coal Ltd. For The Development Of The Sheerness Mine And The Construction And Operation Of A Proposed Sheerness Thermal Power Plant and In The Matter Of Applications By Edmonton Power For The Development Of The Genessee Mine And The Construction And Operation Of A Proposed Genessee Thermal Power Plant* (January 1979), s. 9.2. The Board in its findings will state how a particular concern can be alleviated, but does not always then attach an appropriate condition to the permit or approval. This may reflect a lack of confidence by the Board as to the extent of its jurisdiction.

53. S.A. 1973, c. 65, as am., ss. 23 and 24.

54. *See* Energy Resources Conservation Board Report No. 80-E, *Obed Marsh Coal Project, Hinton* (July 1980).

55. The Alberta Historical Resources Act, S.A. 1973, c. 5, as am., s. 22.

56. *Supra* n. 8, at 5-22:
> The intention is to stimulate conservation projects designed to locate, assess, recover, and record Alberta's historical, archeological, and paleontological resources.
>
> It is not the wish of the Heritage Resources Division of Alberta Culture to impede or halt any industrial development or other project, in pursuit of such conservation, although the Minister is empowered to do so should a valuable resource be threatened with destruction.
>
> In every instance, Culture wishes to encourage all proponents to ensure that their activities will not result in the destruction of valuable historic, archeological, or paleontological sites before these can be properly assessed and recorded.

Supra n. 8, at 7-6:
> The ERCB, and Alberta Culture through the Archeological Survey of Alberta, assume certain responsibilities in preserving significant archeological, historical, and paleontological resources that may otherwise be disturbed or destroyed by energy-related developments within the ERCB's jurisdiction, ...

In addition, the Department of Culture has issued "Interim Guidelines, Historical Resources Impact Assessments".[57] The legal status of these guidelines is unclear. The E.R.C.B. has also issued interim directives entitled, "Preservation of Archaeological, Paleontological and Historical Resources",[58] and has stated that it will require such surveys for all coal mine permit applications. After the proponent has advised the Director of the Archaeological Survey of Alberta of its assessment, the Director apparently will recommend the steps the proponent should take to ensure preservation and will entertain discussions with the proponent should the latter "consider the Director's recommendations impractical".[59] Only those site preservation measures that are agreed upon will definitely be included as conditions in any permit, licence or approval the E.R.C.B. may subsequently issue.[60] If, when proceeding with an authorized development, a previously unsuspected archaeological, historical or paleontological resource is encountered, the E.R.C.B. has stated that its staff should be notified, although there does not appear to be any obligation to do so. After examination of the site by the Director of the Archaeological Survey of Alberta, and where necessary, "the ERCB will then formally ensure compliance with the agreed upon measures by issuing a directive" to the proponent or by amending the subsisting permit, licence or approval.[61]

B. *Compatibility with other land uses*

> The Government recognizes the importance of Alberta's land resources for agriculture, recreation, forest products and wildlife, and is determined that proper attention be given to these alternative uses in the consideration of coal development projects. Some coal developments may be carried on with little disturbance of the land surface; others may involve the progressive disturbance of several square miles at any one time with reclamaton immediately to follow production operations. Only where the temporary withdrawal of the land from agricultural, recreational or other use for coal development is judged to be in the public interest, and where full reclamation is assured, will the Government authorize developments which would cause land disturbance.[62]

A basic premise behind both the Eastern Slopes policy[63] and the coal policy is the multiple use concept. In order for this concept to operate, only where the withdrawal of land from other uses for coal development is judged to be in the public interest and where full reclamation is assured, will the government authorize coal development which would cause land disturbance. Since permission to allow development of a major coal mine is subject to the approval of the Lieutenant Governor in Council,[64] he is the ultimate judge of the public interest in this regard.[65] Since surface coal mining in Alberta on a large scale is still in its infancy, what constitutes "full reclamation" is yet to be defined or evidenced by empirical data. The Department of the Environment, in its approval of reclamation plans to date, appears willing to accept scientific probabilities of full reclamation

57. The Archaeological Survey of Alberta. "Interim Guidelines Historical Resources Impact Assessments" (March 15, 1977).
58. E.R.C.B. Interim Directives 77-1 and 79-18.
59. *Supra* n. 8 at 7-6.
60. *Supra* n. 8 at 7-6.
61. *Supra* n. 8 at 7-7.
62. *Supra* n. 1, s. 3.2
63. *Supra* n. 2.
64. *Supra* n. 53, s. 21.
65. However, the E.R.C.B. will make recommendations designed to minimize surface disburbance, *supra* n. 12 at 11-18.

rather than any "assured" full reclamation.[66] However, with the predicted widespread development of surface coal mining operations in areas of prime agricultural land, the issue of full reclamation will certainly have to be addressed further. Totally successful reclamation techniques in certain agricultural areas have yet to be established.[67]

Where existing or future land uses require ground water supplies, there does not appear to be any legal or technological guarantee of reinstatement of the underground aquifers. Nor does there appear to be provision for compensation for loss of ground water, although presumably the loss of ground water supplies would be reflected by a reduction in the market value of the land taken. However, if the land is not actually taken for the mine and ground water supplies are interrupted, there is no right to compensation.[68]

C. *Rights of owners of surface land*

The rights of the owners of surface land are recognized and will be respected along with those of owners or lessees of coal resources. Holders of rights to coal who do not own the surface will be expected to negotiate with the owners and occupants of the surface for consent to enter and for the temporary use of the land. Should negotiations fail, application may be made under the Surface Rights Act to the Surface Rights Board. The Board would hold a hearing on the application at which representations from the surface owner, lessee or occupant and any other interested party would be received. Where the Board grants a right of entry order it also determines what compensation should be paid and to whom. In determining the compensation the Board may consider a variety of matters, including the value of the land, the loss of use by the owner or occupant, adverse effects on the owner or occupant and damage to the land.[69]

The coal policy does not purport to alter the rights and procedures affecting private surface rights owners and occupants from that which already exists in regard to oil and gas well and pipeline operations. Holders of rights to coal are not only expected, but are obligated to negotiate with the owners and occupants of the surface if right of entry is desired.[70] If negotiations fail, right of entry can be obtained pursuant to the Surface Rights Act.[71] Where application is made to the Surface Rights Board for right of entry, a hearing before the Board is mandatory.[72] Compensation is determined pursuant to s. 23 of the Act.[73] The Board also has the right to arbitrate disputes between a mineral right owner and the owner or occupant of the surface for damage claims in amounts up to $2,000.[74] The Land Surface Conservation and Reclamation Council also

66. *Supra* n. 54 at 42, "satisfactory reclamation would be possible".

67. *E.g.* in soils containing large amounts of sodium and smectite clays (bentonite). Doubts have also been raised about reclamation in forested areas as well. *See* St. Regis (Alberta) Ltd. intervention in Obed Marsh hearing, *supra* n. 54 at 42.

68. *Supra* n. 12.

69. *Supra* n. 1, s. 3.3.

70. W.N. Richards and F.C.R. Price, "Surface Rights Acquisition and Compensation" (1982) *20 Alta. L. Rev.* at *supra* p. 1.

71. S.A. 1972 c. 91, as am., ss. 12(3) and 15(1).

72. *Id.* at *supra* p. 1., s. 17.

73. Although the E.R.C.B. has no jurisdiction over compensation, it does on occasion make its views known in this regard, *supra* n. 58 at 9-12.

74. *Id.*, s. 38. It appears that the E.R.C.B. does not feel that a county is entitled to compensation for or replacement of its roads that are lost to coal development, *see* Energy Resources Conservation Board and Alberta Department of Environment, ERCB-AE Report 78-AA, *In The Matter Of An Application By Forestburg Collieries Limited For A Permit To Develop And A Licence To Commence Mining Operations At A Mine Site near Halkirk* (June 1978) at 6-7.

has the power, with the consent of the parties concerned, to arbitrate damage claims.[75]

Recently conflicts have arisen between the owners of different subsurface rights.[76] Surface coal mines and oil and gas drilling cannot take place at the same time in the same area.[77] Notwithstanding ss. 25 and 26 of The Mines and Minerals Act, which state that a person who has the right to work a mineral may work through any other mineral in the same tract to the extent necessary to obtain his mineral without permission from or compensation to any other person,[78] it may be that at some point the Surface Rights Act will have to be utilized to compensate a mineral right owner who has suffered loss due to the actions of another mineral right owner. To date there have been no such claims for compensation and conflicts have either been resolved between the parties themselves or by the E.R.C.B.[79] Presently the Department of Energy and Natural Resources, in advertising sales notices of Crown petroleum and natural gas rights, identifies those lands subject to a mine permit issued by the E.R.C.B.[80] The E.R.C.B. also has new guidelines setting forth how these types of conflicts should be resolved.[81] These guidelines basically provide that well licences will not be granted in areas that are subject to a ten year mine plan in an approved mine site. The Department has stated that in appropriate circumstances oil and gas lease extensions pursuant to s. 12.1(1)f of The Mines and Minerals Act would be granted.

D. *Land surface reclamation*

The primary objective in land reclamation is to ensure that the mined or disturbed land will be returned to a state which will support plant and animal life or be otherwise productive or useful to man at least to the degree it was before it was disturbed. In many instances the land can be reclaimed to make it more productive, useful, or desirable than it was in its original state; every effort will be made towards this end.

The Land Surface Conservation and Reclamation Act requires the filing of an Environmental Impact Assessment as well as acceptable detailed mining and reclamation plans before approval to proceed with mining is granted. In addition, a security deposit based on the degree of disturbance and the quantity of coal produced will be required to ensure complete and satisfactory compliance with the regulations and approvals.

Land reclamation will include the contouring of the mined or disturbed lands, the replacement of the top soil, revegetation for soil stabilization, biological productivity and appearance, and suitable maintenance of the vegetation or, where appropriate, the conversion of the land to agricultural or other desirable use. Where applicable it will also include the replacement or rehabilitation of those facilities or features which were disrupted during the mining process and which are required to return the land to its former use. Since each reclamation program will be especially designed to suit the projected future use of the land, it will be necessary to establish this future use early in the review process. Representations will be invited from interested persons, especially any affected landowners and municipal governments.

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75. The Land Surface Conservation and Reclamation Act, S.A. 1973, c. 34, as am., s. 61.
76. *See* Energy Resources Conservation Board Decision Report 80-24, *Chinook Management Ltd. Licence to Drill a Well.*
77. Although there are procedures to allow surface mining over an oil or gas well, *see Report of Canadian Petroleum Association Committee on Problems Associated with Mining and Petroleum Operations within the same Geographic Area* (12 February 1980).
78. *Supra* n. 47.
79. *Supra* n. 76. *See also supra* n. 52 at 11-4.
80. E.R.C.B. Informational Letter 80-11, "Identification of Coal Permit Areas in Sales Notices of Crown Petroleum and Natural Gas Rights."
81. E.R.C.B. Informational Letter 80-14, "Coal Mining and Well Drilling in the same Land — New Policy."

> The Government will accelerate its current reclamation program on lands which were mined prior to effective reclamation legislation in 1973 with the objective of rendering the lands suitable for further beneficial uses. It will expect the coal industry to assist in this program.[82]

The purpose of the Alberta reclamation policy is not to restore the land to exactly the same contours, productivity, and so on that existed prior to the land being disturbed. Pursuant to s. 23 of The Land Surface Conservation and Reclamation Act, s. 3 of The Regulated Coal Surface Operations Regulations and The Land Conservation Regulations,[83] the opening up, operation, alteration, extension, or abandonment of a mine is designated a regulated surface operation. Approval to commence operations is required pursuant to s. 24 of the Act.[84] The Minister of the Environment has final approving authority over any such operation and may impose conditions as he sees fit.[85] This approval is presumably the development and reclamation approval that is provided for under The Regulated Coal Surface Operations Regulations.[86]

Applications for a development and reclamation approval go to the Development and Reclamation Review Committee established under Part 4 of The Land Conservation Regulations[87] to determine compliance with the regulations. This committee is composed of representatives from interested government departments. It examines "the general and overall impact of the proposed operation on the environment in relation to the Land Conservation Guidelines and the Development and Reclamation Guidelines . . . , the ability of the applicant to complete in a satisfactory manner, the proposed operation and any reclamation required in connection therewith, and the past performance of the applicant in respect of any prior operations or reclamation conducted by him".[88] The committee does have the power to recommend changes in the regulations or guidelines.[89] The committee also has authority to recommend a public meeting be held in regard to the application.[90] The Minister of the Environment or the

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82. *Supra* n. 1, s. 3.4.

83. *Supra* n. 75, *supra* n. 17 and *supra* n. 21 respectively.

84. *Supra* n. 75 s. 24:
> Unless he has first obtained an approval therefor under this Part, no person shall, subject to subsection (3), commence or continue or recommence any operation or activity in, upon, or over the surface of any land where
> (a) the operation or activity is of a kind designated by the regulations under section 23 as a regulated surface operation, and
> (b) the land to be affected by the operation or activity is within a part of Alberta to which the designation applies.

85. *Supra* n. 75, s. 27:
> (1) Subject to any regulations under section 25, subsection (1), clause (d), the Minister may grant or refuse to grant the approval or may require a change in the specifications or location as a condition precedent to granting an approval.
> (2) The Minister may
> (b) make an approval subject to conditions, or
> (c) specify requirements as to the manner in which land conservation and reclamation is to be conducted.

86. *Supra* n. 17, s. 8.

87. *Supra* n. 21.

88. *Id.*, s. 22(1).

89. *Id.*, s. 14. In the case of the expansion of the No. 9 Mine Site near Grande Cache, the committee prepared specific guidelines for the proposed expansion, *see* Energy Resources Conservation Board and Alberta Department of Environment, ERCB-AE Report 77-BB, *In The Matter Of An Application By McIntyre Mines Limited For The Extension Of The No. 9 Mine Site Near Grande Cache* (November 1977) Appendix 3.

90. *Supra* n. 22, s. 14(3).

Chairman of the Land Conservation and Reclamation Council receives the recommendations of the Development and Reclamation Review Committee and either grants or refuses the development and reclamation approval.[91] Where "an operation will result in substantial permanent damage of sufficient magnitude to the environment" the Minister of the Environment may refuse the application or direct the operator to "undertake additional reclamation work to compensate for the loss of resources, especially recreation facilities and, if applicable, ungulate winter rangeland", or provide additional funding to the government for compensatory or amelioratory action.[92] Recreation facilities and ungulate winter rangeland have special importance attached to them through this regulation.[93]

A development and reclamation plan is mandatory[94] in order to obtain a development and reclamation approval and the required contents thereof are set forth in Part 5 of The Land Conservation Regulations[95] and Parts 3 and 4 of The Regulated Coal Surface Operations Regulations.[96] A development and reclamation plan would normally include reports on surface disturbance, geotechnical engineering, surface water management, groundwater management, water and air quality management and pollution control. Notwithstanding that the contents of all these reports are specifically set out in The Land Conservation Regulations,[97] an applicant may consult with the Department of the Environment in regard to what information or which reports, documents, maps and plans are necessary. The Chairman of the Land Conservation and Reclamation Council may then waive any of these requirements.[98] Since reclamation as a science is

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91. *Supra* n. 86, ss. 11 and 12.

92. *Supra* n. 21, s. 23. This assumes that s. 23 of the Land Conservation Regulations applies to a coal mine, however a coal mine may not be an "operation" within the ambit of this section. Generally, The Regulated Coal Surface Operations Regulations rather than the Land Conservation Regulations govern coal mines.

93. For a discussion on ungulate winter rangeland *see supra* n. 89 at 7-5.

94. *Supra* n. 17, s. 8.

95. *Supra* n. 21, s. 25:
A development report shall consist of an outline of an investigation into the impact of the proposed plan on alternate uses of land in the same location or in close proximity thereto, and shall normally include a discussion, as far as may be applicable, respecting
(a) residential development;
(b) aesthetic and scenic considerations;
(c) active or passive outdoor recreation areas;
(d) environmental considerations of indigenous flora and especially fauna;
(e) existing agricultural, commercial and industrial developments;
(f) proposed transmission and transportation facilities and the need for relocation of existing transmission or transportation facilities;
(g) housing requirements, if any, and related services, including
(i) sewer,
(ii) domestic water,
(iii) electricity,
(iv) telephone,
(v) access roads,
(vi) schools, and
(vii) hospitals,
(h) such other details as may be required to provide an assessment depending on the nature of the site to be developed.

96. *Supra* n. 17.

97. *Supra* n. 21.

98. *Supra* n. 86, s. 9.

relatively new in Alberta, the degree and methods of reclamation the Council requires are continually being modified.

The specifics of a land reclamation plan can also be gleaned from an analysis of the land reclamation "guidelines". The Development and Reclamation Review Committee has prepared a document entitled "Application Requirements for a Development and Reclamation Approval".[99] In addition, the Land Conservation and Reclamation Council has prepared "Guidelines for the Reclamation of Land Affected by Surface Disturbance".[100] In these latter guidelines it is reiterated that s. 35 of The Land Surface Conservation and Reclamation Act provides for the making of regulations, but in the absence of regulations s. 36 allows the Council to use other standards. It is the Council's "opinion that regulations at this point in time [presumably December 1977] would be too inflexible for satisfactory application and that more flexible guidelines would be more applicable".[101] These guidelines are to take the place of the regulations contemplated under s. 35. Reclamation criteria are set out in relative specificity. Although they are stated not to be regulations but only guidelines, the Council clarifies its position stating that the criteria "will be applied by the approving authorities under the Act and regulations".[102] The guidelines have as a reclamation goal "the return to, or the continuation or resumption of some appropriate land use upon the conclusion of the surface disturbance".[103] "Some appropriate land use" is presumably the "full reclamation" assured under the coal policy. An operator remains responsible for disturbed land until some indication is given that the reclamation desired is being effected; for example, productivity for agricultural land existing prior to the surface disturbance has been restored.

Although these guidelines do not have the status of legislation, it appears that they are being used as determinative of land reclamation plans. Since they are guidelines, they can be waived or varied at the discretion of the Land Conservation and Reclamation Council. It should be noted that the Council is not one body, but rather consists of different personnel depending on where the disturbance is located.[104] It is not known at this time whether the government intends to put into regulation form any of these guidelines.

Presumably the "facilities or features" the coal policy requires be replaced or rehabilitated would include man-made structures and buildings. The construction of buildings on reclaimed land, however, may prove to be a problem.[105] The future use of the land after reclamation must be established prior to any approval for disturbance being given. The degree to which uses other than the original land use will be permitted remains to be seen and will evolve through practice.

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99. The Development and Reclamation Review Committee, "Application Requirements for a Development and Reclamation Approval" (1978).

100. Land Conservation and Reclamation Council, Alberta Environment and Alberta Energy and Natural Resources, "Guidelines for the Reclamation of Land Affected by a Surface Disturbance" (December 1977).

101. *Id.*, at 1.

102. *Id.*, at 2.

103. *Id.*, at 1.

104. *Supra* n. 75, s. 15.

105. *Supra* n. 52 at 20.21.

The specifics of the promised public representation include actual participation on the Development and Reclamation Council by local landowners and representatives of the municipal government in the case of lands located within the jurisdiction of a municipal government.[106]

If a party is not satisfied with the terms of his development and reclamation approval he may appeal it to the Minister of the Environment.[107] As well, the Development and Reclamation Review Committee is obligated to give reasons for any recommendation it makes.[108] This may enhance the exposure of such decisions to possible judicial review.

Section 12 of The Coal Conservation Act requires that a proposed scheme for reclamation be included in any mine permit application.[109] In practice, this is the same development and reclamation plan submitted to obtain development and reclamation approval. A mineral surface lease application must also provide for restoration.[110] At that stage of mine development, however, it is more likely that an applicant would already have his development and reclamation approval, thus fulfilling this requirement.

The Land Surface Conservation and Reclamation Act provides that surface rights in land cannot be surrendered until a reclamation certificate is issued by the Land Conservation and Reclamation Council.[111] The issuance or non-issuance of reclamation certificates can be appealed, including to the Court of Queen's Bench of Alberta, which hears the matter as a trial *de novo*.[112] Where reclamation has not been carried out satisfactorily, the Council may issue a reclamation order[113] directing proper reclamation, even if the owner or occupant of the surface of the land consents to the release of the operator.[114] The conditions under which the Council may issue a reclamation order are set out in s. 39 of the Act.[115] Interestingly, reclamation must be in accordance with the regulations that prescribe criteria or standards, but no reference is made to the use of guidelines in this regard.

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106. *Supra* n. 75, s. 15.
107. *Supra* n. 21, Part 6.
108. *Supra* n. 21, s. 13(2).
109. *Supra* n. 6.
110. The Mineral Surface Lease Regulations, Alta. Reg. 228/58, s. 24.
111. *Supra* n. 75, s. 49.
112. *Supra* n. 75, ss. 56 and 57.
113. *Supra* n. 75, s. 53.
114. *Supra* n. 75, s. 52.
115. *Supra* n. 75, s. 39:
    (1) Where the Council is authorized to make a reclamation order under this Part, the order may direct the performance of any work that is necessary in the opinion of the Council to do any or all of the following in respect of the land that is the subject of the inquiry by the Council:
        (a) subject to subsection (3), to condition, maintain or reclaim the land or any part thereof, and land adjacent thereof, or
        (b) to destroy or prevent the growth of noxious weeds or weed seeds, or
        (c) to remove or remedy any hazard to human life, domestic livestock or wildlife, or to the conduct of agricultural or other operations, or
        (d) to install or repair any fence, gate, cattle guard, culvert or other thing.
    (2) A reclamation order shall specify the date by which the work is to be completed.
    (3) Where the regulations prescribe criteria or standards for, or the manner of carrying out, the conditioning, maintenance or reclamation of the land, the reclamation order shall be in accordance with the regulations.
    (4) A reclamation order shall be directed to the operator concerned.

A mineral surface lessee is required, prior to surrender of his lease, to "restore the leased area as nearly as possible to the same condition it was in at the time the application for the original lease was made, and such restoration shall be made to the satisfaction of the Minister".[116] In addition, the Minister of Energy and Natural Resources has the power to direct restoration. It would seem that it is the present intention of the government to have reclamation matters handled by the Department of the Environment, rather than the Department of Energy and Natural Resources and consequently this section may have fallen into disuse. The latter department does, however, play an active role in experimental reclamation test plots.

Part 7 of The Land Conservation Regulations provides for security deposits to ensure reclamation.[117] Where reclamation has been completed to the satisfaction of the land use officer the deposit is returned pursuant to s. 30 of the Act;[118] if the land has not been reclaimed all or part of the deposit may be retained. E.R.C.B. approval must be obtained before operations are suspended at a mine and part of this approval requires information as to the status of reclamation.[119] Annual status reports on reclamation must be given to the Land Conservation and Reclamation Council.[120]

In addition to the requirements for new mines the government has stated that it "will accelerate its current reclamation program on lands which were mined prior to effective reclamation legislation in 1973".[121] Under the Land Surface Conservation and Reclamation Act, provision is made for the reclaiming of lands to which the new legislation does not apply and that remain in need of reclamation.[122] Although the coal policy states that the coal industry is expected to assist in this program and although the legislation provides for this, to date such assistance has been merely voluntary on the coal industry's part, as the actual reclamation is being done at public expense and by public authorities.[123]

E. *Use of Alberta manpower, services, materials and equipment*

As a matter of policy the Government requires the maximum practical development and use of Alberta manpower, services, materials and equipment in all aspects of resource development, from initial planning and design through construction to final operation. Companies planning new coal developments must demonstrate that all efforts have been made to comply with the Government's policy in this regard.

This means, for example, that Alberta-based engineering and construction firms are to be given every opportunity to participate in the planning and conduct or operation of coal exploration and development projects, in the design and construction of equipment and plants, and in the related environmental protection and reclamation programs. Where local expertise is lacking or is only partly developed, developers will be expected to work with trade and professional associations and the Government to ensure that Albertans are given the opportunity to acquire the necessary skills and build their capability for future needs.

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116. *Supra* n. 110, s. 24(1)(b).
117. *Supra* n. 21.
118. *Supra* n. 16.
119. The Coal Conservation Regulations, Alta. Reg. 229/74, s. 12.
120. *Supra* n. 17, s. 16.
121. *Supra* n. 1.
122. *Supra* n. 75, ss. 44 and 45.
123. Although apparently in the Crowsnest Pass area the government has used reclamation deposits for existing leases to reclaim old mine sites.

> The same principle applies to the provision of services, materials and equipment, including the design, construction and operation of facilities for manufacturing or fabricating essential materials and equipment in Alberta.[124]

The government has placed a major emphasis on this aspect of the coal policy. The prime method of ensuring compliance is through the Lieutenant Governor in Council's required approval for all coal mining operations over 45,000 tonnes per year and its ability to attach conditions thereto.[125] In addition, in deciding on the granting of any mine permit, the E.R.C.B. clearly wishes the applicant to make its plans in this regard known to it.[126] An examination of applications before the E.R.C.B. reveals examples of undertakings applicants are prepared to give in this regard.[127] The E.R.C.B. can then use its general jurisdiction to recommend approval conditions designed to implement this purpose of the coal policy.[128]

Unlike some other jurisdictions,[129] Alberta grants no express competitive advantage to Alberta companies. What constitutes "the max-

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124. *Supra* n. 1, s. 3.5.

125. *See supra* n. 7, approval of the Obed Marsh Project, which was made subject to the following condition:

> The government has formalized a reporting procedure which can be negotiated and modified on a project by project basis as mutually agreed between the project owners/sponsors and the Department of Economic Development. A project owner/sponsor is required to notify the Department of the estimated Alberta, Canadian and foreign content for engineering, project management, and the overall project capital expenditure, the bidders' lists for engineering contractors, the project's organization chart, a list of business opportunities relating to the project, the project's procurement office in Alberta, monthly procurement reports listing significant purchase orders and subcontracts, monthly commitment reports showing cumulative estimates of Alberta, other Canadian and foreign content, and various other information. The government maintains the confidentiality of such information, but demands full access to procurement information by industry development senior officers in order to satisfy the government that fair opportunity was provided to supply engineering, manufacturing and construction goods and services to the project.

See Alberta Economic Development, *Policy to Maximize Alberta and Canadian Content:*

> In developing this program of support, it is realized that local firms must always be competitive in quality, price, delivery time, and post-installation services and it should be clearly understood that the policy is not intended to become a penalty to projects or a bonus for local suppliers.
>
> Providing the foregoing conditions are met, it would be expected that the contracts and purchase orders on projects would be awarded to those firms which provided the greatest Alberta content in their bids and engineering proposals.

126. *See* Obed Marsh Project, Application No. 790729, *Request for Additional Information Cost/Benefit and Social Impact Analysis Obed Marsh Thermal Coal Project* (12 November, 1979).

127. *See* Obed Marsh Project, Application No. 790729, and Esso Cold Lake Project, Application No. 770866.

128. *Supra* n. 53, s. 7:

> The Board, with the approval of the Lieutenant Governor in Council, may make such just and reasonable orders or directions as may be necessary to effect the purposes of this Act but are not otherwise specifically authorized by this Act.

Supra n. 53, s. 14(c):

> Upon receiving an application under section 10, 11, or 13, the Board may, after considering the circumstances of the particular case, . . . grant a permit or licence or an amendment of a permit or licence, as the case may be, subject to such conditions, restrictions or stipulations as it may consider appropriate and set out in the permit or licence or amendment.

However, the Supreme Court of Canada has ruled that the E.R.C.B.'s authority to attach conditions is not unlimited. *See Athabasca Tribal Council* v. *Amoco Canada Petroleum Company Ltd. et al* unreported, (22 June 1981), 58-03; 3242-01 (S.C.C.)

129. *E.g.* Bill C-48, the proposed Canada Oil and Gas Act.

imum practical development and use" is at the discretion of the Lieutenant Governor in Council.

F. *Townsites and infrastructure*

> The Government is aware of the critical importance to any expansion of the coal industry of the availability of townsites, residences and commercial activities as well as schools, hospitals and community services. Also the Government is aware of the impact on a community of the kind of industrial development represented by the coal industry. The Government will encourage the improvement and growth of existing towns and facilities rather than the development of entirely new ones. It recognizes the weaknesses of "one-company" or even "one-resource" based communities and will promote economically feasible diversification wherever possible. The Government solicits the support of the coal industry in this regard and requests potential developers to propose projects which incorporate diversified activities. It agrees with the report of the Grande Cache Commission (Crump report) in recognizing that "reincarnation of the company town would ... be extremely unwise but the assumption of some of the financial risk of building the town by the compay might not be".[130]

The effect on townsites and infrastructures is always a prime concern of local residents when any major new coal mine or other industrial proposal is made for a location in proximity to what is usually a relatively small town. Oftentimes the majority of interventions at the E.R.C.B. hearing are concerned with matters of this nature.[131] Frequently the E.R.C.B. hearing is used as a public sounding board and as a perceived communication conduit to the relevant government departments that have jurisdiction in regard to infrastructure matters. The only jurisdiction of the E.R.C.B. to hear these concerns falls within its general "public interest" mandate, as there is no specific legislation directing it to examine such issues. On the other hand, the Lieutenant Governor in Council has on occasion attached conditions to its approvals that require "the assumption of some of the financial risk of building the town by the company."[132]

Unless it is a condition of a permit or approval, there are no legislated requirements for an applicant for a coal mine permit to provide assistance with development or expansion of infrastructure, such as schools, hospitals, and community services, other than by way of contributions through the existing property tax system. Recent examples of applicants undertaking to provide housing for workers have either been for planning reasons, for the development of the mine itself or at the request or admonition of the applicable government authorities. There is no express requirement for a mine applicant to provide such facilities.

A related problem arises due to the fact that coal mines are invariably located outside the boundaries of the local municipality which has to bear the brunt of housing and employee servicing costs required to enable construction and operation of the mine. This means that the sizeable prop-

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130. *Supra* n. 1, s. 3.6.

131. *See* Obed Marsh Project, Application No. 790729, where seven out of twelve interventions emphasized the effect of the proposed coal mine on the local townsite and government infrastructure.

132. *See* the condition attached to Obed Marsh Project approval, O.C. 273/81:
> The Permittee shall satisfy the Minister of Municipal Affairs, the Minister of the Environment, the Minister of Transportation and the Minister of Energy and Natural Resources, prior to December 31, 1981, as to the plans of the Permittee with respect to
> (a) transportation services to and from the proposed development,
> (b) the housing of employees, and
> (c) the development of additional necessary infrastructure.

erty taxes arising from such a major industrial undertaking are for the most part outside the grasp of the municipality.[133]

The government does not intend to promote the creation of new company towns which would involve large government expenditures for creation of infrastructure, such as roads, municipal servicing, water and sewage treatment plants. In relation to the coal industry, the town of Grande Cache undoubtedly provides the best example of the government allowing and assisting in the creation of such a new town.[134] In addition to the government using its control of the permitting process as a means of discouraging new "one-company" or "one-resource" towns, development of such towns is also unlikely in view of the fact that governments are responsible for supplying the infrastructure for such a development and could simply refuse to supply these services to the mining operation, thus making it difficult and expensive to attract workers to the mine.[135]

G. *Transportation*

> The Government recognizes the vital role of transportation in the marketing of coal and will continue to support industries' efforts with the railways and the Government of Canada to ensure that planning and development of rail capacity keeps pace with needs and that freight rates are realistic. While some extension and upgrading of existing roads, bridges and railways will be inevitable, the Government believes that most of the desirable new developments can be approved for areas now reasonably well provided with transportation service. Where entirely new facilities are needed primarily for the use of a coal development, the Government would expect the developer to pay their full cost. In keeping with the concept of diversification of economic activity for improved stability of the towns which will serve the expanded coal industry, the transportation system will be developed having in mind diversified industrial growth.[136]

Currently the only method of transportation of coal outside of Alberta is by rail. Since the national railways fall under exclusive federal jurisdiction, the provincial government has little control over them, other than through financial contributions to the purchase of rolling stock or to actual rail lines (e.g. the Alberta Resources Railway), or representations it may make to the federal government. Significantly, the government has declined to offer the prospect of public financial contribution to rail line extensions to virgin coal areas similar to that which the Province of British Columbia has undertaken in northeastern British Columbia. The conclusion, therefore, is that in the field of rail transportation a coal

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133. Except for the Industrial Tax Transfer Grant whereby contributions are made to the adjoining town or city from the pertinent municipal district, county or improvement district in which the development is located.

134. An interesting example of the opposite effect of a new coal mining proposal was the removal of the hamlet of Keephills due to the expansion of the Highvale mine.

135. In its 1973 review of the Alberta coal industry, Energy Resources Conservation Board, ERCB Report 74-E, *Review Of The Alberta Coal Industry 1973* (March 1974) the E.R.C.B. had the following to say at 12-5:

> From an overview of this study the Board also considers it necessary that closer attention be given to economic aspects of new coal developments. The Board recognizes that, in particular cases, major coal developments in the future may involve substantial Provincial commitments and expenditures by various levels of government and by private individuals, and that it would be in the public interest for the Government to have a reasonable assurance of the permanence and soundness of these investments. The Board believes that in such cases, it may be appropriate for the Lieutenant Governor in Council, under the provision of Section 24(1) of The Energy Resources Conservation Act, to request the Board to investigate the general economic feasibility of the proposed project and to advise the Government thereon. The requirement to provide a cost-benefit analysis is undoubtedly an outgrowth of this recommendation.

136. *Supra* n. 1, s. 3.7.

developer will have minimal involvement from the government of Alberta and the lack of legislation in this province reflects this absence of direct participation.

Freight rates for coal transportation are negotiated by the developer with either the Canadian National Railway or the Canadian Pacific Railway, both of which are governed by the federal Railway Act and the Canadian Transport Commission.[137] The government of the Province of Alberta has given no legislative indication as to how it intends that "the transportation system will be developed having in mind diversified industrial growth".

The government has, however, made provision for road transportation in its coal approval process. If a proposed project involves hauling coal on public roads the proponent is required to submit with his coal mine permit application a transportation impact assessment pursuant to the Public Highways Development Act.[138] The E.R.C.B. in its guide "How to Apply for Government Approval of Mining Activities in Alberta", has set forth the purpose and contents of a transportation impact assessment,[139] but there are no regulations concerning its content. The Board itself does not appear willing to assume a leading role in road planning for a coal development.[140]

In addition, Part 7 of The Exploration Regulation[141] provides for the protection of public roads during the exploration phase of coal development.

H. *Royalty on crown coal — taxes on freehold coal*

Alberta will levy a realistic royalty on all coal produced from Crown leases and will levy a property tax on coal contained in producing freehold properties.

A new schedule of royalties payable on all coal produced from Crown leases and used or marketed becomes effective July 1, 1976. Barring any major disruption of the economy or action of another government having a major impact upon revenues to the producer, the Government will plan to continue the use of the basic formula without change for a ten-year period.

Under The Mines and Minerals Act royalty is payable at the discretion of the Crown in kind as a percent of the quantity of coal used or marketed or in dollars as a percent of the deemed value of the coal used or the revenue received from the coal marketed. Where the Government is satisfied with the conditions of sale arranged by a lessee for the lessee's share of production, the Government may not take its royalty in kind and may request the lessee to market the royalty share of production along with the lessee share.

To recognize the high expenditures which must be made by a developer before revenues are produced, *there will be a "phase-in" period of 36 months from the start of commercial operations during which the rate of royalty will be increased in steps from a low initial level to the normal level.* The royalty will increase each 12 months over this period from 25 to 50, to 75 and finally to 100 percent of the normal level.

The *normal* royalty rate will be determined by a formula designed to ensure a fair share of revenues both to the developer and to the Alberta Crown under any reasonably foreseeable com-

137. R.S.C. 1970, c. 234, as am..

138. R.S.A. 1970, c. 295, as am..

139. *Supra* n. 8 at 5-24:
Purpose of the TIA
The TIA is meant to provide the Government with information on
— any additional demand to be placed on existing roads
— the need to upgrade present roads
— the need for new transportation services
— any potential conflict between roads proposed by the applicant and existing or future public roads
— the proposed design of any junction or crossing of private and public roads.

140. *See supra* n. 52 at 17-6 and *supra* n. 74 at 6-7 et seq.

141. Alta. Reg. 423/78.

bination of investment level, operating costs, production levels and coal prices.

The formula will provide for a normal royalty rate which:

(a) will not seriously restrict the rate of return to the investor in viable projects when total revenues only marginally exceed costs,

(b) will provide the Crown with approximately a one-third share of the total revenue under circumstances where the total revenue sufficiently exceeds the costs to provide a rate of return to the developer adequate to stimulate further exploration and development, and

(c) will provide the Crown with an increasing share of the total revenue when the return to the developer exceeds the rate mentioned above.

Details of the formula are given in Appendix I.

To ensure that the people of Alberta receive appropriate revenue from those coal reserves which are privately held, the Government will act under the Freehold Mineral Taxation Act and, effective January 1, 1977 will levy a property tax on those coal resources which are generating revenues to their owners. The tax will be based upon an assessed value of freehold coal property. Details of the assessment procedure will be developed in the near future and presented in regulations.[142]

When the coal policy was announced in 1976, the new royalty structure was seen as one of the more significant weather vanes indicative of the directions the government of Alberta intended to take. Previously the royalty rates for coal were at a fixed rate per ton.[143] In its 1973 "Review of the Alberta Coal Industry",[144] the E.R.C.B. recommended higher royalty rates. The coal policy now provides for a sliding scale royalty which reaches significantly higher than what is provided for in British Columbia.[145] In effect, the government of Alberta has put the coal industry on notice that it sees no particular reason for haste in development of the industry in Alberta. Undoubtedly the province's current resource revenues and economic benefits arising from the petroleum and natural gas sector mitigate against the necessity of a rapidly expanding coal industry.

The royalty structure is set forth in The Coal Royalty Regulations.[146]

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142. *Supra* n. 1, s. 3.8. (emphasis in original).

143. Ten cents per ton.

144. *Supra* n. 135.

145. British Columbia's royalty rate is twenty-five cents per ton for thermal coal and $1.25 per ton for metallurgical coal.

146. Originally Alta. Reg. 193/76, but the actual royalty schedule was changed by Alta. Reg. 232/78:

The rate of royalty for a month for all agreements granting coal rights shall be the greater of

(a) 5%, or

(b) the rate calculated in accordance with the following equation:

$$X = K\left(1 - \frac{C}{R}\right)^2,$$

where

X is the rate of royalty payable expressed as a percentage of marketable coal and products obtained from coal,

K is the project factor for a coal project or new coal project as determined in accordance with the following equation:

$$K = \frac{50}{1 + \frac{C}{R}\left(0.30\,\frac{I}{C} - 1\right)}$$

where

I is the annual investment allowance of a coal project or new coal project,

C is the annual cost allowance of a coal project or new coal project, and

R is the annual revenue from a coal project or new project,

but where "C" exceeds "R", $\frac{\text{"C"}}{R}$ is deemed to be 1."

One questions whether this royalty structure is as "realistic" and "fair" as the coal policy suggests it is.[147]

The government has given no indication as to whether it plans any significant changes in the royalty structure upon the conclusion of the ten year period it advised it was prepared to wait. To date the government has taken no royalty share in kind.[148] Undoubtedly, at least part of the reason for inclusion of a provision allowing the taking of royalty in kind is the prospect of a constitutional struggle similar to that in which the federal and Alberta governments engaged over petroleum and natural gas revenue sharing.

The thirty-six month royalty phase-in is provided for in s. 3 of The Coal Royalty Regulations.[149] In its application the royalty rate varies from a low of 5 percent to a maximum royalty of approximately 35 percent,

147. The actual royalty can be calculated as follows:

CALCULATION OF ROYALTY FOR
COAL PRODUCED FROM ALBERTA CROWN LEASES

1) CALCULATE – ANNUAL COST ALLOWANCE "C"

Operating Cost
Provision for Mine Closing
Indirect Costs
Ammortization of Capital Investment
Annual Cost Allowance "C"

2) CALCULATE – ALLOWED CUMULATIVE INVESTMENT "I"

Ammortization Base, Previous Year
Capital Additions
Inflation Adjustment
Less
Ammortization of Capital Investment
Plus
Provision for Working Capital
Allowed Cumulative Investment "I"

3) CALCULATE – ANNUAL REVENUE "R"

Total Revenue
Less
Ex. Mine Costs
Annual Revenue "R"

4) CALCULATE – PROJECT CHARACTERIZING FACTOR "K"

$$K = \frac{50}{1 + \frac{C}{R}(0.30\,\frac{I}{C} - 1)}$$

5) CALCULATE – ROYALTY "X"

$$X = K\left(1 - \frac{C}{R}\right)^2$$

The government has published "Interim Guidelines for the Calculation of Crown Royalty and Other Products" (1 July 1976).

148. *Supra* n. 146, s. 5, and *supra* n. 78, s. 31(4). Note, however, that there does not appear to be any Ministerial power to deem a market value for royalty calculation purposes, as is the case with petroleum and natural gas.

149. *Id.*.

however, the Lieutenant Governor in Council has the power to reduce the coal royalty below 5 percent.[150]

The provisions of the Freehold Mineral Taxation Act are designed to effectively mimic the current crown royalty for coal produced from freehold coal reserves, however, no regulations in this regard have been developed to date.[151]

Coal production, the disposition thereof and the value of sales must be reported monthly to the Department of Energy and Natural Resources[152] and the E.R.C.B.[153]

I. *Opportunity for equity participation by Albertans*

> The Government has recognized the need to provide individual Albertans with an opportunity to invest in the development of the Province's energy and natural resources through creation of the Alberta Energy Company. As a matter of principle it believes that Albertans should be able to participate in the equity ownership of such resource developments.
>
> The Government expects that many Albertans would welcome the opportunity to invest in the growth of Alberta's coal industry either directly or through the Alberta Energy Company. Consideration will therefore be given to the degree to which a developer proposes to provide this opportunity and, for developments involving Crown leases, project approval will be conditional upon the manner and degree of equity participation available to Albertans. It is assumed that such equity participation would commence immediately following project approval and would share in both the risk and profit.[154]

The Lieutenant Governor in Council, in considering for approval a coal mine permit application, attaches importance to the opportunities for equity participation by Albertans. To date the government has appeared to examine each application on its merits and has given no indication as to any formalized level of Alberta equity participation that it wishes to see in Alberta coal projects. In the Luscar Sterco (1977) Ltd. Coal Valley operation, for example, the Alberta Energy Company holds a 25 percent equity participation. More recently Union Oil Company of Canada Limited and Rescon Coal Holdings Ltd. received a coal mine permit for the Obed Marsh Thermal Coal Project. Rescon is a private Alberta company and Union, a public company holding 90 percent of the project at the time of the issuance of the mine permit, was approximately 13 percent Canadian owned. The Alberta equity participation is therefore not known, although Union did advise it had undertaken to offer participation to Albertans.[155]

There has been no direct or indirect expropriation of coal reserves in place, nor granting of such to Albertans, the Alberta government, the Alberta Energy Company nor to any Alberta crown corporation. It would

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150. *Id.*, s. 3(6):
> Where in his opinion it is necessary or desirable in the interest of conservation and the prevention of waste or the loss of recovery of marketable coal or products of the coal, the Lieutenant Governor in Council may by order
> (a) prescribe a royalty payable with respect to the marketable coal or products of the coal that is less than the royalty that would otherwise be payable under these regulations, and
> (b) prescribe the period in respect of which the order is to apply.

151. Although assessment procedures are set forth in Part III of The Mineral Rights Assessment Regulations, Alta. Reg. 357/73. A freehold mineral tax apparently used to be levied, but was discontinued due to the minimal government revenues recovered.

152. *Supra* n. 78, s. 31.1.

153. *Supra* 119, ss. 68 and 69.

154. *Supra* n. 1, s. 3.9.

155. Union Oil Company of Canada Limited, "Interim Report to Shareholders," (31 March 1981).

appear that the government is following its assumption that Alberta equity participation would share in both the risk and the profit.

In order to monitor the situation The Coal Conservation Act provides that if there is any change in ownership of a mine or of a coal processing plant, the E.R.C.B. must be notified.[156]

J. *Timing of developments*

> The Government recognizes that it may not be in Alberta's best interests that each major industrial development proceed within the time frame which the developer proposes and that some Government adjustment of the scheduling of projects may be necessary in recognition of such factors as the market situation, the assurance that Alberta's own requirements for coal are met, the prevention of a peaking of demand for capital available for Alberta projects, the supply for manpower, services, materials and equipment available in Alberta and the availability of adequate infrastructure. For these reasons the Government will exercise an overall control on the time when major coal (and other) developments are permitted to proceed.
>
> Should the Government find it desirable in the public interest to require the deferral of a proposed development meeting other requirements of this policy, lease rentals and work requirements on affected Crown properties would be suspended for the period of the deferral.[157]

The factors relevant to scheduling of projects as set out in the coal policy, for the most part are not reflected in any specific legislation or regulations. Presumably such factors would either be considered by the E.R.C.B. during the permitting process or by the Lieutenant Governor in Council prior to the approval of any permit.[158] To date the government has not refused to approve a mine permit in order to delay a coal project for any of the reasons set forth in the coal policy. However, in the case of the proposed Dodds Roundhill coal development in 1976, the government did make its apprehensions known, which undoubtedly was a factor in the developer not proceeding with the project.[159] As well, the E.R.C.B. has ruled on the timing of the development of the Sheerness, Genessee, and Keephills power projects, which in turn has affected the development of the mines supplying coal to these projects.[160] Should a project be deferred, The Mines and Minerals Act[161] permits the Minister to waive lease rentals and work requirements for the period of the deferral.

K. *Overall benefit to Alberta*

> A fundamental feature of the Government's policy is that no coal development will be permitted to proceed unless in its overall economic and social impact it is clearly beneficial to Alberta. This will be ensured by requiring that any proposal for a significant coal development be supported by a detailed Cost-Benefit and Social Impact Analysis which will be assessed by the appropriate departments and agencies of the Government and finally by the Executive Council. The analysis and assessment will incorporate the results of an Environmental Impact Assessment and will evaluate and weigh all significant direct and indirect benefits against all significant direct and indirect costs or adverse effects. Consideration will be given not only to those costs and benefits which are measurable in dollars but also to the more subjective, social costs and benefits.
>
> In order that consideration of proposals for development may proceed on a co-ordinated basis and that worthy projects will not be unduly delayed, an applicant for project approval will be required to file a Cost-Benefit and Social Impact Analysis, an Environmental Impact Assessment and a Development and Reclamation Plan simultaneously with the Technical Application under The Coal Conservation Act. The Environmental Impact Assessment and the Development and

156. *Supra* n. 53, ss. 15 and 26.

157. *Supra* n. 1, s. 3.10.

158. *Quaere* whether the Supreme Court of Canada's recent decision, *supra* n. 128, limits the jurisdiction of the E.R.C.B. or the Lieutenant Governor in Council to attach conditions in this regard?

159. Although the proposal actually predated the coal policy.

160. *See* addendum to ERCB-AE Report 79-AA, *In the Matter of a Power Plant and Coal Mine at Genessee.*

161. *Supra* n. 78, s. 12.1(1)d.

Reclamation Plan will be reviewed by all concerned departments with the appraisal being co-ordinated by the Department of the Environment. The Department will also be responsible for considering the specific applications under the environmental legislation.

Appraisal of the Cost-Benefit and Social Impact Analysis will involve all concerned departments of the Government and the Energy Resources Conservation Board and will be co-ordinated by the Department of Energy and Natural Resources.[162]

The E.R.C.B. requires a cost-benefit and social impact analysis pursuant to its general purposes under s. 4 of The Coal Conservation Act.[163] To date there are no regulations setting forth the contents of such an analysis, however, the government has published "Guidelines for the Preparation of a Cost-Benefit and Social Impact Analysis".[164] The E.R.C.B. specifically addresses this document but it makes no decision on the matter; the Board only notifies the Department of Energy and Natural Resources as to its views on the entire cost-benefit and social impact analysis.[165] There would appear to be no legal obligation on an applicant to "evaluate and weigh *all* significant direct and indirect benefits against *all* significant direct and indirect costs or adverse effects".[166] Therefore determination of the adequacy of any such analysis is at the discretion of the particular body concerned with its review. Should the analysis be inadequate or should the development be found to not be clearly beneficial to Alberta, the Lieutenant Governor in Council could exercise his discretion and refuse to approve the mine permit.

The status of the cost-benefit and social impact analysis guidelines is not clear. Although they have no legislative sanction, a mine permit applicant can be requested to comply with the guidelines by the E.R.C.B. or the government. Should he not do so, the granting of a permit to the applicant may be placed in jeopardy. Conversely, the appropriate body has the administrative capability to ignore the guidelines should it feel that doing so is warranted. The issue can be contentious when an applicant is requested to include in his analysis data that he wishes to keep confidential from competitors, for example, mining costs. It does not appear that there is any impetus to give legislative sanction to the guidelines, even though a great number of these guidelines are currently applied without exception to all coal mine permit applications.

L. *Granting of rights to explore for coal*

Rights to explore for coal under public lands may be granted whether or not an applicant has the leasehold right to produce the coal from under the lands but will only be granted under conditions which will ensure no significant adverse environmental impact.

The right to enter on the surface of public lands is granted under The Public Lands Act; approval must be obtained from the Local Authority to use public roads or road allowances. Control of the actual exporation activity and all associated operations on public lands is exercised primarily through The Coal Conservation Act, The Geophysical Regulations (under various acts), and The Land Surface Conservation and Reclamation Act. The provisions of The Clean Air Act, The Clean Water Act, The Water Resources Act, The Forests Act 1971 and The Forest and Prairie Protection Act must also be complied with.

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162. *Supra* n. 1, s. 3.11.

163. *Supra* n. 53.

164. Department of Energy and Natural Resources, "Guidelines for the Preparation of a Cost-Benefit and Social Impact Analysis" (September 1976).

165. *Supra* n. 8 at 7-6.

166. There is not even an express obligation to evaluate *some* of the benefits and costs. McIntyre Mines Ltd. did not submit any cost-benefit analysis for the expansion of its No. 9 mine nor did Forestburg Collieries Limited submit such in its 1978 mine expansion application.

> Rights to explore for coal under private lands (whether the coal is owned by the Crown or otherwise) may also be granted separately from the right to produce the coal. The right of entry to the surface must be negotiated with the surface owner. The actual exploration activity and associated operations in the field will be made subject to much the same control as on public lands.[167]

Under The Public Lands Act and its accompanying regulations[168] licences of occupation, as well as mineral surface leases, miscellaneous leases and easement agreements, can all be acquired. However, for preliminary exploration purposes the Department of Energy and Natural Resources will issue a letter of authority to enter on public lands and no formal request for such a letter is necessarily required. The Minister also has the right to refuse to accept applications for entry onto specific public lands or to refuse to issue licences of occupation.[169]

Except for specified exceptions a licence to conduct exploration is also required.[170] As well, the exploration program must be approved and no equipment can be operated without an exploration permit.[171] The exceptions where no exploration licence is required are set out in s. 2 of The Exploration Regulation.[172] Consent to explore must also be obtained from persons in occupation of the surface of the land.[173] Exploration restricted areas have been created in which no exploration, including the drilling of holes, may be conducted.[174] Other lands can also be removed from exploration potential pursuant to The Land Surface Conservation and Reclamation Act or pursuant to the designation of restricted development areas or water conservation areas.[175]

Where the method of exploration involves a surface disturbance, approval must be sought pursuant to Part II of The Regulated Coal Surface Operations Regulations.[176] Application is made to the E.R.C.B., which in turn forwards it to the Exploration Review Committee of the Land Conservation and Reclamation Council.[177] The Exploration Review Committee considers the application having regard to "the general and overall impact of the proposed exploration on the environment in relation to the Land Conservation Guidelines, the ability of the applicant to complete in a satisfactory manner the proposed exploration and any reclamation required in connection therewith, and the past performance of the applicant in respect of any prior exploration or development or reclamation conducted by him".[178]

For deeper drilling or major excavation, exploration approval must be obtained pursuant to Part II of The Coal Conservation Regulations.[179] Ex-

167. *Supra* n. 1, s. 3.12.
168. The Public Lands Act, R.S.A. 1970, c. 297, as am.; The Public Lands Licence of Occupation Regulations, Alta. Reg. 201/58, and The Mineral Surface Lease Regulations, *supra* n. 110.
169. The Public Lands Licence of Occupation Regulations, Alta. Reg. 201/58, ss. 6(1) and 7(a).
170. *Supra* n. 78, s. 188.
171. *Supra* n. 8 at 3-2.
172. *Supra* n. 15.
173. *Id.*, s. 3.
174. *Id.*, s. 4.
175. *Id.*, s. 5.
176. *Supra* n. 17.
177. *Supra* n. 17, s. 6 and *supra* n. 21, Part III.
178. *Supra* n. 21, s. 20(1).
179. *Supra* n. 119.

ploration that may affect any water resources, such as overburden drainage, depressurization of basal acquifers or diversion of surface or sub-surface water, requires an exploration permit under The Water Resources Act.[180]

When coal leases are acquired by public tender and a bonus is paid, exploration expenditures which are part of an exploration program approved by the E.R.C.B. can be applied against the bonus until it has been totally refunded.[181]

M. *Classification of lands for coal exploration and development*

Having regard to the questions of environmental sensitivity, alternate land uses, potential coal resources and the extent of existing development of townsites and transportation facilities, the Government has classified Provincial lands into four categories with respect to coal exploration and development:

Category 1 in which no exploration or commercial development will be permitted. This category includes National Parks, present or proposed Provincial Parks, Wilderness Areas, Natural Areas, Restricted Development Study Areas, Watershed Research Study Basins, Designated Recreation Areas, Designated Heritage Sites, Wildlife Sanctuaries, settled urban areas and major lakes and rivers. These are areas for which it has been determined that alternate land uses have a higher priority than coal activity. Category 1 also includes most areas associated with high environmental sensitivity; these are areas for which reclamation of disturbed lands cannot be assured with existing technology and in which the watershed must be protected.

Category 2 in which limited exploration is desirable and may be permitted under strict control but in which commerical [sic] development by surface mining will not normally be considered at the present time. This category contains lands in the Rocky Mountains and Foothills for which the preferred land or resource use remains to be determined, or areas where infrastructure facilities are generally absent or considered inadequate to support major mining operations. In addition this category contains local areas of high environmental sensitivity in which neither exploration or development activities will be permitted. Underground mining or *in-situ* operations may be permitted in areas within this category where the surface effects of the operation are deemed to be environmentally acceptable.

Category 3 in which exploration is desirable and may be permitted under appropriate control but in which development by surface or underground mining or *in-situ* operations will be approved subject to proper assurances respecting protection of the environment and reclamation of disturbed lands and as the provision of needed infrastructure is determined to be in the public interest. This category covers the Northern Forested Region and eastern portions of the Eastern Slopes Region shown in Map 1 of Appendix 2. It also includes Class 1 and Class 2 agricultural lands in the settled regions of the Province. Although lands in this category are generally less sensitive from an environmental standpoint than the lands in Category 2, the Government will require appropriate assurances, with respect to surface mining operations on agricultural lands, that such lands will be reclaimed to a level of productivity equal to or greater than that which existed prior to mining.

Category 4 in which exploration may be permitted under appropriate control and in which surface or underground mining or *in-situ* operations may be considered subject to proper assurances respecting protection of the environment and reclamation of disturbed lands. This category covers the parts of the Province not included in the other three categories.

Table 1 presents a summary of the classification system and the extent of exploration and development permitted in the four land categories. A further description of the Categories and two maps related to them are given in Appendix 2.

The Government emphasizes that the present classification, while based upon the best available knowledge, is subject to review in the light of changing knowledge and new technology related to environment protection, reclamation and mining methods. The Government will consider documented applications for reclassification of lands from any interested persons. Such applications should be addressed to the Minister of Energy and Natural Resources with a copy to the Minister of the Environment.

It is also important to note that lands in Category 2, 3 or 4 are not *automatically* open to exploration nor are lands in Category 3 or 4 *automatically* open to exploration and development. Each ap-

180. *Supra* n. 28.

181. *See* Energy and Natural Resources Information Letter 78-12.

plication for rights to explore, for leases to Crown coal rights and for authorization for development will be considered on its own merits through the procedure outlined in Section 4.1, 4.2 and 4.3. Particular care will be taken in the appraisal of applications for exploration or development in productive or potentially productive agricultural areas.[182]

The zoning system established by the coal policy is strictly internal to the Department of Energy and Natural Resources. No reference is made to it in any legislation or regulations. Administration and enforcement of the various zones centres on ministerial discretion.[183] As well, the majority of the lands falling within Category 1 are governed by legislation which already gives the government the power to restrict development[184] and the majority of all Category 2 lands are owned by the Crown as to both surface and mineral rights. Thus the government has the proprietary control necessary to implement the zoning system. The land use zoning in the coal policy also meshes closely with the zoning carried out under the

182. *Supra* n. 1, s. 3.13. Interestingly, the E.R.C.B. recital of the zoning policy in its Mining Guide (*supra* n. 8) has made slight changes to the explanation of the four categories.

183. *E.g.*, The Mines and Minerals Act, *supra* n. 78, ss. 12 and 12.1:
s. 12 (1) The Minister may restrict the dispostion or withdraw from disposition any mineral in any specified area in any manner he may consider warranted.
(2) During the period that a mineral is withdrawn from disposition pursuant to subsection (1), no person has the right to acquire that mineral in all or any part of the area specified.

s.12.1 (1) The Minister may
(a) exchange any Crown minerals for other minerals in Alberta;
(b) acquire by expropriation any estate or interest in mines or minerals where the Minister is of the opinion that any or any further exploration for or development of those mines or minerals is not in the public interest;
(c) accept the surrender of, cancel or refuse to renew an agreement as to all or part of the location where the Minister is of the opinion that any or any further exploration for or development of the mineral to which the agreement relates within that location or part thereof is not in the public interest, subject to the payment of compensation determined in accordance with the regulations for the lessee's interest under the agreement;
(d) order the remission of all or part of any rental, fee or other sum payable under this Act, the regulations or an agreement, with or without conditions;
(e) where any provision of this Act, the regulations or an agreement requires the doing of any act within a fixed period or at a fixed time, by order, with or without conditions, extend that period or fix another time by or on which that act is to be done, whether the period within which or the time by or on which the act ought to be done has or has not expired or arrived, as the case may be;
(f) where he receives evidence satisfactory to him that a lessee has been prohibited by circumstances beyond the lessee's control, other than financial circumstances, from conducting operations on his location, from time to time agree with the lessee to extend the term of the lessee's agreement for an additional period or periods not exceeding 5 years in the aggregate upon any condition specified by the Minister in the case of any extension;
(g) reinstate upon such terms and conditions he may prescribe, an agreement, a part of the location of an agreement or a zone in the location of an agreement, that has been surrendered, cancelled or forefeited, if application for the reinstatement is made
(i) within 30 days of the date of the surrender, cancellation or forefeiture, or
(ii) within 90 days of the date of the surrender, cancellation or forfeiture, where the surrender, cancellation or forfeiture was made in error;
(h) where he considers that the circumstances warrant it, agree with a lessee to grant an agreement to the lessee in substitution for an agreement held by the lessee.
(2) Within 60 days of the completion of an exchange under subsection (1), clause (a), the Minister shall cause to be published in the Gazette a notice stating the particulars of the exchange and the reason for the exchange.

184. *E.g.* The Wilderness Areas Act, S.A. 1971, c. 114, as am.; and The Provincial Parks Act, S.A. 1974, c. 51.

Eastern Slopes Policy.[185] Coal leases in Category 4 lands are presently available for disposition.[186]

Since the zoning system is not legislated, the appeal procedures set out in the coal policy are handled administratively. Questions such as who might be an interested person, what might be the consequences of an "unfair" administrative rejection of an appeal, or what were the original reasons for the particular zoning,[187] would therefore not seem to be answerable or reviewable by resort to the courts. The E.R.C.B. has, however, set out nine specific pieces of information required when any coal zoning appeal is taken.[188]

N. *Submission of results of exploration*

> The Coal Conservation Act and regulations under it require the full submission to the Energy Resources Conservation Board of the results of exploration activity. This includes samples, cores, test data, surveys logs [sic] and other relevant data or information. These data are of vital importance in appraising the extent of Alberta's coal reserves. This information is kept confidential for a period of time and then becomes available to the public.[189]

The E.R.C.B.'s jurisdiction in this regard comes from s. 4(g) of The Coal Conservation Act.[190] Part IV of The Coal Conservation Regulations sets out what is required to be submitted to the E.R.C.B.[191] Data regarding the

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185. *Supra* n. 2.

186. *Supra* n. 181.

187. *E.g.* the Government has admitted that one of the factors influencing the original zoning was the location of coal reserves that were known at the time.

188. *Supra* n. 8 at 2-4:
Information Requirements for Applications for Reclassification of Lands Under the Coal Development Policy:
- A statement explaining the nature and purpose of the proposed reclassification.
- An overall statement of justification for the change, describing the economic and/or social benefits to the province should such a reclassification be approved.
- If a more protective classification is being requested, the applicant must submit sufficient background information to prove the significance of the area in both a regional and provincial context in order to justify the withdrawal of land and resources from future exploration or development.
- A statement of the exploration or development to take place including the reasons for selecting the particular site, the principal developer, a description of the specific activities to be undertaken on the land.
- A statement describing the timing of any exploration or development.
- A statement of present and possible land use conflicts, eg. timber, grazing, recreation, fisheries and wildlife, and how the conflicts will be resolved.
- A statement describing the known and foreseen environmental effects on the area, including impact on such things as water, soil, timber, vegetation and any measures that will be required to minimize any known or expected adverse effect.
- A statement describing the reclamation measures that will be taken when the activities are completed or terminated.
- A map(s) illustrating (scale – medium, eg. 1:50,000)
  - the location of the proposed reclassification by Quarter section, Township, Range, and Meridian.
  - the location of proposed and/or existing infrastructure such as roads, trails, and powerlines.
  - details of Crown leases and freehold coal lands ownership within the proposed exploration/mining area.

189. *Supra* n. 1, s. 3.14.

190. *Supra* n. 53:
The purposes of this Act are . . . (g) to provide for the recording, and for the timely and useful dissemination of data and information relating to exploration for coal and to the occurrence, reserves, quality, production, transportation, processing and use of coal in Alberta.

191. *Supra* n. 119, *see also supra* n. 8 at 3-13.

location and drilling of exploratory holes is available to the public immediately, while the logs, core segments, etc. therefrom are not available until two years from completion of the hole.[192] Data from infill holes are kept confidential for five years.[193] Special tests submitted to the Board are kept confidential until the Board decides their release is in the public interest.[194] However, an operator may request that all his exploration data be kept confidential.[195] The Board may use confidential information for certain specified purposes.[196] Certain information regarding surface disturbances must be submitted to the Land Conservation and Reclamation Council upon completion of an exploration program.[197]

O. *Restrictions on existing leases; lease purchase by the government*

> The Government recognizes that the restrictions now imposed on exploration and development in the areas classified as Category 1, 2 or 3 will affect persons holding Crown leases in areas in those categories and is prepared to purchase such leases for sums commensurate with expenditures which have been made with respect to them by the lessees. The Government requests holders of such leases in Category 1 to sell them back to the Government on this basis. Leases not sold will be subject to normal rental payments but will not be renewed on expiry of their terms.
>
> Holders of Crown leases in Categories 2 and 3 may also sell their leases back to the Government. Alternately, they may continue to hold them on payment of normal rentals, recognizing the restrictions on development, and may expect them to be renewed on application.
>
> Where the Government buys back Crown leases in areas in Categories 1, 2 or 3 it will do so on the basis of approved expenditures, adjusted to a current dollar basis, plus interest.
>
> Where freehold rights to coal and leases of such rights are affected by the restrictions on exploration and development imposed by Categories 1, 2 and 3, the Government is prepared to purchase the lessor rights on the same basis as for lessees of Crown rights.
>
> Where the Government purchases leases as described above the results of any exploration work done on the leases will immediately be released to the public.[198]

The buy-back is accomplished pursuant to s. 12.2(1) of The Mines and Minerals Act.[199] The amount of compensation is determined in accordance with The Mineral Rights Compensation Regulation.[200] Bonus application fees, rentals, exploration and development costs, plus interest for up to ten years, are all included in this compensation.[201] Since the regulations are phrased in the imperative it appears that the Minister is obligated to pay these amounts. Any party who has a lease repurchased or cancelled

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192. *Supra* n. 119, ss. 53 and 54.
193. *Id.*, s. 55.
194. *Id.*, s. 59.
195. *Id.*, s. 16.
196. *Id.*, s. 63:
> (1) Notwithstanding the provisions of this Part, the Board may use confidential information for the purpose of preparing reports, maps and supporting information which it may from time to time publish.
> (2) Where the Board uses confidential information in accordance with subsection (1) the report, map or supporting information shall be confined to
> (a) delineation of the field or deposit,
> (b) indication of its general geological identity, configuration, size, direction, and degree of dip,
> (c) disclosure of the Board's estimate of reserves,
> (d) in the case of a near surface coal deposit, qualitative notation that the reserves are considered to be recoverable by stripping, and
> (e) in the case of coal recoverable by underground methods, the average depth at which the coal lies.

197. *Supra* n. 17, Part 6.
198. *Supra* n. 1, s. 3.15.
199. *Supra* n. 78.
200. Alta. Reg. 161/78.
201. *Id.*, s. 2.

also acquires a right of first refusal should the government decide to reissue the lease at some future date.[202] The Lieutenant Governor in Council may authorize the purchase of mineral rights in order to prevent environmental degradation or "inconsistent" use of land.[203] The government has stated that it would be willing to buy back any affected Crown leases if it rejects a development proposal at the preliminary disclosure stage.[204] However, it is not obligated to do so and it seems that there would be instances of rejection at the preliminary disclosure stage where the government would not offer to buy back the affected Crown leases, for example, if it was rejected by reason of failure of the applicant to comply with an approval requirement. In fact, in no instances would it appear that the government is obligated to buy back leases; its only obligation is to pay certain amounts once it has decided to repurchase the leases. The Mineral Rights Compensation Regulations,[205] in determining compensation, make no provision for an adjustment to a current dollar basis, as was the stated intention under the coal policy.

P. *Granting of leases for development*

> About 80 percent of the coal resources of Alberta are owned by the Crown in the right of Alberta. The remaining privately owned 20 percent are located mainly in the central and southern settled regions of the Province.
>
> Leases of Crown coal rights granting the right to produce the coal (subject to all applicable regulatory requirements) are issued under the provisions of The Mines and Minerals Act; such leases have an initial term of 21 years and require payment of an annual rental of $1 per acre per year.
>
> The Government has recognized that the leasing of Crown coal rights must accord with general land use and resource development policies applicable to all public lands in Alberta. Consequently since June, 1973 Crown coal leases have not been granted in areas such as the Eastern Slopes where long-term resource development policies have been under review. Elsewhere in the Province, leases of Crown coal rights have been granted only after review by an interdepartmental referral committee, and only in areas where it seems likely that exploration and development activities can meet strict environmental protection and reclamation standards.
>
> In keeping with this policy, new coal leases will be granted only in areas where a reasonable likelihood exists that commercial mining operations will be permitted in the foreseeable future, subject to normal approval and regulatory procedures. Time-dated applications for new leases in Category 2 or 3 lands will be received and given preference in the order of receipt if and when the lands are reclassified as Category 4 or a specific development is approved. The possible need for the issuance of exploration permits will be considered. . .
>
> New leases and renewals will be issued for initial or renewal terms of 15 years. The right of lease renewal will be assured to lease holders who commence or receive approval for commercial development. This will apply to all leases covered by the project approval. New leases and renewals will be subject to annual rental payments at the present rate of $1 per acre, but holders of them may be required to conduct satisfactory programs of detailed reserves appraisal unless commercial operations are underway. The results of the appraisal would be submitted both to the Department of Energy and Natural Resources and to the Energy Resources Conservation Board.[206]

Crown coal leases, as well as being subject to the terms specifically included in the document, are also subject to the provisions of The Mines and Minerals Act.[207] For anything but Category 4 lands, the Department

202. *Id.*, s. 8.

203. *Supra* n. 75, s. 14:
> The Lieutenant Governor in Council upon the recommendation of the Minister, may authorize the Minister of Energy and National Resources to acquire by expropriation any estate or interest in mines or minerals within, upon or under any land to prevent the environmental degradation or inconsistent use of that land as a result of the exploration for or recovery of those mine or minerals.

204. *Supra* n. 8 at 4-5.

205. *Supra* n. 200.

206. *Supra* n. 1, s. 3.16.

207. *Supra* n. 78.

of Energy and Natural Resources currently accepts applications for leases and time dates them, but does not issue coal leases. Where there is more than one interested party for a particular acreage, the Department has the discretion to lease the mineral interest by public tender.[208] It is not known whether the practice of time dating coal lease applications would give any party a priority right to the actual coal leases. The Minister, it seems, would still have the discretion to issue a particular coal lease to a party who was not the first to apply for it. In spite of the coal policy assurance of a renewal of leases in approved commercial developments, the government is under no obligation to renew coal leases.[209] On the other hand, a coal lease purports to grant the right to the coal that is the property of the Crown and not merely the right to produce the coal, as is usually the case with Crown mineral grants.[210]

No syndicate or other association of persons can acquire a lease in the name of that association unless it has been incorporated by or under an Act of the Province and approved by the Minister as an association that may hold the lease.[211] The Crown Mineral Disposition Review Committee established under Part II of The Land Conservation Regulations, prior to the disposition of any Crown mineral rights, reviews the surface of the lands and the lands adjacent thereto having regard to the nature of the proposed disposition and its effect or possible effect on the environment and subsequently recommends granting of the lease or refusal.[212]

Q. *Regulation to ensure safe and efficient development without waste*

In addition to ensuring against adverse environmental impact the Government, through the provisions of The Coal Conservation Act and The Coal Mines Safety Act, and regulations, orders, permits and licences under them, will ensure that all coal mining and processing operations are carried out with full regard for safety and industrial health, efficiency, and the maximum practical recovery without waste of the coal resources being tapped.

Proper operations are ensured not only by the requirements of regulations and orders and the conditions of permits and licences but by actual field inspection by trained personnel of the Energy Resources Conservation Board. These inspectors co-operate with personnel of the Department of the Environment and Energy and Natural Resources to ensure compliance with conditions relating to the protection of the environment and of the renewable resources.[213]

Pursuant to The Coal Conservation Act, the E.R.C.B. is to ensure the orderly, efficient and economic development of Alberta's coal resources in the public interest, to effect conservation and prevent waste of the coal resources of Alberta and to ensure the observance of safe and efficient practices in exploration for, mining, storing, processing and transporting coal.[214] In addition to the E.R.C.B. approval required to construct a mine and processing plant,[215] licenses are required from the E.R.C.B. to actually operate the mine and processing plant[216] and any facilities directly con-

208. *Supra* n. 78, s. 61.
209. *Id.*, s. 65(3).
210. *Id.*, s. 64.
211. *Id.*, s. 44(2).
212. *Supra* n. 21, ss. 16 and 17.
213. *Supra* n. 1, s. 3.17.
214. *Supra* n. 53, s. 4.
215. *Id.*, ss 10 and 23.
216. *Id.*, ss. 11 and 23. The Board has a practice of licensing mines for the life of the pit or five years, whichever is less. They are generally renewed upon application if operation during the previous license period satisfies the Board in matters affecting safety and resource conservation. *Supra* n. 89 at 12-1.

nected with the coal processing plant.[217] If the Board feels that coal is not being recovered in accordance with good conservation practices and that it could be more efficiently recovered by other practical and reasonable mining or processing procedures, it may direct the holder of a permit, licence or approval to alter his program of development or operations accordingly.[218] The Board also has a more general jurisdiction to effect conservation under the Energy Resources Conservation Act.[219] In addition, the Lieutenant Governor in Council can reduce the Crown royalty where in his opinion it is necessary or desirable in the interests of conservation and the prevention of waste or the loss of recovery of marketable coal or products of coal.[220] Finally, the E.R.C.B. has an ultimate jurisdiction to make such orders and to attach such conditions to approvals as it feels necessary to effect the purposes of The Coal Conservation Act.[221] The Supreme Court of Canada has recently attempted to delineate the limits of this jurisdiction.[222]

As for safety in the minesite, Part IV of The Coal Mine Safety Regulations[223] sets out what has to be done in this regard. The Department of Labour now has jurisdiction over coal mine safety. New equipment, new blasting techniques, the location and use of explosives and detonators, magazines, man riding procedures, battery charging stations, diesel garages, and notice of commencement of operations all require approval.[224]

R. *Efficient use of coal in Alberta — maximum upgrading*

> In order to secure maximum benefit to Alberta from coal mining and processing activity, Government policy will require that so far as practical and beneficial to the Province, processing for the purpose of upgrading coal or any coal or any coal product to market specifications be undertaken in Alberta. This policy will apply to all types of coal as well as to secondary processing of all major products that are or may in future be obtained from coal by gasification, liquefaction or other forms of treatment.
>
> The extent of processing that should be undertaken in Alberta in connection with any particular development will be assessed under the provisions of The Coal Conservation Act, having regard both for market opportunities and for all relevant environmental, technical, economic and social aspects of the proposals. The Energy Resources Conservation Board will determine to what extent potentially useful by-products from any project, if not immediately saleable, should be stockpiled and conserved for future marketing.[225]

Except for the general purposes of The Coal Conservation Act,[226] there are no legislative requirements for upgrading of coal in Alberta. The application of this portion of the policy falls under the administrative discretion of the E.R.C.B. and the Lieutenant Governor in Council.

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217. *Supra* n. 53, s. 23(d).
218. *Id;* n. 47, s. 41.
219. *Supra* n. 148, ss. 2(c) and (e).
220. *Id.*, s. 3(6).
221. *Supra* n. 53, s. 7:
> The Board, with the approval of the Lieutenant Governor in Council, may make such just and reasonable orders or directions as may be necessary to effect the purposes of this Act but are not otherwise specifically authorized by this Act.
222. *Supra* n. 128.
223. The Coal Mines Safety Regulations, Reg. 333/75, as am..
224. *Supra* n. 8 at 8-11.
225. *Supra* n. 1, s. 3.18.
226. *Supra* n. 53, ss. 4(c) and (d).

S. *Appraisal and protection of Alberta's requirements*

The protection of a supply of coal of suitable quality and suitably located which may be recovered at reasonable cost and which is adequate for Alberta's present and all foreseeable future needs will be assured. This applies to requirements for present and future thermal power plants; future metallurgical operations; future other industrial requirements including petrochemical operations; future surface and *in-situ* gasification operations; and future coal liquefaction operations.

The protection will be assured under the provisions of The Coal Conservation Act by the Energy Resources Conservation Board through periodic assessments of Alberta's coal requirements made following pubic hearings and continuing appraisals of the proved and available reserves of coal in each of its major types. The Board will also ensure that the most appropriate deposits, having regard for location and costs, are made available for the generation of electric energy for Alberta. Permits for mining developments to serve markets outside Alberta will only be granted where it is found in the public interest, having regard to the present and future requirements for coal in Alberta.

If for the protection of Alberta's future requirements it should be found necessary to deny a proposed earlier development meeting other requirements of this policy, lease rentals and work requirements on affected Crown properties would be suspended until development was authorized.[227]

The E.R.C.B. carries out its periodic assessments of Alberta's coal requirements pursuant to section 4(b) of The Coal Conservation Act.[228] There are numerous requirements for operators to supply the E.R.C.B. with coal reserve information and data.[229]

Part 5.1 of The Coal Conservation Act sets out the details and necessity of obtaining an industrial development permit when coal is used as a raw material, reductant or fuel in any industrial or manufacturing operation. Small manufacturing operations and the production of electrical energy are excluded from the requirement to obtain an industrial development permit. No permit will be granted unless the Board determines that it is in the public interest to do so having regard to, among other considerations, the efficient use without waste of coal or products derived from coal and the present and future availability of coal in Alberta.[230]

The Board may, when requested to do so by the Lieutenant Governor in Council or upon its own motion, enquire into, examine, and investigate any matter referred to in s. 4, the purposes section of The Coal Conservation Act.[231] It may also hold an investigation into any matter connnected with the development and operation of a mine site, mine coal processing plant and connected facilities.[232] Finally, it may make enquiries and investigations and prepare studies and reports on any matter within the purview of any Act administered by it relating to energy resources and energy, and recommend to the Lieutenant Governor in Council such measures as it considers necessary or advisable in the public interest related to the exploration for, production, development, conservation, control, transportation, transmission, use and marketing of energy resources and energy.[233] It can be seen that the E.R.C.B. has wide ranging

227. *Supra* n. 1, s. 3.19.

228. *Supra* n. 53:
The purposes of this Act are . . . (b) to provide for appraisals of coal requirements in Alberta and in markets outside Alberta.

229. *E.g. supra* n. 53, s. 30 and *supra* n. 119, ss. 65 to 69.

230. *Supra* n. 53, s. 27.1(5); *see also* D. J. Jenkins, "Industrial Development Permits" (1979) 17 *Alta. L. Rev.* at 467.

231. *Supra* n. 53, s. 8.

232. *Id.*, s. 40.

233. *Id.*, s. 24.

inquisitorial and investigative powers in regard to energy in general and coal in particular.

T. *Supply for Canadian markets beyond Alberta*

> The Government recognizes that Alberta's coal resources will play an increasing important [sic] role in meeting essential energy demands in other parts of Canada. The Government will therefore be prepared under the provisions of The Coal Conservation Act to consider proposals for development of new coal mining and processing facilities that may from time to time be needed in order to help meet Canadian demands.
>
> Developments to meet Canadian markets beyond Alberta will be authorized only if they meet all normal requirements, are in the Alberta public interest and provided that they are compatible with the protection of Alberta's present and future requirements.
>
> To ensure stability of supply and avoid unduly rapid depletion of a particular grade of coal, or of a particular coal deposit, preference may be given to projects designed to produce and market an appropriate blend of different coals.[234]

There does not appear to be any specific legislative implementation of the government's concern regarding coal required to help meet Canadian demands. It is difficult to envision how the province could enact any such provisions without running the danger of overstepping the bounds of its provincial jurisdiction under the British North America Act.[235] On the other hand, from 1928 to 1971 federal subvention aid was used to offset part of Alberta coal production and transportation costs and so enable Canadian coal to compete against imported fuels in central Canadian markets.[236] To date there has been no practical experience with production and marketing of blends of different coals and the existing law does not reflect the stated government preference for such projects.

U. *Supply to foreign markets*

> Where it appears to be in the Alberta public interest, the Government will consider proposals for new coal mining and processing development from which thermal and metallurgical coal can be supplied to foreign markets under suitable contractual arrangement. These will be considered under the provisions of The Coal Conservation Act.
>
> Developments for foreign markets will also have to meet all normal requirements as described elsewhere and be compatible with the protection of Alberta's present and future requirements.[237]

It is interesting to note that the federal government to date has not enacted any legislation requiring government or National Energy Board approval of coal exports out of the country. What the Alberta government therefore approves and dictates through its various approval processes is the sole regulating factor for exports of Alberta coal out of the country.

V. *Pricing and marketing*

> It is not the Government's intention at this time to intervene in prices or other marketing arrangements determined by contract between the producer and buyer of coal, provided they are compatible with overall government policy and the provision of applicable legislation, regulations and orders. The Government will however require that provision be made, in all future contracts for the sale of coal for delivery outside the province, for price review and possible redetermination at two-year intervals. The Government will arrange for a regular confidential monitoring by the Department of Energy and Natural Resources or the Energy Resources Conservation Board of the prices of coal sold under contract for markets outside Alberta. Should a situation develop where in the Government's view a fair price is not being received for coal shipped from Alberta, the Government will intervene as appropriate.[238]

234. *Supra* n. 1, s. 3.20.
235. (U.K.) 30 Vict., c. 3.
236. *Supra* n. 135 at 2-8.
237. *Supra* n. 1, s. 3.21.
238. *Supra* n. 1, s. 3.22.

True to its word, the government has not intervened in prices and marketing arrangements. But it also has not insisted that all contracts for the sale of coal for delivery outside the province include price review and redetermination provisions at two year intervals.[239] A mine operator is obliged to report to the E.R.C.B. monthly raw coal production, disposition and the value of sales for each month.[240] However, the Board is required to keep confidential specific references to costs of production or processing and pricing.[241] When the government speaks of intervening if a fair price is not being received, it is probably referring to the Crown's right to take its royalty share in kind.[242] However, in view of the wide discretionary powers of both the government, through the Department of Energy and Natural Resources, and the E.R.C.B., there is virtually an unlimited number of other steps that it could take. As part of the technical mine permit application, the E.R.C.B. requires a general statement concerning marketing plans.[243] A typical example of the government's current thinking is the condition attached to the Obed-Marsh project approval that the permittee:[244]

> satisfy the Minister of Energy and Natural Resources that, at least six months prior to the date of start up of production, the price of any coal sold for use outside Alberta is generally compatible with the prices paid for similar types and qualities of coal used in Canada and elsewhere, and that appropriate provision has been made for the review and redetermination of prices in each contract for the sale of coal.

W. *Manpower training*

> In order to enable Albertans to avail themselves of employment and career opportunities in coal exploration and development activities, and to alleviate potentially serious shortages of qualified manpower the Government will keep itself informed on the projected manpower needs for the industry and take such measures as may be required to assure the adequacy of training facilities.
>
> The Government will expect the coal industry and related enterprises to develop or expand on-the-job training programs and to afford employees suitable opportunities of skill-upgrading programs.[245]

The government has not enacted any specific legislative requirements in regard to on-the-job training and skill upgrading programs in the coal industry.

X. *Research and development*

> The Government recognizes that efficient development and use of Alberta's coal resources will depend on continued and increased research and on the exchange of scientific and technical information with the coal industry and government agencies elsewhere.
>
> To help generate up-to-date information on the location, extent and characteristics of Alberta's coals, and to assist the development of new or improved technologies for extracting, processing, transporting and using the various kinds of coal found in the province, the Government will therefore continue to support resource appraisal programs by the Energy Resources Conservation Board and coal-related research projects at the Alberta Research Council. Through detailed discussions with industry, the Government will also assess what additional investigations and test facilities may from time to time be required to meet Alberta's needs and, where desirable, participate in specific studies and in the establishment of additional facilities.

239. Export coal contracts have been signed that do not provide for biannual price reviews.
240. *Supra* n. 119, ss. 68 and 69.
241. *Id.*, s. 61.
242. *Supra* n. 148.
243. *Supra* n. 8 at 5-8.
244. O.C. 273/81.
245. *Supra* n. 1, s. 3.23.

> The Government will take steps to ensure that Alberta is an active party to current and future international technology exchanges, and that relevant scientific and technical advances made elsewhere are available for detailed assessment and possible use in Alberta.[246]

Except for the information gathering and resource appraisal powers within the jurisdiction of the E.R.C.B.,[247] the government has not enacted any research and development legislation specifically concerning the coal industry.

III. CONCLUSION

The province of Alberta currently has in effect a comprehensive regulatory regime governing the coal industry. Prime responsibility for managing this regime lies with the Department of Energy and Natural Resources and the Energy Resources Conservation Board, and to a lesser extent the Department of the Environment. The focal point of the approval process is the mine permit application and hearing before the E.R.C.B., although ultimate responsibility for any major project lies with the Lieutenant Governor in Council.

It also can be seen that the government has basically chosen a method of administrative control of the industry through the Alberta public service and the executive branch. This decision is probably grounded on a number of factors, notably the historical development of our system of government, political ideology, the newness and potential for expansion of the coal industry in Alberta, the rapidly changing state of the art of coal technology, and the consequently perceived requirement for administrative flexibility and government intervention. As a result of this the industry, although highly regulated by government, is not based upon any cohesive set of legal rights; it is therefore "administered", rather than "regulated" in a legal sense.

On the other hand, in emphasizing the "one window" approach centered around the required E.R.C.B. hearing, and in directing that a number of other required approvals be examined at that hearing,[248] the Alberta regime has to a great extent established both the proponent's and the public's "right" to have decisions on the project made openly. The salient aspects of any new coal development cannot escape public scrutiny and debate in the E.R.C.B.'s forum.

Unfortunately, the openness of the real decision making may be more perceived than actual, in view of the E.R.C.B.'s limited jurisdiction and the wide scope for ministerial and Lieutenant Governor in Council discretion. At law this discretion is so broad that it can vary or overturn almost any decision or recommendation made at or arising out of the public hearing. Such discretion is shielded from public examination since there are few, if any, methods of review of these decisions other than political redress by elections, and since no reasons for the use of the discretion need be given. It may be the inarticulated premise of the Alberta regime that because decisions in regard to the coal industry have such a major impact on the whole province, they must be dealt with in their entirety by the political process and only in limited areas, through and subject to our legal system.

246. *Supra* n. 1, s. 3.24.

247. *E.g. supra* n. 229.

248. *E.g.* The environmental impact assessment and cost-benefit and social impact analysis are to be complete and before the Energy Resources Conservation Board for the public hearing, even though the E.R.C.B. is not the assessing body.

TAB 13

Date: 20170616

Dockets: A-78-17 (lead file); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-73-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17; A-86-17

Citation: 2017 FCA 128

2017 FCA 128 (CanLII)

Present: STRATAS J.A.

BETWEEN:

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝ AM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, MUSQUEAM INDIAN BAND, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, KWAW-KWAW-APILT, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY

Applicants

and

ATTORNEY GENERAL OF CANADA, NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC

Respondents

and

ATTORNEY GENERAL OF ALBERTA

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 16, 2017.

REASONS FOR ORDER BY: STRATAS J.A.

2017 FCA 128 (CanLII)

Date: 20170616

Dockets: A-78-17 (lead file); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-73-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17; A-86-17

Citation: 2017 FCA 128

2017 FCA 128 (CanLII)

Present: STRATAS J.A.

BETWEEN:

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝ AM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, MUSQUEAM INDIAN BAND, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, KWAW-KWAW-APILT, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY

Applicants

and

ATTORNEY GENERAL OF CANADA, NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC

Respondents

and

ATTORNEY GENERAL OF ALBERTA

Intervener

[76] An academic commentator expressed it this way:

> Without knowing the reasoning behind a decision, it is impossible for a judge to determine if it is founded upon arbitrary reasoning. Thus, in order for a judge to determine whether a decision maker acted lawfully, the decision maker must provide reasons adequate to allow a reviewing judge to determine why the decision maker made the decision they did and whether it followed explicit statutory requirements [or the basis for the decision must be apparent in the record]. If the judge cannot ascertain how the decision was made [even in light of the evidentiary record], then the court cannot fulfill this role and decisions made in violation of the rule of law may be sanctioned by the court.

(Paul A. Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016), 29 C.J.A.L.P. 87 at p. 113.)

[77] In support of its motion, the Tsleil-Waututh Nation forcefully and repeatedly makes the point about immunization. It cites the dissenting reasons of this Court in *Slansky*, above, correctly noting that the majority did not disagree with the propositions put on this point. *Slansky* put the point this way (at para. 276):

> If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to detect reversible error on the part of the tribunal. In other words, an inadequate evidentiary record before the reviewing court can immunize the tribunal from review on certain grounds.

[78] In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Put another way, all holders of public power are to be

2017 FCA 128 (CanLII)

accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of law: *Slansky* at paras. 313-315. Subject to any concerns about justiciability, when a judicial review of executive action is brought the courts are institutionally and practically capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility. That assessment is the proper, constitutionally guaranteed role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir*, above; *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737 at para. 66; *Habtenkiel v. Canada (Citizenship and Immigration)*, 2014 FCA 180 at para. 38; *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, 382 D.L.R. (4th) 720 at para. 140. But, at least in the situation where the evidentiary record of the administrative decision-maker is not before the reviewing court in any way whatsoever—*i.e.,* there is not even a summary or hint of what was before the administrative decision-maker—or the record is completely lacking on an essential element, concerns about immunization of administrative decision-making can come to the fore.

[79] In this Court, administrative decision-makers whose decisions cannot be fairly evaluated because of a complete lack of anything in the record on an essential element—situations where in effect the administrative decision-maker says on an essential element, "Trust us, we got it right"—have seen their decisions quashed: see, *e.g.*, *Leahy* above at para. 137; *Kabul Farms Inc.* at paras. 31-39; *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337, 54 C.P.R. (4th) 15 at para. 17. The test would seem to be that if a particular evidentiary record—even if bolstered by permissible inferences and any

2017 FCA 128 (CanLII)

TAB 14

CITATION: Mathur v. Ontario, 2020 ONSC 6918
COURT FILE NO.: CV-19-00631627
DATE: 20201112

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SOPHIA MATHUR, a minor by her litigation guardian Catherine Orlando, ZOE KEARY-MATZNER, a minor by her litigation guardian Anne Keary, SHAELYN HOFFMAN-MENARD, SHELBY GAGNON, ALEXANDRA NEUFELDT, MADISON DYCK and LINDSAY GRAY, Applicants/Responding Party

AND:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, Respondent/Moving Party

BEFORE: Justice Carole J. Brown

COUNSEL: Nader R. Hasan, Justin Safayeni, Spencer Bass, Fraser Andrew Thomson, and Danielle Gallant for the Applicants

S. Zachary Green and Padraic Ryan for the Respondent

HEARD: July 13, 2020

REASONS FOR DECISION

[1] The moving party, the Attorney General of Ontario ("**Ontario**"), brings this motion to strike out an application pursuant to Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on the ground that it has no reasonable prospect of success.

[2] The Applicants seek declaratory and mandatory orders relating to Ontario's target and plan for the reduction of greenhouse gas ("**GHG**") emissions in the province by the year 2030. The Applicants submit that Ontario's target is insufficiently ambitious, and that Ontario's failure to set a more stringent target and a more exacting plan for combating climate change over the coming decade infringes the constitutional rights of youth and future generations.

[3] The issue to be determined by this Court is whether, pursuant to Rule 21, the Notice of Application (the "**Application**") should be struck. It must be determined whether it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action.

2020 ONSC 6918 (CanLII)

BACKGROUND

Greenhouse Gas Emissions and Mitigating Climate Change

[4] The Court of Appeal for Ontario has noted that "there is no dispute that global climate change is taking place and that human activities are the primary cause": *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, 146 O.R. (3d) 65 ("***Carbon Pricing Reference***"), at para. 7. These activities, which include the combustion of fossil fuels like coal, natural gas and oil and its derivatives, release GHGs into the atmosphere. When incoming radiation from the Sun reaches the Earth's surface, it is absorbed and converted into heat. GHGs act like the glass roof of a greenhouse, trapping some of this heat as it radiates back into the atmosphere, causing surface temperatures to increase: *Carbon Pricing Reference*, at para. 7.

[5] At appropriate levels, GHGs are beneficial. They surround the planet like a blanket, keeping temperatures within limits at which humans, animals, plants, and marine life can live in balance: *Carbon Pricing Reference*, at para. 8.

[6] However, an excess level of GHGs in the atmosphere is problematic because it leads to global warming. Since the beginning of the industrial revolution in the 18th century, and more particularly since the 1950s, the level of GHGs in the atmosphere has been increasing at an alarming rate. As a result, the global average surface temperature has increased by approximately 1.0 degree Celsius above pre-industrial levels (*i.e.*, prior to 1850). It is estimated that by 2040, the global average surface temperature will have increased by 1.5 degrees Celsius: *Carbon Pricing Reference*, at paras. 8-9.

[7] Global warming is causing climate change and its associated impacts. The Court of Appeal accepted that "uncontested evidence" shows that climate change is causing or exacerbating: increased frequency and severity of extreme weather events (including droughts, floods, wildfires, and heat waves); degradation of soil and water resources; thawing of permafrost; rising sea levels; ocean acidification; decreased agricultural productivity and famine; species loss and extinction; and expansion of the ranges of life-threatening vector-borne diseases, such as Lyme disease and West Nile virus: *Carbon Pricing Reference*, at para. 11.

[8] The Court of Appeal also found that recent manifestations of the impacts of climate change in Canada include: major wildfires in Alberta in 2016 and in British Columbia in 2017 and 2018; and major flood events in Ontario and Québec in 2017, and in British Columbia, Ontario, Québec and New Brunswick in 2018. The recent major flooding in Ontario, Québec and New Brunswick in 2019 was likely also fueled by climate change: *Carbon Pricing Reference*, at para. 11.

[9] One of the main methods to mitigate climate change is through pricing GHG emissions. Carbon dioxide ("**CO_2**") is the most prevalent GHG emitted by human activities; pricing GHG emissions is therefore commonly known as "carbon pricing": *Carbon Pricing Reference*, at para. 7. A pan-Canadian working group notes that "[m]any experts regard carbon pricing as a necessary policy tool for efficiently reducing GHG emissions": *Carbon Pricing Reference*, at para. 27.

[10] The United Nations Intergovernmental Panel on Climate Change, an international body that draws on the world's leading experts to provide objective, scientific information relevant to

2020 ONSC 6918 (CanLII)

climate change, noted that global net anthropogenic CO_2 emissions must be reduced by approximately 45% below 2010 levels by 2030 and must reach "net zero" by 2050 in order to limit global average surface warming to 1.5 degrees Celsius and to avoid the significantly more deleterious impacts of climate change. Deep reductions in other GHG emissions will also need to occur in order to limit global average surface warming to 1.5 degrees Celsius: *Carbon Pricing Reference*, at para. 16.

[11] Since the early 1990s, there have been global initiatives to mitigate climate change. In 1992, growing international concern regarding the potential impacts of climate change led to the adoption of the United Nations Framework Convention on Climate Change (the "**UNFCCC**"). The objective of the UNFCCC is to "stabiliz[e] [...] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Canada ratified the UNFCCC in December 1992 and it came into force on March 21, 1994. The UNFCCC has been ratified by 196 other countries: *Carbon Pricing Reference*, at para. 22.

[12] In December 1997, the parties to the UNFCCC adopted the Kyoto Protocol, which established GHG emissions reduction commitments for developed country parties. Canada ratified the Kyoto Protocol on December 17, 2002 and committed to reducing its GHG emissions for the years 2008 to 2012 to an average of 6% below 1990 levels. Canada did not fulfill its commitment and ultimately withdrew from the Kyoto Protocol in December 2012: *Carbon Pricing Reference*, at para. 23.

[13] In December 2015, the parties to the UNFCCC adopted the Paris Agreement. The parties committed to holding global warming to "well below" 2 degrees Celsius above pre-industrial levels and to making efforts to limit it to 1.5 degrees Celsius above pre-industrial levels. Canada ratified the Paris Agreement on October 5, 2016 and committed to reducing its GHG emissions by 30% below 2005 levels by 2030: *Carbon Pricing Reference*, at para. 25.

Efforts in Canada and Ontario to Mitigate Climate Change

[14] Following the adoption of the Paris Agreement in 2015, the Prime Minister of Canada met with all provincial and territorial Premiers to discuss strategies to mitigate climate change. It led to the formation of a Federal-Provincial-Territorial Working Group on Carbon Pricing Mechanisms, which was tasked with reporting on the role and effectiveness of carbon pricing in meeting Canada's emissions reduction commitments. The Working Group produced a report, which stated that economy-wide carbon pricing is the most efficient way to reduce emissions and that carbon pricing would be a foundational element of Canada's response to climate change. Based on this report, the federal government announced the Pan-Canadian Approach to Pricing Carbon Pollution. The stated goal is to ensure that carbon pricing mechanisms of gradually increasing stringency apply to all Canadian jurisdictions by 2018, either in the form of an explicit price-based system (*e.g.*, a "carbon tax") or a "cap and trade" system: *Carbon Pricing Reference*, at para. 27.

[15] On December 9, 2016, eight provinces, including Ontario, and the three territories adopted the Pan-Canadian Framework on Clean Growth and Climate Change. At that point, British

2020 ONSC 6918 (CanLII)

Columbia, Alberta, and Québec already had carbon pricing mechanisms, and Ontario had announced its intention to join the Québec/California cap and trade system: *Carbon Pricing Reference*, at para. 29.

[16] In the same year, Ontario enacted the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, S.O. 2016, c. 7 ("***Climate Change Act***"). The Act established a cap and trade program, "a market mechanism […] intended to encourage Ontarians to change their behaviour by influencing their economic decisions that directly or indirectly contribute to the emission of greenhouse gas": see s.2(2).

[17] Section 6(1) of the *Climate Change Act* established three targets for reducing the amount of GHG from the amount of emissions in Ontario: a reduction of 15% by the end of 2020, a reduction of 37% by the end of 2030, and a reduction of 80% by the end of 2050, compared to levels calculated in 1990.

[18] Section 6(2) of the *Climate Change Act* provided that the Lieutenant Governor in Council may increase the targets in s. 6(1) through regulations.

[19] Section 6(4) of the *Climate Change Act* expressly referenced and calibrated Ontario's policy to comply with the UNFCCC's standards: "When increasing the targets specified in subsection (1) or establishing interim targets for the reduction of greenhouse gas emissions, the Lieutenant Governor in Council shall have regard to any temperature goals recognized by the Conference of the Parties established under Article 7 of the United Nations Framework Convention on Climate Change."

[20] Two years later, on June 21, 2018, the federal government enacted the *Greenhouse Gas Pollution Pricing Act,* S.C. 2018, c. 12, s.186 ("***Carbon Pricing Act***"), and established a federal GHG emissions pricing regime that ensured the existence of carbon pricing mechanisms throughout Canada. Provinces were also entitled to enact their own carbon pricing schemes that meet designated federal benchmarks.

[21] The federal *Carbon Pricing Act* became the subject of various court challenges throughout Canada. The Ontario government challenged the Act on the ground that it is unconstitutional. Ontario argued that Parliament is not entitled to regulate all activities that produce GHG emissions and that the jurisdiction Canada asserts under the *Carbon Pricing Act* "would radically alter the constitutional balance between federal and provincial powers": *Carbon Pricing Reference*, at para. 54.

[22] At the Court of Appeal for Ontario, Ontario submitted that it would continue to take its own approach to meet the challenge of reducing GHG emissions. It highlighted its own environmental plan, titled "Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan", released in November 2018, which proposes to find ways to "slow down climate change and build more resilient communities to prepare for its effects": *Carbon Pricing Reference*, at paras. 55-57. This plan is the subject of this Application.

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[23] On June 28, 2019, the Court of Appeal held that the *Carbon Pricing Act* is constitutional. The decision was appealed and recently heard at the Supreme Court of Canada. A decision is pending.

Ontario Revokes Cap and Trade

[24] In July 2018, Ontario revoked cap and trade and prohibited trading of emissions allowances. It introduced the *Cap and Trade Cancellation Act, 2018*, S.O. 2018, c. 13 ("***Cancellation Act***"), which is the focus of the Application.

[25] Section 16 of the *Cancellation Act* repeals the *Climate Change Act*.

[26] Section 3(1) of the *Cancellation Act* states: "The Government shall establish targets for the reduction of greenhouse gas emissions in Ontario and may revise the targets from time to time."

[27] Section 4(1) of the *Cancellation Act* states: "The Minister, with the approval of the Lieutenant Governor in Council, shall prepare a climate change plan and may revise the plan from time to time." Section 1(1) of the Act defines "Minister" as "the Minister of the Environment, Conservation and Parks or such other member of the Executive Council as may be assigned the administration of this Act under the *Executive Council Act*".

[28] Pursuant to s.4(1) of the *Cancellation Act*, the Ministry of the Environment, Conservation and Parks published a plan titled "Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan" in November 2018 (the "**Plan**"). This is the same plan Ontario cited at the Court of Appeal for Ontario in the *Carbon Pricing Reference*.

[29] The Plan states that Ontario will reduce its GHG emissions by 30% below 2005 levels by 2030 (the "**Target**"). This is the same as the target adopted in the Paris Agreement. (The Applicants note that this Target represents a 15% decrease compared to the previous target set out in the *Climate Change Act*, as that was calibrated against the baseline of 1990, and the new Target is against the baseline of 2005. They submit that if 37% based on 1990 levels is adjusted to the 2015 level, it would be about 45%.)

[30] The Applicants, Ontario residents between the ages of 12 and 24, brought the Application to challenge Ontario's cancellation of the *Climate Change Act* and its newly-enacted Target contained in the Plan.

[31] The Applicants seek the following relief on behalf of their generation and future generations of Ontarians:

- A declaration, under s.52(1) of the *Constitution Act, 1982*, that the Target violates the rights of Ontario youth and future generations under ss.7 and 15 of the *Charter* in a manner that cannot be saved under s.1, and is therefore of no force and effect;

- A declaration, under s.52(1) of the *Constitution Act, 1982*, that the Target violates the unwritten constitutional principle that governments are prohibited from

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engaging in conduct that will, or reasonably could be expected to, result in the future harm, suffering or death of a significant number of its own citizens;

- A declaration that s.7 of the *Charter* includes the right to a stable climate system, capable of providing youth and future generations with a sustainable future;

- A declaration, under s.52(1) of the *Constitution Act, 1982*, that ss.3(1) and/or 16 of the *Cancellation Act*, which repealed the *Climate Change Act* and allowed for the imposition of more lenient targets without mandating that they be set with regard to the Paris Agreement temperature standard or any kind of science-based process, violate ss.7 and 15 of the *Charter* in a manner that cannot be saved under s.1, and are of no force and effect;

- In the alternative, the same declaratory relief sought in the paragraphs above pursuant to s.24(1) of the *Charter* and/or this Court's inherent jurisdiction;

- An order that Ontario forthwith set a science-based GHG reduction target under s.3(1) of the *Cancellation Act* that is consistent with Ontario's share of the minimum level of GHG reductions necessary to limit global warming to below 1.5 degrees Celsius above pre-industrial temperatures or, in the alternative, well below 2 degrees Celsius (*i.e.*, the upper range of the Paris Agreement temperature standard); and

- An order directing Ontario to revise its climate change plan under s.4(1) of the *Cancellation Act* once it has set a science-based GHG reduction target.

[32] Ontario, the Respondent on the Application and the moving party on this motion, seeks to strike this Application in whole, pursuant to Rule 21.01(1)(b) of the *Rules*, on the ground that the Application discloses no reasonable cause of action.

[33] Just prior to the release of these reasons, the parties alerted me to the Federal Court decision of *La Rose v. Canada*, 2020 FC 1008, released on October 27, 2020. The *La Rose* action is similar to the Application, in that 15 plaintiffs, all children and youth from across Canada, launched a *Charter* claim under ss.7 and 15 to challenge the Government of Canada's "alleged conduct that the plaintiffs associate with GHG emissions" in Canada. The plaintiffs submitted that the increased emissions contributed to climate change.

[34] The Federal Court granted Canada's motion to strike the plaintiffs' Statement of Claim without leave to amend. The court found that the *Charter* claims were not justiciable and disclosed no reasonable cause of action. The court also found that the public trust doctrine, on which the plaintiffs relied, was justiciable, but did not disclose a reasonable cause of action. That doctrine is not at issue in the Rule 21 motion before this Court.

[35] Leaving aside the issue that *La Rose* does not bind this Court, that matter is distinguishable from the motion before this Court. The differences will be commented on throughout my reasons.

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RULE 21

[36] Rule 21.01(1)(b) provides that a party may move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.

[37] Under this Rule, a claim will only be struck if it is "plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action." Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17.

[38] The Supreme Court has held that novelty alone is not a reason to strike a claim. As Wilson J. noted in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at p. 980 [emphasis added]:

> [I]f there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect […] should the relevant portions of a plaintiff's statement of claim be struck out […].

[39] The nature of the "radical defect" required to justify striking out a claim was described in very narrow terms by Epstein J., as she then was, in *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463 (S.C.), at para. 6:

> In order to foreclose the consideration of an issue past the pleadings stage, the moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our courts. Only by restricting successful attacks of this nature to the narrowest of cases can the common law have a full opportunity to be refined or extended […].

[40] More recently, McLachlin C.J. elaborated on the proper approach to novel claims in *Imperial Tobacco*, at para. 21:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. […] The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson.* Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach

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> must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [emphasis added]

[41] Ontario submits that the Application is "certain to fail" for four reasons: (1) the Application is not justiciable; (2) the Application is based on unprovable speculations about the future climate consequences of the Target; (3) there is no positive constitutional obligation on the Province to prevent harms associated with climate change; and (4) the Applicants have no standing to seek remedies for "future generations".

[42] In response, the Applicants submit: (1) the Application is justiciable; (2) the claims in the Application are capable of scientific proof; (3) the Application does not depend on positive obligations; and (4) the Applicants have standing on behalf of future generations.

[43] The overarching question that must be answered on this motion is whether this Application has a reasonable prospect of success on a full hearing. To answer this question, the following sub-questions must be addressed:

- Are the Target and the Plan reviewable by the courts?
- Are the claims in the Application capable of being proven?
- Is this matter justiciable? More specifically, do the *Charter* claims in the Application have a reasonable prospect of success?
- Does the Application depend on positive obligations on the Province?

[44] Once it is determined whether the Application has a reasonable prospect of success, three additional questions must be addressed:

- Do the Applicants have standing on behalf of future generations?
- What remedies are potentially available to the Applicants?
- Does this Court have jurisdiction to hear the Application?

ANALYSIS

A. Are the Target and the Plan reviewable by the courts?

[45] Ontario submits that if the Target and the Plan are not "law", then the court should not be making legal determinations about them (*i.e.*, they are not reviewable by the courts). It does not submit that the *Charter* does not apply to the Target and the Plan.

[46] Several sections of the *Cancellation Act* are especially relevant to this discussion [emphasis added]:

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- Section 3(1): "The Government shall establish targets for the reduction of greenhouse gas emissions in Ontario and may revise the targets from time to time."

- Section 4(1): "The [Minister of the Environment, Conservation and Parks], with the approval of the Lieutenant Governor in Council, shall prepare a climate change plan and may revise the plan from time to time."

[47] As mentioned above, pursuant to s.4(1) of the *Cancellation Act*, the Ministry of the Environment, Conservation and Parks published a climate change plan (the Plan) in November 2018. Several sentences from the Plan are especially relevant to this discussion [emphasis added]:

- Page 3: "With hard work, innovation and commitment, we will ensure Ontario achieves emissions reductions in line with Canada's 2030 greenhouse gas reduction targets under the Paris Agreement."

- Page 18: "The following chapter of our environment plan acts as Ontario's climate change plan, which fulfills our commitment under the *Cap and Trade Cancellation Act, 2018*."

- Page 21: "Ontario will reduce its emissions by 30% below 2005 levels by 2030. This target aligns Ontario with Canada's 2030 target under the Paris Agreement. This is Ontario's proposed target for the reduction of greenhouse gas emissions, which fulfills our commitment under the *Cap and Trade Cancellation Act, 2018*."

- Page 22: "The policies within this plan will put us on the path to meet our 2030 target, and we will continue to develop and improve them over the next 12 years."

Position of the Parties

[48] Ontario submits that the Target, published in the Plan, is "an expression of the provincial government's intentions and aspirations" and therefore "not a legal instrument like a statute or regulation". Ontario disagrees with the Applicants' assertion that the Target "governs" the amount of GHG emissions in the province.

[49] Ontario argues that these "aspirational statements" can also be found in other provincial statutes, such as the *Poverty Reduction Act, 2009*, S.O. 2009, c. 10, which states in the Preamble: "A principal goal of the Government's strategy published on December 4, 2008 is to achieve a 25 per cent reduction in the number of Ontario children living in poverty within five years." Ontario argues that it does not follow that courts are empowered to make a declaration that the goal of reducing child poverty by 25% is unlawful because it is insufficiently ambitious, and that the Constitution requires that the Government must instead make its goal the reduction of child poverty by, for example, 50% or 75%, or the eradication of poverty altogether.

[50] Ontario further submits that the Target has no legal effect on anyone, as the Target itself does not change the law that governs the burning of natural gases, since there are other statutes,

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regulations, and policies. Evaluating the Target's merits, therefore, is not a question with legal content, and, on that basis, the Application should be struck.

[51] Ontario also contends that the Plan is unlike a statute because it does not have a "fixed and definite meaning" and is unlike a regulation, which is similar to a statute that is enacted by the Lieutenant Governor in Council. The Plan is therefore more like a press release, a speech in the assembly, or a budget presentation. Ontario describes the Plan as essentially a tool "that lays out for the public in detail what the government intends to do."

[52] The Applicants submit that the Plan is "law" in that it is "promulgated pursuant to a statutory mandate [the *Cancellation Act*]". As excerpted above, the *Cancellation Act* requires the government to establish targets for the reduction of GHGs, and the Minister of the Environment, with the approval of the Lieutenant Governor in Council, shall prepare a climate change plan: see ss.3(1) and 4(1).

[53] The Applicants also point out that Ontario has, in other proceedings, relied heavily on the Plan's existence for the purpose of "justifying its conduct". In the *Carbon Pricing Reference* (reviewed above in the background section), Ontario relied on the Plan to argue that the province did not need a federal carbon tax because it had its own scheme. As the Court of Appeal outlined in the Positions of the Parties section of the reasons:

> [57] Ontario's environmental plan ("Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan") [the Plan], released in November 2018, proposes to find ways to "slow down climate change and build more resilient communities to prepare for its effects", but it will do this in a "balanced and responsible" way, without placing additional burdens on Ontario families and businesses.
>
> [58] Ontario has committed to reducing its emissions by 30% below 2005 levels by 2030 [the Target], which aligns with Canada's target under the *Paris Agreement*. It will do so, for example, by updating its *Building Code*, O. Reg. 332/12, increasing the renewable content of gasoline, establishing emissions standards for large emitters, and reducing food waste and organic waste.

[54] The Applicants submit that the Respondent cannot, in one proceeding at the Court of Appeal, rely on the Plan to argue that there is no need for a federal carbon tax due to its own Plan and Target, while in this proceeding argue that the Plan is just a "glossy brochure", as Ontario described the Plan during oral submissions.

[55] The Applicants rely on *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31, [2009] 2 S.C.R. 295 ("***GVTA***"), to argue that the Target and the Plan are "law".

[56] In *GVTA*, the Supreme Court of Canada considered whether policies of transit authorities restricting advertising on the sides of buses were "law", for the purpose of satisfying the "prescribed by law" requirement in s.1 of the *Charter*. There are two considerations. First, the court must ask itself whether the government entity was authorized to enact the impugned policies and whether the policies are binding rules of general application. The court must then consider

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whether the policies are sufficiently precise and accessible: at para. 50. Second, a distinction must be drawn between rules that are legislative in nature and rules that are administrative in nature: at para. 58. Administrative policies, intended for internal use within government as aids in the interpretation of regulatory powers, are often informal and inaccessible outside government, thereby not considered "law": at paras. 58-59, 63. Where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law": at para. 65.

[57] The Applicants submit that the Plan is "law" because it is not internal policy. It is policy of general application that was made pursuant to delegated rule-making authority (s.4(1) of the *Cancellation Act* indicates that the Minister of Environment shall set a target). Ontario also sets out in the Plan that it is Ontario's fulfilment of the requirements under the *Cancellation Act*, making the Plan a "law".

[58] Ontario, in response, submits that the *Cancellation Act* empowered and required the Minister of Environment to make a plan and a target, not to establish rules. Ontario submits that both the Plan and the Target do not establish rules or affect the rights of any individuals. More importantly, the Plan and the Target do not themselves establish standards. For example, no GHG emitters are required to comply with any standards articulated in the Plan or the Target, as there are existing emission standards in Ontario to which GHG emitters are already subject.

Analysis and Conclusion

[59] *GVTA* has limited application on this motion as it is focused on whether a policy is "law" for the purpose of the s.1 test (*i.e.*, whether the policy is "prescribed by law"). At this stage of the proceedings, the question of whether the Target and Plan are "law" need not be answered.

[60] It is not disputed that the *Charter* applies to the Target and the Plan. Ontario merely argues that the Target and the Plan are not "law" and therefore not reviewable by the courts (*i.e.*, the court should not be making legal determinations about them). However, Ontario cannot escape judicial review for its preparation of the Plan and the Target simply by arguing that they are not law. The question of whether the Target and the Plan are "law" is therefore misguided.

[61] The fundamental question on this motion is whether the preparation of the Target and Plan is governmental action that is reviewable by the courts for compliance with the *Charter*. Later in these reasons, in the justiciability section, I discuss whether the matter as a whole is reviewable by the courts. At this juncture, I must first answer the threshold question of whether the Target and the Plan – both of which the Applicants argue violate their *Charter* rights – are reviewable by the courts.

[62] While Ontario argues that neither the Target nor the Plan "binds" anyone and is merely an "aspiration" that does not itself govern the amount of GHGs in the province, I am of the view that the preparation of the Target and the Plan is to be considered government action that is reviewable by the courts. There are three reasons for this.

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[63] First, given that the Plan and Target are legislatively mandated by the Ontario legislature and sub-delegated to the Ministry of the Environment, Conservation and Parks and which is to be approved by the Lieutenant Governor in Council, it is a Cabinet decision. The Supreme Court has already found that Cabinet decisions are reviewable by the courts. In *Operation Dismantle*, [1985] 1 S.C.R. 441, the applicants alleged that the Government of Canada's decision to allow the U.S. to test cruise missiles in Canada violated s.7 of the *Charter*. The Supreme Court first considered whether this decision, made by the Government of Canada in relation to a matter of national defence and foreign affairs, is reviewable in the courts. Canada submitted that Cabinet decisions fell within the prerogative power of the Crown and that the *Charter*'s application must be restricted to the exercise of powers that derive directly from statute, not to an exercise of the royal prerogative, a source of power that exists independently of Parliament. The court disagreed with Canada and found that Cabinet decisions made pursuant to both statutory authority and the royal prerogative fall within the ambit of the *Charter* and are therefore reviewable by the courts: at para. 50.

[64] Second, the Plan and Target can be subject to judicial review because they resemble quasi-legislation or "soft law". Unlike executive legislation, quasi-legislation has a hortatory, rather than mandatory, effect on legal decision-making, notably those involving the imposition of sanctions. In other words, quasi-legislation offers advice about activities regulated by law (*e.g.*, agriculture, waste disposal). See: John Mark Keyes, *Executive Legislation*, 2nd ed. (Toronto: LexisNexis Canada, 2010), at p. 50.

[65] At the very least, the Target and the Plan can be considered quasi-legislation or "soft law" that guide internal policy making within the government. While the Target and the Plan may not directly control the emission of GHGs in Ontario, they do reflect the Province's intentions, which would presumably guide policy-making decisions. Indeed, the Plan, at p. 35, states that one of the action steps the Ministry of Environment will take is to make climate change a cross-government priority, which would include updating the Statement of Environmental Values to reflect Ontario's environmental plan. Statements of Environmental Values are prepared by applicable ministries in Ontario. Section 7 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, states that these statements are to:

> (a) explain[] how the purposes of this Act [the *Bill of Rights*] are to be applied when decisions that might significantly affect the environment are made in the ministry; and
>
> (b) explain[] how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision-making in the ministry.

Section 11 of the *Bill of Rights* further states: "The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry."

[66] Ontario has also indicated in another proceeding (the *Carbon Pricing Reference*) that federal policies should not apply to Ontario, as it already has its own provincial policy (the Plan). At the very least, this reflects the Province's intention of working toward meeting the Target. To

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do so, Ontario might decide to reduce the emission of GHGs by sectors such as transportation, industrial, building heating, agriculture, and waste disposal activities, which Ontario indicated in its factum are responsible for the great majority of GHG emissions in the Province. As the Court of Appeal noted in the *Carbon Pricing Reference*, Ontario already had plans to update its *Building Code*: at para. 58. In other words, the Target and the Plan would guide Ontario's policy making such that the Province could meet the Target it outlines in the Plan.

[67] Although quasi-legislation may not have binding legal effect, it often has something approaching it, and recent cases suggest that courts are prepared to give quasi-legislation increasing significance in adjudicating disputes: Keyes, at p. 51. A long line of cases also suggests that quasi-legislation is judicially reviewable when a legitimate basis for review is presented: at p. 58. See, *e.g.*: *Canadian Association of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 (F.C.A.); *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2007 FCA 273, [2008] 2 F.C.R. 341; and *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104 (C.A).

[68] Lastly, the Plan and Target have the force of law and are therefore reviewable. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, the Supreme Court considered administrative guidelines issued under s. 6 of the *Department of the Environment Act*, R.S.C. 1985, c. E-10, which states:

> For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada […]. [emphasis added]

[69] La Forest J. held that the section cited above authorized guidelines that have a mandatory effect:

> Here […] we are dealing with a directive that is not merely authorized by statute, but one that is required to be formally enacted by "order", and promulgated under s. 6 of the *Department of the Environment Act*, with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority. To my mind this is a vital distinction. […]

[70] I have noted above that the Plan and the Target are akin to guidelines, in that they are quasi-legislation that could potentially guide internal policy-making decisions. The fact that they are statutorily mandated by the *Cancellation Act* suggests that they are more than just internal ministerial policy guidelines. La Forest J.'s comments above strongly suggest that the Target and the Plan would therefore have the force of law: they are authorized and required by statute, promulgated under ss.3(1) and 4(1) of the *Cancellation Act*, and required the approval of the Lieutenant Governor in Council.

[71] For all three reasons above, I find that the Target and the Plan are reviewable by the courts, regardless of whether they are considered "law" for the purpose of a *Charter* analysis. I leave the

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question of whether they are considered "law" to the application judge, if s/he deems it necessary to answer the question.

B. Are the claims in the Application capable of being proven?

[72] Generally, a motion to strike proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Imperial Tobacco*, at para. 22. Facts that are "manifestly incapable of being proven" include "bald conclusory statements of fact, unsupported by material facts": *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683, 117 O.R. (3d) 721, at para. 31.

[73] The long-standing rule that facts pleaded in a statement of claim must be taken as proven was first enunciated in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": [citation omitted].

[74] In *Operation Dismantle*, cited and discussed above, the Supreme Court heard an appeal on a motion to strike, in which the plaintiffs alleged that Canada's decision to allow the U.S. to test its air-launched cruise missile in Canada violated the *Charter*. The court wrestled with the rule in *Inuit Tapirisat* and the majority departed from that rule at para. 27:

> We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat*, *supra*, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

[75] Ultimately, the court concluded that the causal link between the actions of the Canadian government and the alleged violation of the plaintiffs' rights under the *Charter* was simply too uncertain, speculative, and hypothetical to sustain a cause of action: *Operation Dismantle*, at para. 3.

[76] *Operation Dismantle* is relevant to this Application as Ontario alleges that the facts pled by the Applicants cannot be taken as true and that their case is founded on speculative apprehensions about the link between the Target set by Ontario and harms that will be suffered by future generations.

[77] The Applicants argue that the facts in their pleadings are all capable of scientific proof and therefore not based on assumption or speculation.

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The Law

[78] It is helpful to first review the facts in *Operation Dismantle* to understand why the court found the plaintiffs' claim to be "uncertain, speculative and hypothetical": at para. 3.

[79] In *Operation Dismantle*, the plaintiffs sought (i) a declaration that Canada's decision to permit the testing of the cruise missile was unconstitutional; (ii) injunctive relief to prohibit the testing; and (iii) damages.

[80] The court outlined the relevant portions of the plaintiffs' statement of claim at para. 4:

> The plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:
>
> > (a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;
> >
> > (b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;
> >
> > (c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;
> >
> > (d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;
> >
> > (e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

[81] The court noted that to succeed, the plaintiffs must show that they had some chance of proving that the action of the Canadian government had caused a violation or a threat of violation of their rights under the *Charter*: at para. 10. In other words, the plaintiffs would have to demonstrate that the testing of the cruise missile would cause an increase in the risk of nuclear war: at para. 15. The court ultimately found that the plaintiffs could not establish the link between the Cabinet decision to permit the testing of the cruise missile and the increased risk of nuclear war: at para. 15.

[82] The court then ruled that the plaintiffs' claim essentially rested on an if-then assumption – *i.e.*, if the Canadian government allowed the U.S. government to test the cruise missile system

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in Canada, then there would be an increased risk of nuclear war: at para. 16. However, this assumption was contingent upon the possible reactions of the nuclear powers to the testing of the cruise missile in Canada and was based on major assumptions as to how foreign powers would react: at para. 19.

[83] The court focused on the fact that the claims were based on foreign policy decisions and found that they were speculative:

- Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to permit the testing of the cruise and the results that the appellants allege could never be proven: at para. 18.

- The parties make two assumptions with regard to the reaction of foreign powers: first, that they will not develop new types of surveillance satellites or new methods of verification, and second, that foreign powers will not establish new modes of co-operation for dealing with the problem of enforcement: at para. 19.

- Even if the testing results in an increased American military presence and interest in Canada, to say that this would make Canada more likely to be the target of a nuclear attack is to assume certain reactions of hostile foreign powers to such an increased American presence. Given the impossibility of determining how an independent sovereign nation might react, it can only be a matter of hypothesis whether an increased American presence would make Canada more vulnerable to nuclear attack. It would not be possible to prove it one way or the other: at para. 20.

- The plaintiffs assume that foreign states will not develop their technology in such a way as to meet the requirements of effective detection of the cruise and that there will therefore be an increased likelihood of a pre-emptive strike or an accidental firing, or both. Again, this assumption concerns how foreign powers are likely to act in response to the development of the cruise: at para. 21.

- The plaintiffs assert that the development of the cruise will lead to an escalation of the nuclear arms race. This again involves speculation based on assumptions as to how foreign powers will react: at para. 22.

- Exactly what the Americans will decide to do about development and deployment of the cruise missile, whether tested in Canada or not, is a decision that they, as an independent and sovereign nation, will make for themselves. Even with the assistance of qualified experts, a court could only speculate on how the American government may make this decision, and how important a factor the results of the testing of the cruise in Canada will be in that decision: at para. 24.

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[84] A concurring opinion by Wilson J. departed slightly from the majority. Wilson J. followed the rule in *Inuit Tapirisat*, noting, at para. 78:

> It has been suggested [by the majority], however, that the plaintiffs' claim should be struck out because some of the allegations contained in it are not matters of fact but matters of opinion and that matters of opinion, being to some extent speculative, do not fall within the principle that the allegations of fact in the statement of claim must be taken as proved. I cannot accept this proposition since it appears to me to imply that a matter of opinion is not subject to proof. What we are concerned with for purposes of the application of the principle is, it seems to me, "evidentiary" facts. These may be either real or intangible.

[85] Wilson J. advocated for a more flexible approach to evidence and to the taking of the facts alleged as proven, *i.e.*, not dismissing the facts simply because they are a matter of opinion. However, she ultimately found that the facts could not constitute a violation of s. 7 of the *Charter.* Later in these reasons, I will elaborate on Wilson J.'s discussion of the standard required to prove causation in a s.7 claim.

Position of the Parties

[86] Ontario submits that the Applicants' burden is to prove that Ontario's target for the reduction of GHG emissions by the year 2030 will cause or contribute to future harms claimed. They also submit that the allegations in the Application are "manifestly incapable of being proven".

[87] Ontario also submits that this Application raises the same problems of proof as *Operation Dismantle*: it is not possible for this Court, even with the best available evidence, to do more than speculate upon the likelihood that the catastrophic climate scenarios pleaded will come to pass unless Ontario's Target is struck down or amended.

[88] During oral submissions, Ontario emphasized the global aspect of GHG reduction, which it argued involves "coordination problems with a variety of other jurisdictions, both national and subnational" and that "these are the kind of things that cannot be established through evidence", as "[t]here isn't sufficient probability."

[89] Notably, Ontario does not argue that climate change itself is speculative. It also does not contest the fact of anthropogenic climate change or the desirability of taking action to mitigate the adverse effects of climate change. However, it submits that the Application rests on a "chain of speculative assumptions, none of which is provable with evidence in court":

- that the actual GHG emissions in the Province of Ontario in the year 2030 will not be different from the current Target;
- that the Plan and the Target will not themselves change before the year 2030;
- that the climate policies of the Canadian federal government applicable in Ontario will have no effect (positive or negative) on GHG emissions in Ontario or on the future impact of the climate on Ontario's residents;

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- that the impact on the climate of meeting Ontario's Target will not be offset (either positively or negatively) by the climate policies of and GHG emissions from other jurisdictions in Canada and throughout the world;

- that the catastrophic climate effects foretold by the Applicants for future generations can be avoided or mitigated at all by any target adopted today by the Government of Ontario; and

- that the future impacts of climate change on the health and well-being of Ontario residents, considered in conjunction with all other factors affecting the future health and well-being of future residents (including advances in medicine, engineering and climate mitigation), can be predicted with reasonable accuracy today on the available evidence.

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[90] The Applicants submit that Ontario's "chain of speculative assumptions" is flawed for two reasons. First, they submit that it is Ontario's position that is speculative, as Ontario suggests that the actual GHG emissions may differ from the Target, or that the Target may change before 2030, despite the fact that Ontario is in a position to control emissions through the Plan and that there is no date for revisiting the Target. They note further that Ontario ignores the fact that GHGs being released today pursuant to the Target will remain in the atmosphere and are part of the problem.

[91] The Applicants also submit that Ontario's assertion that the catastrophic effects of climate change cannot be avoided or mitigated at all by any GHG reduction target is itself speculative. The Applicants point to the Plan itself, which states that the people of Ontario have "played an important role in fighting climate change and mitigating the threats to our prosperity and way of life"; that by reducing emissions, Ontario will "maintain… a healthy environment" and "slow down climate change"; and that Ontario's actions "are important in the global fight to reduce emissions" (citing p. 17-18 of the Plan).

[92] The Applicants submit generally that Ontario cannot escape judicial review by arguing that the Application is based on theories about future events. They maintain that on Ontario's logic, the Target could never be subject to scrutiny until it is too late, when catastrophic climate change is irreversible. By extension, any constitutional challenge to legislation encompassing future harms would automatically fail because that law could theoretically change before the harms fully materialize.

[93] Additionally, the Applicants submit that the Application asks for something concrete and cognizable that can be determined with reference to "scientifically known and knowable standards" and expert evidence. They submit that experts can determine the specific amount of megatons to which Ontario must limit its emissions, in conformity with a scientifically specific standard that is not vague or amorphous.

[94] Lastly, the Applicants cite decisions in other countries to demonstrate that their claim is capable of scientific proof. For example, in *Urgenda et al. v. The State of the Netherlands (Ministry of Infrastructure and the Environment),* 19/00135 (Hoge Raad), the Supreme Court of the Netherlands affirmed that reduction in emissions was necessary for the Dutch government to

protect human rights. The court recognized that "each additional molecule of GHG in the atmosphere causes a demonstrable increase in the harm, with a single molecule of carbon dioxide causing a warming effect." Citing other decisions in the U.S., New Zealand, Australia, and Colombia, the Applicants argue that many countries have already found causal links between local government policies, emissions levels, and increased risks of harm from climate change, regardless of the emissions of other nations.

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Analysis and Conclusion

[95] At this stage of the proceedings, the facts in the Applicants' claim should be deemed to have been proven, pursuant to *Inuit Tapirisat*. Unlike the facts claimed in *Operation Dismantle*, I am satisfied, for the purposes of this Rule 21 motion, that the facts in the Applicants' pleadings are capable of scientific proof. As the Applicants pointed out during oral submissions, "whether or not we succeed is going to be a matter for a trier of fact" and based on the full evidentiary record. I agree with that statement.

[96] In contrast to fear of missile testing leading to nuclear war, I am satisfied, again for the purposes of this Rule 21 motion, that it is not plain and obvious that scientific evidence cannot be marshalled to establish that GHG emissions cause harm. As well, I am satisfied that appropriate levels of global GHG emissions can be established through scientific evidence, based on the past and projected emission levels. In their Notice of Application, the Applicants cite various facts that are capable of scientific proof and about which courts are capable of making determinations, based on expert evidence, including the following:

- The total level of CO_2 in the atmosphere is rising and is now around 410 ppm, compared to the approximately 280 ppm level that was present through the relatively stable climate of the last 10,000 years;

- The buildup of CO_2 and other GHGs in the atmosphere has warmed the planet by approximately 1 degree Celsius on average since the pre-industrial period, with global temperature now increasing at the rate of 0.2 degree Celsius per decade;

- If all human-caused GHG emissions ceased immediately, the Earth's climate would still heat up by several tenths of a degree Celsius because of the latency time between GHG accumulation in the atmosphere and warming in the Earth's climate system;

- The Target allows for 30 megatonnes more in annual GHG pollution by 2030 than the 2030 target that was previously in place, or a total of 190 megatonnes of GHGs into the atmosphere's CO_2 stock between 2018 and 2030;

- The Target's annual increase of 30 megatonnes is equal to the annual emissions of more than 7 million passenger vehicles;

- Ontario has warmed about twice as fast as the global average since the pre-industrial period, at approximately 1.7 degrees Celsius; Ontario will continue to experience the impacts of global warming at an above-average rate;

- Devastating impacts of climate change will become more pronounced in Ontario as the Earth's climate warms to levels approaching and exceeding 2 degrees Celsius above pre-industrial levels;

- Canada's share of the remaining global carbon budget is (at most) 2,000 megatonnes of CO_2, in order to likely avoid the catastrophic consequences of global temperatures rising beyond 1.5 degrees Celsius above pre-industrial levels; and

- Under the Target, Ontario's total CO_2 emissions from now until 2030 will be 1,670 megatonnes, or between 250-363% greater than Ontario's share of the global carbon budget, and almost *all* of Canada's budget.

[97] In the *Carbon Pricing Reference*, the Court of Appeal for Ontario observed that various findings and standards can be projected or predicted with scientific accuracy. For example, the court found [emphasis added]:

- "[…T]he global average surface temperature has increased by approximately 1.0 degree Celsius above pre-industrial levels (*i.e.*, prior to 1850). It is estimated that by 2040, the global average surface temperature will have increased by 1.5 degrees Celsius.": at para. 9;

- "It is predicted that temperatures in Canada will continue to increase at a rate greater than the rest of the world.": at para. 10;

- "This global warming is causing climate change and its associated impacts. The uncontested evidence before this Court shows that climate change is causing or exacerbating: [various examples of the impact of climate change]": at para. 11; and

- "The United Nations Intergovernmental Panel on Climate Change recently reported that global net anthropogenic CO_2 emissions must be reduced by approximately 45 percent below 2010 levels by 2030, and must reach "net zero" by 2050 in order to limit global average surface warming to 1.5 degrees Celsius and to avoid the significantly more deleterious impacts of climate change. […]": at para. 16.

These examples demonstrate that unlike the assumptions in *Operation Dismantle* that cannot be predicted with scientific accuracy, it is probable, with evidence, that many of the Applicants' claims are capable of proof.

[98] As an additional example, in *Energy Probe v. Canada (Attorney General)* (1989), 68 O.R. (2d) 449 (C.A.), the Court of Appeal for Ontario held that a non-governmental organization may be able to prove that Ontario's lax liability standards provided nuclear power operators with

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incentive to increase production of reactors, at the expense of greater risk of harm to the public. In the following paragraphs, the Court of Appeal distinguished the case from *Operation Dismantle*:

> [41] I see a difference between the level of speculation and ability to predict a result dependent upon actions of foreign governments [referring to *Operation Dismantle*], and the "speculation" here, which involves the impact of our tort laws upon industry and standards of care in a particular industry. If I were presented with an expert opinion which stated: "toys are safer for children today than they were 15 years ago, and it is because of the increasing awareness of tort liability," I would give that *prima facie* credence. It might not be proven; there may be regulatory rules that have led to the apparent result but, tested as a triable issue, the nexus between the allegation and the conclusion is very different from that between testing missiles and nuclear war. […]
>
> [42] I am not persuaded that the expert evidence in this case could not be translated into a finding of fact by a trial Judge associating exposure to liability with standard of care for the purpose of making the declaration which is sought. […]
>
> [43] It is therefore my conclusion that the appellants have "some chance of proving" that the Act [*Nuclear Liability Act*, R.S.C. 1985, c. N-28] violates rights protected by s. 7 of the *Charter*.

[99] Similarly, in this case, there is a difference between the level of speculation and ability to predict a result dependent upon actions of foreign governments and the facts pleaded here, which are capable of scientific proof. At this stage of the proceedings, therefore, it is premature to find that the Applicants' claim is "manifestly incapable of being proven", as expert evidence can be, and I understand will be, tendered to demonstrate the validity of the Applicants' claim.

[100] I note, additionally, that *Operation Dismantle* was recently considered in a climate change context in *La Rose*, where the Federal Court disagreed with Canada's submission that the plaintiffs' claim was speculative, which would also apply to this Application:

> [74] The Defendants [Canada] further allege that the *Charter* claims are speculative because they are incapable of proof, owed to the cumulative and global nature of climate change. Climate change is driven from historical and global human activities and requires a comprehensive, international approach to address. In this way, the Defendants liken the current case to *Operation Dismantle*, where a "sufficient causal link" could not be established. In *Operation Dismantle*, the Federal Cabinet's decision to approve cruise missile testing could not be linked to the result the appellants were alleging – the increased threat of nuclear war. This amounted to speculation, which could never be proven (*Operation Dismantle* at para. 18).
>
> [75] I cannot find that there is no reasonable prospect of success on the basis of the speculation arguments alone. Unlike the speculation inherent in the assumption in *Operation Dismantle* - that the reaction of foreign powers to cruise missile testing will increase the risk of nuclear war, the Plaintiffs in this case are alleging that Canada's role in

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> climate change has led to the alleged harms. Canada has a role in GHG emissions that is more than speculative in this current case. [emphasis added]

[101] Lastly, there exists an international body, established by the United Nations, the mission of which is to provide scientific information on climate change, further suggesting that the Applicants' claims are potentially capable of scientific proof. The United Nations Intergovernmental Panel on Climate Change is "the leading world body for assessing the most recent scientific, technical, and socio-economic information produced worldwide relevant to understanding climate change, its impacts and potential future risks, and possible response options": *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, [2019] 9 W.W.R. 377, at para. 16.

[102] As mentioned above, for the purposes of this motion, the facts pleaded in the Applicants' claim are to be taken as proven. I am satisfied that the claims in this Application are not "manifestly incapable of being proven" or as speculative as Ontario asserts. It is probable that they are capable of being scientifically proven. These facts are, by no means, as "uncertain, speculative and hypothetical" as the ones in *Operation Dismantle*, which mostly depended on the reaction of different nations to missile testing in Canada. I am satisfied that this Application meets the threshold of "capable of proof", leaving the question of whether the Applicants are able to prove their claims to the application judge, who will be presented with a full evidentiary record. Concluding, for the purposes of this Rule 21 motion, that the Application is capable of scientific proof, I will elaborate later in these reasons the Applicants' evidentiary burden under s.7 and s.15 to establish causation.

C1. Is this matter justiciable?

The Law

[103] When courts are asked to adjudicate matters of complex public policy, the question of whether the matter is justiciable may arise. In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012), Dean Lorne Sossin (as he then was) defines "justiciability" as follows:

> [J]usticiability may be defined as a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable. The criteria used to make this determination pertain to three factors: (1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court: at p. 7.

[104] The doctrine of justiciability is largely focused on an inquiry into the "appropriateness" of judicial adjudication. As stated in *Canada (Auditor-General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49, "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts

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deciding a given issue, or instead deferring to other decision-making institutions of the polity": at pp. 90-91.

[105] The doctrine of justiciability ensures respect for the functional separation of powers among the legislative and judicial branches of government in Canada. As Dean Sossin (as he then was) observes:

> First, as a non-democratic (some would say anti-democratic) institution, courts do not have the resources or expertise to competently establish what policy or law best advances the public interest. Second, the legitimacy of judicial decision-making is more difficult to sustain where it appears that the judge is substituting her preferences for those of the legislative or executive branches: Sossin, at pp. 204-05.

[106] In *Operation Dismantle*, Wilson J. was careful to note that the wisdom of a government's legislative and policy choices could not be made the subject of a legal claim. However, she also emphasized that when *Charter* rights are violated, the court is obliged to review the governmental action:

> [63] It might be timely at this point to remind ourselves of the question the Court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s. 91(7) of the *Constitution Act, 1867* and that the federal executive has the powers conferred upon it in ss. 9-15 of that Act. Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the effect [emphasis in original] of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. […]
>
> [64] I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.

[107] Ontario relies heavily on two cases to argue that the Application is not justiciable: *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, 123 O.R. (3d) 161 ("***Tanudjaja (ONCA)***"), aff'ing *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 5410, 116 O.R. (3d) 574 ("***Tanudjaja (SCJ)***"), and *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183, [2009] 3 F.C.R. 201, aff'd 2009 FCA 297, leave to appeal refused, [2010] S.C.C.A. No. 33469,

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the latter of which I will address later in these reasons. I will summarize *Tanudjaja (ONCA)* prior to outlining the parties' positions on it.

[108] In *Tanudjaja*, the Court of Appeal for Ontario upheld this Court's decision to strike out an application for non-justiciability. The application alleged that the action and inaction on the part of Canada and Ontario resulted in homelessness and inadequate housing. The trial judge described the application as follows:

> The Application is premised on an obligation said to be imposed, by the *Charter of Rights and Freedoms*, on the government of Canada and the government of Ontario […] to put in place policies and strategies that ensure that affordable, adequate and accessible housing is available for all Ontarians and Canadians. The Application relies on s. 7 (life, liberty and security of the person) and s. 15 (equal protection and equal benefit of the law without discrimination) of the *Charter* which, it alleges, have been breached. The breaches, as identified in the Application, arise out of changes to legislative policies, programs and services which are said to have resulted in increased homelessness and inadequate housing. The Application states that, beginning in the mid-1990's, both Canada and Ontario took decisions which have eroded access to affordable housing. It is said that these decisions were made, and the program changes which implemented them put in place, without appropriately addressing their impact on homelessness and inadequate housing and without ensuring that alternative measures have been provided to protect vulnerable groups from these effects. The Application seeks a broad set of remedies, including declarations that the failure of both Canada and Ontario to implement effective national and provincial policies to reduce and eliminate homelessness and inadequate housing has violated the rights of the applicants under s. 7 and s. 15 of the *Charter.* As remedial measures, the Application seeks mandatory orders that such strategies be developed and implemented "in consultation with affected groups" and include "timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms". The Application requests that the Court remain "…seized of supervisory jurisdiction to address concerns regarding implementation of the order": *Tanudjaja (SCJ)*, at para. 2.

[109] Notably, the applicants in *Tanudjaja* did not

> expressly […] challenge […] any particular legislation, nor do they allege that the particular application of any legislation or policy to any individual has violated his or her constitutional rights. They do not point to a particular law which they say "in purpose or effect perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1)". They do not identify any particular law which violates the s. 7 right to life, liberty and security of the person. Rather, they submit that the social conditions created by the overall approach of the federal and provincial governments violate their rights to adequate housing.: *Tanudjaja (ONCA)*, at para. 10.

[110] The Court of Appeal found *Tanudjaja* to be non-justiciable because the claims were problematic and there was no sufficient legal component to anchor the analysis. The court noted:

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- The application did not challenge a specific state action or a specific law; there is therefore no sufficient legal component to engage the decision-making capacity of the courts: *Tanudjaja (ONCA)*, at para. 27.

- The diffuse and broad nature of the claims does not permit an analysis under s. 1 of the *Charter*. As indicated in *R. v. Oakes*, [1986] 1 S.C.R. 103, in the event of a violation of a right guaranteed by the *Charter*, the legislation will nonetheless be sustained if the objective of the legislation is pressing and substantial, the rights violation is rationally connected to the purpose of the legislation, the violation minimally impairs the guaranteed right, and the impact of the infringement of the right does not outweigh the value of the legislative object. In this application, in the absence of any impugned law, there is no basis to make that comparison: *Tanudjaja (ONCA)*, at para. 32.

- There is no judicially discoverable and manageable standard for assessing whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy: *Tanudjaja (ONCA)*, at para. 33.

[111] Neither party made submissions on *La Rose*, but that action was struck for reasons similar to those in *Tanudjaja*. Like the *Tanudjaja* applicants, the *La Rose* plaintiffs did not challenge specific governmental actions. Instead, they challenged Canada's "Impugned Conduct", which involved the following actions and inactions on the part of the government:

- Continuing to cause, contribute to and allow a level of GHG emissions incompatible with a Stable Climate System;

- Adopting GHG emission targets that are inconsistent with the best available science about what is necessary to avoid dangerous climate change and restore a Stable Climate System;

- Failing to meet the Defendants' own GHG emission targets; and

- Actively participating in and supporting the development, expansion and operation of industries and activities involving fossil fuels that emit a level of GHGs incompatible with a Stable Climate System: *La Rose*, at para. 8.

[112] Because of the "undue breadth and diffuse nature of the Impugned Conduct" above, the *La Rose* court found the action to be non-justiciable as a result: at para. 41.

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Position of the Parties

[113] Ontario submits that this Application is not justiciable because a court should not involve itself in the review of actions or decisions of the Executive or Legislative branches where the subject matter of the dispute is either inappropriate for judicial involvement or where the court lacks the capacity to properly resolve it. Ontario submits that the questions in this Application are simply unsuitable for adjudication in court.

[114] As mentioned earlier, Ontario also relies on *Friends of the Earth* to argue that this Application is not justiciable. That case largely focused on the Canadian government's actions after Parliament enacted the *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30 ("***KPIA***"). The *KPIA* requires the Minister of the Environment to prepare an annual Climate Change Plan that describes "the measures to be taken [by the federal government] to ensure that Canada meets its [Kyoto] obligations". When the federal government released a plan that was allegedly inadequate for meeting the obligations, the environmental organization Friends of the Earth brought a challenge.

[115] The Federal Court found the challenge to be non-justiciable and held that the court had no role to play in reviewing "the reasonableness of the government's response to Canada's Kyoto commitments within the four corners of the *KPIA*": *Friends of the Earth*, at para. 46. The court further held that "[w]hile the failure of the Minister to prepare a Climate Change Plan may well be justiciable, an evaluation of its content is not": at para. 34. In other words, the *KPIA* comprised many "policy-laden considerations which are not the proper subject matter for judicial review": at para. 40.

[116] Ontario relies on *Friends of the Earth* to argue that this Application is similarly non-justiciable. In its factum, Ontario argues that the Target is analogous to statements of public policy objectives, such as those found in the *Poverty Reduction Act, 2009*, cited and discussed above, which states in the preamble: "A principal goal of the Government's strategy published on December 4, 2008 is to achieve a 25 per cent reduction in the number of Ontario children living in poverty within five years."

[117] Ontario also argues that *Friends of the Earth* is very similar to this case, because just as there were no objective legal criteria which could be applied in *Friends of the Earth* to allow the court to determine whether Canada's plan provided for an "equitable distribution of reduction levels among the sectors of the economy that contribute to greenhouse gas emissions", so too there are no legal criteria that could allow this Court to adjudicate the Applicants' claim for a mandatory order that "Ontario forthwith set a science-based GHG reduction target under s.3(1) of the *CTCA* that is consistent with Ontario's share of the minimum level of GHG reductions necessary to limit global warming to below 1.5°C." It submits further that determining "Ontario's share" of global GHG emissions should be determined based on population, gross domestic product, emissions since Confederation or over any other period of time, economic efficiency, or diplomatic strategy, which are all questions outside the court's institutional capacity.

[118] Ontario also relies heavily on *Tanudjaja*, where the court found the application to be "demonstrably unsuitable for adjudication" as there was not a "sufficient legal component to

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anchor the analysis": *Tanudjaja (ONCA)*, at paras. 35-36. Ontario submits that this Application is similar to the one in *Tanudjaja*, as plans to deal with global climate change are unsuited to judicial review. It submits that climate change plans are even less suitable for judicial review than housing policy, because while provincial housing policy is at least largely confined within provincial boundaries, climate change is notoriously planetary in scope.

[119] The Applicants submit that their Application is different from the one in *Tanudjaja*, as it is aimed at a number of very specific measures – both legislation and policies passed pursuant to legislation – taken by Ontario. The Applicants submit that the majority in *Tanudjaja (ONCA)* left the door open by noting that "[t]his is not to say that constitutional violations caused by a network of government programs can never be addressed, particularly when the issue may otherwise be evasive of review": *Tanudjaja (ONCA)*, at para. 29. The Applicants submit that that is precisely what this Application is premised on: a myriad of government decisions, programs, and conduct contribute to climate change in various ways and would otherwise be evasive of review. They submit that the Target is the coordinating mechanism and guiding principle underlying all of these elements; it is therefore not plain and obvious that this case is not justiciable. I accept the Applicants' submissions on this point.

[120] Generally, the Applicants submit that the questions raised in the Application are well within this Court's institutional capacity. The questions all concern the alleged pressing threat to constitutional rights posed by Ontario's failure to act in order to protect its population from climate change, which are precisely the type of issue that engages this Court's obligation to interpret and apply the *Charter*.

[121] The Applicants also submit that non-justiciable cases are rare, especially when *Charter* rights are involved. They cite *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, a case I will discuss further below, where the Supreme Court stated, at para. 107:

> The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. In such circumstances, it is the court's *obligation* to decide the matter.

[122] The Applicants also cite the Federal Court of Appeal, which has stated that "*Charter* cases are justiciable regardless of the nature of the government action": *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 379 D.L.R. (4th) 737, at para. 61.

[123] Additionally, the Applicants disagree with Ontario's assertion that the Application will take this Court beyond its institutional capacity because, as Ontario asserts, the relief sought does not encompass judicially manageable standards. They submit that a "science-based GHG reduction target", a "stable climate system", and a "sustainable" future for youth and future generations are all standards based on a globally-recognized body of scientific research and prescriptive standards that make them both judicially manageable and discoverable. This Court will have the benefit of international scientific guidance, as well as expert evidence, when hearing the Application on its merits. These standards are unlike the ones in *Tanudjaja*, where the claimants sought recognition of a right to "adequate" housing and argued that federal and provincial governments gave the issue

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"insufficient priority". The Applicants submit that these standards were not judicially discoverable or manageable because they were infused with subjective considerations and unmoored from any standard that could be established through evidence. These are unlike the science of climate change, which they submit is likely one of the most thoroughly researched issues in recent scientific history, with thousands of scientists from all over the world assessing not only its causes, trajectory and consequences, but also the necessary GHG emission reductions to avoid the most catastrophic results.

[124] Lastly, the Applicants submit that courts in Canada and around the world have adjudicated similar issues and courts have ruled on questions involving a government's constitutional and legal obligations as regards GHG reductions. They cite cases from the Québec Superior Court (*Environnement Jeunesse c. Procureur Général du Canada*, 2019 QCCS 2885), the Dutch *Urgenda* decision (cited above), and other cases from the High Court in New Zealand, Australia, Lahore High Court in Pakistan, and Colombia.

Analysis and Conclusion

[125] As the Federal Court of Appeal has noted, the category of non-justiciable cases is very small: *Hupacasath First Nation*, at para. 67. The court also noted that even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a "very large margin of appreciation": *Hupacasath First Nation*, at para. 67.

[126] As indicated above, I have already found that Cabinet decisions are justiciable and reviewable. As Wilson J. eloquently summarized in *Operation Dismantle*, where a *Charter* challenge is involved, "it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so": at para. 64.

[127] Other courts have also noted the special status of a *Charter* claim in the context of a review of government action and the courts' role in ensuring the validity of government action.

[128] Lederer J., for example, noted in *Tanudjaja (SCJ)*, at para. 139: "There is no doubt that an application that involves allegations of breaches of the *Charter* is justiciable."

[129] In *Turp v. Canada*, 2012 FC 893, [2014] 1 F.C.R. 439, the Federal Court considered a challenge of the Canadian government's decision to withdraw from the Kyoto Protocol in 2011. The court found the matter to be non-justiciable but noted that a *Charter* challenge would have rendered it justiciable: at para. 18.

[130] Similarly, in *Friends of the Earth*, on which Ontario relies, the court expressed doubts that the court has any role to play in controlling or directing the other branches of government in the conduct of their legislative and regulatory functions outside of the constitutional context: at para. 40.

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[131] Ontario states that the task of dealing with global climate change is an "enormously complex issue unsuited to judicial review" and that the Target falls within the realm of public policy that is inappropriate for judicial involvement.

[132] I have already found above that the Target and Plan are not pure policy decisions. However, I also note that this Application is very different from those in *Tanudjaja* and *La Rose*. In *Tanudjaja*, the applicants "did not challenge a specific state action or a specific law": *Tanudjaja (ONCA)*, at para. 27. In *La Rose*, the court noted that the plaintiffs were essentially challenging "Canada's overall approach to climate policy": at para. 22. Here, the Applicants are challenging very specific governmental actions and legislation. They are challenging policy decisions that were translated into law – in the form of the *Cancellation Act* – and by state action – in that the Ministry of Environment set the Target, pursuant to the *Cancellation Act*.

[133] Indeed, the *La Rose* court did not foreclose the possibility that policy can be justiciable, noting, "Policy choices must be translated into law or state action in order to be amenable to *Charter* review and otherwise justiciable": at para. 38 (also see discussion at para. 45).

[134] Additionally, both *Friends of the Earth* and *Tanudjaja* suggest that a matter is not non-justiciable simply because it may involve another branch of government.

[135] In fact, Dean Sossin (as he then was), in *Boundaries of Judicial Review*, suggests that the judge in *Friends of the Earth* should not have invoked the doctrine of justiciability due to concern over another branch of government relating to implementing a remedy. He also notes that the judge rejected an approach that would allow the court to separate the *KPIA* policy imperatives into justiciable and non-justiciable components: Sossin, at p. 247.

[136] Further, as the majority in *Tanudjaja (ONCA)* noted at para. 35:

> I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, *Chaoulli*, at para. 107.

[137] Lastly, while social and economic rights are not the main focus of the Application, they are collateral issues that are raised. As Feldman J.A. noted in her dissent in *Tanudjaja (ONCA),* justiciability of social and economic rights is an open question:

> [79] [Dean Sossin] then concludes that the justiciability of social and economic rights under the *Charter* is an open question:
>
> > It is striking that, despite the rich jurisprudence which has developed under the *Charter*, such uncertainty remains with respect to a question of fundamental importance to the scope of judicial review of government action. For the moment, the justiciability of social and economic rights under the *Charter* remains an open question. [Sossin, at p. 244]
>
> […]

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> [81] In *Gosselin*, the Supreme Court did not hold that claims for social and economic rights under the *Charter* were non-justiciable. As a result, courts should be extremely cautious before foreclosing any enforcement of these rights. In my view, to strike a serious *Charter* application at the pleadings stage on the basis of justiciability is therefore inappropriate. [emphasis added]

[138] Dean Sossin has also noted that the extent to which social and economic rights are incorporated into the Canadian Constitution remains unsettled: Sossin, at p. 242. Social and economic rights are wide-ranging and may include rights to adequate nutrition, clothing, housing, health, education, and welfare: Sossin, at p. 242. This further suggests that the courts have the institutional competence to determine these types of matters.

[139] To summarize, this Application is different from the ones considered in *Friends of the Earth*, *Tanudjaja*, and *La Rose*. As noted above, *Friends of the Earth* did not consider the government's action in the constitutional context. While the claim in *Tanudjaja* was based on the *Charter*, it failed to identify specific government conduct that led to a *Charter* violation. Rather, as the court pointed out, the application was largely focused on seeking recognition of an explicit positive obligation on the province to implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing. In *La Rose*, the plaintiffs did not challenge any specific legislation or governmental action. Leaving the question of positive obligations to later in these reasons, this Application is different, as it challenges specific government conduct (preparation of the Target and the Plan) and legislation (the *Cancellation Act*).

[140] This Application is, therefore, based on the foregoing, *prima facie* justiciable. The focus must now shift to whether there is any reasonable prospect that the *Charter* claims made by the Applicants can succeed.

C2. Do the *Charter* claims in the Application have a reasonable prospect of success?

a. Section 7: Life, Liberty, and Security

The Claim as Pleaded

[141] The Applicants pleaded the following facts in the Notice of Application, which, for the purpose of this motion, are taken as proven, as discussed above and pursuant to *Inuit Tapirisat*.

[142] The Applicants submit that there are myriad ways that climate change impacts the health, lives, liberty, and livelihood of current and future generations of Ontarians. They submit that if global warming exceeds 1.5 degrees Celsius above pre-industrial temperatures, the impacts of climate change in Ontario will include (but will not be limited to):

- An increase in the frequency and intensity of acute extreme heat events, resulting in an increase in fatalities, serious illness, and severe harm to human health;
- An increase in overall temperatures and heat waves, resulting in an increase in fatalities, serious illness, and severe harm to human health;

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- An increase in the spread of infectious diseases such as Lyme disease and West Nile Virus, resulting in an increase in fatalities, serious illness, and severe harm to human health;

- An increase in the frequency and intensity of fire activity (including forest wildfires), resulting in an increase in fatalities, serious illness, displacement, and severe harm to human health;

- An increase in the frequency and intensity of flooding and other extreme weather events, resulting in an increase in fatalities, serious illness, displacement, and severe harm to human health;

- An increase in the spread of harmful algal blooms in water that Ontarians use for drinking and recreational purposes, with a resulting increase in serious illness, loss of livelihood, and severe harm to human health;

- An increase in exposure to contaminants such as mercury through food webs, with a resulting increase in severe harm to human health and negative impact on food security and sovereignty of certain Ontario communities;

- An increase in harms to Indigenous peoples, including increased impacts on health, access to essential supplies, ability to carry out traditional activities, loss of livelihood, and displacement; and

- An increase in serious psychological harms and mental distress resulting from the impacts of climate change, including but not limited to, the impacts set out in the paragraphs above.

[143] The Applicants submit that the Target violates the rights of Ontario's youth under s.7 of the *Charter* by compromising their right to life, liberty, and security of the person, in a serious and pervasive manner that does not accord with the principles of fundamental justice. Their Notice of Application outlines the following:

- The Target is inadequate to hold global average temperature increases to 1.5 or 2 degrees Celsius above pre-industrial levels and thereby avoid catastrophic climate change impacts. The Target will ensure a higher level of GHG emissions that will cause or contribute to death, serious illness, and severe harm to the health of Ontario's youth and future generations, interfering with their right to life and security of the person.

- The Target violates the right to liberty of Ontario's youth and future generations because the impacts of climate change interfere with their ability to choose where to live, their right to personal autonomy, and their right to make other decisions of fundamental importance.

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- The Target will materially increase the risk that Ontario's youth and future generations will suffer from the many harmful impacts of climate change.

[144] The Applicants submit that the Respondent's deprivation of the rights to the life, liberty, and security of Ontario's youth and future generations is not in accordance with the principles of fundamental justice in the following ways:

- The Target is grossly disproportionate to Ontario's stated objective of taking proactive action to address climate change, given the severity and extent of the harm caused by a high level of GHG emissions.

- The Target is arbitrary. Ontario's objective in adopting the Target was to take proactive action to address climate change. The Target bears no relation to and is inconsistent with that objective.

- To the extent Ontario may rely on economic justifications, the justifications ring hollow, and Ontario's inaction on climate change now will prove to be increasingly costly to Ontarians in the future.

Section 7 Jurisprudence and Analysis

[145] Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[146] The constituent elements of a claim under s. 7 of the *Charter* were recently summarized succinctly by the Court of Appeal in *Bedford v. Canada (Attorney General)*, 2012 ONCA 186, 109 O.R. (3d) 1:

> [88] [Section] 7 creates a single constitutional right: the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. There is no free-standing right to life, liberty and security of the person: [citation omitted]. Legislation that limits the right to life, liberty and security of the person will attract s. 7 scrutiny. It will, however, survive that scrutiny and avoid judicial nullification unless it is shown to be contrary to the principles of fundamental justice.
>
> [89] An applicant alleging a breach of s. 7 must demonstrate on the balance of probabilities that (1) the challenged legislation interferes with or limits the applicant's right to life, or the right to liberty, or the right to security of the person; and (2) that the interference or limitation is not in accordance with the principles of fundamental justice. […]

[147] On its face, the Application engages each of the s.7 rights: life, liberty, and security.

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Life Interest

[148] Since the enactment of the *Charter* in the early 1980s, s.7 jurisprudence has traditionally been tied to the penal system or the administration of justice. However, s.7 jurisprudence has since expanded into broader matters of social policy, starting with cases like *Chaoulli*, cited above: see J. Hendry, "Section 7 and Social Justice" (2009-10) 27 Nat'l J. Const. L. 93.

[149] In *Chaoulli*, the Supreme Court ruled that Québec statutes prohibiting private medical insurance in the face of long wait times violated the *Québec Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12. *Chaoulli* was one of the first cases that greatly expanded the understanding of the "life" interest in s.7 jurisprudence.

[150] This expanded understanding of s.7 was once again apparent in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 ("***PHS***"). The PHS Society operated Insite, a supervised drug injection site, in Downtown Eastside Vancouver, an area racked by high drug use. To operate, Insite was obliged to apply for renewable exemptions from the federal Minister of Health, as the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, prohibits the possession and trafficking of controlled substances. In 2008, the Minister of Health did not extend the exemption. The Supreme Court found that the Minister's failure to grant the exemption limited Insite users' s.7 *Charter* rights and breached the principles of fundamental justice. The life interest was engaged as clients of Insite were deprived of potentially lifesaving medical care: at para. 91.

[151] The expansion of the concept of right to life continued. In a case challenging the prohibition of assisted suicide, *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, the Supreme Court summarized, at para. 62:

> This Court has most recently invoked the right to life in *Chaoulli* [citation omitted], where evidence showed that the lack of timely health care could result in death [citation omitted], and in *PHS*, where the clients of Insite were deprived of potentially lifesaving medical care [citation omitted]. In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. […]

[152] In a non-*Charter* context, the Supreme Court has also acknowledged that "certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health": see *Ontario v. Canadian Pacific Ltd*., [1995] 2 S.C.R. 1031, at para. 55; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 127.

[153] The excerpt in *Carter* above suggests that right to life is engaged in this Application, as the Applicants argue that Ontario's actions in repealing the *Climate Change Act* and setting an inadequate Target increase the risk of death of Ontario's youth and future generations.

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Liberty Interest

[154] Section 7's liberty interest is about more than physical freedom. The Supreme Court has found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 49. This interest also protects "the right to make fundamental personal choices free from state interference": *Blencoe*, at para. 54. In *Carter*, the Supreme Court also stated: "concerns about autonomy and quality of life have traditionally been treated as liberty and security rights": at para. 62.

[155] Additionally, in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, the Supreme Court found that the right to choose where to establish one's home falls within the scope of the liberty interest guaranteed by s.7 of the *Charter*, since this right to choice is so fundamentally or inherently personal such that, by its very nature, it implicates basic choices going to the core of what it means to enjoy individual dignity and independence: at para. 66.

[156] The Applicants submit in their Notice of Application that impacts of climate change will interfere with the Applicants' ability to choose where to live. On its face, that engages the "liberty" interest in s.7.

Security Interest

[157] Section 7's security interest is grounded in the idea of personal autonomy and protects both physical and psychological integrity. In *Carter*, the Supreme Court found that this interest is engaged when the state interferes with "an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering": at para. 64. To trigger protection under the psychological branch of security of the person, the Supreme Court outlined in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 60:

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety. [emphasis added]

[158] In another context, the Supreme Court has also acknowledged that security of the person encompasses the right to be free from prospective harm. In other words, security of the person "must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself": *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 207.

[159] The Applicants, in their Notice of Application, submit that Ontario's inadequate Target could further contribute to climate change, which could lead to an increase in serious psychological harm and mental distress resulting from the impacts of climate change. While the Applicants will

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need to establish at the merits hearing that this harm is "greater than ordinary stress or anxiety", the Application, at this stage of the proceedings, *prima facie* engages the security interest in s.7.

Principles of fundamental justice

[160] The s.7 rights of life, liberty, and security of the person may only be infringed upon if in accordance with the principles of fundamental justice. The Supreme Court, in *Canada (Attorney General) v. Bedford,* 2013 SCC 72, [2013] 3 S.C.R. 1101, noted at para. 105:

> The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. To deprive citizens of life, liberty, or security of the person by laws that violate these norms is not in accordance with the principles of fundamental justice.

[161] The Supreme Court also emphasized that courts are not to consider competing social interests or public benefits conferred by the impugned law. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s.1 of the *Charter*: *Carter*, at para. 79, citing *Bedford*, at paras. 123 and 125.

[162] The Supreme Court outlined the basic principles of arbitrariness, overbreadth, and gross disproportionality in *Bedford* [emphasis in original]:

> [111] Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person [citation omitted]. A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. […]
>
> [112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. […] At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. […]
>
> [120] Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. […]

[163] The Application has identified that the Target and ss.3(1) and/or 16 of the *Cancellation Act* were arbitrary and grossly disproportionate. Accordingly, for the purposes of the Rule 21 motion,

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I will proceed on the basis that the Applicants have properly pleaded breaches of two principles of fundamental justice.

Flexibility of s.7 and the Evidentiary Burden

[164] In *Blencoe*, a decision that first outlined the scope of s.7, the Supreme Court emphasized the flexible nature of this *Charter* section at para. 188:

> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*. […]

[165] In a climate change context, Rennie J.A., speaking for a unanimous Federal Court of Appeal in *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223, 438 D.L.R. (4th) 148, stated at para. 139:

> I am cognizant of the fact that section 7 is not frozen in time, nor is its content exhaustively defined, and that it may, some day, evolve to encompass positive obligations – possibly in the domain of social, economic, health or climate rights. [Emphasis added]

[166] With that in mind, at this stage of the proceedings, it is not apparent that the Application cannot succeed. That being said, the Applicants will have a high evidentiary burden at the merit hearing. This still does not suggest that the Applicants cannot succeed.

[167] *Operation Dismantle*, discussed above, was one of the first s.7 cases that the Supreme Court heard, and the court wrestled with the standard to be applied to causation. The court noted that to succeed, the applicant must show that they have some chance of proving that the action of the Canadian government caused a violation or a threat of violation of their rights under the *Charter*: at para. 10. Applied to this case, Ontario submits that the Applicants' burden is to prove that Ontario's target for the reduction of GHG emissions by the year 2030 will cause or contribute to future harms.

[168] Wilson J.'s concurring opinion in *Operation Dismantle* suggests that the Applicant could potentially meet this burden. Wilson J. advocated for a more flexible approach to evidence required to prove causation. Departing from the majority, she held that "matters of opinion" can still be subject to proof through "evidentiary" facts. She then elaborated on different types of "facts" and provided examples where "opinions" can be proven [emphasis added]:

> [78] […] What we are concerned with for purposes of the application of the principle [in *Inuit Tapirisat*] is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts.

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> Intangible facts are frequently the subject of opinion. The question of the probable cause of a certain result is a good illustration and germane to the issues at hand. […] Indeed, even a finding that an event "would cause" a certain result in the future is a finding of intangible fact. […]
>
> [79] In my view, several of the allegations contained in the statement of claim [in *Operation Dismantle*] are statements of intangible fact. Some of them invite inferences; others anticipate probable consequences. They may be susceptible to proof by inference from real facts or by expert testimony or "through the application of common sense principles": [citation omitted]. We may entertain serious doubts that the plaintiffs will be able to prove them by any of these means. It is not, however, the function of the Court at this stage [motion to strike] to prejudge that question.

[169] More recently, in *Bedford*, the Supreme Court also held that a more flexible standard of causation, the "sufficient causal connection" standard, should prevail. As the court noted:

> [75] I conclude that the "sufficient causal connection" standard should prevail. This is a flexible standard, which allows the circumstances of each particular case to be taken into account. Adopted in *Blencoe* [citation omitted], and applied in a number of subsequent cases […], it posits the need for "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" for s. 7 to be engaged (*Blencoe*, at para. 60 (emphasis added)).
>
> [76] A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities ([citation omitted]). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link. […]

[170] In addition to affirming a flexible standard, *Bedford* also encouraged the use of expert witnesses to present social science evidence, which is included in the Application. Part of the Applicants' case depends on social and legislative facts, in addition to facts that are based on science. Social and legislative facts are facts about society at large, established by complex social science evidence: *Bedford*, at para. 48. The *Bedford* court noted that the use of social science evidence in *Charter* litigation has evolved significantly, and the Supreme Court has expressed a preference for social science evidence to be presented through an expert witness: at para. 53.

[171] As I have indicated above, this Application is capable of scientific proof and the Applicants have already included many facts based on scientific and social science findings. Pursuant to *Bedford*, the assessment of expert evidence relies heavily on the trial judge: at para. 53. The Applicants should therefore be afforded the opportunity to present their complete evidence in front of the application judge, especially in light of the flexible standard used to establish causation in a s.7 claim.

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b. Section 15: Equality

The Claim as Pleaded

[172] The Applicants submit that the Target violates s.15 of the *Charter* because Ontario's youth and future generations:

- are a uniquely vulnerable population by virtue of their age and, for some, their inability to influence political decisions at the ballot box;
- will be disproportionately impacted by the devastating impacts of climate change, which will significantly increase in severity and intensity as the years progress;
- are among those who will suffer the most from the climate change impacts, including, but not limited to, extreme heat events, warming temperatures and heat waves, infectious diseases, fires, flooding, algal blooms, toxic contamination, and mental health challenges; and
- will have their pre-existing vulnerability and disadvantage heightened as a result of the impacts stated above.

[173] Ontario submits that the essence of the Applicants' discrimination claim is that Ontario residents of the future will suffer more harm than those of the present or of the past. Ontario submits that even if this could be proven, it is a temporal distinction, not one based upon enumerated or analogous grounds in the *Charter*.

[174] In response, the Applicants submit that they are particularly vulnerable because of the cumulative and compounding impacts of climate change that will play out over years and therefore impact them longer and more acutely. In addition, the Applicants submit that the specific physiological and psychological characteristics of young people would make them particularly susceptible to the negative health impacts of climate change.

Section 15 Jurisprudence and Analysis

[175] Section 15 (1) of the *Charter* provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[176] In *Kahkewistahaw First Nation v. Taypotat,* 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20, the Supreme Court identified two steps to the equality analysis under s.15(1):

> a) does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds; and

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> b) if so, does the law fail to respond to the actual capacities and needs of the members of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage?

[177] Section 15 claims are typically fact-driven and highly contextual. The Supreme Court has noted that these claims are inherently comparative, in that claimants have to establish distinctive treatment (or effect) based on a prohibited ground: *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 62.

[178] The Applicants' s. 15 claim highlights the vulnerability of the Applicants by virtue of their age: some of them do not have the right to vote; most, if not all, of them will be proportionately affected by impacts of climate change and will suffer the most of all generations; but more importantly, these impacts will exacerbate their pre-existing vulnerability and disability.

[179] On the first stage of the test, the Applicants clearly identify an alleged distinction based on an enumerated ground, age. The second stage of the test, which generally answers the question of whether the distinction is discriminatory, is less straightforward.

[180] The Applicants' claim is essentially one of "adverse effects" or "adverse impact" discrimination, *i.e.*, indirect discrimination. In such cases, it is alleged that a particular law or rule, while neutral on its face, has a disproportionate adverse impact on a group characterized by a prohibited (enumerated or analogous) ground of discrimination: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 60-63.

[181] The Supreme Court has noted the difficulty of identifying indirect discrimination:

> In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). […] In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. […] In that kind of case, the claimant will have more work to do at the first step. Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group: *Withler*, at para. 64.

[182] The Supreme Court has also long noted the importance of substantive equity when considering whether there has been discrimination. Indeed, formal equality has been squarely rejected by the Supreme Court of Canada in favour of a substantive equality analysis: see *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux,* 2018 SCC 17, [2018] 1 S.C.R. 464 ("***Alliance***"); *Québec v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, *Withler*; *Taypotat*.

[183] In *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143, McIntyre J. anticipated the dangers of formal equality, in which likes are treated alike, at p. 165:

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> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law […,] the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another. [emphasis added]

[184] More recently, in *Alliance*, Abella J. noted: "when the government passes legislation in a way that perpetuates historic disadvantage for protected groups, regardless of who caused their disadvantage, the legislation is subject to review for s. 15 compliance": at para. 41.

[185] Pre-existing disadvantage plays an important role in the substantive equality analysis. Indeed, while the equality analysis is inherently comparative, *disadvantage* rather than *distinction* lies at its heart: *Single Mothers' Alliance of BC Society v. British Columbia*, 2019 BCSC 1427, at para. 129. As articulated by Abella J. in *Québec v. A*, at para. 332:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.

[186] Whether the Applicants are able to meet the second stage of the s.15 test outlined above remains to be seen. However, I am unable to say, at this stage, that the Applicants' claim under s.15 of the *Charter* has no prospect of success.

[187] First, it is acknowledged that evidentiary challenges for claimants may be more apparent in claims of "adverse effect" or "adverse impact" discrimination. To date, few decisions of the Supreme Court have dealt with adverse effect discrimination, perhaps because of the significant practical difficulties involved in adducing sufficient evidence to demonstrate adverse impacts on particular groups: see *Symes v. Canada*, [1993] 4 S.C.R. 695. However, where adverse impact claims have succeeded under the *Charter*, they have been based on self-evident societal patterns amenable to judicial notice, such as the disadvantage faced by deaf persons seeking to access medical services without the aid of sign language interpretation: see *Eldridge*, cited above. The adverse effects of climate change on younger generations – who presumably would have more years to live than current generations – may be considered self-evident, especially if the Applicants are able to present evidence of historical or sociological disadvantage that the Applicants have experienced as a result of their age.

[188] Second, it is not apparent that the Applicants cannot prove that Ontario's conduct widens the gap between the disadvantaged group (the Applicants, youth and future generations) and the rest of society (adults and current generations) rather than narrowing it, pursuant to Abella J.'s

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comments in *Québec v. A*, cited above, particularly in light of the courts' shift to substantive, rather than formal, equality analysis.

[189] A liberal reading of the Applicants' Notice of Application suggests that they intend to prove, with admissible evidence, that Ontario's actions will have a disproportionate impact on youth and future generations by putting them at an increased risk of various health problems due to their age, an enumerated ground. Just as in the case of the Applicants' s.7 claim, the novelty of the s.15 claim will not prevent the claims from proceeding unless it can be established that the claim is unsustainable, which is not the case here.

D. Does the Application depend on a positive obligation on the Province?

[190] Ontario argues that even if the claim were justiciable and if it were possible to prove future harms, the Application must fail because it is premised on a legal theory that Ontario is constitutionally obliged to take positive steps to redress the future harms of climate change – *i.e.*, the Application is premised on a "positive obligation" on the state. They submit that the province has no constitutional obligation to take positive steps.

The Law

[191] In a labour rights case, *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, the Supreme Court considered the nature of positive and negative obligations in the context of s.2(d) of the *Charter* (freedom of association). The court noted that "positive obligations may be required 'where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms'": at para. 25. "Negative obligations" are generally understood to mean "that Parliament and the provincial legislatures need only refrain from interfering (either in purpose or effect) with protected associational activity [that guarantees fundamental freedoms]": at para. 19.

[192] One year later, in *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, the Supreme Court left the door open for positive obligations on the state in the context of s.7. *Gosselin* centered around a claim under s.7 for a right to an adequate level of social assistance in Québec, as the province excluded citizens under age 30 from receiving full social security benefits. While the majority rejected the *Charter* challenge, McLachlin C.J. noted the following regarding positive obligations [emphasis added]:

> [82] <u>One day s. 7 may be interpreted to include positive obligations.</u> To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada* [citation omitted], the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": [citation omitted]. <u>It would be a mistake to regard s. 7 as frozen</u>, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe* [citation omitted] are apposite:
>
> > We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural

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> guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
>
> The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.
>
> [83] I conclude that they do not. With due respect for the views of my colleague Arbour J. [dissenting], I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

[193] In the context of s.15, the Supreme Court found a "duty to take positive action" as early as 1997. In *Eldridge*, cited above, the Supreme Court found that the failure to provide services to deaf clients at a hospital was an omission that violated the claimant's *Charter* rights and ordered the provision of that service: at para. 80. The Court of Appeal for Ontario, in *Ferrel v. Ontario (Attorney General of)* 1998, 42 O.R. (3d) 97 (C.A.), a case Ontario cites, noted that *Eldridge* stands for the proposition that "the Supreme Court of Canada has left open the possibility, in some cases, that s. 15(1) may oblige the state to take positive actions to ameliorate the symptoms of systemic or general inequality": at para. 43.

Position of the Parties

[194] The Applicants submit that this is not a case of positive obligation, as "typical" positive rights cases seek relief that requires the government to take on spending or other obligations to improve a certain social welfare problem they did not create (*e.g.*, the homelessness problem in *Tanudjaja*). On the other hand, in this Application, the government is acting to cause the harm in question. By lowering the target for Ontario, the government is essentially authorizing, incentivizing, and itself creating the very GHGs that are the cause of the alleged *Charter* violations in the Application. The Applicants emphasize that none of the relief sought addresses specifically how the government should go about achieving the appropriate level of emissions reductions, meaning there is "very little in the way of positive obligations in the classic sense".

[195] Alternatively, the Applicants submit that even if this were a positive obligation case, it is a case that involves a "special circumstance", pursuant to *Gosselin*. They submit that as multiple appellate courts have already recognized, climate change is an existential threat. In this fundamental way, the issues and relief sought in this Application engage the very precondition to the enjoyment of all fundamental freedoms, making it unlike any of the cases Ontario cites. With

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climate change, the stakes could not be higher, and action is required at the governmental level in order to avoid its catastrophic impacts.

[196] In response, Ontario submits that no matter what the Applicants call it, what they really seek in this case is "a Plan and a Target that has a different number". Essentially, Ontario argues, the Applicants want the government to take a positive step to put in a different number for the Target and then meet that number. In other words, the Application entails "a duty to take steps to combat the adverse effects of climate change in the future by doing something today", no matter how the Applicants phrase it.

[197] Ontario largely relies on five cases to argue that (a) the *Charter* does not impose positive obligation on the state to take steps to address harms or to prevent future harms, and (b) Ontario does not have a constitutional obligation to do so in the first place. I will summarize these cases and outline the parties' positions on them: (1) *Ferrel*, cited above; (2) *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538, 91 O.R. (3d) 412; (3) *Tanudjaja (SCJ)*, cited above; (4) *Barbra Schlifer*, 2014 ONSC 5140, 121 O.R. (3d) 733; and lastly, (5) *ETFO et al. v. Her Majesty the Queen*, 2019 ONSC 1308, 144 O.R. (3d) 347. These cases discuss either s.7 or s.15, but Ontario argues that for the sake of this argument, the principles apply equally.

1. *Ferrel v. Ontario* (1998)

[198] *Ferrel* is a s.15 case that challenged the Ontario legislature's repeal of an act that comprised various employment equity provisions. The repealed Act imposed an obligation on employers to work toward the goal of a workplace that reflected the various groups that make up Ontario society: at para. 7. The Court of Appeal for Ontario rejected the challenge as it found that there was no constitutional obligation to enact the repealed Act in the first place, and s.15 does not impose the obligation on the state to do so.

[199] Ontario cites *Ferrel* for two propositions. First, in cases where there is no obligation to enact an act in the first place, the legislature, as the Court of Appeal wrote, is "free to return the state of the statute book to what it was before the [repealed Act], without being obligated to justify the repealing statute under s.1 of the *Charter*": at para. 36. Second, Ontario relies on the Court of Appeal's comments on the dangers of imposing a positive obligation on the state:

> [48] Finally, if it is thought that s. 15(1) imposes an obligation to enact employment equity legislation, what is the nature and scope of the obligation? A court is not competent to answer this question in a satisfactory way. It is a question that is not justiciable. Legislatures require substantial freedom in designing the substantive content, procedural mechanisms, and enforcement remedies in legislation of this kind. They are the appropriate branch of government to make these decisions, not courts working from the general terms of s. 15(1).
>
> [49] In this vein, what would be the constitutional minimum content of employment equity legislation? […] Considerations of this nature are further indications that it would not be sensible to interpret s. 15(1) as imposing an obligation to enact laws the constitutional adequacy of which would be subject to judicial review under the *Charter*.

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[200] The Applicants submit that *Ferrel* does not apply to the case at bar because the issue was about systemic discrimination in the employment context, which is not conduct that Ontario authorized or created. That makes it different than this case, where Ontario is actively authorizing and creating the very emissions that are causing harm.

2. *Flora v. OHIP* (2008)

[201] *Flora* centered on whether s.7 imposes an obligation on the government to fund life-saving surgery. In that case, Mr. Flora challenged a regulation that prevented him from recovering from the Ontario Health Insurance Plan ("**OHIP**") his half-million-dollar expenditure on a procedure that saved his life. The procedure had to be performed at a privately-funded hospital in the United Kingdom because it was not approved in Ontario and was therefore not an "insured service" for the purposes of reimbursement.

[202] Mr. Flora submits that his rights under s.7 were deprived because Ontario repealed an older law that would have paid for his treatment. The court relied on *Ferrel*, discussed above, and held that a *Charter* violation cannot be grounded on a mere change in law: *Flora*, at para. 104.

[203] Mr. Flora, relying on *Chaoulli*, cited and discussed above, argued that s. 7 imposes positive obligations on the state to fund the surgery. The Court of Appeal distinguished *Chaoulli*, stating that it was not a positive obligation case, as the claimants there did not seek an order requiring the government to fund their private health care or to spend more money on health care: *Flora*, at para. 107.

[204] The Court of Appeal, citing *Chaoulli*, held that because the *Charter* does not confer a freestanding constitutional right to health care, the Ontario government, in the case of OHIP, has "elect[ed] to provide a financial benefit that is not otherwise required by law": at para. 108. The court therefore concluded, at para. 108:

> On the law at present, the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on the Ontario government to fund out-of-country medical treatments even where the treatment in question proves to be life-saving in nature.

[205] Ontario cites *Flora* for the proposition that if there was no requirement to enact a protective measure in the first place, there cannot be a constitutional requirement not to repeal it.

[206] The Applicants, citing *Chaoulli*, submit that even if the *Charter* does not confer a freestanding constitutional right to a safe environment, Ontario must still ensure that the scheme it put in place to protect against climate change complies with the *Charter*, as it acted to do in the first place: see *Chaoulli*, at para. 104.

[207] They also submit that *Flora* does not apply to the case at bar because the underlying issue in *Flora* was about Ontario residents with diseases or disabilities that required medical treatment, which the Province was, once again, not responsible for.

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3. *Tanudjaja v. Ontario* (SCJ) (2013)

[208] On the issue of positive obligation, Ontario cited this Court's decision in *Tanudjaja*, as the Court of Appeal's decision did not address this issue after finding the application not justiciable.

[209] Early in the reasons, the Court found that "[t]here cannot be a breach of the *Charter* that is based on the assertion of a positive obligation on the state to provide for life, liberty and the security of the person and there is no general obligation that all people will be treated equally": at para. 26.

[210] The applicants in *Tanudjaja (SCJ)* argued that they should have the chance to present a full evidentiary record to demonstrate that their case could be a "special circumstance" as outlined in *Gosselin.* That position was rejected, the Court stating:

> [56] It proposes that every time an application raises the prospect of a positive requirement being imposed on government in order to enforce compliance with s. 7 of the *Charter*, it will have to be the subject of a full hearing. The facts, as asserted, are to be taken as proved and, as a result of the decision in *Gosselin*, it will never be plain and obvious that the case cannot succeed. This is said to be so even in the face of the many cases that, in the years since *Gosselin* was decided, considered but have not recognized a positive obligation on the state to act to protect rights under s. 7.
>
> […]
>
> [58] […] As of this moment, there is no positive obligation placed on Canada or Ontario, arising out of an allegation of a breach of s. 7 of the *Charter*, having been found to apply in circumstances such as this. To the contrary, *Clark* and *Masse* [two cases similar to the one before Lederer J.] demonstrate the opposite. It may be that values, attitudes and perspectives will change, but this evolution is not sufficient to trigger reconsideration in the lower courts [….]

[211] Citing the paragraph above, Ontario submits that the test on a motion to strike cannot be premised on the fact that one day the law may change, as that would mean that all claims can survive a motion to strike.

[212] I note, as an aside, that the comments on positive obligation, set forth at para. 210 above, were heavily criticized by Feldman J.A. in her dissent at the Court of Appeal, an issue the majority did not address. Feldman J.A. observed that the Court in *Tanudjaja* "erred in stating that the s.7 jurisprudence on whether positive obligations can be imposed on governments to address homelessness is settled": at para. 52. Feldman J.A. further stated, at para. 56:

> While recognizing that the majority in *Gosselin* did not foreclose the possibility that, in "special circumstances" in a future case, a court could find that s. 7 imposes positive obligations on government, the motion judge nevertheless concluded the opposite.

[213] As with other cases, the Applicants submit that the underlying issue in *Tanudjaja*, homelessness, was not a problem or predicament that Ontario authorized or created.

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4. *Barbra Schlifer Commemorative Clinic v. Canada* (2014)

[214] In *Barbra Schlifer*, the applicant, a specialized clinic for women who experience violence, challenged amendments to the *Firearms Act, 1995*, S.C. 1995, c. 39, which repealed the long-gun registry system that required the registration of non-restricted firearms. The applicants submit that the registry system protected against the risk of harm, and repealing the registry was contrary to ss.7 and 15.

[215] In that case, Morgan J. first stated that for a s.7 challenge to succeed, there must be *some* state-imposed burden or state-implemented deprivation of rights: at para. 22 [emphasis in original]. In other words, there must be some sort of state intervention.

[216] Applying *Barbra Schlifer*, Ontario argues that the only "state intervention" that is challenged here is the Target, and questions whether the Target itself creates risk and whether it is considered "state intervention". Ontario submits that if it is not state intervention, then the risk does not fall within the government's constitutional responsibilities.

[217] Morgan J. continued, stating that the *Charter* does not impose a positive obligation on the government to enact particular protective measures against the risk of firearm use or to maintain them once enacted. Ontario relies on this as another example of this Court finding that a positive example did not exist.

[218] The Applicants submit that there are at least two ways this Application is different from the one in *Barbra Schlifer*. First, they maintain that the only constitutional focus in *Barbra Schlifer* was a repeal, whereas here, Ontario put in place a legislative scheme with a target that allows for a dangerously high level of emissions. Second, Morgan J. found the connection between the state conduct and the non-state conduct (*i.e.*, violence perpetrated by persons with firearms) to be remote: see para. 31. The Applicants point out that, once again, in *Barbra Schlifer*, the government did not authorize the conduct that caused harm, but here, Ontario established a target that essentially allows GHG emitters to continue to emit GHGs into the atmosphere, thereby causing harm.

[219] The Applicants also point out that *Barbra Schlifer* did survive a motion to strike: see *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271.

5. *ETFO v. Ontario* (2019)

[220] Ontario cites *ETFO* as a more recent case that affirms *Flora* and *Ferrel* and one that largely supports their position. In *ETFO*, the Elementary Teachers' Federation of Ontario brought an application for judicial review at the Divisional Court to challenge Ontario's 2018 decision to issue a directive requiring Ontario's teachers to teach the sex education curriculum in place from 2010 to 2015 ("2010 curriculum"), instead of the new curriculum in place between 2015 and 2018 ("2015 curriculum"). The 2010 curriculum does not include topics that were in the 2015 curriculum, such as consent, specific names for body parts, gender identify and sexual orientation, online behaviour and cyberbullying, and sexually transmitted infections. The applicants submit that the directive infringes the *Charter* rights of teachers (s.2(b), right to freedom of expression), students (ss.7 and 15(1)), and parents (ss.7 and 15(1)).

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[221] The court found that a *Charter* challenge cannot be made out in *ETFO*. On the s.7 issue, the court noted: "a change in the law or government policy alone does not constitute deprivation of a right even if the previous law provided greater life, liberty or security of the person": at para. 139, citing *Flora* and *Barbra Schlifer.* On s.15, the court wrote, at para. 152:

> A section 15(1) *Charter* challenge cannot be based on the removal or omission of learning objectives referable to the 2015 Curriculum. As we have noted previously, that curriculum does not enjoy *Charter* protection: [citation omitted]. A *Charter* infringement cannot be grounded on a mere change in the law nor on a change of curriculum, even a change that no longer provides a benefit from the earlier curriculum.

[222] The court then cited, with approval, Ontario's summary of cases on this point, at para. 153:

> In a long line of *Charter* s. 15 cases, Ontario courts have held that "in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values." These *Charter* s. 15 cases include *Ferrel* (repeal of employment equity statute), *Lalonde* (closing a Francophone hospital), *Barbra Schlifer* (repeal of long-gun registry), *Tanudjaja* (reduction in housing programs), and *Irshad* (restricting OHIP eligibility). In every case, persons who benefitted from the previous law or policy alleged that its removal or replacement had a discriminatory effect. In every case, the Court rejected this argument.

[223] The Applicants do not dispute that the legislature is entitled to change its approach, but emphasizes that its actions must still be constitutionally compliant: *Alliance*, cited above, at para. 36. They submit that in this case, constitutional compliance requires Ontario to reduce its share of GHG emissions to protect its citizens based on internationally accepted science on the impacts of climate change, rather than imposing an inadequate and dangerous Target.

Analysis and Conclusion

[224] As the Applicants submit, the thrust of Ontario's submissions is that if there is no constitutional basis for the government to act in the first place, then repeal of legislation cannot, in and of itself, be unconstitutional.

[225] Ontario's line of reasoning assumes that the province is not constitutionally obliged to take positive steps to redress the future harms of climate change. However, that assumption is not clear at this stage of the proceedings. Cases such as *Gosselin* and *Eldridge*, discussed above, suggest that under very specific circumstances, a positive constitutional duty can be found. Also, the Applicants are seeking relief not only for the repeal of the *Climate Change Act* but also for the setting of the new Target by Ontario.

[226] The Applicants submit that if Ontario chose to put in a scheme to protect against climate change, it must do so in a way that complies with the *Charter*. It is of note that in *La Rose*, on this point, the court noted: "[…] when policy choices are translated into law or state action, that resulting law or state action must not infringe the constitutional rights of the Plaintiffs": at para. 45. In other words, once Ontario chose to translate policy choices into law and state action, which

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I have found to be the case here, Ontario has a responsibility to ensure that the same law and state action do not infringe the constitutional rights of Ontario residents.

[227] I note further that cases cited by Ontario were addressed on their merits, after the court had carefully considered the factual context and the full merits of the novel legal propositions put forward by the various applicants. A motion to strike is not the appropriate forum to make judicial findings on the complex issue of positive obligations. The Applicants should therefore be given the chance to make full submissions at a merits hearing.

[228] Additionally, the cases cited by Ontario are all judicial statements in contexts very different from the case before this Court. It is not clear that a case for positive obligation cannot be made out in the climate change context, and it is especially unclear if this Application could be a "special circumstance" described in *Gosselin* without the benefit of a full record.

[229] In fact, "special circumstance" has been considered in a climate change context in *La Rose*, where the court emphasized that it would be a mistake to regard s.7 as frozen. The court noted that the plaintiffs in that action "have pleaded facts that may support the existence of 'special circumstances'" and rejected Canada's argument that the plaintiffs' claim discloses no reasonable cause of action on the basis of a positive obligation alone: at para. 72.

[230] Indeed, in *Tanudjaja (SCJ)*, Lederer J. specifically stated that the application did not meet the "special circumstance" test in *Gosselin* because a right to housing had already been argued before the courts in previous cases: at para. 54.

[231] Similarly, in *Ferrel*, a case that pre-dates *Gosselin*, the court, after reviewing various cases, noted that "the judicial statements clearly preponderate against concluding that s.15(1) imposes a positive obligation on legislatures to enact employment equity legislation": at para. 66 [emphasis added].

[232] *Flora*, as the Court of Appeal stated, is a case involving solely economic rights: at para. 106.

[233] To date, no *Charter* cases have arisen in the context of a positive constitutional obligation on the state to provide a stable climate system. However, as Rennie J.A. noted in *Kreishan*, cited above, s.7 jurisprudence may someday evolve to encompass positive obligations in the domain of climate rights.

[234] Indeed, as Feldman J.A. (dissenting) concluded in *Tanudjaja*, the question of whether "special circumstances" exist should not be determined on a motion to strike based on the pleadings alone, an issue the majority did not address:

> Whether a party characterizes the circumstances as "special" is not determinative. What matters is whether the court considers them sufficiently special. That can be determined only after a consideration of the full record, as well as the response from the governments. For example, in *Gosselin* […], the court stated that there was not enough evidence to support the proposed interpretation of s. 7: at para. 65.

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[235] Additionally, the *La Rose* court, after finding that the plaintiffs might have been able to support the existence of "special circumstances", observed further:

> [65] […] I will offer some comments in regards to the Defendants' [Canada's] argument in relation to the positive rights framing of the section 7 *Charter* claim. I do not find this argument sufficient to find that the claim discloses no reasonable cause of action for the reasons below.
>
> [66] The Defendants assert that the Plaintiffs' section 7 *Charter* claim discloses no reasonable cause of action because the claim is seeking recognition of positive rights to the climate change policies preferred by the Plaintiffs. Section 7 of the *Charter* does not instill positive obligations, rather it is premised on the finding of a deprivation resulting from law or state action. The Defendants further indicate that the Plaintiffs' claim is not consistent with an incremental step in the evolution of section 7 *Charter* interpretation and that there is allegedly a lack of special circumstances in this case that would allow for a positive rights framing.
>
> [67] I am not prepared to find that the Plaintiffs would be unable to argue a negative rights claim or that they are otherwise barred from arguing a positive rights claim at this stage in the proceedings. Therefore, this argument has not been accepted as an additional basis for striking the section 7 *Charter* claim.

[236] I am satisfied that the issue of positive obligation should be decided on a full evidentiary record, and not at the Rule 21 stage.

[237] I am therefore not able to find, at this juncture, that the Application has no reasonable prospect of success.

E. Do the Applicants have standing on behalf of future generations?

[238] The Applicants consist of seven youths who are between the ages of 12 and 24 and reside in Ontario. They brought the Application to seek relief on behalf of their generation and of future generations of Ontarians.

[239] The Applicants were – and are – all involved with various climate change initiatives and activism:

- Sophia Mathur, who is 12 years old and lives in Sudbury, was the first youth outside of Europe to strike from school in solidarity with a global movement (started by Swedish youth activist Greta Thunberg) and has played an active role within the "Fridays for Future" movement in Ontario;
    - Zoe Keary-Matzner, who is 13 years old and lives in Toronto, has also been actively involved with the "Fridays for Future" movement in Ontario and has spoken at many climate change-related rallies, press conferences, and other events within Ontario;

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- Shaelyn Hoffman-Menard, who is 22 years old and lives in Peterborough, has worked on issues of climate change, biodiversity, Indigenous-led conservation, youth and community engagement on environmental issues, and cultural and language revitalization initiatives;
- Shelby Gagnon, who is 23 years old and lives in Thunder Bay, has worked on Indigenous food sovereignty in northern Ontario communities and has taken local action to help her own community become more sustainable in response to climate change;
- Alexandra Neufeldt, who is 23 years old and lives in Ottawa, has been actively involved with Citizens Climate Lobby Canada through lobbying elected officials and doing public outreach to promote effective climate action;
- Madison Dyck, who is 23 years old and lives in Thunder Bay, has sailed through Lake Superior giving presentations on climate change impacts in surrounding communities and to youth; and
- Lindsay Gray, who is 24 years old, two-spirit, and lives in the Township of Tiny, is a community organizer focused on environmental, climate and Indigenous issues, including in their home community of Aamjiwnaang First Nation.

The Law

[240] On a preliminary motion to strike for lack of standing, the court should be prepared to terminate the application only in "very clear cases": *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211, at para. 25. The court added:

> At this stage of the proceeding [a motion to strike], the Court may not have all the relevant facts before it, or the benefit of full legal argument on the statutory framework within which the administrative action in question was taken. To the extent that the strength of the applicant's case, and other factors, are relevant to the ground of discretionary standing, the Court may not be in a position to make a fully informed decision that would justify a denial of standing: at para. 25.

While *Sierra Club* was a judicial review decision, these principles have been adopted by Ducharme J. of this Court on a Rule 21 ruling: see *Fraser v. Canada* (Attorney General), [2005] O.J. No. 5580 (S.C.).

[241] The three-part test for granting discretionary standing in a public law case is outlined in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524: (1) whether the case raises a serious justiciable issue, (2) whether the party bringing the action has a real stake or a genuine interest in its outcome, and (3) whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: at para. 2. Courts are to exercise this discretion to grant or refuse standing in a "liberal and generous manner": at paras. 2 and 35.

[242] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" or an "important one". The claim must be "far from frivolous", although courts should not

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examine the merits of the case in more than a preliminary manner. In *Downtown Eastside*, the Supreme Court noted, at para. 42:

> Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

[243] The third consideration, whether the proposed suit is a reasonable and effective means to bring the case to court, has often been expressed as a strict requirement. The court in *Downtown Eastside*, however, established a "flexible, discretionary and purposive approach to public interest standing", not applying this factor in a rigid manner: at paras. 44, 47. The court outlined some factors to be considered in granting or refusing standing, at para. 51:

- The plaintiff's capacity to bring forward a claim: the plaintiff's resources, expertise, and whether the issue will be presented in a sufficiently concrete and well-developed factual setting;

- Whether the case is of public interest: does it transcend the interests of those most directly affected by the challenged law or action? Does it provide access to justice for disadvantaged persons in society whose legal rights are affected?;

- Whether there are realistic alternative means that would favour a more efficient and effective use of judicial resources: are there other potential plaintiffs or parallel proceedings? In particular, courts should consider whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. For example, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing; and

- The potential impact of the proceedings on the rights of others who are equally or more directly affected: courts should pay special attention where private and public interests may come into conflict. (The court noted that the converse is also true: if those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.)

Position of the Parties

[244] Neither party disputes that the Applicants have public interest standing generally. The issue is whether the Applicants have standing on behalf of future generations.

[245] Ontario submits that the Applicants do not have standing on behalf of "people who do not yet exist." It submits that the category of "future generations" is too unbounded in scope to be amenable to a grant of public interest standing. It submits that granting this standing would take this Court's discretionary power "too far". It also notes that the Applicants did not attempt to explain why they are "better placed than anyone else" to represent the interests of future generations of Ontario residents.

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[246] Citing *Downtown Eastside*, Ontario emphasizes that courts have been reluctant to grant public interest standing where "private and public interests may come into conflict." In this case, Ontario submits it would be impossible to determine if one such conflict exists, as the interests and wishes of future generations cannot be known.

[247] The Applicants submit that the issue of standing for future generations is a novel issue that should be determined on a full record. The Applicants note that their claim differs significantly from rights claims on behalf of unborn foetuses in the abortion context (*e.g.*, *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342). The Applicants argue that they should be granted standing as future generations of Ontarians would not be able to bring the same case against a future Ontario government: the failure to reduce GHG emissions and consequent violations of their rights would already be "locked in" before their lifetime even began.

[248] Applying the test in *Downtown Eastside*, the Applicants submit, first, that this Application raises a serious justiciable issue. Second, the Applicants have demonstrated a serious and genuine interest in the subject matter of this Application. Further, this Application is a reasonable and effective way to bring various issues to the court because: (i) the claim at issue impacts all Ontario youth and future generations; (ii) the Applicants have the support of counsel with the expertise, resources, and commitment to bring this Application forward; and (iii) the Applicants are well-placed to bring this Application and it is unreasonable to expect that other children and young adults (or future generations) will bring a similar application at this point in time.

Analysis and Conclusion

[249] At this stage of the proceedings, it is not conclusive that the Applicants should not be granted standing on behalf of future generations. This Court is not able to review all the evidence or to benefit from full legal arguments on the impact of climate change on future generations. This is therefore not a "clear case" where this Court can find that the Applicants lack standing on behalf of future generations.

[250] At a preliminary level, the Applicants have met the test for standing on behalf of future generations:

- As I have found above, this case raises a serious justiciable issue and a substantial constitutional issue.

- The Applicants have demonstrated that they have a real stake and genuine interest in the Application's outcome, given their age and various examples of activism, as outlined above.

- The proposed suit is a reasonable and effective means to bring this Application to court. I have considered the following factors:

    i. Ecojustice, a Canadian environmental law charity, is counsel for the Applicants, which reflects the plaintiff's resources and expertise in

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presenting these issues in a sufficiently concrete and well-developed factual context;

ii. This case is of public interest, in that it transcends the interests of all Ontario residents, not just the Applicants' generation or the ones that follow;

iii. Given their age, the Applicants do bring a useful and distinctive perspective to the resolution of the issues on this Application. There could very well be other persons with different interests in the issues, but the Applicants will provide a unique perspective as young Ontarians; and

iv. Granting the Applicants standing on behalf of future generations does not create a conflict between private and public interests or affect the rights of others who are equally or more directly affected by climate change. The Respondents have not demonstrated that there are parallel proceedings or that other parties with more direct and personal stakes in the matter have deliberately refrained from filing an application. As the Applicants have argued, future generations are unlikely to be able to bring the same suit as the Applicants against current or future Ontario governments, as the state of the world will likely be different. At this preliminary stage, granting the Applicants standing on behalf of future generations does not preclude future generations from bringing other climate change-related claims against the Ontario government at a future time.

[251] I note, additionally, that the Court of Appeal for Ontario has held that no injury needs to have been committed in order to determine standing as long as the claimants can show that a potential injury affected them:

> There is no suggestion that these appellants have suffered any present damage or losses that could be compensable in damages, their expressed purpose being to reduce the risk of a future nuclear incident and to assure compensation if one occurs. They invoke the preventative role of the declaratory judgment as referred to by Wilson J. in *Operation Dismantle*, [citation omitted] quoting from Edwin Borchard, *Declaratory Judgments* [citation omitted]:
>
> > [N]o 'injury' or 'wrong' need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant.

See *Energy Probe v. Canada (Attorney General)*, cited above, at para. 45.

[252] Ontario submits that the Applicants did not explain why they are "better placed than anyone else" to represent the interests of future generations of Ontario. Ontario did not provide jurisprudence to support that this is required for a determination of standing.

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[253] As I have reviewed above in the sections discussing the Applicants' ss.7 and 15 claims, the Applicants have made various claims – which are deemed valid and proven at this point of the proceedings – that their, and future, generations will bear the brunt of various impacts of climate change. Future generations would not be able to bring the same claim against the current government for setting a Target that the Applicants deem inadequate. The Applicants therefore should be given standing for their generation, as well as for future generations.

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F. What remedies are potentially available to the Applicants?

[254] In both written and oral submissions, Ontario took issue with two of the Applicants' relief sought. Specifically, it argues that the Applicants' request for orders requiring Ontario to set a "science-based GHG reduction target" in order to ensure a right to a "stable climate system" and a "sustainable future" for future generations are all matters that would take the court "well beyond its institutional capacity."

[255] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, cited in Feldman J.A.'s dissent in *Tanudjaja (ONCA)* at para. 85, should alleviate Ontario's concerns on this Application. In *Khadr*, the Supreme Court was required to consider whether a remedy sought was precluded as an option to the courts, as it touched on the Crown's prerogative power with respect to matters of foreign affairs. Mr. Khadr was a Canadian citizen who had been detained by the United States at Guantanamo Bay since he was apprehended as a minor in Afghanistan in 2002. Mr. Khadr turned to the judicial system to request that courts make an order compelling the Canadian government to request his repatriation to Canada.

[256] The Supreme Court concluded that the Canadian government's conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice and violated his s.7 rights: *Khadr*, at paras. 24-26. The court ultimately held that it is possible to balance protection of *Charter* rights with Crown prerogative through declarations:

> [44] […] The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. […] It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights.
>
> […]
>
> [46] In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle* [citation omitted]. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble* [citation omitted]. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

[257] The *Khadr* case suggests that it is possible for courts to avoid venturing into questions of public policy – one of Ontario's assertions on this Application – by limiting the available remedy to declarations and by leaving it to the government to determine the best means forward.

[258] Indeed, applying *Khadr* to *Friends of the Earth*, Dean Sossin (as he then was) writes: "in light of *Khadr*, the better approach to have taken in the [...] case would have been to acknowledge the remedial limits on the court and issue declaratory relief": Sossin, at p. 247.

[259] In this case, the final decision as to any relief to be accorded rests with the application judge, but the Application should not be struck simply because the relief sought – or some of it – would take this Court beyond its institutional capacity.

G. Does this Court have jurisdiction to hear the Application?

[260] The final issue to be addressed is where this Application should be heard. Ontario submits that the Application is, at its core, an application for judicial review, as it challenges the lawfulness of the government's actions in preparing the Plan or establishing the Target under the *Cancellation Act*. The Applicants submit that the Application is, in substance, primarily a *Charter* challenge and not an application to review the Province's actions. I have already found that the Target and the Plan were statutorily mandated and reviewable by this Court.

[261] The Application is a *Charter* challenge. (See discussion in *Alford v. The Law Society of Upper Canada,* 2018 ONSC 4269, at para. 41.) First, the Applicants are seeking relief under s.52(1) of the *Constitution Act, 1982* and s.24(1) of the *Charter*, unlike the applicant in *Alford*, a case Ontario relies on. Second, by seeking various constitutional remedies, the Applicants are clearly doing more than "raising *Charter* issues in support of their arguments": *Williams v. Trillium Gift of Life Network*, 2019 ONSC 6159, at para. 35.

[262] I also rely on comments from this Court on this issue. In *Di Cienzo v. Attorney General of Ontario,* 2017 ONSC 1351, 138 O.R. (3d) 41, Belobaba J. held that while applications for declarations pursuant to s.51(1) of the *Constitution Act, 1982* can be heard in the Divisional Court, the Superior Court nonetheless maintains jurisdiction in such matters. In declining to transfer an application challenging a provincial regulation on constitutional grounds to the Divisional Court, Belobaba J. stated, at para. 3:

> In my view, the applicant is not in the "wrong court." The Superior Court of Justice as a court of general jurisdiction has long granted the declaration that is sought herein (that an impugned regulation is inconsistent with the *Charter of Rights* and is thus of no force or effect under s. 52(1) of the *Constitution Act*) and has done so either in an action or by way of a Rule 14.05 application. The fact that the Divisional Court on occasion has done this as well under the *JRPA* [*Judicial Review Procedure Act*] is not contested in this case and, in any event, is a matter that is best addressed by the Divisional Court. But the existence of a possible parallel route by way of judicial review does not nullify the Superior Court's well-established jurisdiction to hear a *Charter*-based constitutional challenge to subordinate legislation by way of a Rule 14.05 application. […]

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[263] Another case, cited by Belobaba J., made similar comments regarding s.24(1) remedies:

> Declarations of unconstitutionality on *Charter* grounds, consequent to an application for a remedy under s. 24(1) of the *Charter* are, for the most part, obtained from a court of original jurisdiction — a trial court — by way of action, or […] by way of application […]: *Falkiner v. Ontario Ministry of Community and Social Services* (1996), 140 D.L.R. (4th) 115 (Ont. Div. Ct.), at para. 22.

[264] The Divisional Court is not a court of original or general jurisdiction; it is a statutory court that has "no inherent jurisdiction such as is vested in each individual Judge of the [Superior Court]": *Di Cienzo*, at para. 33, citing *Chramer et al. v. The Queen* (1974), 3 O.R. (2d) 602 (Div. Ct.), and *Marlatt v. Woolley* (2000), 129 O.A.C. 328 (Div. Ct.).

[265] I am satisfied that the Superior Court of Justice, therefore, is the appropriate venue to hear this *Charter*-based constitutional challenge.

DISPOSITION

[266] This is a novel application. At its core, it is about whether the Respondent, Ontario, violated the Applicants' ss.7 and 15 rights by repealing the *Climate Change Act* through the *Cancellation Act* and by setting a target for the reduction of GHG emissions that is insufficiently ambitious. As I have already found, both the preparation of the Plan and the repeal of the *Climate Change Act* by Ontario are governmental actions that are reviewable by the court for compliance with the *Charter.*

[267] For the reasons given above, I find that it is not plain and obvious that the Application discloses no reasonable cause of action or that it has no reasonable prospect of success.

[268] I thereby dismiss the motion of the Respondent, Ontario, seeking to strike out the Application under Rule 21.01(b).

COSTS

[269] I would strongly urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to five pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within sixty days of the release of these Reasons.

Carole J. Brown, J.

Date: November 12, 2020

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TAB 15

Black v. Chrtien et al.

[Indexed as: Black v. Canada (Prime Minister)

54 O.R. (3d) 215
[2001] O.J. No. 1853
Docket No. C33887

Court of Appeal for Ontario,
Laskin, Goudge and Feldman JJ.A.
May 18, 2001

2001 CanLII 8537 (ON CA)

Courts--Jurisdiction--Provincial superior court having jurisdiction to grant declaratory relief against Prime Minister in respect of his exercise of honours prerogative of Crown --However, jurisdictional issue moot as exercise of honours prerogative is always beyond judicial review.

Crown--Crown prerogative--Granting of honours has not been displaced by statute in Canada and continues to be Crown prerogative--Advice by Prime Minister of Canada to Queen about conferral of honour on Canadian citizen constituting exercise of prerogative power of Crown which is not reviewable by courts.

The appellant, who was at the time a Canadian citizen, was nominated for appointment by the Queen as a peer. The nomination was accepted and recommended by the British Government. The Prime Minister of Canada intervened with the Queen to block the appellant's peerage, citing a contravention of Canadian law. He asserted that he had a right to block the appellant's nomination because of the Nickle Resolution, passed by the Canadian House of Commons in 1919, which requested the King to refrain from conferring titles on any of his Canadian subjects. The appellant's appointment as a peer was suspended or deferred. The appellant brought an action against the Prime

Minister for abuse of power, misfeasance in public office and negligence. He also sued the Government of Canada for negligent misrepresentation. The Prime Minister and the Attorney General of Canada brought a motion to dismiss the claims (except for the claim of negligent misrepresentation against the Government) on two grounds: first, that the claims were not justiciable and therefore disclosed no reasonable cause of action; and, second, that the Superior Court had no jurisdiction to grant declaratory relief against the respondents because that jurisdiction lay exclusively with the Federal Court. The motions judge held that the Superior Court had jurisdiction to entertain the appellant's claims. He dismissed the claims, holding that what was involved was an exercise of the Crown prerogative, non-reviewable in court. The appellant appealed on the issue of justiciability. The respondents cross-appealed on the jurisdiction of the Superior Court to grant declaratory relief.

Held, the appeal and the cross-appeal should be dismissed.

The Crown prerogative is the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown. It can be limited or displaced by statute. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The granting of honours has never been displaced by statute in Canada and therefore continues to be a Crown prerogative in Canada.

Whether the Prime Minister exercised a prerogative power was a question of law. The court has the responsibility to determine whether a prerogative power exists and, if so, its scope and whether it has been superseded by statute. The motions judge was entitled to consider the legal character of the appellant's allegations even though the appellant did not expressly plead that the Prime Minister exercised the Crown prerogative.

Crown prerogative powers are not required to be exercised exclusively by the Governor General. As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative.

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Whether one characterizes the Prime Minister's actions as communicating Canada's policy on honours to the Queen, giving her advice on the appellant's peerage or opposing the appellant's appointment, he was exercising the prerogative power of the Crown relating to honours. The honours prerogative is not limited to conferrals the Government of Canada or the Prime Minister might make. The honours prerogative also includes giving advice on, and even advising against, a foreign country's conferral of an honour on a Canadian citizen.

The controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter. The exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. The exercise of the honours prerogative is always beyond the review of the courts. No important individual interests are at stake. The appellant's rights were not affected. No Canadian citizen has a right to an honour, and no Canadian citizen can have a legitimate expectation of receiving an honour. In Canada, the doctrine of legitimate expectations informs the duty of procedural fairness; it gives no substantive rights. Even if the doctrine of legitimate expectations could give substantive rights, neither the appellant nor any other Canadian citizen can claim a legitimate expectation of receiving an honour. The receipt of an honour lies entirely within the discretion of the conferring body. The disc retion to confer or refuse to confer an honour is the kind of discretion that is not reviewable by the court. In this case, the court has even less reason to intervene because the decision whether to confer a British peerage on the appellant rested not with the Canadian Prime Minister but with the Queen.

Once the Prime Minister's exercise of the honours prerogative was found to be beyond review by the courts, how the Prime Minister exercised the prerogative was also beyond review. Even if the advice was wrong or careless or negligent, even if his motives were questionable, they could not be challenged by judicial review.

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Section 18(1) of the Federal Court Act, R.S.C. 1985, c. F-7 gives the Federal Court, Trial Division exclusive original jurisdiction to grant declaratory relief against any "federal board, commission or other tribunal". "Federal board, commission or other tribunal" is defined in s. 2(1) of the Act as meaning "any body or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown". The actions complained of by the appellant were not performed "by or under an Act of Parliament". The motions judge held that "an order" modifies both "by" and "under" in the definition. The Prime Minister did not exercise powers conferred by an order made pursuant to a prerogative of the Crown or exercise powers conferred under an order made pursuant to a prerogative of the Crown. The respondents submitted that "an order" modifies "under" but not "by". Under this interpretation, the Federal Court would have exclusive jurisdiction if the respondents exercised powers conferred by a prerogative of the Crown or exercised powers conferred under an order made pursuant to a prerogative of the Crown. However, a fair reading of s. 2(1) suggests that "an order made pursuant to" modifies both "by" and "under". Even if the respondents' interpretation was plausible, it collided with the principle that clear and explicit statutory language is required to oust the jurisdiction of provincial superior courts, which, unlike the Federal Court, are courts of inherent jurisdiction. Section 18(1) of the Act does not clearly and explicitly oust the jurisdiction of the Superior Court to grant declaratory relief in respect of the Prime Minister's exercise of the honours prerogative.

Council of Civil Service Unions v. Minister for the Civil Service, [1984] 3 All E.R. 935, [1984] 3 W.L.R. 1174, [1985] 1 A.C. 374, [1985] I.C.R. 14 (H.L.); Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, 59 N.R. 1, 13 C.R.R. 287, 12 Admin. L.R. 16n, apld

Other cases referred to

Attorney-General v. De Keyser's Royal Hotel, [1920] A.C. 508,

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[1920] All E.R. Rep. 80, 89 L.J. Ch. 417, 122 L.T. 691, 36 T.L.R. 600, 64 Sol. Jo. 513 (H.L.); Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, 243 N.R. 22; Barton v. Commonwealth of Australia (1974), A.L.J.R. 161; Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources), [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604, 97 N.R. 241; Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385, 224 N.R. 241, 50 C.R.R. (2d) 189, 22 C.P.C. (4th) 1, 147 F.T.R. 305n; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105 (sub nom. Hunt v. T & N plc); Ordon Estate v. Grail, [1998] 3 S.C.R. 437, 40 O.R. (3d) 639n, 166 D.L.R. (4th) 193, 232 N.R. 201 ; Proclamations Case (1611), 12 Co. Rep. 74, 2 State Tr. 723, 77 E.R. 1352 (K.B.); R. v. Secretary of State for Foreign & Commonwealth Affairs, Ex p. Everett, [1989] 1 All E.R. 655, [1989] Q.B. 811, [1989] 2 W.L.R. 224 (C.A.); R. v. Secretary of State for the Home Department, Ex p. Bentley, [1993] 4 All E.R. 442 (Q.B.); Reference re Canada Assistance Plan (British Columbia), [1991] 2 S.C.R. 525, 58 B.C.L.R. (2d) 1, 83 D.L.R. (4th) 297, 127 N.R. 161, [1991] 6 W.W.R. 1 (sub nom. Constitutional Question Act (Re)); Reference re Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings, [1933] S.C.R. 269, 59 C.C.C. 301, [1933] 2 D.L.R. 348; Schreiber v. Canada (Attorney General), [2000] 1 F.C. 427, 174 F.T.R. 221; Thorne's Hardware Ltd. v. R., [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577, 46 N.R. 91 (sub nom. Irving Oil Ltd. v. National Harbours Board)

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 6, 7, 32(1)(a)
Citizenship Act, R.S.C. 1985, c. C-29
Criminal Code, R.S.C. 1985, c. C-46, s. 749
Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50
Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22
Federal Court Act, R.S.C. 1985, c. F-7, ss. 2 "federal board, commission or other tribunal", 2(1) "federal board, commission or other tribunal" (as am. S.C. 1990, c. 8, s. 1),

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18(1)
Letters Patent constituting the office of the Governor General of Canada (1947), Canada Gazette, Part I, Vol. 81, p. 3104 (reprinted at R.S.C. 1985, Appendix II, No. 31), para. II
Parliament of Canada Act, R.S.C. 1985, c. P-1, s. 4

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APPEAL from an order of LeSage C.J.S.C. (2000), 47 O.R. (3d)

2001 CanLII 8537 (ON CA)

532 (S.C.J.) striking out part of statement of claim as disclosing no reasonable cause of action; CROSS-APPEAL from an order that the Superior Court had jurisdiction to entertain the plaintiff's claims.

Alan J. Lenczner, Q.C., for appellant.
David W. Scott, Peter K. Doody and Jan Brongers, for respondents.

The judgment of the court was delivered by

LASKIN J.A.:--

A. Introduction

[1] The appellant Conrad Black wants to be appointed a peer in the United Kingdom, which would allow him to sit in the House of Lords. He alleges that Prime Minister Jean Chrtien intervened with the Queen to oppose his appointment and that, but for the Prime Minister's intervention, he would have received the honour and title of peer. Mr. Black has sued the Prime Minister for abuse of power, misfeasance in public office and negligence. He has sued the Government of Canada, represented by the Attorney General of Canada, for negligent misrepresentation. He seeks declaratory relief and damages of $25,000.

[2] The respondents Prime Minister Chrtien and the Attorney General of Canada brought a motion to dismiss all of Mr. Black's claims (except the claim for negligent misrepresentation against the Government) on two grounds: first, that the claims are not justiciable and therefore disclose no reasonable cause of action; and second, that the Superior Court has no jurisdiction to grant declaratory relief against the respondents because that jurisdiction lies exclusively with the Federal Court.

[3] In a decision reported as Black v. Canada (Prime Minister) (2000), 47 O.R. (3d) 532 (S.C.J.), LeSage C.J.S.C.

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held that the Superior Court had jurisdiction to entertain Mr. Black's claims. However, the motions judge dismissed these claims, concluding at p. 544 that "[i]t is [the Prime Minister's] prerogative, non-reviewable in court, to give advice and express opinions on honours and foreign affairs . . . his actions and his reasons for giving that advice or expressing those opinions are not justiciable."

[4] Black appeals on the issue of justiciability and the respondents cross-appeal on the jurisdiction of the Superior Court to grant declaratory relief. Together, the appeal and the cross-appeal raise the following three issues:

(1) Is it plain and obvious that, in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising a prerogative power of the Crown?

(2) If so, is it plain and obvious that this exercise of the prerogative is not reviewable by the courts?

(3) If the Prime Minister's exercise of the prerogative is reviewable, does the Superior Court have jurisdiction to grant declaratory relief?

[5] For the reasons that follow, I would answer yes to all three questions. Because of my answers to the first two questions, I would dismiss Mr. Black's appeal. In my view, in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising his honours prerogative, a prerogative power that is beyond the review of the courts.

B. The Claim

[6] For the purpose of both the motion before LeSage C.J.S.C. and this appeal, the facts pleaded in Mr. Black's amended statement of claim must be taken as true and assumed to be proven. I will briefly summarize Mr. Black's pleading.

(a) The factual allegations

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[7] In February 1999, the leader of the British Conservative Party advised Mr. Black that he intended to nominate him for appointment by the Queen as a peer. At the time, Mr. Black was a Canadian citizen ordinarily residing in England. The nomination was accepted and recommended by the British Government. The appointment would permit Mr. Black to use a title and sit in the House of Lords.

[8] On May 10, 1999, the British Government asked the Government of Canada to confirm the absence of a legal impediment to conferring a peerage on Mr. Black. On May 24, the Canadian High Commissioner in London spoke to Mr. Black. The Commissioner told Mr. Black that he had been advised by the Honours Committee of the Canadian Government that Mr. Black was not prevented from accepting a peerage by any statutory bar in Canada, though consultation between the United Kingdom and Canada was customary. Mr. Black claims that hundreds of honours, including more that 25 titular honours, have been bestowed on Canadians without objection by the Canadian Government. Some of those honours have been bestowed during Prime Minister Chrtien's term in office.

[9] On May 28, 1999, the Prime Minister of England, Mr. Blair, told Mr. Black that as long as he became a British citizen and did not use the title in Canada, the Canadian Government did not object to the peerage. The Canadian Government confirmed Prime Minister Blair's advice in a letter to the British Government dated June 9, 1999. The British High Commission received the same advice from Canada.

[10] Relying on this advice, Mr. Black immediately applied for, and on June 11, 1999 obtained, British citizenship. On June 14, Prime Minister Blair wrote Mr. Black confirming that his nomination as a peer was being forwarded to the Queen. Mr. Black was told that his appointment would be made on June 18, 1999.

[11] However, on June 17, Prime Minister Blair told Mr. Black that Prime Minister Chrtien had intervened with the Queen to oppose Mr. Black's peerage, citing a contravention of Canadian law. Prime Minister Chrtien asserted that he had a right to

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block Mr. Black's nomination because of the Nickle Resolution passed by the House of Commons in 1919, which requested the King to refrain from conferring titles on any of his Canadian subjects. Later that day, Mr. Black telephoned Prime Minister Chrtien. The Prime Minister refused to change his position. He defended his actions by referring to the Nickle Resolution and the status of the monarchy in Canada. He added that he had not been kindly treated by the National Post, a newspaper published by Mr. Black. This was the third time in six months that the Prime Minister had expressed to Mr. Black his dissatisfaction with comments made about him in the National Post.

[12] Because of Prime Minister Chrtien's intervention with the Queen, Mr. Black's appointment as a peer was suspended or deferred "with considerable public embarrassment and inconvenience" to him. The Prime Minister later tried to justify his actions by referring to a Regulation passed in 1968 and a Policy issued in 1988.

(b) Canadian policy statements

[13] Mr. Black's amended statement of claim refers to three Canadian policy statements dealing with the granting of honours to Canadian citizens by foreign countries: the 1919 Nickle Resolution, the 1968 Regulation and the 1988 Policy.

[14] The Nickle Resolution passed by the House of Commons in 1919 asked the King "to refrain hereafter from conferring any title or honour or titular distinction upon any of your subjects domiciled or ordinarily resident in Canada . . .". The amended statement of claim states that Prime Minister Chrtien relied on the Nickle Resolution in opposing Mr. Black's appointment. However, Mr. Black pleads that the Nickle Resolution "had no legal effect on the prerogative of Her Majesty the Queen in Right of the United Kingdom" and "without the status of a statute . . . could not affect in any way the prerogative of Her Majesty the Queen". Mr. Black also pleads that the Nickle Resolution must yield to the Citizenship Act, R.S.C. 1985, c. C-29, which permits and recognizes dual citizenship with the United Kingdom. And, finally, Mr. Black pleads that he was a British citizen resident in the United

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Kingdom before the Prime Minister intervened with the Queen.

[15] Mr. Black also alleges that Prime Minister Chrtien relied both on the 1968 Regulation and the 1988 Policy "after the fact" and that neither justified the Prime Minister's actions. The 1968 Regulation [See Note 1 at end of document] was issued by the Secretary of State Department, the 1988 Policy [See Note 2 at end of document] by the Clerk of the Privy Council. Both the Regulation and the Policy require foreign countries to obtain the Government of Canada's approval before awarding an order, a decoration or a medal to a Canadian citizen. And both the Regulation and the Policy state that the Government of Canada shall not grant approval for an award "that carries with it an honourary title or confers any precedence or privilege". However, s. 5 of the 1968 Regulation states that "approval is generally given to accept orders and decorations conferred on Canadian citizens who have dual nationality, provided acceptable evidence is offered that the recipient is ordinarily resident in or has a closer actual connection with the donor country."

(c) Relief sought

[16] In substance, Mr. Black seeks three declarations: first, a declaration that the Prime Minister and the Government of Canada had no right to advise the Queen not to confer an honour on a British citizen or a dual citizen; second, a declaration that the Prime Minister committed an abuse of power by intervening with the Queen to prevent him from receiving a peerage; and third, a declaration that the Government of Canada negligently misrepresented to Mr. Black that he would be entitled to receive a peerage if he became a dual citizen and refrained from using his title in Canada. Mr. Black also seeks damages of $25,000 against both respondents for abuse of power, negligence and negligent misrepresentation. The respondents acknowledge that the negligent misrepresentation claim against the Government of Canada can proceed to trial. However, they move to dismiss all other claims against the Government of Canada and all claims against the Prime Minister.

C. The Decision of the Motions Judge

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[17] LeSage C.J.S.C. dealt first with the question whether the Superior Court had jurisdiction to grant declaratory relief against the Prime Minister and the Government of Canada. He held that it did. He concluded at p. 539 that Mr. Black's claim did not "come clearly or exclusively within the jurisdiction of the Federal Court (Trial Division)" under s. 18(1) of the Federal Court Act, R.S.C. 1985, c. F-7 because Prime Minister Chrtien did not act under an Act of Parliament or make any "order".

[18] The motions judge then considered whether Mr. Black's claims were justiciable. He concluded that they were not. He held that the justiciability of the Prime Minister's actions depended on how these actions were characterized. The motions judge characterized them as an exercise of the Crown prerogative in relation to the granting of honours or the giving of advice in foreign affairs. In his view, these actions came "within the political area of the prerogative that is not subject to review in the courts" (supra, at p. 541).

[19] The motions judge then looked separately at the claims in negligence and for abuse of power. He concluded that these claims could not succeed. Having found that Prime Minister Chrtien acted within his prerogative, the motions judge held that neither the improper exercise of that prerogative nor the wisdom of the Prime Minister's actions was justiciable. The motions judge therefore struck out all claims as non-justiciable, except the claim for negligent misrepresentation against the Government of Canada, which was permitted to proceed.

D. Discussion

[20] The respondents brought their motion under rule 21.01(1)(b) and rule 21.01(3)(a) of the Rules of Civil Procedure [R.R.O. 1990, Reg. 194]. Under rule 21.01(1)(b), the respondents contend that Mr. Black's claim, other than the negligent misrepresentation claim against the Government, discloses no reasonable cause of action. Under rule 21.01(3)(a), they contend that the Superior Court has no

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jurisdiction to grant the declaratory relief Mr. Black requests.

[21] I will deal first with whether Mr. Black's claim discloses a reasonable cause of action. The test under rule 21.01(1)(b) is well established. The threshold is low. The court must assume that the facts pleaded are true. The court should strike out the statement of claim only if it is "plain and obvious" that the claim discloses no reasonable cause of action: "Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail . . . should the relevant portions of a plaintiff's statement of claim be struck out": Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 980, 49 B.C.L.R. (2d) 273. In applying this test, counsel for Mr. Black appropriately cautioned us not to give this statement of claim extra scrutiny because of who the parties are.

[22] The broad question raised by Mr. Black's pleading is whether it discloses a justiciable cause of action against the Prime Minister. As I stated earlier, this broad question divides into two issues: Is it plain and obvious that in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising a prerogative power? If so, is the exercise of this prerogative power reviewable by the courts?

First issue: Was the Prime Minister exercising a prerogative power?

[23] The motions judge concluded that the Prime Minister's communication with the Queen was an exercise of the prerogative power to grant honours and conduct foreign affairs. I agree with the motions judge that Prime Minister Chrtien was exercising a prerogative power, although I rest my own conclusion on the honours prerogative alone.

[24] Mr. Black submits that the motions judge erred in his conclusion for four reasons. First, because Mr. Black did not

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plead that the Prime Minister exercised a Crown prerogative, the motions judge should not have concluded that he did. Second, in Canada the Prime Minister does not have the power to exercise the Crown prerogative, only the Governor General does. Third, the actions of Prime Minister Chrtien pleaded in the statement of claim were not an exercise of the Crown prerogative, in relation to either the granting of honours or the conduct of foreign affairs, but an unsolicited personal intervention in which the Prime Minister gave wrong legal advice. Fourth, in Canada the prerogative power to conduct foreign affairs has been displaced by the Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22.

[25] To put these submissions in context, I will briefly review the nature of the Crown's prerogative power. According to Professor Dicey, the Crown prerogative is "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown": Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (London: Macmillan, 1959) at p. 424. Dicey's broad definition has been explicitly adopted by the Supreme Court of Canada and the House of Lords. See Reference re Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings, [1933] S.C.R. 269 at pp. 272-73, 59 C.C.C. 301, and Attorney General v. De Keyser's Royal Hotel, [1920] A.C. 508 at p. 526, [1920] All E.R. Rep. 80 (H.L.). See also Peter Hogg and Patrick Monahan, Liability of the Crown, 3rd ed. (Toronto: Carswell, 2000) at p. 15.

[26] The prerogative is a branch of the common law because decisions of courts determine both its existence and its extent. In short, the prerogative consists of "the powers and privileges accorded by the common law to the Crown": Peter Hogg, Constitutional Law in Canada, loose-leaf ed. (Toronto: Carswell, 1995) at 1.9. See also Proclamations Case (1611), 12 Co. Rep. 74, 77 E.R. 1352 (K.B.). The Crown prerogative has descended from England to the Commonwealth. As Professor Cox has recently observed, "it is clear that the major prerogatives apply throughout the Commonwealth, and are applied as a pure question of law": N. Cox, The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity,

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14 Australian Journal of Law and Society (1998-99) 15 at 19.

[27] Despite its broad reach, the Crown prerogative can be limited or displaced by statute. See Parliament of Canada Act, R.S.C. 1985, c. P-1, s. 4. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The Crown may no longer act under the prerogative, but must act under and subject to the conditions imposed by the statute: Attorney General v. De Keyser's Royal Hotel, supra. In England and Canada, legislation has severely curtailed the scope of the Crown prerogative. Dean Hogg comments that statutory displacement of the prerogative has had the effect of "shrinking the prerogative powers of the Crown down to a very narrow compass" (supra). Professor Wade agrees:

> [I]n the course of constitutional history the Crown's prerogative powers have been stripped away, and for administrative purposes the prerogative is now a much-attenuated remnant. Numerous statutes have expressly restricted it, and even where a statute merely overlaps it the doctrine is that the prerogative goes into abeyance.

E.C.S. Wade, Administrative Law, 6th ed. (Oxford: Clarendon Press, 1988) at pp. 240-41.)

Nonetheless, as I will discuss, the granting of honours has never been displaced by statute in Canada and therefore continues to be a Crown prerogative in this country.

[28] I turn now to Mr. Black's submissions. Mr. Black did not plead that Prime Minister Chrtien exercised a prerogative power. Therefore, he first submits that on a rule 21.01(1)(b) motion, LeSage C.J.S.C. should not have characterized his allegations about the Prime Minister's actions as amounting to an exercise of the prerogative, and then used that characterization to strike out the amended statement of claim. If the Prime Minister is relying on the prerogative, he must plead it in his statement of defence.

[29] I disagree with this submission. As is evident from my earlier discussion, whether the Prime Minister exercised a

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prerogative power is a question of law. The court has the responsibility to determine whether a prerogative power exists and, if so, its scope and whether it has been superseded by statute. Although Mr. Black did not expressly plead that the Prime Minister was exercising the Crown prerogative, the motions judge was entitled to consider the "legal character" of Mr. Black's allegations.

[30] That the motions judge was entitled to do so on a motion under rule 21.01(1)(b) is supported by the Supreme Court of Canada's decision in Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 13 C.R.R. 287. In that case, the plaintiffs pleaded that the decision of the federal Cabinet to allow the United States to test cruise missiles in Canada violated s. 7 of the Canadian Charter of Rights and Freedoms. The court struck out the claim, holding that it did not disclose a reasonable cause of action. The plaintiffs did not plead that in deciding to permit cruise missile testing the Cabinet was exercising the Crown prerogative. Nonetheless, both the Federal Court of Appeal and Wilson J., in her concurring judgment in the Supreme Court of Canada, held that [the] Cabinet's decision was an exercise of the Crown prerogative relating to national defence and foreign affairs. That finding alone did not insulate the Cabinet's decision from review under the Charter. But Wilson J.'s judgment shows that in determining whether a statement of claim discloses a reasonable cause of action, the court may consider whether, on the allegations pleaded, the defendant exercised a prerogative power.

[31] Mr. Black's second submission is that the Prime Minister cannot exercise the Crown prerogative. He submits that in Canada, only the Governor General can exercise the prerogative. I find no support for this proposition in theory or in practice. Admittedly, the Governor General is the Queen's permanent representative in Canada. The 1947 Letters Patent constituting the office of the Governor General of Canada [Canada Gazette, Part I, Vol. 81, p. 3104] is the instrument by which the Monarch delegates her prerogative powers for application in Canada. The Letters Patent empower[s] the Governor General "to exercise all powers and authorities lawfully belonging to Us in respect of Canada" (at para. II).

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By convention, the Governor General exercises her powers on the advice of the Prime Minister or Cabinet. Although the Governor General retains discretion to refuse to follow this advice, in Canada that discretion has been exercised only in the most exceptional circumstances. See Pa ul Lordon, Q.C., Crown Law (Toronto: Butterworths, 1991) at p. 70.

[32] Still, nothing in the Letters Patent or the case law requires that all prerogative powers be exercised exclusively by the Governor General. As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative: see Lordon, supra, at p. 71. The reasons of Wilson J. in Operation Dismantle affirm that prerogative power may be exercised by cabinet ministers and therefore does not lie exclusively with the Governor General. Similarly, in England the prerogative "[was] gradually relocated from the Monarch in person to the Monarch's advisors or ministers. Hence it made increasing sense to refer to those powers as belonging to the Crown . . .": Bridgid Hadfield, "Judicial Review and the Prerogative Power" in M. Sunkin and S. Payne, The Nature of the Crown (Oxford: Oxford University Press, 1999) at p. 199. This gradual relocation of the prerogative is consistent with Professor Wade's general view of the Crown prerogative as an "instrument of government": Commentary on Dicey's Introduction to the Study of the Law of the Constitution, 9th ed. (London: Macmillan, 1950). The conduct of foreign affairs, for example, "is an executive act of government in which neither the Queen nor Parliament has any part": F.A. Mann, Foreign Affairs in English Courts (Oxford: Clarendon Press, 1986) at p. 2. See also Barton v. Commonwealth of Australia (1974), A.L.J.R. 161 at 172.

[33] Counsel for the respondents points out that if Mr. Black were correct, the Prime Minister -- whose powers are not enumerated in any statute -- would have no legal authority to speak for Canada on foreign affairs. This proposition is, on its face, absurd. I therefore reject Mr. Black's submission that only the Governor General can exercise prerogative powers in Canada. I conclude that the Prime Minister and the Government of Canada can exercise the Crown prerogative as well.

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[34] Mr. Black's third submission is that even if the Prime Minister can exercise prerogative power relating to the granting of honours or the conduct of foreign affairs, on the facts pleaded in the amended statement of claim, Prime Minister Chrtien was doing neither. He was not deciding whether to grant Mr. Black an honour -- that decision rests with the Queen -- and he was not conducting foreign affairs. Instead, according to Mr. Black, Prime Minister Chrtien intervened personally with the Queen and gave unsolicited and wrong legal advice.

[35] In my view, however, whether one characterizes the Prime Minister's actions as communicating Canada's policy on honours to the Queen, giving her advice on Mr. Black's peerage, or opposing Mr. Black's appointment, he was exercising the prerogative power of the Crown relating to honours.

[36] Unquestionably, the granting of honours is the prerogative of the Crown. The Monarch is "the fountain, parent and distributor of honours, dignities, privileges and franchises": Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject (London: Butterworths and Son, 1820), at p. 6. Because no statute in Canada governs the conferral of honours, this prerogative has not been displaced by federal law. Nor has it been limited by the common law. As Hogg and Monahan, supra, observe at pp. 18-19, appointments and honours is one area in which the prerogative power "remains meaningful". Their view is consistent with the opinion of Lord Roskill in the important House of Lords decision, Council of Civil Service Unions v. Minister for the Civil Service, [1985] 1 A.C. 374, [1984] 3 All E.R. 935. In his speech in that case Lord Roskill said at p. 418 that the modern exercise of the prerogative includes "the making of treaties , the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others . . .". (Emphasis added.)

[37] It is one thing to state that the honours prerogative still exists in Canada. However, one critical question on this

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appeal is the scope of that power. Common sense dictates that, at a minimum, the honours prerogative includes the power to grant or refuse to grant an honour to a Canadian citizen. However, in my view the honours prerogative is much broader than that, and is not limited to conferrals the Government of Canada or the Prime Minister might make. The honours prerogative also includes giving advice on, even advising against, a foreign country's conferral of an honour on a Canadian citizen. If that were not so, the three Canadian policy statements on the granting of honours by foreign countries -- the 1919 Nickle Resolution, the 1968 Regulation and the 1988 Policy -- would be meaningless. Because these policy statements guide the exercise of Canada's honours prerogative, the exercise of the prerogative necessarily embraces the communication of these policies to a foreign country considering bestowing a title on a Canadian citizen. Furthermore, the authority to communicate that policy rests with the nation's leader, the Prime Minister.

[38] The policy statements show that Canada has chosen to exercise the honours prerogative differently from England. As we have seen, Canada calls for foreign countries to obtain the Government of Canada's approval before granting honours to Canadian citizens. The underlying rationale of these policies is egalitarianism. Canada disapproves of ranking its citizens according to status and lineage. In communicating Canada's policy to the Queen, in giving her advice on it, right or wrong, in advising against granting a title to one of Canada's citizens, the Prime Minister was exercising the Crown prerogative relating to honours.

[39] Mr. Black's argument appears to rest on the notion that Prime Minister Chrtien's communication with the Queen was grounded not in the prerogative but was a "personal intervention" motivated by a "personal vendetta". He argues that the exercise of a prerogative power is confined to powers and privileges unique to the Crown; powers and privileges enjoyed equally with private persons are not part of the prerogative. There are two answers to Mr. Black's argument. One answer is that the Prime Minister's authority is always derived from either a federal statute or the prerogative; it is never

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personal in nature. See Dicey, supra, at p. 424 and Schreiber v. Canada (Attorney General), [2000] 1 F.C. 427 at p. 444, 174 F.T.R. 221. Here, Prime Minister Chrtien did not act under a statute; he therefore acted under the authority of the Crown prerogative.

[40] The other answer is that even if the Prime Minister does at times act as a private citizen of Canada, he could hardly be said to have been acting as one in this case. Private citizens cannot ordinarily communicate private advice to the Queen. Thus, even accepting Mr. Black's pleading, Prime Minister Chrtien's intervention with the Queen was not personal. Whatever his motivation, he was acting as the leader of this country, giving advice or communicating Canada's policy on honours to a foreign head of state.

[41] For these reasons, I conclude that it is plain and obvious the Prime Minister was exercising the Crown prerogative relating to the granting of honours. Because I am satisfied that the Prime Minister was exercising prerogative power relating to the granting of honours, it is unnecessary to consider the alternative basis for the motions judge's decision, the foreign affairs prerogative, or Mr. Black's submissions on it.

Second issue: Is the prerogative power exercised by the Prime Minister reviewable in the courts?

[42] This is the main question on this appeal. The motions judge concluded at p. 541 that Mr. Black's complaint about the Prime Minister was not justiciable. He wrote: "It is not within the power of the court to decide whether or not the advice of the PM about the prerogative honour to be conferred or denied upon Black was right or wrong. It is not for the court to give its opinion on the advice tendered by the PM to another country. These are non-justiciable decisions for which the PM is politically accountable to Parliament and the electorate, not to the courts."

[43] Mr. Black submits that the motions judge erred in concluding that Prime Minister Chrtien's exercise of the

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honours prerogative was not reviewable by the court. The amended statement of claim pleads that the Prime Minister gave the Queen wrong legal advice, which detrimentally affected Mr. Black. Mr. Black argues that had the advice been given under a statutory power, it would have been subject to judicial review; it should similarly be subject to judicial review if given under a prerogative power.

[44] I agree with Mr. Black that the source of the power -- statute or prerogative -- should not determine whether the action complained of is reviewable. However, in my view, the action complained of in this case -- giving advice to the Queen or communicating to her Canada's policy on the conferral of an honour on a Canadian citizen -- is not justiciable. Even if the advice was wrong or given carelessly or negligently, it is not reviewable in the courts. I therefore agree with the motions judge's conclusion.

[45] Under the law that existed at least into the 1960s, the court's power to judicially review the prerogative was very limited. The court could determine whether a prerogative power existed and, if so, what its scope was, and whether it had been superseded by statute. However, once a court established the existence and scope of a prerogative power, it could not review how that power was exercised. See S. DeSmith, H. Woolf and J. Jowell, DeSmith, Woolf & Jowell's Principles of Judicial Review (London: Sweet & Maxwell, 1999) at p. 175 and De Keyser's Royal Hotel, supra. The appropriateness or adequacy of the grounds for its exercise, even whether the procedures used were fair, were not reviewable. The courts insisted that the source of the power -- the prerogative -- precluded judicial scrutiny of its exercise. The underlying rationale for this narrow review of the prerogative was that exercises of prerogative power ordinarily raised questions courts were not qualified or competent to answer.

[46] Even this narrow view of the court's role in reviewing the prerogative power now has to be modified in Canada because of the Canadian Charter of Rights and Freedoms. By s. 32(1)(a), the Charter applies to Parliament and the Government of Canada in respect of all matters within the authority of Parliament.

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The Crown prerogative lies within the authority of Parliament. Therefore, if an individual claims that the exercise of a prerogative power violates that individual's Charter rights, the court has a duty to decide the claim. See Operation Dismantle, supra. However, Mr. Black does not assert any Charter claim.

[47] Apart from the Charter, the expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power. The preferable approach is that adopted by the House of Lords in the Civil Service Unions case, supra. There, the House of Lords emphasized that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source. If, in the words of Lord Roskill, the subject matter of the prerogative power is "amenable to the judicial process", it is reviewable; if not, it is not reviewable. Lord Roskill provided content to this subject matter test of reviewability by explaining that the exercise of the prerogative will be amenable to the judicial process if it affects the rights of individuals. Again, in his words at p. 417 A.C.:

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

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[48] In his speech in that case, Lord Diplock discussed two ways in which the exercise of a prerogative power may affect the rights of an individual: by altering the individual's legal rights and obligations or by affecting the individual's legitimate expectations. He stated at p. 408 A.C.:

> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker [that the benefit or advantage] will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

[49] I agree with the House of Lords that the proper test for the review of the exercise of the prerogative is the subject matter test. It is that test that I will endeavour to apply in this case.

[50] At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. See Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources), [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604; Thorne's Hardware Ltd. v. R., [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577. Only those exercises of the prerogative that are justiciable are reviewable. The court must decide "whether the question is purely political in nature and should,

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therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch": Reference re Canada Assistance Plan (British Columbia), [1991] 2 S.C.R. 525 at p. 545, 58 B.C.L.R. (2d) 1.

[51] Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.

[52] Thus, the basic question in this case is whether the Prime Minister's exercise of the honours prerogative affected a right or legitimate expectation enjoyed by Mr. Black and is therefore judicially reviewable. To put this question in context, I will briefly discuss prerogative powers that lie at the opposite ends of the spectrum of judicial reviewability. At one end of the spectrum lie executive decisions to sign a treaty or to declare war. These are matters of "high policy": R. v. Secretary of State for Foreign & Commonwealth Affairs, Ex p. Everett, [1989] 1 All E.R. 655 at p. 660, [1989] Q.B. 811, per Taylor L.J. Where matters of high policy are concerned, public policy and public interest considerations far outweigh the rights of individuals or their legitimate expectations. In my view, apart from Charter claims, these decisions are not judicially reviewable.

[53] At the other end of the spectrum lie decisions like the refusal of a passport or the exercise of mercy. The power to grant or withhold a passport continues to be a prerogative power. A passport is the property of the Government of Canada, and no person, strictly speaking, has a legal right to one. However, common sense dictates that a refusal to issue a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable. This was the position taken by the English Court of Appeal in R. v. Secretary of State for Foreign & Commonwealth Affairs, Ex p. Everett, supra. Two passages from that case are worth highlighting. O'Connor L.J. wrote at p. 658 All E.R.:

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> The judge held that the issue of a passport fell into an entirely different category. That seems common sense. It is a familiar document to all citizens who travel in the world and it would seem obvious to me that the exercise of the prerogative, because there is no doubt that passports are issued under the royal prerogative in the discretion of the Secretary of State, is an area where common sense tells one that, if for some reason a passport is wrongly refused for a bad reason, the court should be able to inquire into it. I would reject the submission made on behalf of the Secretary of State that the judge was wrong to review the case.

And Taylor L.J. wrote at p. 660 All E.R.:

> At the top of the scale of executive functions under the prerogative are matters of high policy, of which examples were given by their Lordships: making treaties, making law, dissolving Parliament, mobilising the armed forces. Clearly those matters, and no doubt a number of others, are not justiciable. But the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision, affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases.

[54] In today's world, the granting of a passport is not a favour bestowed on a citizen by the state. It is not a privilege or a luxury but a necessity. Possession of a passport offers citizens the freedom to travel and to earn a livelihood in the global economy. In Canada, the refusal to issue a passport brings into play Charter considerations; the guarantee of mobility under s. 6 and perhaps even the right to liberty under s. 7. In my view, the improper refusal of a passport should, as the English courts have held, be judicially reviewable.

[55] A similar view might also be taken of the exercise of the prerogative of mercy, still preserved in Canada by s. 749 of the Criminal Code, R.S.C. 1985, c. C-46. Though on one view

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mercy begins where legal rights end, I think the prerogative of mercy should be looked at as more than a royal favour. The existence of this prerogative is the ultimate safeguard against mistakes in the criminal justice system and thus in some cases the Government's refusal to exercise it may be judicially reviewable. That was the view taken by the English Queen's Bench Division in Re Secretary of State for the Home Department, Ex p. Bentley, [1993] 4 All E.R. 442. There, the court held that the Home Secretary's decision not to grant a posthumous conditional pardon was judicially reviewable.

[56] Against the context of these cases I return to the issue raised in this appeal -- whether the action of the Prime Minister affected a right or legitimate expectation enjoyed by Mr. Black and is therefore judicially reviewable. This issue turns on how the subject matter of Prime Minister Chrtien's exercise of the honours prerogative is characterized. Mr. Black characterizes the subject matter of the Prime Minister's actions in one of two ways: first, as giving unsolicited and wrong legal advice to the Queen, which detrimentally affected Mr. Black; or second, as an administrative decision involving the improper interpretation and application of Canadian policy, the Nickle Resolution, to the granting of an honour. See also Hogg and Monahan, supra, at p. 20.

[57] In my opinion, these are not accurate characterizations of Prime Minister Chrtien's actions as pleaded in the amended statement of claim. Prime Minister Chrtien was not giving legal advice or making an administrative decision. Focusing on wrong legal advice or the improper interpretation of a policy misses what this case is about. As I see it, the action of Prime Minister Chrtien complained of by Mr. Black is his giving advice to the Queen about the conferral of an honour on a Canadian citizen. The Prime Minister communicated Canada's policy on honours to the Queen and advised her against conferring an honour on Mr. Black.

[58] So characterized, it is plain and obvious that the Prime Minister's exercise of the honours prerogative is not judicially reviewable. Indeed, in the Civil Service Unions case, Lord Roskill listed a number of exercises of the

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prerogative power whose subject matters were by their very nature not justiciable. Included in the list was the grant of honours. He wrote, in a passage I have already referred to, at p. 418 A.C.:

> But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

(Emphasis added)

[59] Lord Roskill's opinion on the grant of honours was obiter in that case, and regardless of course, is not binding on this court. Moreover, including the grant of honours in a list of non-reviewable exercises of the prerogative has been criticized by some as overly broad. See Hogg and Monahan, supra, at p. 15 and Hadfield, supra, at p. 217. However, I agree with Lord Roskill. Holding that the exercise of the honours prerogative is always beyond the review of courts is not a departure from the subject matter test espoused by the House of Lords in the Civil Service Unions case. Rather, it is faithful to that test. See also Cox, supra, at p. 19.

[60] The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr. Black's rights were not

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affected, however broadly "rights" are construed. No Canadian citizen has a right to an honour.

[61] And no Canadian citizen can have a legitimate expectation of receiving an honour. In Canada, the doctrine of legitimate expectations informs the duty of procedural fairness; it gives no substantive rights: Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at pp. 838-42 S.C.R., pp. 212-14 D.L.R.. See also Civil Service Unions, per Lord Diplock at pp. 408-09 A.C. Here Mr. Black does not assert that he was denied procedural fairness. Indeed, he had no procedural rights.

[62] But even if the doctrine of legitimate expectations could give substantive rights, neither Mr. Black nor any other Canadian citizen can claim a legitimate expectation of receiving an honour. The receipt of an honour lies entirely within the discretion of the conferring body. The conferral of the honour at issue in this case, a British peerage, is a discretionary favour bestowed by the Queen. It engages no liberty, no property, no economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the court's intervention. Instead, it involves "moral and political considerations which it is not within the province of the courts to assess". See Operation Dismantle, supra, per Wilson J. at p. 465 S.C.R.

[63] In other words, the discretion to confer or refuse to confer an honour is the kind of discretion that is not reviewable by the court. In this case, the court has even less reason to intervene because the decision whether to confer a British peerage on Mr. Black rests not with Prime Minister Chrtien, but with the Queen. At its highest, all the Prime Minister could do was give the Queen advice not to confer a peerage on Mr. Black.

[64] For these reasons, I agree with the motions judge that Prime Minister Chrtien's exercise of the honours prerogative by giving advice to the Queen about granting Mr. Black's peerage is not justiciable and therefore not judicially reviewable.

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[65] Once Prime Minister Chrtien's exercise of the honours prerogative is found to be beyond review by the courts, how the Prime Minister exercised the prerogative is also beyond review. Even if the advice was wrong or careless or negligent, even if his motives were questionable, they cannot be challenged by judicial review. To paraphrase Dickson J. in Thorne's Hardware, supra, at p. 112 S.C.R.: "It is neither our duty nor our right" to investigate the Prime Minister's motives or his reasons for his advice. Therefore, the declaratory relief and the tort claims asserted by Mr. Black cannot succeed. For these reasons, I would dismiss his appeal.

Third issue: Does the Superior Court have jurisdiction to grant declaratory relief against the Prime Minister and the Government of Canada?

[66] Although raised only on the cross-appeal, the Superior Court's jurisdiction over Mr. Black's claim is a threshold issue. For that reason, and because it was fully argued, I will consider it in these reasons.

[67] Under the recent amendments to the Federal Court Act and the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, the general rule is that the Federal Court and the courts of the provinces have concurrent jurisdiction to entertain claims for relief against the Crown. In their cross-appeal, however, the Prime Minister and the Government of Canada submit that even if Mr. Black's claims are justiciable, the Superior Court does not have jurisdiction to grant the declaratory relief he seeks because that jurisdiction rests exclusively with the Federal Court (Trial Division). The respondents ask us to dismiss Mr. Black's claims for declaratory relief under rule 21.01(3)(a) of the Rules of Civil Procedure. This rule permits a court to dismiss an action on the ground that "the court has no jurisdiction over the subject matter of the action." The motions judge concluded that the Superior Court had jurisdiction to entertain the claim against the Prime Minister. He also held that the Superior Court could deal with the claim against the Government of Canada because for the purpose of jurisdiction it was in the same position as the Prime Minister.

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[68] The respondents rely on s. 18(1) of the Federal Court Act, which gives the Trial Division of the Federal Court exclusive original jurisdiction to grant declaratory relief against any "federal board, commission or other tribunal":

> 18(1) Subject to section 28, the Trial Division has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> . . . . .
>
> (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Thus, the narrow question on this cross-appeal is whether the Prime Minister or the Government of Canada was acting as a federal board, commission or other tribunal.

[69] When the Federal Court Act was first enacted, the phrase "federal board, commission or other tribunal" was defined in s. 2 to mean a body exercising jurisdiction or powers conferred by or under an Act of Parliament:

> . . . any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance

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with a law of a province or under section 96 of the Constitution Act, 1867.

However, in 1990, this definition was amended to include the exercise of power conferred by or under an order made pursuant to a prerogative of the Crown. Section 2 was replaced by a new definition in s. 2(1), which reads:

"federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.

(Emphasis added)

[70] The respondents acknowledge that the actions complained of by Mr. Black were not performed "by or under an Act of Parliament". Even if Prime Minister Chrtien acted under the 1919 Nickle Resolution or the 1968 Regulation or the 1988 Policy, none of these policy statements gives powers conferred by or under a federal statute. Therefore, the Federal Court has exclusive jurisdiction only if Prime Minister Chrtien exercised powers conferred "by or under an order made pursuant to a prerogative of the Crown". LeSage C.J.S.C. concluded, and the respondents accept, that Prime Minister Chrtien did not make any order. What he did, according to the amended statement of claim, was intervene with the Queen to block Mr. Black's peerage or advise the Queen not to appoint Mr. Black. There was no "order".

[71] However, the phrase "by or under an order made pursuant to a prerogative of the Crown" admits of two possible interpretations. Under the first interpretation, advanced by Mr. Black and accepted by the motions judge, "an order" modifies both "by" and "under". Under this interpretation, the Federal Court (Trial Division) would have exclusive

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jurisdiction if the Prime Minister exercised powers conferred by an order made pursuant to a prerogative of the Crown or exercised powers conferred under an order made pursuant to a prerogative of the Crown. As Prime Minister Chrtien did neither, under this interpretation, the Superior Court has jurisdiction to entertain Mr. Black's claim for declaratory relief.

[72] Under the second interpretation, advanced by the respondents, "an order" modifies "under" but not "by". Under this interpretation, the Federal Court would have exclusive jurisdiction if the respondents exercised powers conferred by a prerogative of the Crown or exercised powers conferred under an order made pursuant to a prerogative of the Crown. As the Prime Minister exercised a prerogative power, under this interpretation only the Federal Court (Trial Division) would have jurisdiction to grant declaratory relief, at least against him.

[73] The respondents submit that their interpretation is more plausible. They argue that the motions judge's interpretation of the Act is contrary to Parliament's intention to make the Federal Court the only forum for review of federal administrative action. They point out that under the motions judge's interpretation, if the prerogative were exercised pursuant to an order, it could only be reviewed by the Federal Court; but if the prerogative were exercised directly, that is, without an order, it could be reviewed by the Superior Court. The respondents contend that such a result is anomalous. And they point out that judicial review of administrative action does not depend on the existence of an order.

[74] One possible answer to the respondents' argument is that by defining "federal board, commission or other tribunal" in the way it did, Parliament intended that the exercise of the prerogative be immune from judicial review. However, accepting -- as I have -- that some prerogative powers are reviewable, the respondents' argument must yield to the wording and structure of s. 2(1) of the statute. A fair reading of s. 2(1) suggests that "an order made pursuant to" modifies both "by" and "under". This interpretation is supported by the parallel

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structure of s. 2(1) -- "by or under an Act of Parliament" and "by or under an order made pursuant to a prerogative of the Crown". The former phrase must mean by an Act of Parliament or under an Act of Parliament; similarly, the latter phrase must mean by an order made pursuant to a prerogative of the Crown or under an order made pursuant to a prerogative of the Crown.

[75] Even if the respondents' interpretation is plausible, it collides with the principle that clear and explicit statutory language is required to oust the jurisdiction of provincial superior courts, which, unlike the Federal Court, are courts of inherent general jurisdiction. The Supreme Court of Canada articulated this principle in Ordon Estate v. Grail, [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193, where Iacobucci and Major JJ. wrote at p. 474 S.C.R.:

> As a statutory court, the Federal Court of Canada has no jurisdiction except that assigned to it by statute. In light of the inherent general jurisdiction of the provincial superior courts, Parliament must use express statutory language where it intends to assign jurisdiction to the Federal Court. In particular, it is well established that the complete ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court (rather than simply concurrent jurisdiction with the superior courts) requires clear and explicit statutory wording to this effect. This latter principle finds early expression in the judgment in Peacock v. Bell (1677), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88:
>
> > And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.
>
> This basic principle continues to be applied up to the present day . . .

Section 18(1) of the Federal Court Act does not clearly and

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explicitly oust the jurisdiction of the Superior Court to grant declaratory relief in respect of the Prime Minister's exercise of the honours prerogative.

[76] Put differently, if Parliament has left a "gap" in its grant of statutory jurisdiction to the Federal Court, the institutional and constitutional position of provincial superior courts warrants granting them this residual jurisdiction over federal matters. See Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626, 50 C.R.R. (2d) 189. I therefore conclude that absent an order, the exercise of a prerogative power may be reviewable in the Superior Court. Thus, I agree with the motions judge and would dismiss the cross-appeal.

E. Conclusion

[77] I would dismiss the appeal with costs. I would also dismiss the cross-appeal with costs. I conclude by thanking counsel for their submissions. This case was exceptionally well-argued by both sides.

Appeal and cross-appeal dismissed.

Notes

Note 1: The 1968 Regulation of the Secretary of State (Respecting the Acceptance and Wearing by Canadian of Commonwealth and Foreign Orders, Decorations and Medals).

Note 2: The 1988 Policy of the Clerk of the Privy Council (Respecting the Awarding of an Order, Decoration and Medal by a Commonwealth or a Foreign Government).

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TAB 16

Prime Minister of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police *Appellants*

v.

Omar Ahmed Khadr *Respondent*

and

Amnesty International (Canadian Section, English Branch), Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program, David Asper Centre for Constitutional Rights, Canadian Coalition for the Rights of Children, Justice for Children and Youth, British Columbia Civil Liberties Association, Criminal Lawyers' Association (Ontario), Canadian Bar Association, Lawyers Without Borders Canada, Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Canadian Civil Liberties Association and National Council for the Protection of Canadians Abroad *Interveners*

Premier ministre du Canada, ministre des Affaires étrangères, directeur du Service canadien du renseignement de sécurité et commissaire de la Gendarmerie royale du Canada *Appelants*

c.

Omar Ahmed Khadr *Intimé*

et

Amnesty International (Canadian Section, English Branch), Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program, David Asper Centre for Constitutional Rights, Coalition canadienne pour les droits des enfants, Justice for Children and Youth, Association des libertés civiles de la Colombie-Britannique, Criminal Lawyers' Association (Ontario), Association du Barreau canadien, Avocats sans frontières Canada, Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Association canadienne des libertés civiles et National Council for the Protection of Canadians Abroad *Intervenants*

INDEXED AS: CANADA (PRIME MINISTER) *v.* KHADR

2010 SCC 3

File No.: 33289.

2009: November 13; 2010: January 29.

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

RÉPERTORIÉ : CANADA (PREMIER MINISTRE) *c.* KHADR

2010 CSC 3

N° du greffe : 33289.

2009 : 13 novembre; 2010 : 29 janvier.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Application — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Application — Citoyen canadien détenu par les autorités américaines à Guantanamo — Interrogatoire d'un détenu

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detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether process in place at Guantanamo Bay at that time violated Canada's international human rights obligations — Whether Canadian Charter of Rights and Freedoms applies to conduct of Canadian state officials alleged to have breached detainee's constitutional rights.

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Fundamental justice — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether conduct of Canadian officials deprived detainee of his right to liberty and security of person — If so, whether deprivation of detainee's right is in accordance with principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7.

Constitutional law — Charter of Rights — Remedy — Request for repatriation — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Violation of detainee's right to liberty and security of person guaranteed by Canadian Charter of Rights and Freedoms — Detainee seeking order that Canada request his repatriation from Guantanamo Bay — Whether remedy sought is just and appropriate in circumstances — Canadian Charter of Rights and Freedoms, s. 24(1).

Courts — Jurisdiction — Crown prerogative over foreign relations — Courts' power to review and intervene on matters of foreign affairs to ensure constitutionality of executive action.

K, a Canadian, has been detained by the U.S. military at Guantanamo Bay, Cuba, since 2002, when he was a minor. In 2004, he was charged with war crimes, but the U.S. trial is still pending. In 2003, agents from two Canadian intelligence services, CSIS and DFAIT, questioned K on matters connected to the charges pending against him, and shared the product of these interviews with U.S. authorities. In 2004, a DFAIT official interviewed K again, with knowledge that he had been subjected by U.S. authorities to a sleep deprivation

par des responsables canadiens qui savaient qu'il avait été privé de sommeil et communication du contenu des interrogatoires aux autorités américaines — Le processus en place à Guantanamo à l'époque violait-il les obligations internationales du Canada en matière de droits de la personne? — La Charte canadienne des droits et libertés s'applique-t-elle à la conduite de responsables canadiens qui auraient violé les droits constitutionnels du détenu?

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Justice fondamentale — Citoyen canadien détenu par les autorités américaines à Guantanamo — Interrogatoire d'un détenu par des responsables canadiens qui savaient qu'il avait été privé de sommeil et communication du contenu des interrogatoires aux autorités américaines — La conduite des responsables canadiens a-t-elle porté atteinte aux droits du détenu à la liberté et à la sécurité de sa personne? — Si oui, l'atteinte était-elle compatible avec les principes de justice fondamentale?— Charte canadienne des droits et libertés, art. 7.

Droit constitutionnel — Charte des droits — Réparation — Demande de rapatriement — Citoyen canadien détenu par les autorités américaines à Guantanamo — Interrogatoire d'un détenu par des responsables canadiens qui savaient qu'il avait été privé de sommeil et communication du contenu des interrogatoires aux autorités américaines — Violation des droits du détenu à la liberté et à la sécurité de sa personne garantis par la Charte canadienne des droits et libertés — Sollicitation par le détenu d'une ordonnance intimant au Canada de demander son rapatriement — La réparation demandée est-elle juste et convenable eu égard aux circonstances? — Charte canadienne des droits et libertés, art. 24(1).

Tribunaux — Compétence — Prérogative royale en matière de relations internationales — Pouvoir des tribunaux d'examiner les questions relatives aux affaires étrangères et d'intervenir à leur égard pour s'assurer de la constitutionnalité de l'action de l'exécutif.

K, un Canadien, est détenu à Guantanamo par les autorités militaires américaines depuis 2002. Il était alors mineur. En 2004, il a été accusé de crimes de guerre, mais le procès qu'il doit subir aux États-Unis est toujours pendant. En 2003, des agents des services de renseignements du SCRS et du MAECI ont interrogé K sur des sujets liés aux accusations portées contre lui et ont relayé l'information recueillie aux autorités américaines. En 2004, un responsable du MAECI a interrogé K une nouvelle fois, en sachant que les autorités

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technique, known as the "frequent flyer program", to make him less resistant to interrogation. In 2008, in *Canada (Justice) v. Khadr* ("*Khadr 2008*"), this Court held that the regime in place at Guantanamo Bay constituted a clear violation of Canada's international human rights obligations, and, under s. 7 of the *Canadian Charter of Rights and Freedoms*, ordered the Canadian government to disclose to K the transcripts of the interviews he had given to CSIS and DFAIT, which it did. After repeated requests by K that the Canadian government seek his repatriation, the Prime Minister announced his decision not to do so. K then applied to the Federal Court for judicial review, alleging that the decision violated his rights under s. 7 of the *Charter*. The Federal Court held that under the special circumstances of this case, Canada had a duty to protect K under s. 7 of the *Charter* and ordered the government to request his repatriation. The Federal Court of Appeal upheld the order, but stated that the s. 7 breach arose from the interrogation conducted in 2004 with the knowledge that K had been subjected to the "frequent flyer program".

Held: The appeal should be allowed in part.

Canada actively participated in a process contrary to its international human rights obligations and contributed to K's ongoing detention so as to deprive him of his right to liberty and security of the person, guaranteed by s. 7 of the *Charter*, not in accordance with the principles of fundamental justice. Though the process to which K is subject has changed, his claim is based upon the same underlying series of events considered in *Khadr 2008*. As held in that case, the *Charter* applies to the participation of Canadian officials in a regime later found to be in violation of fundamental rights protected by international law. There is a sufficient connection between the government's participation in the illegal process and the deprivation of K's liberty and security of the person. While the U.S. is the primary source of the deprivation, it is reasonable to infer from the uncontradicted evidence before the Court that the statements taken by Canadian officials are contributing to K's continued detention. The deprivation of K's right to liberty and security of the person is not in accordance with the principles of fundamental justice. The interrogation of a youth detained without access to counsel, to elicit statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and while knowing that the

américaines l'avaient soumis à une technique de privation de sommeil connue sous le nom de « programme grand voyageur », dans le but d'amoindrir sa résistance lors des interrogatoires. En 2008, dans *Canada (Justice) c. Khadr* (« *Khadr 2008* »), la Cour a conclu que le régime en place à Guantanamo constituait une violation manifeste des obligations internationales du Canada en matière de droits de la personne et, se fondant sur l'art. 7 de la *Charte canadienne des droits et libertés*, a ordonné au gouvernement canadien de communiquer à K les transcriptions des interrogatoires auxquels il avait été soumis par des agents du SCRS et du MAECI, ce qui fut fait. Après que K eut demandé à plusieurs reprises que le gouvernement canadien sollicite son rapatriement, le premier ministre a annoncé sa décision de ne pas le faire. K a alors présenté, à la Cour fédérale, une demande de contrôle judiciaire faisant valoir que la décision violait les droits qui lui sont garantis par l'art. 7 de la *Charte*. La Cour fédérale a conclu que, dans les circonstances particulières de l'espèce, le Canada avait l'obligation de protéger K en application de l'art. 7 de la *Charte* et a ordonné au gouvernement de demander son rapatriement. La Cour d'appel fédérale a confirmé l'ordonnance, mais a affirmé que l'atteinte à l'art. 7 découlait de l'interrogatoire mené en 2004 auquel on avait procédé en sachant que K avait été soumis au « programme grand voyageur ».

Arrêt : Le pourvoi est accueilli en partie.

Le Canada a activement participé à un processus contraire aux obligations internationales qui lui incombent en matière de droits de la personne et a contribué à la détention continue de K, de telle sorte qu'il a porté atteinte aux droits à la liberté et à la sécurité de sa personne que lui garantit l'art. 7 de la *Charte*, et ce, de manière incompatible avec les principes de justice fondamentale. S'il est vrai que la procédure à laquelle est soumis K a changé, la demande qu'il formule repose sur la série de faits déjà examinée dans *Khadr 2008*. Comme la Cour l'a conclu dans cet arrêt, la *Charte* s'applique à la participation de responsables canadiens à un régime jugé ultérieurement en violation de droits fondamentaux protégés par le droit international. Il existe un lien suffisant entre la participation du gouvernement au processus illégal et l'atteinte à la liberté et à la sécurité de K. Même si les États-Unis sont la source première de l'atteinte, il est raisonnable de déduire de la preuve non contredite portée à notre connaissance que les déclarations recueillies par des responsables canadiens contribuent à la détention continue de K. L'atteinte aux droits de K à la liberté et à la sécurité de sa personne n'est pas compatible avec les principes de justice fondamentale. Interroger un adolescent détenu sans qu'il ait pu consulter un avocat pour lui soutirer des déclarations

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fruits of the interrogations would be shared with the prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

K is entitled to a remedy under s. 24(1) of the *Charter*. The remedy sought by K — an order that Canada request his repatriation — is sufficiently connected to the *Charter* breach that occurred in 2003 and 2004 because of the continuing effect of this breach into the present and its possible effect on K's ultimate trial. While the government must have flexibility in deciding how its duties under the royal prerogative over foreign relations are discharged, the executive is not exempt from constitutional scrutiny. Courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown exists; if so, whether its exercise infringes the *Charter* or other constitutional norms; and, where necessary, to give specific direction to the executive branch of the government. Here, the trial judge misdirected himself in ordering the government to request K's repatriation, in view of the constitutional responsibility of the executive to make decisions on matters of foreign affairs and the inconclusive state of the record. The appropriate remedy in this case is to declare that K's *Charter* rights were violated, leaving it to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the *Charter*.

Cases Cited

Applied: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; **referred to:** *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *United States of America v. Jawad*, Military Commission, September 24, 2008, online: www.defense.gov/news/Ruling%20D-008.pdf; *R. v. Collins*, [1987] 1 S.C.R. 265; *Re*

relatives à des accusations criminelles sérieuses, tout en sachant qu'il a été privé de sommeil et que les fruits des interrogatoires seraient communiqués aux procureurs américains, contrevient aux normes canadiennes les plus élémentaires quant aux traitements à accorder aux suspects adolescents détenus.

K a droit à une réparation en vertu du par. 24(1) de la *Charte*. La réparation demandée par K — une ordonnance intimant au Canada de demander son rapatriement — est suffisamment liée à la violation de la *Charte* survenue en 2003 et 2004 parce que les incidences de cette violation persistent jusqu'à présent et pourraient influer sur son procès lorsqu'il sera finalement tenu. Bien que le gouvernement doive disposer d'une certaine marge de manœuvre lorsqu'il décide de quelle manière il doit s'acquitter des obligations relevant de sa prérogative en matière de relations étrangères, l'exécutif n'est pas à l'abri du contrôle constitutionnel. Les tribunaux ont compétence, et sont tenus d'exercer cette compétence, pour déterminer si la prérogative invoquée par la Couronne existe véritablement et, dans l'affirmative, pour décider si son exercice contrevient à la *Charte* ou à d'autres normes constitutionnelles. Lorsque cela s'avère nécessaire, les tribunaux ont aussi compétence pour donner à la branche exécutive du gouvernement des directives spécifiques. En l'espèce, le juge de première instance s'est fondé sur des considérations erronées en ordonnant au gouvernement de demander le rapatriement de K, compte tenu de la responsabilité constitutionnelle de l'exécutif de prendre les décisions concernant les affaires étrangères et du dossier qui n'est pas suffisamment probant. La réparation appropriée, en l'espèce, consiste à déclarer que les droits de K garantis par la *Charte* ont été violés, et à laisser au gouvernement le soin de décider de quelle manière il convient de répondre à la lumière de l'information dont il dispose actuellement, de sa responsabilité en matière d'affaires étrangères et de la *Charte*.

Jurisprudence

Arrêts appliqués : *Canada (Justice) c. Khadr*, 2008 CSC 28, [2008] 2 R.C.S. 125; *R. c. D.B.*, 2008 CSC 25, [2008] 2 R.C.S. 3; **arrêts mentionnés :** *Khadr c. Canada*, 2005 CF 1076, [2006] 2 R.C.F. 505; *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292; *États-Unis d'Amérique c. Dynar*, [1997] 2 R.C.S. 462; *Rasul c. Bush*, 542 U.S. 466 (2004); *Hamdan c. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene c. Bush*, 128 S. Ct. 2229 (2008); *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *United States of America c. Jawad*, commission militaire, 24 septembre 2008, en ligne : www.defense.gov/news/Ruling%20D-008.pdf; *R. c. Collins*, [1987]

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B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269; *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Gamble*, [1988] 2 S.C.R. 595.

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Robert J. Frater, *Doreen C. Mueller* and *Jeffrey G. Johnston*, for the appellants.

Nathan J. Whitling and *Dennis Edney*, for the respondent.

Sacha R. Paul, *Vanessa Gruben* and *Michael Bossin*, for the intervener Amnesty International (Canadian Section, English Branch).

1 R.C.S. 265; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3; *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] R.C.S. 269; *Black c. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228; *Operation Dismantle c. La Reine*, [1985] 1 R.C.S. 441; *Air Canada c. Colombie-Britannique (Procureur général)*, [1986] 2 R.C.S. 539; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *Kaunda c. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452; *Solosky c. La Reine*, [1980] 1 R.C.S. 821; *R. c. Gamble*, [1988] 2 R.C.S. 595.

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Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp. Scarborough, Ont. : Thomson/Carswell, 2007 (loose-leaf updated 2009, release 1).

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Nadon, Evans et Sharlow), 2009 CAF 246, 310 D.L.R. (4th) 462, 393 N.R. 1, [2009] A.C.F. nº 893 (QL), 2009 CarswellNat 2699, qui a confirmé une décision du juge O'Reilly, 2009 CF 405, 341 F.T.R. 300, 188 C.R.R. (2d) 342, [2009] A.C.F. nº 462 (QL), 2009 CarswellNat 1472. Pourvoi accueilli en partie.

Robert J. Frater, *Doreen C. Mueller* et *Jeffrey G. Johnston*, pour les appelants.

Nathan J. Whitling et *Dennis Edney*, pour l'intimé.

Sacha R. Paul, *Vanessa Gruben* et *Michael Bossin*, pour l'intervenante Amnesty International (Canadian Section, English Branch).

2010 SCC 3 (CanLII)

John Norris, *Brydie Bethell* and *Audrey Macklin*, for the interveners Human Rights Watch, the University of Toronto, Faculty of Law — International Human Rights Program and the David Asper Centre for Constitutional Rights.

Emily Chan and *Martha Mackinnon*, for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth.

Sujit Choudhry and *Joseph J. Arvay*, *Q.C.*, for the intervener the British Columbia Civil Liberties Association.

Brian H. Greenspan, for the intervener the Criminal Lawyers' Association (Ontario).

Lorne Waldman and *Jacqueline Swaisland*, for the intervener the Canadian Bar Association.

Simon V. Potter, *Pascal Paradis*, *Sylvie Champagne* and *Fannie Lafontaine*, for the interveners Lawyers Without Borders Canada, Barreau du Québec and Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval.

Marlys A. Edwardh, *Adriel Weaver* and *Jessica Orkin*, for the intervener the Canadian Civil Liberties Association.

Dean Peroff, *Chris MacLeod* and *H. Scott Fairley*, for the intervener the National Council for the Protection of Canadians Abroad.

The following is the judgment delivered by

THE COURT —

I. Introduction

[1] Omar Khadr, a Canadian citizen, has been detained by the United States government at Guantanamo Bay, Cuba, for over seven years. The Prime Minister asks this Court to reverse the decision of the Federal Court of Appeal requiring the Canadian government to request the United States to return Mr. Khadr from Guantanamo Bay to Canada.

John Norris, *Brydie Bethell* et *Audrey Macklin*, pour les intervenants Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program et David Asper Centre for Constitutional Rights.

Emily Chan et *Martha Mackinnon*, pour les intervenants la Coalition canadienne pour les droits des enfants et Justice for Children and Youth.

Sujit Choudhry et *Joseph J. Arvay*, *c.r.*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Brian H. Greenspan, pour l'intervenante Criminal Lawyers' Association (Ontario).

Lorne Waldman et *Jacqueline Swaisland*, pour l'intervenante l'Association du Barreau canadien.

Simon V. Potter, *Pascal Paradis*, *Sylvie Champagne* et *Fannie Lafontaine*, pour les intervenants Avocats sans frontières Canada, le Barreau du Québec et le Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval.

Marlys A. Edwardh, *Adriel Weaver* et *Jessica Orkin*, pour l'intervenante l'Association canadienne des libertés civiles.

Dean Peroff, *Chris MacLeod* et *H. Scott Fairley*, pour l'intervenant National Council for the Protection of Canadians Abroad.

Version française du jugement rendu par

LA COUR —

I. Introduction

[1] Omar Khadr, un citoyen canadien, est détenu à Guantanamo (Cuba) par le gouvernement des États-Unis depuis plus de sept ans. Le premier ministre voudrait que la Cour infirme la décision par laquelle la Cour d'appel fédérale a ordonné au gouvernement canadien de demander aux États-Unis le rapatriement de M. Khadr au Canada.

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[2] For the reasons that follow, we agree with the courts below that Mr. Khadr's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated. However, we conclude that the order made by the lower courts that the government request Mr. Khadr's return to Canada is not an appropriate remedy for that breach under s. 24(1) of the *Charter*. Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Khadr a declaration that his *Charter* rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond. We would therefore allow the appeal in part.

II. Background

[3] Mr. Khadr was 15 years old when he was taken prisoner on July 27, 2002, by U.S. forces in Afghanistan. He was alleged to have thrown a grenade that killed an American soldier in the battle in which he was captured. About three months later, he was transferred to the U.S. military installation at Guantanamo Bay. He was placed in adult detention facilities.

[4] On September 7, 2004, Mr. Khadr was brought before a Combatant Status Review Tribunal which affirmed a previous determination that he was an "enemy combatant". He was subsequently charged with war crimes and held for trial before a military commission. In light of a number of procedural delays and setbacks, that trial is still pending.

[5] In February and September 2003, agents from the Canadian Security Intelligence Service ("CSIS") and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade ("DFAIT") questioned Mr. Khadr on matters connected to the charges pending against him

[2] Pour les motifs exposés ci-après, nous estimons, à l'instar des juridictions inférieures, que les droits garantis à M. Khadr par l'art. 7 de la *Charte canadienne des droits et libertés* ont été violés. Nous arrivons toutefois à la conclusion que l'ordre donné par les tribunaux d'instances inférieures au gouvernement de demander le renvoi de M. Khadr au Canada ne constitue pas la réparation convenable de cette violation visée au par. 24(1) de la *Charte*. Conformément à la séparation des pouvoirs et à la réticence légitime des tribunaux à intervenir dans les questions relatives aux affaires étrangères, la réparation appropriée consiste à prononcer, en faveur de M. Khadr, un jugement déclaratoire confirmant la violation des droits qui lui sont garantis par la *Charte*, tout en laissant au gouvernement une certaine latitude pour décider de la manière dont il convient de répondre. Nous sommes donc d'avis d'accueillir le pourvoi en partie.

II. Le contexte

[3] M. Khadr était âgé de 15 ans lorsqu'il a été fait prisonnier par les forces américaines en Afghanistan, le 27 juillet 2002. Il lui est reproché d'avoir lancé une grenade qui a tué un soldat américain, lors du combat au cours duquel il a été capturé. Trois mois plus tard environ, il a été transféré aux installations militaires américaines à Guantanamo et placé dans un centre de détention pour adultes.

[4] Le 7 septembre 2004, M. Khadr a été traduit devant un tribunal d'examen du statut de combattant (*Combatant Status Review Tribunal*) qui a confirmé une décision antérieure selon laquelle il était un [TRADUCTION] « combattant ennemi ». Par la suite, il a été accusé de crimes de guerre et détenu en vue de la tenue d'un procès devant une commission militaire. Par suite de nombreux reports et obstacles de nature procédurale, ce procès est toujours pendant.

[5] En février et en septembre 2003, des agents du Service canadien du renseignement de sécurité (« SCRS ») et des membres de la Direction du renseignement extérieur du ministère des Affaires étrangères et du Commerce international (« MAECI ») ont interrogé M. Khadr sur des sujets

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and shared the product of these interviews with U.S. authorities. In March 2004, a DFAIT official interviewed Mr. Khadr again, with the knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the "frequent flyer program", in an effort to make him less resistant to interrogation. During this interview, Mr. Khadr refused to answer questions. In 2005, von Finckenstein J. of the Federal Court issued an interim injunction preventing CSIS and DFAIT agents from further interviewing Mr. Khadr in order "to prevent a potential grave injustice" from occurring: *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505, at para. 46. In 2008, this Court ordered the Canadian government to disclose to Mr. Khadr the transcripts of the interviews he had given to CSIS and DFAIT in Guantanamo Bay, under s. 7 of the *Charter*: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 ("*Khadr 2008*").

liés aux accusations portées contre lui et ont relayé l'information recueillie aux autorités américaines. En mars 2004, un responsable du MAECI a interrogé M. Khadr une nouvelle fois, en sachant que les autorités américaines l'avaient soumis à une technique de privation de sommeil, connue sous le nom de « programme grand voyageur » (*frequent flyer program*), dans le but d'amoindrir sa résistance lors des interrogatoires. Durant cet interrogatoire, M. Khadr a refusé de répondre aux questions. En 2005, le juge von Finckenstein, de la Cour fédérale, interdisait par une injonction provisoire aux agents du SCRS et aux fonctionnaires du MAECI d'interroger M. Khadr de nouveau, « pour empêcher une éventuelle injustice grave » : *Khadr c. Canada*, 2005 CF 1076, [2006] 2 R.C.F. 505, par. 46. En 2008, notre Cour, se fondant sur l'art. 7 de la *Charte*, ordonnait au gouvernement canadien de communiquer à M. Khadr les transcriptions des interrogatoires auxquels il avait été soumis par des agents du SCRS et du MAECI à Guantanamo : *Canada (Justice) c. Khadr*, 2008 CSC 28, [2008] 2 R.C.S. 125 (« *Khadr 2008* »).

[6] Mr. Khadr has repeatedly requested that the Government of Canada ask the United States to return him to Canada: in March 2005 during a Canadian consular visit; on December 15, 2005, when a welfare report noted that "[Mr. Khadr] wants his government to bring him back home" (Report of Welfare Visit, Exhibit "L" to Affidavit of Sean Robertson, December 15, 2005 (J.R., vol. IV, at p. 534)); and in a formal written request through counsel on July 28, 2008.

[6] M. Khadr a demandé à plusieurs reprises que le gouvernement du Canada sollicite auprès des États-Unis son rapatriement au Canada : en mars 2005, lors d'une visite de responsables consulaires canadiens; le 15 décembre 2005, lorsqu'il a été indiqué dans un rapport sur le bien-être de M. Khadr que [TRADUCTION] « [ce dernier] veut que son gouvernement le ramène au pays » (*Rapport quant à une visite relative au bien-être*, pièce « L », jointe à l'affidavit de Sean Robertson, 15 décembre 2005 (D.C., vol. IV, p. 534)); et dans une demande écrite officielle présentée par l'intermédiaire de son avocat le 28 juillet 2008.

[7] The Prime Minister announced his decision not to request Mr. Khadr's repatriation on July 10, 2008, during a media interview. The Prime Minister provided the following response to a journalist's question, posed in French, regarding whether the government would seek repatriation:

[7] Le 10 juillet 2008, lors d'une conférence de presse, le premier ministre a annoncé sa décision de ne pas demander le rapatriement de M. Khadr. À une question que lui a posée une journaliste en français pour savoir si le gouvernement allait demander le rapatriement, il a répondu ceci :

[TRANSLATION] The answer is no, as I said the former Government, and our Government with the notification of the Minister of Justice had considered all these

La réponse c'est non. Comme je l'ai dit, l'ancien gouvernement et notre gouvernement, avec l'avis du ministère de la Justice, ont considéré toutes ces questions-là et la

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issues and the situation remains the same. . . . We keep on looking for [assurances] of good treatment of Mr. Khadr.

(http://watch.ctv.ca/news/clip65783#clip65783, at 3'3", referred to in Affidavit of April Bedard, August 8, 2008 (J.R., vol. II, at pp. 131-32).)

[8] On August 8, 2008, Mr. Khadr applied to the Federal Court for judicial review of the government's "ongoing decision and policy" not to seek his repatriation (Notice of Application filed by the respondent, August 8, 2008 (J.R., vol. II, at p. 113)). He alleged that the decision and policy infringed his rights under s. 7 of the *Charter*, which states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[9] After reviewing the history of Mr. Khadr's detention and applicable principles of Canadian and international law, O'Reilly J. concluded that in these special circumstances, Canada has a "duty to protect" Mr. Khadr (2009 FC 405, 341 F.T.R. 300). He found that "[t]he ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the *Charter*" (para. 92). Also, he held that "[t]o mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable" (para. 92).

[10] The majority judgment of the Federal Court of Appeal (*per* Evans and Sharlow JJ.A.) upheld O'Reilly J.'s order, but defined the s. 7 breach more narrowly. The majority of the Court of Appeal found that it arose from the March 2004 interrogation conducted with the knowledge that Mr. Khadr had been subject to the "frequent flyer program", characterized by the majority as involving cruel and abusive treatment contrary to the principles of fundamental justice: 2009 FCA 246, 310 D.L.R. (4th) 462. Dissenting, Nadon J.A. reviewed the many

situation reste la même. [. . .] Nous continuons à chercher des assurances de bon traitement de M. Khadr.

(http://watch.ctv.ca/news/clip65783#clip65783, à 3 min. 3 sec., auquel renvoie l'affidavit d'April Bedard, 8 août 2008 (D.C., vol. II, p. 131-132).)

[8] Le 8 août 2008, M. Khadr a présenté, à la Cour fédérale, une demande de contrôle judiciaire à l'égard de [TRADUCTION] « la décision et [de] la politique inchangée » (Avis de demande de l'intimé, 8 août 2008 (D.C., vol. II, p. 113)) du gouvernement de ne pas demander son rapatriement. Cette décision et cette politique violaient, selon lui, les droits qui lui sont garantis par l'art. 7 de la *Charte*, dont voici le texte :

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[9] Après avoir passé en revue l'historique de la détention de M. Khadr et les principes applicables du droit canadien et du droit international, le juge O'Reilly a conclu que, dans les circonstances particulières de l'espèce, le Canada avait « l'obligation de protéger » M. Khadr (2009 CF 405, [2009] A.C.F. nº 462 (QL)). Il a jugé que « [l]e refus constant du Canada de solliciter le rapatriement de M. Khadr est contraire à un principe de justice fondamental et porte atteinte aux droits que l'article 7 de la *Charte* lui garantit » (par. 92). En outre, il a conclu que « [p]our atténuer l'effet de cette atteinte, le Canada [devait] demander le plus tôt possible aux États-Unis de rapatrier M. Khadr » (par. 92).

[10] Les juges majoritaires de la Cour d'appel fédérale (les juges Evans et Sharlow) ont confirmé l'ordonnance du juge O'Reilly, tout en définissant cependant de façon plus étroite l'atteinte à l'art. 7. Ils ont jugé que cette atteinte découlait de l'interrogatoire de mars 2004 auquel on avait procédé en sachant que M. Khadr avait été soumis au « programme grand voyageur » qui, selon les juges majoritaires, constituait un traitement cruel et abusif contraire aux principes de justice fondamentale : 2009 CAF 246, [2009] A.C.F. nº 893 (QL).

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steps the government had taken on Mr. Khadr's behalf and held that since the Constitution conferred jurisdiction over foreign affairs on the executive branch of government, the remedy sought was beyond the power of the courts to grant.

Le juge Nadon, dissident, a rappelé les nombreuses mesures que le gouvernement avait prises en faveur de M. Khadr. Il est arrivé à la conclusion que puisque la Constitution conférait à la branche exécutive du gouvernement la compétence en matière d'affaires étrangères, la réparation souhaitée allait au-delà de ce que les tribunaux avaient le pouvoir d'octroyer.

III. The Issues

III. Les questions en litige

[11] Mr. Khadr argues that the government has breached his rights under s. 7 of the *Charter*, and that the appropriate remedy for this breach is an order that the government request the United States to return him to Canada.

[11] M. Khadr soutient que le gouvernement a violé les droits que lui garantit l'art. 7 de la *Charte* et que la réparation convenable consiste à ordonner au gouvernement de demander aux États-Unis son rapatriement au Canada.

[12] Mr. Khadr does not suggest that the government is obliged to request the repatriation of all Canadian citizens held abroad in suspect circumstances. Rather, his contention is that the conduct of the government of Canada in connection with his detention by the U.S. military in Guantanamo Bay, and in particular Canada's collaboration with the U.S. government in 2003 and 2004, violated his rights under the *Charter*, and requires as a remedy that the government now request his return to Canada. The issues that flow from this claim may be summarized as follows:

[12] M. Khadr ne prétend pas que le gouvernement est tenu de demander le rapatriement de tous les citoyens canadiens détenus à l'étranger dans des circonstances suspectes. Il soutient plutôt que la conduite du gouvernement du Canada à l'égard de sa détention à Guantanamo par les autorités militaires américaines, et en particulier la collaboration du Canada avec le gouvernement américain en 2003 et 2004, a porté atteinte aux droits qui lui sont garantis par la *Charte*. Il exige en outre, à titre de réparation, que le gouvernement demande maintenant son rapatriement au Canada. Les questions soulevées par cette demande peuvent être résumées de la façon suivante :

A. Was There a Breach of Section 7 of the *Charter*?

A. Y a-t-il eu violation de l'art. 7 de la *Charte*?

1. Does the *Charter* apply to the conduct of Canadian state officials alleged to have infringed Mr. Khadr's s. 7 *Charter* rights?

1. La *Charte* s'applique-t-elle à la conduite des responsables canadiens qui, selon M. Khadr, ont porté atteinte aux droits que lui garantit l'art. 7 de la *Charte*?

2. If so, does the conduct of the Canadian government deprive Mr. Khadr of the right to life, liberty or security of the person?

2. Si tel est le cas, la conduite du gouvernement canadien porte-t-elle atteinte aux droits de M. Khadr à la vie, à la liberté ou à la sécurité de sa personne?

3. If so, does the deprivation accord with the principles of fundamental justice?

3. Si tel est le cas, cette atteinte est-elle compatible avec les principes de justice fondamentale?

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B. Is the Remedy Sought Appropriate and Just in All the Circumstances?

[13] We will consider each of these issues in turn.

A. *Was There a Breach of Section 7 of the Charter?*

1. Does the Canadian *Charter* Apply to the Conduct of the Canadian State Officials Alleged to Have Infringed Mr. Khadr's Section 7 *Charter* Rights?

[14] As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter*. International customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 48, *per* LeBel J., citing *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 123. The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms: *Hape*, at para. 52, *per* LeBel J.; *Khadr 2008*, at para. 18.

[15] The question before us, then, is whether the rule against the extraterritorial application of the *Charter* prevents the *Charter* from applying to the actions of Canadian officials at Guantanamo Bay.

[16] This question was addressed in *Khadr 2008*, in which this Court held that the *Charter* applied to the actions of Canadian officials operating at Guantanamo Bay who handed the fruits of their interviews over to U.S. authorities. This Court held, at para. 26, that "the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay", given holdings of the Supreme Court of the United

B. La réparation demandée est-elle convenable et juste eu égard à toutes les circonstances?

[13] Nous étudierons chacune de ces questions successivement.

A. *Y a-t-il eu violation de l'art. 7 de la Charte?*

1. La *Charte* canadienne s'applique-t-elle à la conduite des responsables canadiens qui, selon M. Khadr, ont porté atteinte aux droits que lui garantit l'art. 7 de la *Charte*?

[14] De manière générale, les Canadiens qui sont à l'étranger sont assujettis au droit du pays où ils se trouvent et ne peuvent pas se prévaloir des droits que leur garantit la *Charte*. Le droit international coutumier et le principe de la courtoisie entre les nations s'opposent, en règle générale, à l'application de la *Charte* aux actions des responsables canadiens en mission à l'étranger : *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292, par. 48, le juge LeBel citant *États-Unis d'Amérique c. Dynar*, [1997] 2 R.C.S. 462, par. 123. La jurisprudence prévoit une exception dans le cas d'une participation canadienne à des activités d'un État étranger ou de ses représentants qui sont contraires aux obligations internationales du Canada ou aux normes relatives aux droits fondamentaux de la personne : *Hape*, par. 52, le juge LeBel; *Khadr 2008*, par. 18.

[15] La question dont nous sommes saisis est donc celle de savoir si la règle excluant l'application extraterritoriale de la *Charte* empêche son application aux actions de responsables canadiens à Guantanamo.

[16] Statuant sur cette question dans *Khadr 2008*, la Cour a conclu que la *Charte* s'appliquait aux actions des responsables canadiens en mission à Guantanamo qui avaient transmis aux autorités américaines le fruit de leurs interrogatoires avec M. Khadr. La Cour a conclu, au par. 26, que « les principes du droit international et de la courtoisie entre les nations qui, dans d'autres circonstances, pourraient soustraire à l'application de la *Charte* les actes des responsables canadiens en mission à l'étranger ne s'appliquent pas à l'assistance fournie en l'espèce

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States that the military commission regime then in place constituted a clear violation of fundamental human rights protected by international law: see *Khadr 2008*, at para. 24; *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them. The Canadian government complied with this Court's order.

[17] We note that the regime under which Mr. Khadr is currently detained has changed significantly in recent years. The U.S. Congress has legislated and the U.S. courts have acted with the aim of bringing the military processes at Guantanamo Bay in line with international law. (The *Detainee Treatment Act of 2005*, Pub. L. 109-148, 119 Stat. 2739, prohibited inhumane treatment of detainees and required interrogations to be performed according to the Army field manual. The *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2600, attempted to legalize the Guantanamo regime after the U.S. Supreme Court's ruling in *Hamdan v. Rumsfeld*. However, on June 12, 2008, in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the U.S. Supreme Court held that Guantanamo Bay detainees have a constitutional right to *habeas corpus*, and struck down the provisions of the *Military Commissions Act of 2006* that suspended that right.)

[18] Though the process to which Mr. Khadr is subject has changed, his claim is based upon the same underlying series of events at Guantanamo Bay (the interviews and evidence-sharing of 2003 and 2004) that we considered in *Khadr 2008*. We are satisfied that the rationale in *Khadr 2008* for applying the *Charter* to the actions of Canadian officials at Guantanamo Bay governs this case as well.

aux autorités américaines à Guantanamo », étant donné les arrêts de la Cour suprême des États-Unis selon lesquels le régime de commission militaire alors en vigueur constituait une atteinte manifeste aux droits fondamentaux de la personne reconnus en droit international : *Khadr 2008*, par. 24; voir *Rasul c. Bush*, 542 U.S. 466 (2004), et *Hamdan c. Rumsfeld*, 548 U.S. 557 (2006). Selon les principes de justice fondamentale, les responsables canadiens qui avaient interrogé M. Khadr étaient donc tenus de lui révéler la teneur des déclarations qu'il leur avait faites. Le gouvernement canadien s'est conformé à l'ordonnance de la Cour.

[17] Nous constatons que le régime dans le cadre duquel M. Khadr est actuellement détenu a été modifié de façon notable au cours des dernières années. Le Congrès américain a adopté des lois et les tribunaux ont rendu des décisions visant à harmoniser les procédures militaires de Guantanamo avec le droit international. (La *Detainee Treatment Act of 2005*, Pub. L. 109-148, 119 Stat. 2739, interdit de soumettre les détenus à des traitements inhumains et exige que les interrogatoires soient menés en conformité avec le manuel de service de l'armée. Avec la *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2600, le législateur a tenté de légaliser le régime de Guantanamo après l'arrêt rendu par la Cour suprême des États-Unis dans l'affaire *Hamdan c. Rumsfeld*. Or, le 12 juin 2008, cette même cour a déclaré — dans *Boumediene c. Bush*, 128 S. Ct. 2229 (2008) — que les détenus de Guantanamo ont le droit constitutionnel de faire contrôler la légalité de leur détention par voie d'*habeas corpus*, et a annulé les dispositions de la *Military Commissions Act of 2006* qui avaient suspendu ce droit.)

[18] S'il est vrai que la procédure à laquelle est soumis M. Khadr a changé, la demande qu'il formule repose sur la série de faits survenus à Guantanamo — les interrogatoires et la communication d'éléments de preuve ayant eu lieu en 2003 et 2004 — que nous avons déjà examinée dans *Khadr 2008*. Nous sommes convaincus que les arguments sur lesquels nous nous sommes fondés dans cet arrêt pour conclure à l'application de la *Charte* aux actions de responsables canadiens à Guantanamo valent également pour la présente affaire.

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2. Does the Conduct of the Canadian Government Deprive Mr. Khadr of the Right to Life, Liberty or Security of the Person?

[19] The United States is holding Mr. Khadr for the purpose of trying him on charges of war crimes. The United States is thus the primary source of the deprivation of Mr. Khadr's liberty and security of the person. However, the allegation on which his claim rests is that Canada has also contributed to his past and continuing deprivation of liberty. To satisfy the requirements of s. 7, as stated by this Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, there must be "a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected" (para. 54).

[20] The record suggests that the interviews conducted by CSIS and DFAIT provided significant evidence in relation to these charges. During the February and September 2003 interrogations, CSIS officials repeatedly questioned Mr. Khadr about the central events at issue in his prosecution, extracting statements from him that could potentially prove inculpatory in the U.S. proceedings against him (CSIS Document, Exhibit "U" to Affidavit of Lt. Cdr. William Kuebler, November 7, 2003 (J.R., vol. II, at p. 280); Interview Summary, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at p. 289); Interview Summary, Exhibit "BB" to Affidavit of Lt. Cdr. William Kuebler, February 17, 2003 (J.R., vol. III, at p. 292); Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)). A report of the Security Intelligence Review Committee titled *CSIS's Role in the Matter of Omar Khadr* (July 8, 2009), further indicated that CSIS assessed the interrogations of Mr. Khadr as being "highly successful, as evidenced by the quality intelligence information" elicited from Mr. Khadr (p. 13). These statements were shared with U.S. authorities and were summarized in U.S. investigative reports (Report of Investigative

2. La conduite du gouvernement canadien porte-t-elle atteinte aux droits de M. Khadr à la vie, à la liberté ou à la sécurité de sa personne?

[19] Les États-Unis détiennent M. Khadr en vue de lui faire subir un procès pour des accusations de crimes de guerre. Ils sont donc la source première de la privation de sa liberté et de la sécurité de sa personne. Toutefois, la demande de M. Khadr repose sur l'allégation selon laquelle le Canada a lui aussi contribué à l'atteinte passée et présente à sa liberté. Pour qu'il soit satisfait aux exigences de l'art. 7, il doit exister — comme l'a indiqué la Cour dans *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3 — un « lien causal suffisant entre la participation de notre gouvernement et l'atteinte [à la liberté et à la sécurité de la personne] qui survient en bout de ligne » (par. 54).

[20] Le dossier indique que les interrogatoires menés par le SCRS et le MAECI ont fourni des éléments de preuve importants au sujet des accusations dont M. Khadr fait l'objet. Durant les interrogatoires menés en février et septembre 2003, des agents du SCRS ont interrogé M. Khadr à plusieurs reprises sur les faits essentiels en cause dans le cadre de la poursuite intentée contre lui. Ils lui ont en outre soutiré des déclarations potentiellement inculpatoires dans le cadre des instances introduites contre lui aux États-Unis (Document du SCRS, pièce « U », jointe à l'affidavit du Lt. Comm. William Kuebler, 7 novembre 2003 (D.C., vol. II, p. 280); Résumé de l'interrogatoire, pièce « AA », jointe à l'affidavit du Lt. Comm. William Kuebler, 24 février 2003 (D.C., vol. III, p. 289); Résumé de l'interrogatoire, pièce « BB », jointe à l'affidavit du Lt. Comm. William Kuebler, 17 février 2003 (D.C., vol. III, p. 292); Résumé de l'interrogatoire, pièce « DD », jointe à l'affidavit du Lt. Comm. William Kuebler, 20 avril 2004 (D.C., vol. III, p. 296)). Dans un rapport du Comité de surveillance des activités de renseignement de sécurité intitulé *Le rôle du SCRS dans l'affaire Omar Khadr* (8 juillet 2009), il est mentionné en outre que, selon le SCRS, les interrogatoires de M. Khadr ont été « très fructueu[x], comme le montrent les

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Activity, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at pp. 289 ff.)). Pursuant to the relaxed rules of evidence under the U.S. *Military Commissions Act of 2006*, Mr. Khadr's statements to Canadian officials are potentially admissible against him in the U.S. proceedings, notwithstanding the oppressive circumstances under which they were obtained: see *United States of America v. Jawad*, Military Commission, September 24, 2008, D-008 Ruling on Defense Motion to Dismiss — Torture of the Detainee (online: http://www.defense.gov/news/Ruling%20D-008.pdf). The above interrogations also provided the context for the March 2004 interrogation, when a DFAIT official, knowing that Mr. Khadr had been subjected to the "frequent flyer program" to make him less resistant to interrogations, nevertheless proceeded with the interrogation of Mr. Khadr (Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)).

renseignements secrets de qualité » qu'il a fournis (p. 14). Ces déclarations ont été communiquées aux autorités américaines et ont été résumées dans des rapports d'enquête américains (Rapport d'enquête, pièce « AA », jointe à l'affidavit du Lt. Comm. William Kuebler, 24 février 2003 (D.C., vol. III, p. 289 ff.)). Suivant les règles de preuve assouplies établies par la *Military Commissions Act of 2006* des États-Unis, les déclarations faites par M. Khadr aux responsables canadiens pourraient être admissibles dans le cadre des procédures intentées contre lui, en dépit des circonstances abusives dans lesquelles elles ont été obtenues : voir *United States of America c. Jawad*, commission militaire, 24 septembre 2008, Décision D-008 sur la requête en rejet présentée par la défense — Torture du détenu (en ligne : http://www.defense.gov/news/Ruling%20D-008.pdf). Les interrogatoires dont il a été question précédemment ont également préparé l'interrogatoire du mois de mars 2004 lors duquel un représentant du MAECI, sachant que M. Khadr avait été soumis au « programme grand voyageur » pour amoindrir sa résistance lors des interrogatoires, l'a néanmoins interrogé (Résumé de l'interrogatoire, pièce « DD », jointe à l'affidavit du Lt. Comm. William Kuebler, 20 avril 2004 (D.C., vol. III, p. 296)).

[21] An applicant for a *Charter* remedy must prove a *Charter* violation on a balance of probabilities (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277). It is reasonable to infer from the uncontradicted evidence before us that the statements taken by Canadian officials are contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests. In the absence of any evidence to the contrary (or disclaimer rebutting this inference), we conclude on the record before us that Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention, which is the subject of his current claim. The causal connection demanded by *Suresh* between Canadian conduct and the deprivation of liberty and security of person is established.

[21] Celui qui sollicite une réparation fondée sur la *Charte* doit prouver la violation de celle-ci selon la prépondérance des probabilités (*R. c. Collins*, [1987] 1 R.C.S. 265, p. 277). Il est raisonnable de déduire de la preuve non contredite portée à notre connaissance que les déclarations recueillies par des responsables canadiens contribuent à la détention continue de M. Khadr, et ont ainsi une incidence sur ses droits à la liberté et à la sécurité. En l'absence d'éléments de preuve contraires (ou de dénégation réfutant cette inférence), nous concluons sur la foi du dossier dont nous sommes saisis que la participation active du Canada à un régime, illégal à l'époque, a contribué et continue de contribuer à la détention actuelle de M. Khadr, laquelle est l'objet de la demande sur laquelle nous sommes appelés à statuer. Le lien causal exigé par *Suresh* entre la conduite du Canada et la privation de la liberté et de la sécurité de la personne est établi.

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3. Does the Deprivation Accord With the Principles of Fundamental Justice?

[22] We have concluded that the conduct of the Canadian government is sufficiently connected to the denial of Mr. Khadr's liberty and security of the person. This alone, however, does not establish a breach of Mr. Khadr's s. 7 rights under the *Charter*. To establish a breach, Mr. Khadr must show that this deprivation is not in accordance with the principles of fundamental justice.

[23] The principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. They are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound. In *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46, the Court (Abella J. for the majority) restated the criteria for identifying a new principle of fundamental justice in the following manner:

(1) It must be a legal principle.

(2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.

(3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[24] We conclude that Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice. That conduct may be briefly reviewed. The statements taken by CSIS and DFAIT were obtained through participation in a regime which was known at the time to have refused detainees the right to challenge the legality of detention by way of *habeas corpus*. It was also known that Mr. Khadr was 16 years old at the time

3. L'atteinte est-elle compatible avec les principes de justice fondamentale?

[22] Nous avons conclu à l'existence d'un lien suffisant entre la conduite du gouvernement canadien et la privation de la liberté et de la sécurité de sa personne subie par M. Khadr. Cela ne suffit cependant pas à établir une atteinte aux droits de ce dernier garantis par l'art. 7 de la *Charte*. En effet, pour prouver l'existence d'une atteinte, M. Khadr doit démontrer que la privation en question n'est pas compatible avec les principes de justice fondamentale.

[23] Les principes de justice fondamentale « se trouvent dans les préceptes fondamentaux de notre système juridique » : *Renvoi : Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486, p. 503. Tirés de l'expérience et de la jurisprudence canadiennes, ils prennent en compte les obligations et les valeurs du Canada exprimées dans les diverses sources du droit international en matière de droits de la personne auxquelles le Canada est tenu de se conformer. Dans *R. c. D.B.*, 2008 CSC 25, [2008] 2 R.C.S. 3, par. 46, la Cour a réitéré, dans les termes suivants (sous la plume de la juge Abella qui a rédigé les motifs des juges majoritaires), les critères selon lesquels on peut confirmer l'existence d'un nouveau principe de justice fondamentale :

(1) Il doit s'agir d'un principe juridique.

(2) Il doit exister un consensus sur le fait que cette règle ou ce principe est essentiel au bon fonctionnement du système de justice.

(3) Ce principe doit être défini avec suffisamment de précision pour constituer une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne.

[24] Nous concluons que la conduite du Canada relative à la poursuite engagée contre M. Khadr a porté atteinte aux principes de justice fondamentale. Réexaminons brièvement cette conduite. Les déclarations recueillies par le SCRS et le MAECI ont été obtenues au moyen de la participation à un régime dont on savait à l'époque qu'il avait nié à des détenus le droit de contester la légalité de leur détention par voie d'*habeas corpus*. On savait

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and that he had not had access to counsel or to any adult who had his best interests in mind. As held by this Court in *Khadr 2008*, Canada's participation in the illegal process in place at Guantanamo Bay clearly violated Canada's binding international obligations (*Khadr 2008*, at paras. 23-25; *Hamdan v. Rumsfeld*). In conducting their interviews, CSIS officials had control over the questions asked and the subject matter of the interviews (Transcript of cross-examination on Affidavit of Mr. Hooper, Exhibit "GG" to Affidavit of Lt. Cdr. William Kuebler, March 2, 2005 (J.R., vol. III, p. 313, at p. 22)). Canadian officials also knew that the U.S. authorities would have full access to the contents of the interrogations (as Canadian officials sought no restrictions on their use) by virtue of their audio and video recording (*CSIS's Role in the Matter of Omar Khadr*, at pp. 11-12). The purpose of the interviews was for intelligence gathering and not criminal investigation. While in some contexts there may be an important distinction between those interviews conducted for the purpose of intelligence gathering and those conducted in criminal investigations, here, the distinction loses its significance. Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission in *Jawad* as designed to "make [detainees] more compliant and break down their resistance to interrogation" (para. 4).

[25] This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth,

également que M. Khadr était alors âgé de 16 ans et qu'il n'avait pas pu consulter un avocat ou tout autre adulte qui aurait eu son intérêt à cœur. Comme l'a déclaré la Cour dans *Khadr 2008*, la participation du Canada à la procédure illégale engagée à Guantanamo contrevenait manifestement aux obligations internationales du Canada (*Khadr 2008*, par. 23-25; *Hamdan c. Rumsfeld*). En menant leurs interrogatoires, les agents du SCRS étaient ceux qui décidaient des questions posées et du sujet traité (Transcription du contre-interrogatoire relatif à l'affidavit de M. Hooper, pièce « GG », jointe à l'affidavit du Lt. Comm. William Kuebler, 2 mars 2005 (D.C., vol. III, p. 313, p. 22)). Les responsables canadiens savaient aussi que les autorités américaines auraient un accès illimité à la teneur des interrogatoires grâce aux enregistrements audio et vidéo qui en étaient faits, puisque les responsables canadiens n'ont pas cherché à en restreindre l'usage (*Le rôle du SCRS dans l'affaire Omar Khadr*, p. 12-13). Les interrogatoires visaient à recueillir des renseignements secrets et non pas à faire progresser une enquête criminelle. Même si, dans certains contextes, il peut exister d'importantes différences entre les interrogatoires menés en vue de colliger des renseignements secrets et ceux menés dans le cadre d'enquêtes criminelles, en l'espèce, ces différences perdent leur importance. Les responsables canadiens ont interrogé M. Khadr sur des sujets qui pourraient avoir permis de recueillir des éléments de preuve importants pour les procédures criminelles intentées contre lui, dans des circonstances où ces responsables savaient que M. Khadr était détenu pour une période indéterminée, qu'il était un adolescent et qu'il était seul durant les interrogatoires. En outre, l'interrogatoire mené en mars 2004 — au cours duquel M. Khadr a refusé de répondre aux questions — s'est déroulé alors qu'on savait que celui-ci avait été soumis à trois semaines de privation planifiée de sommeil, une mesure décrite par la commission militaire américaine dans *Jawad* comme visant à [TRADUCTION] « rendre [les détenus] plus dociles et à venir à bout de leur résistance à l'interrogatoire » (par. 4).

[25] Ces faits établissent la participation du Canada à une conduite étatique violant les principes de justice fondamentale. Le fait d'avoir interrogé un

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to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

[26] We conclude that Mr. Khadr has established that Canada violated his rights under s. 7 of the *Charter.*

B. *Is the Remedy Sought Appropriate and Just in All the Circumstances?*

[27] In previous proceedings (*Khadr 2008*), Mr. Khadr obtained the remedy of disclosure of the material gathered by Canadian officials against him through the interviews at Guantanamo Bay. The issue on this appeal is whether the breach of s. 7 of the *Charter* entitles Mr. Khadr to the remedy of an order that Canada request of the United States that he be returned to Canada. Two questions arise at this stage: (1) Is the remedy sought sufficiently connected to the breach? and (2) Is the remedy sought precluded by the fact that it touches on the Crown prerogative power over foreign affairs?

[28] The judge at first instance held that the remedy sought was open to him. The Federal Court of Appeal held that he did not abuse his remedial discretion. On the basis of our answer to the second of the foregoing questions, we conclude that the trial judge, on the record before us, erred in the exercise of his discretion in granting the remedy sought.

[29] First, is the remedy sought sufficiently connected to the breach? We have concluded that the Canadian government breached Mr. Khadr's s. 7 rights in 2003 and 2004 through its participation

adolescent, pour lui soutirer des déclarations relatives aux accusations criminelles les plus sérieuses qui soient, alors qu'il était détenu dans ces conditions et qu'il ne pouvait pas consulter un avocat et même si l'on savait que les fruits des interrogatoires seraient communiqués aux procureurs américains, contrevient aux normes canadiennes les plus élémentaires quant aux traitements à accorder aux suspects adolescents détenus.

[26] Nous concluons que M. Khadr a établi que le Canada a enfreint les droits qui lui sont garantis par l'art. 7 de la *Charte.*

B. *La réparation demandée est-elle convenable et juste eu égard à toutes les circonstances?*

[27] Dans une instance antérieure (*Khadr 2008*), M. Khadr a obtenu, à titre de réparation, la communication de l'information recueillie contre lui par des responsables canadiens à la faveur d'interrogatoires ayant eu lieu à Guantanamo. Dans le présent pourvoi, il s'agit de savoir si la violation de l'art. 7 de la *Charte* permet à M. Khadr d'obtenir la réparation consistant en une ordonnance intimant au Canada de demander aux États-Unis son renvoi au Canada. Deux questions se posent à ce stade : (1) Existe-t-il un lien causal suffisant entre la violation et la réparation demandée? (2) Le fait que la réparation sollicitée touche la prérogative royale en matière d'affaires étrangères fait-il obstacle à cette réparation?

[28] Le juge de première instance a conclu qu'il pouvait accorder la réparation demandée. La Cour d'appel fédérale a estimé qu'il n'avait pas abusé de son pouvoir discrétionnaire en matière de réparation. Étant donné notre réponse à la seconde des questions énoncées précédemment, nous arrivons à la conclusion que, sur la foi du dossier dont nous sommes saisis, le juge de première instance a commis une erreur dans l'exercice de son pouvoir discrétionnaire en accordant la réparation demandée.

[29] Premièrement, la réparation demandée a-t-elle un lien suffisant avec la violation? Nous avons conclu que le gouvernement canadien a violé les droits garantis à M. Khadr par l'art. 7, en raison

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in the then-illegal military regime at Guantanamo Bay. The question at this point is whether the remedy now being sought — an order that the Canadian government ask the United States to return Mr. Khadr to Canada — is appropriate and just in the circumstances.

[30] An appropriate and just remedy is "one that meaningfully vindicates the rights and freedoms of the claimants": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55. The first hurdle facing Mr. Khadr, therefore, is to establish a sufficient connection between the breaches of s. 7 that occurred in 2003 and 2004 and the order sought in these judicial review proceedings. In our view, the sufficiency of this connection is established by the continuing effect of these breaches into the present. Mr. Khadr's *Charter* rights were breached when Canadian officials contributed to his detention by virtue of their interrogations at Guantanamo Bay knowing Mr. Khadr was a youth, did not have access to legal counsel or *habeas corpus* at that time and, at the time of the interview in March 2004, had been subjected to improper treatment by the U.S. authorities. As the information obtained by Canadian officials during the course of their interrogations may be used in the U.S. proceedings against Mr. Khadr, the effect of the breaches cannot be said to have been spent. It continues to this day. As discussed earlier, the material that Canadian officials gathered and turned over to the U.S. military authorities may form part of the case upon which he is currently being held. The evidence before us suggests that the material produced was relevant and useful. There has been no suggestion that it does not form part of the case against Mr. Khadr or that it will not be put forward at his ultimate trial. We therefore find that the breach of Mr. Khadr's s. 7 *Charter* rights remains ongoing and that the remedy sought could potentially vindicate those rights.

de sa participation, en 2003 et 2004, au régime militaire de Guantanamo, alors illégal. La question qui se pose à cette étape de l'analyse est celle de savoir si la réparation maintenant demandée — soit une ordonnance intimant au gouvernement canadien de demander aux États-Unis le renvoi de M. Khadr au Canada — est convenable et juste eu égard aux circonstances.

[30] Une réparation convenable et juste est « celle qui permet de défendre utilement les droits et libertés du demandeur » : *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 55. Ainsi, M. Khadr doit tout d'abord réussir à établir l'existence d'un lien suffisant entre les violations de l'art. 7 survenues en 2003 et 2004 et l'ordonnance sollicitée dans le cadre de la demande de contrôle judiciaire qu'il a formulée. Selon nous, l'existence d'un lien suffisant est établie par le fait que les incidences de ces violations persistent jusqu'à présent. Les droits de M. Khadr garantis par la *Charte* ont été violés lorsque des responsables canadiens ont contribué à sa détention par les interrogatoires qu'ils ont menés à Guantanamo, tout en sachant qu'il était un adolescent, qu'il n'avait alors pas accès à un avocat ou à un recours en *habeas corpus* et qu'au moment où s'est déroulé l'interrogatoire du mois de mars 2004, il avait été soumis à des traitements inappropriés par les autorités américaines. Comme l'information recueillie par les responsables canadiens lors de leurs interrogatoires pourrait être utilisée dans le cadre des procédures américaines engagées contre M. Khadr, on ne peut pas dire que les effets des violations ont cessé. Ils se poursuivent à ce jour. Comme nous l'avons indiqué, il est possible que l'information obtenue par les responsables canadiens et transmise aux autorités militaires américaines fasse partie du dossier en vertu duquel il est actuellement détenu. La preuve dont nous disposons donne à penser que l'information en question était pertinente et utile. Les parties n'ont pas suggéré qu'elle ne fait pas partie du dossier colligé contre M. Khadr ou qu'elle ne sera pas produite lorsque son procès sera finalement tenu. Nous concluons donc que la violation des droits garantis à M. Khadr par l'art. 7 de la *Charte* est toujours en cours et que la réparation sollicitée pourrait défendre ces droits.

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[31] The acts that perpetrated the *Charter* breaches relied on in this appeal lie in the past. But their impact on Mr. Khadr's liberty and security continue to this day and may redound into the future. The impact of the breaches is thus perpetuated into the present. When past acts violate present liberties, a present remedy may be required.

[31] Les actions à l'origine des violations de la *Charte* invoquées dans le présent pourvoi appartiennent au passé. Mais leurs effets sur la liberté et la sécurité de M. Khadr persistent à ce jour et pourraient avoir des répercussions à l'avenir. Les effets des violations se perpétuent ainsi dans le présent. Lorsque des actions passées violent des libertés actuelles, une réparation actuelle peut être requise.

[32] We conclude that the necessary connection between the breaches of s. 7 and the remedy sought has been established for the purpose of these judicial review proceedings.

[32] Nous concluons que le lien nécessaire entre les violations de l'art. 7 et la réparation demandée a été établi aux fins de la présente demande de contrôle judiciaire.

[33] Second, is the remedy sought precluded by the fact that it touches on the Crown prerogative over foreign affairs? A connection between the remedy and the breach is not the only consideration. As stated in *Doucet-Boudreau*, an appropriate and just remedy is also one that "must employ means that are legitimate within the framework of our constitutional democracy" (para. 56) and must be a "judicial one which vindicates the right while invoking the function and powers of a court" (para. 57). The government argues that courts have no power under the Constitution of Canada to require the executive branch of government to do anything in the area of foreign policy. It submits that the decision not to request the repatriation of Mr. Khadr falls directly within the prerogative powers of the Crown to conduct foreign relations, including the right to speak freely with a foreign state on all such matters: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 1-19.

[33] Deuxièmement, le fait que la réparation demandée touche la prérogative royale en matière d'affaires étrangères fait-il obstacle à cette réparation? L'existence d'un lien entre la réparation et la violation n'est pas le seul facteur à prendre en considération. Comme l'énonce l'arrêt *Doucet-Boudreau*, la réparation convenable et juste est celle qui, en outre, « fait appel à des moyens légitimes dans le cadre de notre démocratie constitutionnelle » (par. 56) et doit être une réparation « judiciaire qui défend le droit en cause tout en mettant à contribution le rôle et les pouvoirs d'un tribunal » (par. 57). Le gouvernement fait valoir que la Constitution du Canada ne confère pas aux tribunaux le pouvoir d'exiger de la branche exécutive du gouvernement qu'elle fasse quoi que ce soit dans le domaine de la politique étrangère. Selon lui, la décision de ne pas demander le rapatriement de M. Khadr relève directement de la prérogative de la Couronne de conduire les relations internationales, prérogative qui comprend le droit de parler librement avec un État étranger de toutes ces questions : P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), p. 1-19.

[34] The prerogative power is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269, at p. 272, *per* Duff C.J., quoting A. V. Dicey, *Introduction to the Study*

[34] La prérogative royale est [TRADUCTION] « le résidu du pouvoir discrétionnaire ou arbitraire dont la Couronne est légalement investie à tout moment » : *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] R.C.S. 269, p. 272, le juge en chef Duff, citant A. V Dicey,

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of the Law of the Constitution (8th ed. 1915), at p. 420. It is a limited source of non-statutory administrative power accorded by the common law to the Crown: Hogg, at p. 1-17.

[35] The prerogative power over foreign affairs has not been displaced by s. 10 of the *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, and continues to be exercised by the federal government. The Crown prerogative in foreign affairs includes the making of representations to a foreign government: *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 (Ont. C.A.). We therefore agree with O'Reilly J.'s implicit finding (paras. 39, 40 and 49) that the decision not to request Mr. Khadr's repatriation was made in the exercise of the prerogative over foreign relations.

[36] In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms (*Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539).

[37] The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions

Introduction to the Study of the Law of the Constitution (8e éd. 1915), p. 420. Il s'agit d'une source limitée de pouvoir administratif ne découlant pas de la législation, que confère la common law à la Couronne : Hogg, p. 1-17.

[35] La prérogative royale en matière d'affaires étrangères n'a pas été supplantée par l'art. 10 de la *Loi sur le ministère des Affaires étrangères et du Commerce international*, L.R.C. 1985, ch. E-22, et continue d'être exercée par le gouvernement fédéral. Elle comprend le pouvoir de faire des observations à un gouvernement étranger : *Black c. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 (C.A. Ont.). Nous sommes donc d'accord avec la conclusion implicite du juge O'Reilly (par. 39, 40 et 49) selon laquelle la décision de ne pas demander le rapatriement de M. Khadr a été prise dans l'exercice de la prérogative en matière de relations étrangères.

[36] Lorsqu'il exerce les pouvoirs que lui confère la common law en vertu de la prérogative royale, l'exécutif n'est toutefois pas à l'abri du contrôle constitutionnel : *Operation Dismantle c. La Reine*, [1985] 1 R.C.S. 441. Certes, il revient à l'exécutif, et non aux tribunaux, de décider si et comment il exercera ses pouvoirs; mais les tribunaux ont indéniablement compétence pour déterminer si la prérogative invoquée par la Couronne existe véritablement et, dans l'affirmative, pour décider si son exercice contrevient à la *Charte* (*Operation Dismantle*) ou à d'autres normes constitutionnelles (*Air Canada c. Colombie-Britannique (Procureur général)*, [1986] 2 R.C.S. 539) — ils sont d'ailleurs tenus d'exercer cette compétence.

[37] Le pouvoir restreint dont jouissent les tribunaux pour contrôler la constitutionnalité de l'exercice de la prérogative royale tient au fait que, dans une démocratie constitutionnelle, tout pouvoir gouvernemental doit être exercé en conformité avec la Constitution. Cela dit, le contrôle judiciaire de l'exercice de la prérogative sur le plan de sa constitutionnalité demeure tributaire du fait que la branche exécutive du gouvernement est responsable des décisions relevant de ce pouvoir, et que

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within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged: see, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 101-2. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283.

[38] Having concluded that the courts possess a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action, the final question is whether O'Reilly J. misdirected himself in exercising that power in the circumstances of this case (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 117-18). (In fairness to the trial judge, we note that the government proposed no alternative (trial judge's reasons, at para. 78).) If the record and legal principle support his decision, deference requires we not interfere. However, in our view that is not the case.

[39] Our first concern is that the remedy ordered below gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests. For the following reasons, we conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of

l'exécutif est mieux placé pour prendre ces décisions dans le cadre des choix constitutionnels possibles. Il faut que le gouvernement dispose d'une certaine marge de manœuvre lorsqu'il décide de quelle manière il doit s'acquitter des obligations relevant de sa prérogative : voir, p. ex., *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 101-102. Il appartient cependant aux tribunaux de fixer les limites légales et constitutionnelles à l'intérieur desquelles ces décisions doivent être prises. Ainsi, lorsqu'un gouvernement refuse de se conformer aux contraintes constitutionnelles, les tribunaux ont le pouvoir de rendre des ordonnances qui garantissent que la prérogative du gouvernement en matière d'affaires étrangères est exercée en conformité avec la Constitution : *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283.

[38] Après avoir conclu que les tribunaux jouissent d'un pouvoir circonscrit pour examiner les questions relatives aux affaires étrangères et intervenir à leur égard — de façon à s'assurer de la constitutionnalité de l'action de l'exécutif — il nous reste une question à trancher : le juge O'Reilly s'est-il fondé sur des considérations erronées en exerçant ce pouvoir dans les circonstances de l'espèce? (*R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117-118) (Par souci d'équité envers le juge du procès, nous précisons que le gouvernement n'a proposé aucune solution de rechange (motifs du juge du procès, par. 78).) Si sa décision est justifiable au regard du dossier et des principes de droit, la déférence nous oblige à ne pas intervenir. À notre avis, tel n'est toutefois pas le cas.

[39] Nous estimons tout d'abord que la réparation ordonnée par les juridictions d'instances inférieures accorde un poids insuffisant à la responsabilité constitutionnelle de l'exécutif de prendre des décisions concernant les affaires étrangères dans le contexte de circonstances complexes et en fluctuation constante, en tenant compte des intérêts nationaux plus larges du Canada. Pour les motifs suivants, nous concluons que la réparation appropriée consiste, d'une part, à déclarer que, selon le dossier dont la Cour est saisie, le Canada a porté

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current information, its responsibility for foreign affairs, and in conformity with the *Charter.*

[40] As discussed, the conduct of foreign affairs lies with the executive branch of government. The courts, however, are charged with adjudicating the claims of individuals who claim that their *Charter* rights have been or will be violated by the exercise of the government's discretionary powers: *Operation Dismantle*.

[41] In some situations, courts may give specific directions to the executive branch of the government on matters touching foreign policy. For example, in *Burns*, the Court held that it would offend s. 7 to extradite a fugitive from Canada without seeking and obtaining assurances from the requesting state that the death penalty would not be imposed. The Court gave due weight to the fact that seeking and obtaining those assurances were matters of Canadian foreign relations. Nevertheless, it ordered that the government seek them.

[42] The specific facts in *Burns* justified a more specific remedy. The fugitives were under the control of Canadian officials. It was clear that assurances would provide effective protection against the prospective *Charter* breaches: it was entirely within Canada's power to protect the fugitives against possible execution. Moreover, the Court noted that no public purpose would be served by extradition without assurances that would not be substantially served by extradition with assurances, and that there was nothing to suggest that seeking such assurances would undermine Canada's good relations with other states: *Burns*, at paras. 125 and 136.

[43] The present case differs from *Burns*. Mr. Khadr is not under the control of the Canadian

atteinte aux droits garantis à M. Khadr par l'art. 7, et, d'autre part, à laisser au gouvernement le soin de décider de quelle manière il convient de répondre au présent arrêt à la lumière de l'information dont il dispose actuellement et de sa responsabilité en matière d'affaires étrangères et ce, en conformité avec la *Charte*.

[40] Comme nous l'avons indiqué, la conduite des affaires étrangères relève de la branche exécutive du gouvernement. Il incombe en revanche aux tribunaux de statuer sur les actions intentées par des individus qui estiment que l'exercice par le gouvernement de ses pouvoirs discrétionnaires a porté ou portera atteinte à leurs droits garantis par la *Charte* : *Operation Dismantle*.

[41] Dans certaines situations, les tribunaux peuvent donner à la branche exécutive du gouvernement des directives spécifiques sur des questions ayant trait à la politique étrangère. À titre d'exemple, la Cour a conclu, dans *Burns*, qu'il serait contraire à l'art. 7 d'extrader un fugitif du Canada sans demander à l'État requérant, et sans obtenir de lui, la garantie que la peine de mort ne sera pas infligée. Elle a dûment pris en compte le fait que la demande et l'obtention de telles assurances relevaient des relations étrangères du Canada. Elle a néanmoins ordonné au gouvernement de les demander.

[42] Les faits particuliers de l'affaire *Burns* justifiaient une réparation de nature plus spécifique. En effet, les fugitifs se trouvaient sous le contrôle des autorités canadiennes. Il était évident que les assurances conféreraient une protection efficace contre une violation éventuelle de la *Charte* : le Canada avait tout à fait le pouvoir de protéger les fugitifs contre une exécution possible. En outre, la Cour a signalé qu'aucun objectif d'intérêt public que servirait l'extradition sans assurances ne serait pas également servi de façon substantielle par une extradition assortie d'assurances; rien n'indiquait non plus que le fait de demander de telles assurances nuirait aux bonnes relations du Canada avec d'autres États : *Burns*, par. 125 et 136.

[43] La présente affaire est différente de *Burns*. L'intimé n'est pas sous le contrôle du gouvernement

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government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.

[44] This brings us to our second concern: the inadequacy of the record. The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. As observed by Chaskalson C.J. in *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452, at para. 77: "The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal." It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights.

[45] Though Mr. Khadr has not been moved from Guantanamo Bay in over seven years, his legal predicament continues to evolve. During the hearing of this appeal, we were advised by counsel that the U.S. Department of Justice had decided that Mr. Khadr will continue to face trial by military commission, though other Guantanamo detainees will now be tried in a federal court in New York. How this latest development will affect Mr. Khadr's situation and any ongoing negotiations between the United States and Canada over his possible repatriation is unknown. But it signals caution in the exercise of the Court's remedial jurisdiction.

[46] In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence,

canadien; l'efficacité de la réparation proposée est incertaine; et la Cour n'est pas en mesure d'évaluer correctement les conséquences d'une demande de rapatriement sur les relations étrangères du Canada.

[44] Cela nous amène à notre deuxième objection : le caractère inadéquat du dossier. Celui dont nous disposons nous donne une image forcément incomplète de l'ensemble des considérations auxquelles le gouvernement fait actuellement face pour juger de la demande de M. Khadr. Nous ne savons pas quelles négociations ont pu avoir lieu, ou auront lieu, entre les gouvernements des États-Unis et du Canada sur le sort de M. Khadr. Comme l'a observé le juge en chef Chaskalson dans *Kaunda c. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452, par. 77 : [TRADUCTION] « Le moment choisi pour présenter des observations, s'il y a lieu d'en présenter, les termes dans lesquels elles devraient être formulées, et les sanctions qui (le cas échéant) devraient suivre si lesdites observations sont rejetées, sont des questions que les tribunaux ne sont pas véritablement en mesure de trancher. » Dans les circonstances, il ne serait donc pas opportun que la Cour donne des directives quant aux mesures diplomatiques qu'il faudrait prendre pour remédier aux violations des droits de l'intimé garantis par la *Charte*.

[45] Bien que M. Khadr soit détenu à Guantanamo depuis plus de sept ans, la situation juridique difficile dans laquelle il se trouve continue d'évoluer. Selon les représentations des avocats lors de l'audition du présent pourvoi, le ministère de la Justice des États-Unis a décidé que M. Khadr sera jugé, comme prévu, par une commission militaire, même si d'autres détenus de Guantanamo subiront plutôt leur procès devant une cour fédérale à New York. On ignore quelle sera l'incidence de ces nouvelles circonstances sur la situation de M. Khadr et sur les négociations qui pourraient être en cours entre les États-Unis et le Canada quant à son possible rapatriement. Ces faits incitent toutefois la Cour à faire preuve de prudence dans l'exercice de son pouvoir de réparation.

[46] En l'espèce, les incertitudes au chapitre de la preuve, les limites de la compétence institutionnelle

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and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*, at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

de la Cour et la nécessité de respecter les prérogatives de l'exécutif nous amènent à conclure que la réparation appropriée est de nature déclaratoire. Le jugement déclaratoire d'inconstitutionnalité est un redressement discrétionnaire : *Operation Dismantle*, p. 481, citant *Solosky c. La Reine*, [1980] 1 R.C.S. 821. Notre Cour a reconnu qu'il s'agit d'une « forme efficace et souple de règlement des véritables litiges » : *R. c. Gamble*, [1988] 2 R.C.S. 595, p. 649. Un tribunal peut, à juste titre, prononcer un jugement déclaratoire dans la mesure où il a compétence sur l'objet du litige, où la question dont il est saisi est une question réelle et non pas simplement théorique, et où la personne qui la soulève a véritablement intérêt à la soulever. C'est le cas en l'espèce.

[47] The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter.*

[47] La solution à la fois prudente pour l'instant et respectueuse des responsabilités de l'exécutif et des tribunaux consiste à ce que la Cour fasse droit en partie à la demande de contrôle judiciaire présentée par M. Khadr et prononce un jugement déclaratoire en sa faveur informant le gouvernement de son opinion sur le dossier dont elle est saisie, opinion qui fournira, pour sa part, à l'exécutif, le cadre juridique en vertu duquel il devra exercer ses fonctions et examiner les mesures qu'il conviendra de prendre à l'égard de M. Khadr, en conformité avec la *Charte.*

IV. Conclusion

IV. Conclusion

[48] The appeal is allowed in part. Mr. Khadr's application for judicial review is allowed in part. This Court declares that through the conduct of Canadian officials in the course of interrogations in 2003-2004, as established on the evidence before us, Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice. Costs are awarded to Mr. Khadr.

[48] Le pourvoi est accueilli en partie. La demande de contrôle judiciaire de M. Khadr est accueillie en partie. La Cour déclare que, compte tenu de la conduite de responsables canadiens lors d'interrogatoires menés en 2003 et 2004, telle qu'elle est établie par la preuve, le Canada a activement participé à un processus contraire aux obligations internationales qui lui incombent en matière de droits de la personne et a contribué à la détention continue de M. Khadr, de telle sorte qu'il a porté atteinte aux droits à la liberté et à la sécurité de sa personne que lui garantit l'art. 7 de la *Charte* et ce, de manière incompatible avec les principes de justice fondamentale. M. Khadr a droit aux dépens.

Appeal allowed in part with costs to the respondent.

Pourvoi accueilli en partie avec dépens en faveur de l'intimé.

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Solicitor for the appellants: Department of Justice, Ottawa.

Solicitors for the respondent: Parlee McLaws, Edmonton.

Solicitors for the intervener Amnesty International (Canadian Section, English Branch): Thompson Dorfman Sweatman, Winnipeg.

Solicitors for the interveners Human Rights Watch, the University of Toronto, Faculty of Law — International Human Rights Program and the David Asper Centre for Constitutional Rights: John Norris, Brydie Bethell and Audrey Macklin, Toronto.

Solicitor for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth: Justice for Children and Youth Services, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Arvay Finlay, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Greenspan Humphrey Lavine, Toronto.

Solicitors for the intervener the Canadian Bar Association: Waldman & Associates, Toronto.

Solicitors for the interveners Lawyers Without Borders Canada, Barreau du Québec and Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval: McCarthy Tétrault, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Marlys Edwardh Barristers Professional Corporation, Toronto.

Solicitors for the intervener the National Council for the Protection of Canadians Abroad: Theall Group, Toronto; Amsterdam & Peroff, Toronto.

Procureur des appelants : Ministère de la Justice, Ottawa.

Procureurs de l'intimé : Parlee McLaws, Edmonton.

Procureurs de l'intervenante Amnesty International (Canadian Section, English Branch) : Thompson Dorfman Sweatman, Winnipeg.

Procureurs des intervenants Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program et David Asper Centre for Constitutional Rights : John Norris, Brydie Bethell et Audrey Macklin, Toronto.

Procureur des intervenants la Coalition canadienne pour les droits des enfants et Justice for Children and Youth : Justice for Children and Youth Services, Toronto.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Arvay Finlay, Vancouver.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Greenspan Humphrey Lavine, Toronto.

Procureurs de l'intervenante l'Association du Barreau canadien : Waldman & Associates, Toronto.

Procureurs des intervenants Avocats sans frontières Canada, le Barreau du Québec et le Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Marlys Edwardh Barristers Professional Corporation, Toronto.

Procureurs de l'intervenant National Council for the Protection of Canadians Abroad : Theall Group, Toronto; Amsterdam & Peroff, Toronto.

2010 SCC 3 (CanLII)

TAB 17

Court of Queen's Bench of Alberta

Citation: Engel v Alberta (Executive Council), 2019 ABQB 490

Date: 20190628
Docket: 1503 04488
Registry: Edmonton

2019 ABQB 490 (CanLII)

Between:

Tom Engel and Donald Rigney

Applicants

- and -

James Prentice, PC, QC, As President of Executive Council of the Province of Alberta

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice S.N. Mandziuk

I. Introduction

[1] The *Election Act*, RSA 2000, c E-1, was amended in 2011 by Bill 21, the *Election Amendment Act, 2011*, SA 2011, c 19, to add s 38.1. Section 38.1 specifies a time period during which provincial general elections are to be held in Alberta. It reads as follows:

> 38.1 (1) Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislature, in Her Majesty's name, when the Lieutenant Governor sees fit.
>
> (2) Subject to subsection (1), general elections shall be held within the 3-month period beginning on March 1 and ending on May 31 in the 4th calendar year following polling day in the most recent general election.

Minister Olson did allude to the eventuality that an election could be held outside the Fixed Election Period. While it is unnecessary to comment on the Applicants' claim that the *Election Amendment Act, 2011* "was an elaborate deception, backed by deliberate lies", I cannot endorse the Applicants' claim that statements made in the Legislature represent a binding promise to Albertans. While departing from the spirit of the legislation may have political consequences, as acknowledged by Minister Olson in proposing second reading of the Bill on November 22, 2011, a promise or representation by government is not actionable or justiciable: ***Canadian Taxpayers Federation v Ontario***, 2004 CanLII 48177, 73 OR (3d) 621 at paras 51-71 (SC); ***Giacomelli v Canada (Attorney General)***, 2005 CanLII 49204, [2005] OJ No 5677 at para 9 (SC); ***Hogan v Newfoundland (Attorney General)***, 2000 NFCA 12, 183 DLR (4th) 225 at para 38; ***Reference Re Canada Assistance Plan***, [1991] 2 SCR 525 at paras 64, 72.

[74] Moreover, whether this amendment had the purpose argued by the Applicants, is not a justiciable issue.

[75] I agree with the Applicants that the courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": ***Reference Re Secession of Quebec***, [1998] 2 SCR 217 at para 70. But, in rare cases, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns and assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, and pushing courts beyond their proper role within the separation of powers: ***Operation Dismantle v Canada***, [1985] 1 SCR 441 at 459-460 and 465; ***Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)***, [1989] 2 SCR 49 at 90-91; ***Black***, at paras 50-51.

[76] In ***Khadr***, the Supreme Court of Canada discussed the limited role of the courts to review the exercise of Crown Prerogative, stating at para 37:

> The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged: see, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 101-2. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution: *United States v. Burns*, [2001] 1 S.C.R. 283.

[77] The Applicants cite the Ontario Court of Appeal's decision in ***Black*** at paras 45-48 in support of their claim that the courts may review the exercise of Crown Prerogative. However, in ***Black***, the Court also clearly stated the following at para 58:

> So characterized, it is plain and obvious that the Prime Minister's exercise of the honours prerogative is not judicially reviewable. Indeed, in the *Civil Service*

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> *Unions* case, Lord Roskill listed a number of exercises of the prerogative power whose subject matters were by their very nature not justiciable. Included in the list was the grant of honours. He wrote, in a passage I have already referred to, at p. 418 A.C.:
>
> > But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. *Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to* the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, *the dissolution of Parliament* and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter *are such as not to be amenable to the judicial process.* The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another. (emphasis added)

[78] As the Applicants point out, ***Black*** was endorsed by the Supreme Court of Canada in ***Khadr*** (Applicants' brief para 37).

[79] Although ***Black*** is not binding on me, the Ontario Court of Appeal's reasoning is highly persuasive. I agree that the exercise of Crown Prerogative over the dissolution of the Legislature and the calling of an election is not amenable to judicial review.

[80] Having found that s 38.1 does not diminish the ability of a sitting Government, or rather of the Lieutenant Governor in Council, acting on the recommendation of the President of Executive Council, to call an election in its discretion, there is no remedy to grant.

[81] I will now address the s 3 *Charter* issues, in general and then in terms of Mr. Rigney's specific claim that his rights were breached.

C. Were Mr. Rigney's s 3 rights violated when the 2015 general election was held, outside of the Fixed Election Period?

Section 3 *Charter* Rights

[82] Section 3 of the *Canadian Charter of Rights and Freedoms* states:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[83] In ***R v Big M Drug Mart Ltd***, [1985] 1 SCR 295 at 344, Dickson J (as he then was) stated: "[t]he interpretation [of a section of the *Charter*] should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection".

[84] In interpreting the scope of a *Charter* right, courts must adopt a broad and purposive approach that seeks to ensure that duly enacted legislation is in harmony with the purposes of the

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TAB 18

Federal Court Cour fédérale

Date: 20190509

Docket: T-1600-18

Citation: 2019 FC 630

2019 FC 630 (CanLII)

Ottawa, Ontario, May 9, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

CHIEF JOHN STAGG, COUNCILLOR LEONARD SUMNER, COUNCILLOR OWEN STAGG IN THEIR PERSONAL CAPACITY AND AS REPRESENTATIVES OF THE DAUPHIN RIVER FIRST NATION, AND THE SAID DAUPHIN RIVER FIRST NATION AS REPRESENTATIVE FOR ALL ITS MEMBERS

Applicants

and

THE ATTORNEY GENERAL OF CANADA, THE HONOURABLE RALPH GOODALE, MINISTER OF PUBLIC SAFETY, THE HONOURABLE JANE PHILPOTT, MINISTER OF INDIGENOUS SERVICES CANADA, THE HONOURABLE CAROLYN BENNETT, MINISTER OF CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS

Respondents

JUDGMENT AND REASONS

[1] In the spring of 2011, the Dauphin River First Nation [DRFN] was evacuated due to the flooding of its reserve lands. Many of its members have been forced to relocate temporarily in the Winnipeg area or elsewhere in Manitoba. The rebuilding of the community took longer than expected. Indigenous Services Canada [ISC], through a number of intermediaries, provided DRFN members with benefits aimed at securing alternative housing while waiting for new houses to be ready. In the summer of 2018, as new houses were ready or about to be ready for occupancy, it declared that the evacuation was over and terminated the evacuee benefits.

[2] DRFN objected to the termination of evacuee benefits and now seeks judicial review of that decision. It says that the 70 houses that have been built so far are insufficient to address the needs of the community and that there remain 45 evacuee families who have no home to return to when their benefits are terminated. It argues that when the community was evacuated, ISC promised that a house would be built for every evacuated family. It also argues that the decision was not made in a procedurally fair manner.

[3] The Attorney General, on its part, denies that such a promise was ever made. He adds that the termination of the evacuee benefits was reasonable, because DRFN now has more houses and a lower rate of occupancy than before the flood, even when the natural increase of its population is taken into account. The Attorney General also argues that the decision to provide or to terminate benefits is a prerogative decision that courts cannot review.

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[4] DRFN's application for judicial review is denied. The decision is not shielded from review because it is made under the royal prerogative or involved the allocation of public funds. However, the process leading to the decision complied with the requirements of procedural fairness. Most importantly, the decision was reasonable, as it took into account the collective needs of DRFN members. Given DRFN's role in allocating houses to its members, the decision-maker was not required to inquire into individual needs. Lastly, references to certain documents generated in the course of negotiations did not render the decision unreasonable.

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I. Background

[5] As usual, a proper understanding of the case requires a detailed analysis of the facts. But it is difficult to appreciate the relevance of certain facts unless one begins with a summary of legislation and policy in two areas that intersect in this case: the provision of housing and emergency management and assistance.

[6] In these reasons, I refer to the relevant government department as Indigenous Services Canada or ISC. ISC was formerly part of a larger department, most recently known as Aboriginal Affairs and Northern Development Canada.

A. *Housing for First Nations*

[7] Housing is a fundamental human need. In this regard, Article 11 of the *International Covenant on Economic, Social and Cultural Rights* recognizes "the right of everyone to an adequate standard of living … including … housing." In this country, however, housing is often

considered to be a private matter. Individuals are expected to find housing by themselves and to resort to their own resources to cover housing costs. Nevertheless, federal and provincial governments have adopted various strategies to make housing more affordable. At the federal level, the *National Housing Act*, RSC 1985, c N-11, aims to "promote housing affordability" through the provision of financing or various forms of subsidies. Most provinces regulate residential tenancies and provide housing subsidies or other forms of housing assistance to low-income families. See, for example, *The Housing and Renewal Corporation Act*, CCSM c H160.

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[8] Housing in First Nations communities is also provided through a combination of public and private initiative. Given the economic situation in many First Nations communities, as well as the constraints on private ownership flowing from the *Indian Act*, RSC 1985, c I-5, and other factors, public funding plays a more important role than in non-Indigenous communities. In many cases, such as in DRFN, First Nations build houses with whatever federal funding is available and rent them or simply allocate them to their members. Decisions regarding the allocation of housing are made by First Nations, either according to section 20 of the *Indian Act*, which deals with certificates of possession, through rental agreements or through more informal arrangements. The federal government plays no role in the allocation of housing in First Nations communities.

[9] While the federal government appears to accept the political responsibility to provide adequate housing to First Nation communities, the legal basis for the provision of that assistance is unclear. It may be, as DRFN suggested before me, that an obligation to provide housing flows from the treaty relationship between the Crown and many Indigenous peoples. DRFN, for one, is

a party to Treaty 2. In the Indigenous tradition, treaties were meant to establish a family relationship between treaty partners (*wahkohtowin*): Treaty Elders of Saskatchewan, *Our Dream Is That Our Peoples Will One Day Be Clearly Recognized As Nations* (Calgary: University of Calgary Press, 2000) at 33–36. Family members may have a duty to assist each other in times of need. Moreover, DRFN highlighted the fact that the availability of proper housing would be a prerequisite to the exercise of the harvesting rights enshrined in the treaties or in the *Constitution Act, 1930*. However, the evidentiary record in this case is insufficient to determine the existence and scope of a treaty right to housing.

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[10] Parliament has not enacted legislation that deals specifically with First Nations housing (see, in this regard, *Canada (Attorney General) v Simon*, 2012 FCA 312 at paras 4–6; Janna Promislow and Naiomi Metallic, "Realizing Aboriginal Administrative Law", in Colleen M Flood and Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery, 2018) 87, 93–108). It appears that funding for housing is provided either by the Canadian Mortgage and Housing Corporation [CMHC] under the general provisions of the *National Housing Act*, or under policies of ISC. The relevant policies are not in evidence before me.

[11] It is common knowledge that the situation of housing in First Nations communities is particularly difficult, to the point that some speak of a crisis. More than twenty years ago, the Royal Commission on Aboriginal Peoples described the situation as follows:

> Aboriginal housing and community services are in a bad state, by all measures falling below the standards that prevail elsewhere in Canada and threatening the health and well-being of Aboriginal people. The inadequacy of these services is visible evidence of the

> poverty and marginalization experienced disproportionately by Aboriginal people. […]
>
> The problem is threefold: lack of adequate incomes to support the private acquisition of housing, absence of a functioning housing market in many localities where Aboriginal people live, and lack of clarity and agreement on the nature and extent of government responsibility to respond to the problem. […]
>
> (Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 3, *Gathering Strength* (Ottawa: Canada Communication Group 1996) at 341).

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[12] Indeed, it appears that there was a certain level of overcrowding at DRFN prior to the 2011 flood. The affidavits of Tanita and Alexis Cruly provide an illustration: the three Cruly sisters, two of whom were adults, lived in a three-bedroom house, together with their mother and stepfather, as well as the four-year old daughter of one of them. ISC has calculated that in 2011, the occupancy rate, that is, the number of residents per housing unit in DRFN, was 3.8. In comparison, the average occupancy rate for Manitoba First Nations was 5.4, while the overall average in Manitoba was 2.6.

B. *Emergency Assistance*

[13] Most Canadians would expect their governments to protect them in case of an emergency. Indeed, emergency planning has become a significant responsibility of all levels of government. Emergency planning includes prevention, preparedness, response when an emergency occurs and recovery.

[14] Recovering from an emergency may involve the reconstruction of communities and the temporary housing of persons who were evacuated. Those measures are critical for the persons

who are the most affected by an emergency. Despite their importance, however, there is no statutory right to these measures, as will become apparent from a review of the relevant legislation.

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[15] The federal *Emergency Management Act*, SC 2007, c 15, is a very short statute. It is based on the premise that emergency preparedness is a jurisdiction shared between the various levels of government in Canada. Section 4 sets out a number of responsibilities of the federal government with respect to emergencies. In particular, it empowers the federal government to declare that a provincial emergency is of "federal concern" and, upon such a declaration, to provide financial assistance to a province. Section 6 provides that federal ministers shall prepare emergency plans with respect to matters falling under their jurisdiction. Pursuant to that authority, ISC or its predecessors have set up an Emergency Management Assistance Program [EMAP].

[16] Manitoba's *Emergency Measures Act*, CCSM c E80, contains, among other things, provisions requiring government departments and local authorities to prepare emergency plans. It also provides for the declaration of a state of emergency and for exceptional powers to be exercised on such an occasion. Part IV of the Act relates to disaster assistance. Section 16.1 allows for the provision of disaster assistance in accordance with policies adopted by the government. It also states that such assistance is "gratuitous" and not subject to appeal, except to the Disaster Assistance Appeal Board created by section 17.

[17] We can now turn to the events that affected the Interlake region of Manitoba in 2011 and DRFN in particular.

C. *The 2011 Flood and Reconstruction Efforts*

[18] Flooding has been an issue in Manitoba for a long time. The provincial government is involved in managing water flows, preventing floods and mitigating flooding damage and has built a number of works to that end. One of them is the Portage Diversion, a canal that allows the diversion of excess water flows of the Assiniboine River into Lake Manitoba. The waters of Lake Manitoba flow into the Fairford River, then into Lake St. Martin, then into the Dauphin River, which exits in Lake Winnipeg. DRFN is located at the mouth of the Dauphin River in Lake Winnipeg.

[19] In the spring of 2011, a combination of factors led to record water levels in the Assiniboine River basin and elsewhere in Manitoba. In order to minimize the possibility of flooding along the Assiniboine, in particular in Winnipeg and the environs, the provincial government diverted considerable quantities of water into Lake Manitoba through the Portage Diversion. This had the effect of greatly increasing the flow of the Dauphin River. Major floods took place in the Interlake region. Several communities were badly damaged, including DRFN. DRFN describes the water management measures taken by the government of Manitoba as a conscious decision to sacrifice DRFN, and other communities in the region, in order to save Winnipeg and other densely populated areas.

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[20] In view of the impending flood, DRFN was evacuated in May 2011, and its members relocated, mostly in the Winnipeg area. Many, if not all of the 53 houses then existing in DRFN were destroyed or rendered inhabitable.

[21] In 2013, DRFN initiated an action against the federal government in the Manitoba Court of Queen's Bench, with respect to the losses sustained as a result of the 2011 flood. Little progress has been made in bringing this action to trial. The parties have preferred to negotiate a comprehensive settlement agreement [CSA]. Those negotiations have led to an agreement-in-principle [AIP] in 2017, but no CSA has been signed yet.

[22] Although no CSA has yet been signed, the federal government funded DRFN reconstruction efforts, with the participation of the government of Manitoba. Before the flood, there were 53 houses in DRFN: affidavit of Aaron O'Keefe, Respondent's Record [RR] at 8, para 21. The initial plan, which was the object of an agreement between DRFN and the government of Manitoba in 2014, provided for the installation of 41 pre-built houses. However, in 2016, as DRFN identified additional needs, the federal government agreed to fund the construction of 20 additional houses and the renovation of another one. And even those numbers were exceeded, as an additional seven houses were built with funding approved by CMHC. The construction of those houses was completed in the summer or fall of 2018. Hence, there are now 70 new houses in DRFN.

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[23] In addition, the federal government funded the reconstruction and the building of new collective infrastructure. As a result, DRFN now has a new band office, water and sewage system, health center and K-8 school.

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[24] Nevertheless, DRFN takes the position that this is insufficient to cover the housing needs of DRFN members. At meetings with ISC held in the fall of 2017, it asserted that 45 additional houses would be needed. It says that it came to this conclusion as a result of a needs assessment performed in 2017, which would explain that it had not taken this position earlier.

[25] A motion to certify a class action against the federal and Manitoba governments was also filed in the Manitoba Court of Queen's Bench. The motion was initially dismissed against Manitoba as the judge found that a class action was not the preferable procedure to address the members' claims: *Anderson v Manitoba*, 2014 MBQB 255 [*Anderson MBQB*]. The Court of Appeal, however, reversed that finding and certified the class action against Manitoba: *Anderson v Manitoba*, 2017 MBCA 14. I understand that this action has been settled, but both parties agree that this settlement has no bearing on the issues before me. In the same decision, the Court of Queen's Bench dismissed the claims against the federal government as disclosing no cause of action: *Anderson MBQB* at paragraphs 170–192. That finding was not appealed.

D. *The Evacuation Benefits*

[26] One sad consequence of emergencies such as the 2011 flood is that persons who have been evacuated are often unable to return to their homes until significant remedial or reconstruction work is completed. As a result, emergency measures programs often include

relocation assistance, aiming at providing evacuees with the means of living while their homes remain unavailable.

[27] Such assistance, which the parties have referred to as “evacuee benefits,” has been provided to DRFN members who were evacuated in 2011. For the purposes of this application, the precise scope of those benefits is immaterial. Affidavits sworn by five evacuees describe the monthly benefits as including the payment of rent directly to their landlords, for sums in the range of $800-$1200, as well as a cash payment for incidentals, in the range of $200-$300.

[28] The precise manner in which those benefits have been channelled to their recipients was made clear to DRFN only in the course of the present proceedings. The federal government adopted an order-in-council under the *Emergency Management Act* declaring the 2011 flood to be of national concern and authorizing payments to the province of Manitoba. As a result, the federal government made payments intended to cover, among other things, the payment of relocation assistance to both Indigenous and non-Indigenous Manitobans. The provincial government then contracted with a private non-governmental organization, initially the Manitoba Association of Native Firefighters and, starting in 2014, the Canadian Red Cross Society [Red Cross], for the actual delivery of assistance to the intended recipients. The lines of authority and accountability remain unclear. Thus, the federal government signed an agreement directly with the Red Cross in 2014. That agreement contains a statement of work that defines the services to be provided to the evacuees by reference to the provincial Disaster Financial Assistance Program. It also states that the Red Cross will seek reimbursement from the government of Manitoba. We do not know whether the benefits come within the purview of Manitoba’s

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Emergency Measures Act. Nevertheless, at the hearing of this application, counsel for the respondents admitted that the federal government is making decisions with respect to evacuee benefits and that the Red Cross would simply follow those decisions.

E. *The Challenged Decision*

[29] In the winter or early spring of 2018, ISC officials formed the view that DRFN had been restored to a state that allowed evacuees to return home. They asked DRFN to co-sign a letter to all evacuees informing them of the end of the evacuation and the termination of benefits. DRFN, however, declined to do so. As a result, ISC decided to terminate the evacuee benefits as of July 31, 2018. That decision was conveyed to DRFN members by letters from the Regional Director General, dated May 30, 2018, to each evacuee head of household. ISC says that most of those letters were received over the summer, with a few exceptions: affidavit of Aaron O'Keefe, RR at 15-16, paragraphs 43–44.

[30] DRFN objected to the termination of benefits, because of its view that 45 additional houses were needed to accommodate all evacuees, given the growth of community membership since the flood. That position was expressed, among other things, in a letter dated June 15, 2018, to then-Minister of ISC Jane Philpott. As a result of those representations, ISC agreed to delay the termination of evacuee benefits by one month, that is, benefits would end on August 31, 2018. ISC did not agree, however, to delay that termination indefinitely. That was confirmed by a letter of the Acting Regional Director General of ISC on August 23, 2018.

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[31] As further discussions did not result in an agreement, DRFN brought the present application on August 31, 2018, also seeking interim and interlocutory relief. During a telephone conference held on that day with the undersigned, counsel for the respondents agreed to provide evacuee benefits until September 30, 2018, on the understanding that a motion for interlocutory injunction would be heard before that date. Counsel for both parties later agreed that the benefits would be provided until a decision is made on the main application, which rendered the motion for an interlocutory injunction moot. At this time, only the benefits for the 45 evacuee heads of households who have not been allocated a house remain in issue. DRFN no longer challenges the termination of benefits for other evacuees.

[32] The parties do not agree as to what the decision under review exactly is. DRFN says that it is the letter dated August 23, 2018, because the decision made on May 24, 2018 had been "rescinded." The Attorney General, on its part, says that the decision to terminate benefits was made on May 24, 2018, and was never rescinded, only delayed. I agree with the latter view, because ISC never wavered in its intention to terminate the benefits, although it agreed to delay the implementation of the decision by one month. The fact that ISC refused to reconsider its decision does not amount to a new decision being made. I note that in spite of this, neither party suggested that an extension of time was needed.

[33] Perhaps because of the disagreement as to when the decision was made, the parties also disagree as to what constitutes the reasons for that decision. In this regard, we must not lose sight of the fact that the decision is not the result of an adjudicative process. Thus, this is a case in which we need to "look to the record" to find what those reasons are: *Newfoundland and*

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Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paragraph 15, [2011] 3 SCR 708 [*Newfoundland Nurses*]. This record includes not only the letters of May 24, 2018 and August 23, 2018, but also several iterations of a "decision note" prepared for the Regional Director General as well as additional information provided by ISC's affiants. From those sources, I find that the reasons for the decision challenged by this application include:

- "The construction of all new housing at Dauphin River to address the impacts of flooding should be completed by June 30, 2018" (May 30, 2018 letter);

- The construction of 70 houses for 234 evacuees would bring the occupancy rate to 3.34, well below the average for Manitoba First Nations, and below the occupancy rate in DRFN before the flood (April 26, 2018 decision note);

- "It is uncertain of how many of the 234 evacuees will move home as there is the potential of a large number of false evacuees on the current red cross evacuee list, as well as evacuees who may no longer want to return home to Dauphin River [sic]" (May 24, 2018 decision note);

- The cost, estimated at $11 million, of building an additional 43 houses, as well as the fact that $2 million was offered for new housing in 2018-19 (May 24, 2018 decision note);

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- "Dauphin River was originally supposed to demolish existing homes as new homes were being replaced; however the First Nation has been able to keep many of the existing homes which could accommodate future growth" (April 26, 2018 decision note);

- "The number of houses needed to address the impacts of the flood of 2011 was jointly agreed upon and acknowledged by Band Council Resolution, signed August 25, 2016 and in the Agreement of Principle signed May 10, 2017" (August 23, 2018 letter; also mentioned in the April 26, 2018 decision note).

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[34] Over the course of the proceedings, both parties made claims that certain documents, in particular the 2016 band council resolution [BCR] and the 2017 AIP, were covered by settlement privilege and were not admissible in evidence. However, as I explain later, the real thrust of those submissions is that the Regional Director General should not have taken those documents into account when making his decision, not that I should not look at them. Therefore, I have admitted those documents and I will deal with the settlement privilege claim when reviewing the merits.

II. Analysis

[35] The subject-matter of the present application for judicial review is the termination of the evacuee benefits. Yet, this issue cannot be entirely separated from the larger issue of the sufficiency of housing. Intuitively, the evacuation cannot be ended until every family is able to return to a repaired or a new house. But the lapse of time – seven years between the flood and the

decision challenged – made things more complicated. When DRFN was evacuated, one could have thought that a family was the group of persons who inhabited the same house. However, as time went by, as children became adults, as babies were born, as coupled formed or separated and as people passed away, the families of 2011 may not be the same as the families of 2018. Hence DRFN's claim that 45 more houses are needed to fulfil the needs of its members.

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[36] Resolving this issue is further complicated by the fact that the parties undertook reconstruction efforts before negotiating a comprehensive settlement of all issues arising from the flood. Thus, there is no agreement as to the number of houses to be built, nor as to the terms of the evacuee benefits program. There is no consensus on the metrics to be used to measure the needs of the community.

[37] This judgment is divided in three parts. I first need to address an objection raised by the Attorney General to this Court's jurisdiction and capacity to decide the matters at issue. I will explain why I find that the dispute is justiciable. I will then turn to the objections raised by DRFN to the process followed by ISC to make its decision. I will explain why those concerns are unfounded. I will then review the merits of the decision. Ultimately, I find that the decision was reasonable.

[38] At this juncture, I wish to make clear what this case is not about. This is not a claim for damages resulting from the flood. A class action to that effect was settled with Manitoba, and the claim against Canada will be decided by the Manitoba Court of Queen's Bench, on a more fulsome evidentiary record – unless, of course, the parties settle in the meantime. Neither is this a

claim based on a right to housing, whatever its source. The case was not argued on that basis and DRFN has not claimed any remedy regarding housing. And unlike *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2016 CHRT 2, this is not a discrimination claim. No evidence was adduced for the purpose of showing that DRFN members were adversely treated on the basis of a prohibited ground of discrimination.

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A. *Jurisdiction, Justiciability and Standard of Review*

[39] Before dealing with the merits, I must address an objection raised by the Attorney General, who argues that the decision to terminate benefits is "not subject to judicial review." He says that the federal government has no legal obligation to provide evacuee benefits. The provision of those benefits would be an exercise of the royal prerogative, which would be subject to review on constitutional grounds only. The decision to provide such benefits would be a discretionary policy decision unsuitable for review by the courts.

[40] These arguments can be understood as a challenge either to this Court's jurisdiction or the justiciability of the matter. At the hearing, counsel for the Attorney General confirmed that he wished to advance both aspects of the argument. Nevertheless, whether viewed from the perspective of jurisdiction or justiciability, the argument fails.

[41] This Court's jurisdiction to review exercises of the royal prerogative is firmly established and, indeed, is expressly provided for in the definition of "federal board, commission or other tribunal" in section 2 of the *Federal Courts Act*, RSC 1985, c F-7: *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at paragraphs 36–58

[*Hupacasath*]. Our Court has reviewed decisions that are generally understood to be made under the royal prerogative, such as the issuance of passports (for example, *Lipskaia v Canada (Attorney General)*, 2018 FC 789) or the conclusion or withdrawal from international treaties (*Hupacasath*; *Turp v Canada (Justice)*, 2012 FC 893, [2014] 1 FCR 439).

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[42] The Attorney General cited *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr*], as authority for the proposition that courts have jurisdiction "to review exercises of the prerogative power for constitutionality" (at paragraph 37) but not otherwise. However, the Supreme Court's reference to judicial review on constitutional grounds is explained by the fact that the claim in that case was based on the Charter. It was not meant to exclude other grounds of review: *Hupacasath* at paragraph 61. (To the extent that *Hospitality House Refugee Ministry Inc v Canada (Attorney General)*, 2013 FC 543, says otherwise, it has been overtaken by *Hupacasath*.) As the Ontario Court of Appeal wrote in *Black v Canada (Prime Minister)* (2001), 199 DLR (4th) 228 at 245 [*Black*]: "the expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power." (See also Patrice Garant, *Droit administratif*, 7th ed (Cowansville, Qc: Yvon Blais, 2017) at 45−49 [Garant, *Droit administratif*]; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf ed) at para 1.9 [Hogg, *Constitutional Law*].)

[43] Adopting the approach put forward by the Attorney General would cause significant practical problems. A precise definition of the royal prerogative would be needed, as this Court's jurisdiction would depend on the characterization of the source of the decision under review.

Yet, there is no agreement as to which decisions are made under the royal prerogative and which are made under another source of authority, as I will now demonstrate.

[44] The royal prerogative has been described as the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown" (*Khadr* at paragraph 34). Descriptions of the royal prerogative usually focus on powers that relate to traditional State functions, such as defence, foreign affairs, honours and mercy, as well as a number of traditional immunities: see, for example, Craig Forcese, "The Executive, the Royal Prerogative, and the Constitution" in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) [Forcese, "The Executive"]; Philippe Lagassé, "Parliamentary and Judicial Ambivalence Towards Executive Prerogative Powers in Canada" (2012) 55 Canadian Public Administration 157 [Lagassé, "Prerogative Powers"]; Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 75−106; Garant, *Droit administratif* at 49-75.

[45] Yet, it has sometimes been suggested that the royal prerogative also includes powers held by the Crown as a natural person, such as the power to enter into contracts or the power to spend money. It is sometimes said that government spending programs that are not backed up by an elaborate statutory scheme are made under the prerogative: see, for example, *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paragraphs 354–402, [2015] 2 FC 267. Such a characterization, however, is difficult to reconcile with the well-established rule to the effect that the government may not spend public money without Parliament's approval: *Financial Administration Act*, RSC 1985, c F-11, s 26. More generally, the very idea of royal

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prerogative suggests powers that are unavailable to natural persons. In this regard, Professor Hogg says (*Constitutional Law* at para 1.9):

> Powers or privileges enjoyed equally with private persons are not, strictly speaking, part of the prerogative. For example, the Crown has the power to acquire and dispose of property, and to enter into contracts, but these are not prerogative powers, because they are possessed by everyone.

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[46] It may also be difficult to determine whether the royal prerogative has been displaced by legislation: see, for example, the contrasting perspectives in Lagassé, "Prerogative Power" and Forcese, "The Executive." It would be highly inconvenient if this Court's jurisdiction depended on a detailed analysis of such a complex legal issue.

[47] In *Gestion Complexe Cousineau (1989) Inc v Canada (Minister of Public Works and Government Services)*, [1995] 2 FC 694 (CA), Justice Robert Décary of the Federal Court of Appeal warned against making this Court's jurisdiction dependent on fine distinctions regarding the source of authority for the decision reviewed (at 705):

> As between an interpretation tending to make judicial review more readily available and providing a firm and uniform basis for the Court's jurisdiction and an interpretation which limits access to judicial review, carves up the Court's jurisdiction by uncertain and unworkable criteria and inevitably would lead to an avalanche of preliminary litigation, the choice is clear. I cannot assume that Parliament intended to make life difficult for litigants.

[48] Thus, the better view is that the Crown is not acting under the royal prerogative when it sets up a spending program that is not supported by specific legislation, such as the emergency assistance program at issue here. And even if I were wrong in this conclusion, *Hupacasath* tells us that a decision made under the royal prerogative is not beyond this Court's jurisdiction.

[49] Nevertheless, the Attorney General's objection may be recast as a challenge to the justiciability of the matter, instead of a challenge to jurisdiction. Jurisdiction and justiciability are different concepts. In *Hupacasath*, Justice David Stratas of the Federal Court of Appeal explained the concept of justiciability in the following terms, at paragraphs 62 and 66:

> Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.
>
> […]
>
> Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, i.e., within a range of acceptability and defensibility, and that assessment is the proper role of the courts within the constitutional separation of powers […]. In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way.

[50] The phrase "high policy" has sometimes been used to describe the kind of decisions that are not justiciable (Forcese, "The Executive," at 166). In contrast, where "high policy" issues are not at stake, "the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual" (*Black*, at 246–247). Although it was traditionally said that the wisdom of discretionary decisions is not a matter for the courts, the evolution of administrative law in recent decades has resulted in a

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widening of the grounds on which administrative decisions may be reviewed. Thus, the decisive factor is not the political implications of the matter or the decision's discretionary component, but the fact that the question "has a sufficient legal component to warrant the intervention of the judicial branch:" *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545 [*Re Canada Assistance Plan*]; see also Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012).

[51] In this case, it is difficult to discern any "high policy" issues similar to those at stake in *Black* or *Operation Dismantle*. In spite of this, the Attorney General argues that the matter is not justiciable because no one has a right to emergency assistance, citing *Anderson MBQB*, at paragraph 173. Yet, the fact that there is no right in the strict sense does not make the matter non-justiciable. For example, even though no one has a right to a passport, the process by which decisions regarding passports are made is justiciable (*Black*, at 247) and this Court has often reviewed such decisions, as I noted above. Likewise, the fact that a payment is made *ex gratia* (that is, in the absence of an obligation in the strict sense) does not render a matter non-justiciable. When the government chooses to make *ex gratia* payments to a group of individuals, it may set out a process and substantive conditions. Compliance with that process and those conditions raises justiciable issues, as shown by a number of decisions from this Court: see, for example, *Kastner v Canada (Attorney General)*, 2004 FC 773; *Briand v Canada (Attorney General)*, 2018 FC 279.

[52] The Attorney General also argues that the decision challenged is not justiciable because it involves budgetary matters. Indeed, budgetary decisions may not always be justiciable, as the

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allocation of public money is a political matter involving choices that cannot be measured against any legal standard. Yet, the mere fact that a decision involves monetary benefits or has an impact on the public purse does not push it beyond the pale of justiciability. In general terms, a decision is less susceptible to be justiciable when its scope is broad. Purely operational decisions will usually be justiciable.

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[53] Here, the decision challenged does not pertain to the choice to create ISC's EMAP program nor to the scope or main parameters of the program. It is a decision that terminates the benefits provided to 45 families in the wake of a specific evacuation, on the basis, if I may summarize it that way, that the conditions that required the evacuation are no longer present. This is not the kind of decision that we would usually describe as a policy one. Courts are well-equipped to review such a decision to ensure that it was made in a procedurally fair manner and that it is reasonable. In this regard, an analogy may be drawn with *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*, 2018 ONSC 5062, where the precise manner in which an environmental subsidy program was terminated was held to be justiciable.

[54] This brings me to the selection of the standard of review. Where this Court reviews an administrative decision, even in a non-adjudicative context, there is a strong presumption that the decision can only be overturned if it is shown to be unreasonable: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 50, [2013] 2 SCR 559; *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at paragraphs 15−16, [2017] 2 SCR 488.

[55] DRFN seeks to rebut the presumption by asserting that the decision-maker in this case has no specific expertise and that the rationale for deference is absent. I disagree. The decision challenged deals with the provision of services to members of First Nations. This is the daily work of ISC officials. They certainly have more knowledge and expertise regarding those matters than this Court. While the Regional Director General is not specifically empowered by legislation, he has the subject-matter expertise that underpins deference in judicial review. Although the precise context may have been different, this Court has reviewed decisions made by ISC or its predecessors with respect to funding decisions or the administration of service programs and concluded that the standard of review was reasonableness: *Pikangikum First Nation v Canada (Minister of Indian and Northern Affairs)*, 2002 FCT 1246; *Ermineskin v Canada*, 2008 FC 741 at paragraph 43; *Tobique Indian Band v Canada*, 2010 FC 67 at paragraph 56; *Kehewin Cree Nation v Canada*, 2011 FC 364 at paragraphs 16-18; *Thunderchild First Nation v Canada (Indian Affairs and Northern Development)*, 2015 FC 200 at paragraph 26.

[56] Relying on *Hupacasath* at paragraph 67, the Attorney General argues that decisions such as the one challenged can only be quashed in "egregious" cases. This, however, as *Hupacasath* made clear, does not amount to a different, more exacting standard of review. Reasonableness is still the standard. Rather, the use of that adjective highlights the difficulty that an applicant may face in attempting to show that a decision is unreasonable, where it is the result of the balancing of an array of policy considerations, rather than the product of the application of a well-defined legal rule to a particular set of facts.

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[57] With respect to issues of procedural fairness, no standard of review is applicable: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraphs 54–56. The issue is "whether the procedure was fair having regard to all of the circumstances" (*ibid* at paragraph 54).

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B. *Procedural Fairness Issues*

[58] DRFN has advanced a wide number of grounds in support of its challenge to the decision. Those grounds overlap to a certain extent and they sometimes straddle the divide between process and substance. It is easier to deal first with the complaints regarding procedural fairness.

(1) Notice and Right of Appeal

[59] DRFN first claims that no notice was given to the individuals affected by the decision.

[60] In administrative law, the requirement to give notice is a component of procedural fairness. In an adjudicative context, notice must be given in order to enable the person concerned to participate in the hearing or other decision-making process. Thus, a notice must typically provide enough information about the "case to meet," so as to enable the person concerned to make meaningful submissions. It must give sufficient time to allow for preparation. Notice requirements are less stringent when a decision is not adjudicative in nature. Indeed, the requirements of procedural fairness vary according to the nature of the decision: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21–28 [*Baker*]; *Canada (Attorney General) v Mavi*, 2011 SCC 30 at paragraph 39, [2011] 2 SCR 504 [*Mavi*].

[61] In this case, the requirement to give notice serves an additional purpose. Upon the termination of benefits, evacuees need to make alternative housing arrangements. The notice period provides the evacuees with some time to do this in an orderly manner. ISC recognized this purpose of the notice requirement in certain Frequently Asked Questions [FAQ] that it prepared for the evacuees or posted on its website. One of those FAQs, prepared in 2016, stated that "Evacuees will be provided at least 60 days' notice before benefits end."

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[62] With this in mind, I can now review the process by which notice was given to the evacuees. As early as February 2018, ISC staff indicated to DRFN's council and members that they intended to terminate the evacuee benefits in the next summer. As soon as the May 24, 2018 decision was made, letters were prepared for each evacuee. According to the affidavit of Aaron O'Keefe, all but six of those letters had been received by August 31, 2018. DRFN argues, however, that those letters were invalid or ineffective, as the decision that they conveyed – termination of the benefits as of July 31, 2018 – had been "rescinded." A new notice should have been given, says DRFN, when the decision to terminate the benefits on August 31, 2018 was made. As I explained above, this is based on a misapprehension of what constitutes the decision. The decision to terminate the benefits was made on May 24, 2018. That ISC chose to delay the implementation of that decision by one month does not invalidate the notices already given.

[63] In practice, it is the Red Cross, and not ISC, who had a monthly contact with the evacuees, for the purpose of paying the benefits. One troubling aspect of this case is the assertion, contained in the affidavits of Irene Stagg, Melodie Asham and Cherise Ross, that in July 2018, Red Cross personnel required the evacuees to sign a release to the effect that they

accepted that their benefits would end on August 31, 2018. The practice was not uniform, as Tanita and Alexis Cruly say, in their affidavits, that they have not been required to sign such documents. I have not seen those releases, as the affiants say that they were not given a copy. The Attorney General merely says that he is unaware of this situation and has apparently made no effort to investigate. In any event, he does not rely on any releases that might have been signed by the evacuees.

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[64] On the strength of *Mavi*, DRFN argues that ISC had a duty to give evacuees notice of the impending decision and, presumably, a right to make submissions showing why their benefits should not be cut. This assumes, however, that the impugned decision is made at the individual level. As I show below, however, the Regional Director General could reasonably terminate the DRFN benefits on a collective basis. Most importantly, the matter was dealt with collectively, in discussions between ISC staff and DRFN's council. The council was well aware of ISC's intentions as early as February 2018. ISC initially sought the collaboration of DRFN in communicating with evacuees, but DRFN declined to do so. In those discussions, there is no doubt that DRFN's council advocated on behalf of the individual evacuees. Indeed, the five evacuees who provided an affidavit stated that they "look to Chief and Council to be my advocate and to act in my best interests." In the specific circumstances of this case, I conclude that the discussions between ISC and DRFN's council constituted sufficient notice of the impending decision.

[65] DRFN also argues that the decision should be quashed because no right of appeal was provided to the evacuees. It notes that the FAQs prepared by ISC or posted on ISC's website

referred to a right to appeal. However, no information was ever given as to what that appeal process was and how an individual could initiate it. (No one appears to have drawn any connection with the appeal process provided for by section 17 of Manitoba's *Emergency Measures Act*.)

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[66] There was certainly room for improvement in this process, especially with respect to information regarding an appeal process. However, this does not invalidate the decision. There is no evidence that any evacuee actually sought to initiate an individual appeal. What would have happened then is speculation. Perhaps someone would have found what the appeal process was. We simply do not know. In any event, the matter was treated collectively through the present application for judicial review.

[67] Likewise, the requirement to sign a release, while most likely objectionable, does not invalidate the decision. As the releases are not before me, I cannot say whether they amounted to an invalid attempt to curtail the evacuees' right of appeal or other recourse. Moreover, they were obtained after the decision was made.

[68] With respect to the second purpose of giving notice in this case – allowing evacuees to make alternative arrangements – I conclude that ISC made reasonable efforts to notify all evacuees at least 60 days in advance of the termination of their benefits. Several evacuees may not have received the initial letters 60 days ahead of the July 31 deadline, but the extension to August 31 appears to have cured the problem for most of them. The fact that some letters were returned to ISC because evacuees changed their addresses without notifying ISC or the Red

Cross does not result in a breach of procedural fairness, given that ISC deployed other means to ensure that evacuees were made aware of the termination of the benefits.

[69] As a result of the passage of time, the notices given in the spring or summer of 2018 are no longer effective in ensuring that evacuees have adequate time to make alternative living arrangements. Thus, ISC will need to provide a new notice when this judgment is issued.

(2) Bias or Conflict of Interest

[70] DRFN says that the Regional Director of ISC was biased or in a conflict of interest, as he made the challenged decision while he also represented ISC in the negotiations for the conclusion of a CSA. I am unable to accede to that submission, because it overlooks the nature and the context of the function performed by the Regional Director General.

[71] It is trite law that the requirements of procedural fairness, including the requirement of impartiality, vary according to the context. In *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at paragraph 31, [2003] 2 SCR 624 [*Imperial Oil*], Justice Louis LeBel wrote, for a unanimous Supreme Court:

> The extent of the duties imposed on the administrative decision-maker will then depend on the nature of the functions to be performed and on the legislature's intention. In each case, the entire body of legislation that defines the functions of an administrative decision-maker, and the framework within which his or her activities are carried on, will have to be carefully examined. The determination of the actual content of the duties of procedural fairness that apply requires such an analysis.

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[72] In that case, the Minister of the Environment had issued a remediation order against Imperial Oil with respect to lands that it had owned in the past. Imperial Oil argued that the Minister was biased, because the government was being sued by third parties in connection with the failure of past efforts to decontaminate that land. The Supreme Court held that this situation did not result in the Minister being biased. In making his order against Imperial Oil, the Minister was simply furthering the public interest.

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[73] Likewise, in the present case, the Regional Director General was not performing an adjudicative function. He oversees ISC's activities in Manitoba, which include the provision of housing and other infrastructure to Indigenous communities, as well as issues arising out of the 2011 flood. One must expect that he will be involved with respect to all issues affecting a First Nation. Thus, he will oversee the conduct of litigation and negotiations with a given First Nation and the provision of services to that same First Nation under existing programs or authorities. Given the nature of his functions, he will not be considered to be biased simply on account of the broad array of responsibilities that he exercises with respect to a particular First Nation.

(3) Legitimate Expectation

[74] DRFN argues that the decision breached a legitimate expectation arising out of promises repeatedly made by ISC since 2011. I disagree. As I explain below, the statements made by ISC do not have the full scope that DRFN seeks to impart to them. More fundamentally, the doctrine of legitimate expectations cannot create substantive rights.

[75] When reviewing the history of the discussions between DRFN and ISC since 2011, it should be borne in mind that the decision under review relates to the termination of evacuee benefits, not to the issue of the number of houses required to fulfil the needs of DRFN members. Yet, the two issues are often intertwined, as appears from the promises allegedly made by ISC. These alleged promises can be described by three statements: (1) the community will be rebuilt as it was before the flood or better; (2) a house will be built for every family; (3) every family will receive evacuee benefits until a house is ready for them. In their affidavits, DRFN representatives state that ISC repeatedly made promises (1), (2) and (3). ISC accepts that it made promise (1), but denies making promises (2) and (3).

[76] In their affidavits, DRFN representatives state that Ms. Anna Fontaine, then Regional Director General of AANDC (ISC's predecessor), made promise (2) at a meeting held in May 2011, just before DRFN was evacuated. Ms. Fontaine, in her affidavit, denies making that promise. She also denies that promise (1) was made in consideration of DRFN's consent to be flooded.

[77] On cross-examination, Mr. John Stagg, who is now chief of DRFN and who was present at some of those meetings, did not have a precise recollection of the sequence of events and what Ms. Fontaine said exactly. For example, he testified:

> 69 Q. And so can you recall the words that Anna Fontaine used which suggested that every evacuee who had a family would have a house made available for them?
>
> A. Well, from my understanding, that was always in my head, you know, every evacuee would get a home. But you know, like a lot has happened within the six, seven years.
>
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> 70 Q. […] And that's when you told me the promise was made by Anna Fontaine that every evacuee who had a family would have a house made available for them?
>
> A. Yes.
>
> 71 Q. Were those the exact words she used, or can you recall the words she used to get that across?
>
> A. No, I can't recall.

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[78] Mr. Stagg also described the promises made during that meeting in terms that are more compatible with promise (1) than with promise (2):

> 58 Q. Is it your evidence that you heard Anna Fontaine in the meeting that you did attend make the promises with respect to rebuilding your community on condition that the First Nation consented to water being diverted into the community?
>
> A. I didn't hear her say, like, in that way. I just heard her say, like, well, we'll rebuild your community, or even better. That's my answer.

[79] With respect to the benefits themselves, which are the subject of the alleged promise (3), Mr. Stagg said:

> 117 Q. So did Stephen Traynor [the Regional Director General] tell you that the evacuee benefits would continue until everyone had a house to go back to?
>
> A. Well, that's what I told him, so –
>
> 118 Q. So you told him. Did anyone from Canada tell you that?
>
> A. Not that I recall, no.
>
> 119 Q. Now Aaron O'Keefe, in his affidavit, has said that such a commitment was never made. Do you have a response to that evidence?
>
> A. Not at this time, no.

[80] Mr. Emery Stagg, who was chief at the time and who appears to have a better recollection of the events, described ISC's promises as follows:

> 19 Q. But what I would like to know is what [Ms. Fontaine] said to you. Did she ever say anything about flooding and devastating your community?
>
> A. When we were meeting she advised me that, Chief, whatever damages you incur in your First Nation will be replaced, or to a better quality, or better.
>
> […]
>
> 38 Q. Do you have a response to that evidence from Ms. Fontaine?
>
> A. […] And they told me, well, you know, there's going to be a big flood coming your way. And that's when I was told that whatever your losses are, we will replace anything that is damaged to equal or better than what your community had before.
>
> […]
>
> 43 Q. And, again, Anna Fontaine, in her affidavit, has said […] that she did not promise or suggest that a house would be built to offer to each evacuee household. Do you have a response to that?
>
> A. It was our, it was my belief at that time, as spokesman for the community, that anybody that had a house that was going to be affected by the flood would be replaced.
>
> […]
>
> 47 Q. Can you recall the words used by Anna Fontaine?
>
> A. When I was at that meeting she, I was sitting next to her and she said, Chief, whatever the losses are, we will replace all your housing and whatever infrastructure that is damaged.
>
> 48 Q. Did Anna Fontaine promise anything else?
>
> A. No.

[81] This review of the evidence leads me to find that any promise made by ISC representatives was along the lines of promise (1), namely, to rebuild the community as it was

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before the flood or better. There was never any specification of what "better" meant. In fairness to the witnesses, it may be that the difference between promises (1) and (2) was not clearly apparent in 2011. A promise that every family would obtain a house would be equivalent to a promise to rebuild the community as it was, provided that families are defined as the groups of persons who actually occupied houses before the flood. Under that assumption, Messrs. Stagg may have honestly rephrased or understood ISC's promise in terms of "every evacuee will have a house." This does not mean, however, that ISC made promise (2), committed to build a particular number of houses or undertook to build a house for every DRFN member who declares himself or herself to be a head of family.

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[82] I now turn to alleged promise (3) – that evacuated DRFN heads of families would receive benefits until a house is made available for them. As I mentioned above, ISC officials have denied making such a promise and DRFN representatives have not been able to say when, and by whom, such a promise would have been made. Nevertheless, DRFN points to two FAQs documents prepared by ISC, which would embody such a promise.

[83] The first document, which I will call the "paper FAQ," must have been prepared in early 2016, as it refers to events in the spring or summer of 2016 in the future tense. According to Chief Stagg, this FAQ was meant to update DRFN members, at a time when it was thought that a number of DRFN families could be repatriated to the first tranche of new housing in the following summer. This paper FAQ contains the following statements:

> **5. When will my evacuee benefits be cut off?**
>
> Once evacuees return to the reserve, and a home is ready for them, their evacuee benefits will end. Evacuees will be provided at least 60 days' notice before benefits end.

> **10. What happens if I want to return home but there is no house available? Who will work with me to resolve this issue?**
>
> 2011 flood evacuees are the priority to receive housing. Dauphin River First Nation will be provided with 41 homes as well as 6 CMHC homes for a total of 47 homes. At this time, there are 41 homes on site.
>
> The First Nation is responsible to allocate houses to families on the evacuee list and will be responsible for addressing issues that arise from allocation of houses. Additional homes maybe [*sic*] provided later subsequent to a Comprehensive Settlement Agreement.
>
> **14. What happens to me if the only reason why I am not prepared to move back is because there is no house available for me and my family?**
>
> Members are deemed to be evacuees until reasonable housing is offered.

[84] Another FAQ document, which I will call the "web FAQ," appears to have been available on ISC's website until mid-August 2018. The page is titled, "Information for 2011 Manitoba Flood Evacuees." It provides a general description of evacuee benefits, outlines eligibility criteria and defines the scope of the benefits by reference to provincial regulations. It outlines the role of the Red Cross and specifies that decisions regarding eligibility are made by ISC, not the Red Cross. This web FAQ does not contain any specific statements about the termination of evacuee benefits. It merely states that ISC will continue to work with the Red Cross "to ensure evacuees continue to receive services and support until they can safely return to their communities."

[85] When read globally, these FAQs do not address directly the matter at hand, namely the possibility of putting an end to the benefits where some families have not been allocated a house. The paper FAQ was mainly geared towards the logistics of a first wave of repatriation to DRFN.

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It expressly acknowledged that not everyone would obtain a house at that point in time. Additional housing was contemplated, but no specific promises were made. When that document was written, no one had apparently realized that the allocation of houses to evacuees would result in 45 families not having a house. Thus, the statement to the effect that members would be considered as evacuees until a house is offered to them must be read in light of the expectation that there would be a second tranche of houses. It is difficult to interpret it as an open-ended promise that benefits would continue until all housing needs, however defined, are satisfied. Likewise, the web FAQ does not deal in any level of detail with the issue of the end of the evacuation or the termination of benefits. While it refers to the concept of a "safe return home," it does not explain what this means when one family has become two (or more).

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[86] More generally, ISC could only make promise (3) – that benefits would run until everyone is offered a home – if promise (2) – that a home would be built for everyone – had already been made. I have shown above that this is not the case.

[87] In conclusion, I am unable to find that ISC made promises that were "clear, unambiguous and unqualified" (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraphs 95–96, [2013] 2 SCR 559 [*Agraira*]) so as to give rise to a legitimate expectation.

[88] In any event, the doctrine of legitimate expectations relates only to process and not to substance (*Re Canada Assistance Plan*, at 557; *Baker*, at paragraph 26; *Agraira*, at paragraph 97). In other words, even though the government makes a promise with respect to a particular outcome, it is not bound to deliver that outcome. Here, DRFN is invoking the doctrine of

legitimate expectations to produce a substantive result: because a promise was made that evacuee benefits would last until each family has its own house, ISC is bound to that promise. This is not a recognized application of the doctrine.

C. *Reasonableness of the Decision*

[89] That brings me to the crux of the matter, which is the reasonableness of the Regional Director General's decision to terminate evacuee benefits. I will analyze the arguments raised by DRFN in support of its allegation that the decision was unreasonable.

(1) Taking Into Consideration Privileged Documents

[90] DRFN first line of attack is that the decision should not have been based on documents that were produced in the course of negotiations aimed at reaching a comprehensive settlement and that were subject to privilege. The prominence given to that argument may derive from the fact that DRFN considers that the decision challenged was made only on August 23, 2018. The letter written on that day by the Acting Regional Director General referred to two documents that DRFN says are subject to privilege: a BCR adopted in August 2016, and an AIP signed in 2017 in view of a comprehensive settlement of all matters arising out of the 2011 flood. The decision note prepared in April 2018, also refers to the 2016 BCR and the 2017 AIP and it appears to have been a consideration in the Regional Director General's initial decision.

[91] Settlement privilege is "a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute" (*Union Carbide Canada Inc v Bombardier*

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Inc, 2014 SCC 35 at paragraph 31, [2014] 1 SCR 800 [*Union Carbide*]). Privilege is a rule of evidence. As such, it applies when a party seeks to introduce certain evidence in the context of judicial proceedings.

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[92] It can hardly be disputed that the 2017 AIP is a document that was prepared for the purposes of settling all the disputes that arose between DRFN and the federal government as a result of the 2011 flood. Moreover, the AIP itself states that it "does not create legally binding commitments" and participation in the negotiations does not "constitute an admission of fact or law with respect to any claim or issue." Every page of the AIP bears the mention "a without prejudice document, subject to settlement privilege."

[93] In my view, the 2016 BCR is also subject to settlement privilege. To understand why, one must bear in mind that since 2011, ISC has implemented or funded a number of reconstruction projects in spite of the fact that no comprehensive settlement had yet been concluded. The execution of the 2016 BCR was a requirement set by ISC for moving forward on one of those projects, the construction of 20 additional houses. While the Attorney General says that the approval of that project was distinct from the negotiation process, I am unable to dissociate them. The aim of the negotiation process was to settle all claims arising from the flood, including the funding of efforts to "build back better." Building 20 additional houses was an interim measure aimed at achieving part of what was negotiated before a comprehensive deal was struck.

[94] That, however, does not mean that settlement privilege precluded the Regional Director General from considering the 2016 BCR and the 2017 AIP in making the challenged decision.

Settlement privilege, as I mentioned above, is a rule of evidence. It applies when a negotiating party attempts to bring evidence of the negotiation before an independent decision-maker. Where a party to the negotiation is also in a position to make unilateral decisions with respect to issues that are related to the subject-matter of the negotiation, however, settlement privilege does not apply. Here, the Regional Director General, who was overseeing the negotiation, cannot in any meaningful sense be said to have brought evidence before himself when he took into consideration the 2016 BCR and the 2017 AIP. These were matters of which he already had knowledge. There is no issue of privilege.

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[95] Likewise, when DRFN applies for judicial review of a decision and argues that it improperly refers to the 2016 BCR and the 2017 AIP, it is difficult to see how the Court can discharge its review function without knowledge of the contents of those documents. In this regard, this case is similar to *Union Carbide*. In that case, it was held that there is an exception to settlement privilege where a party seeks to prove that a settlement was reached and what the terms of the settlement were. Then, by necessity, the court needs to see otherwise privileged documents in order to be able to decide the case. Likewise, in the instant case, it is necessary for me to see the 2016 BCR and 2017 AIP in order to decide the application.

[96] The real question, as I see it, is whether the contents of the negotiation were an irrelevant consideration that tainted the decision. In performing this analysis, I must heed the Supreme Court of Canada's guidance to the effect that administrative decisions must be read globally, having regard to elements of the record that may help understand the reasoning (*Newfoundland Nurses*, at paragraphs 13–17) and that judicial review is not a "line-by-line treasure hunt for

error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at paragraph 54, [2013] 2 SCR 458).

[97] In the April 2018 decision note, references to the 2016 BCR and 2017 AIP are found in a section titled "Background." That section describes the history of the negotiations – also including a 2014 "agreement on fundamental elements" – as an explanation of the transition from a pre-flood situation where there were 53 houses in the community, to a current count of 70. The note then mentions that DRFN requested an additional 43 houses in October 2017 and then goes on to review factors that relate to the adequacy of ISC's contribution to rebuild DRFN. Those factors are: the fact that DRFN has been able to keep many existing homes instead of demolishing them; the number of evacuees; the current occupancy rate compared to the average rate of Manitoba First Nations; and the new collective infrastructure that has been built. Under the heading "Considerations," the note then mentions that DRFN has refused to jointly sign a letter to evacuees; it discusses the costs associated with various options and suggests that there may be a "large number of false evacuees" as well as evacuees who might not wish to return to the community. No mention is made of the 2016 BCR or the 2017 AIP in that section. The decision note also contains a "Summary," which focuses on the state of readiness of the recently built housing and infrastructure as well as DRFN's refusal to collaborate. It makes no mention of the 2016 BCR or the 2017 AIP.

[98] Thus, in my view, the decision note referred to the 2016 BCR and the 2017 AIP simply to provide a history of the discussions that led to the construction of a larger number of houses than existed before the flood. The substantive reason for the recommendation to terminate benefits is

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clearly the fact that building 70 houses as well as new collective infrastructure puts DRFN in an adequate position, relative to its situation before the flood and to the situation of other First Nations in Manitoba, and that building an additional 43 houses is not warranted in light of the needs and the costs.

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[99] In other words, the decision note did not consider the 2016 BCR and the 2017 AIP as a bar to DRFN's claims. The decision note addressed the substance of the claim for additional housing and found that it was not warranted on the current facts, irrespective of previous promises or admissions. Thus, the decision was not based on an irrelevant factor.

[100] It is true that the August 23, 2018 letter seems to give much more importance to the 2016 BCR and the 2017 AIP as reasons for terminating the benefits. However, as I noted earlier, the decision was made in May 2018, and was based on a much wider array of factors than the 2016 BCR and the 2017 AIP. Moreover, the August 23, 2018 letter was written by someone who was replacing the Regional Director General on an interim basis and who may not have accurately summarized the reasons for the decision made in May 2018. In my view, the reference to those documents in the August 23, 2018 letter does not invalidate the decision retroactively.

(2) Taking Needs Into Consideration

[101] A constant theme of DRFN's argument is that the decision failed to take actual needs into account. In the present case, the concept of needs may relate to the state of housing in DRFN – are there enough houses? – or to the evacuee benefits – does an individual need those benefits to make a living? I said at the outset that this case is not about a general claim to a particular level

of housing. Nevertheless, it is not possible to entirely separate housing and evacuee benefits. This is so because, logically, ISC cannot reasonably decide to terminate evacuee benefits unless it first makes a reasonable determination that housing needs are met. Said otherwise, it would be unreasonable to cut benefits and to require people to return to a community that has not enough space to accommodate them.

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[102] This, indeed, flows from the requirement that the decision-maker must consider the purposes of the relevant legislation or program (*Doshi v Canada (Attorney General)*, 2018 FC 710 at paragraphs 31–36). The explicit or implicit objective of the "recovery" component of the EMAP program is to restore a community affected by a disaster to a situation at least equivalent to the status quo ante. AANDC's National Emergency Management Plan, prepared in 2011, describes "recovery" as follows (at page 19):

> Recovery focuses on the reparation or restoration of conditions to an acceptable level through measures taken after the emergency. Recovery activities include the return of evacuees, trauma counselling, reconstruction, economic impact studies and financial assistance for eligible costs. […]
>
> Returning a community to a state of normalcy, which existed prior to the emergency, is a priority.

[103] This is encapsulated in the phrase "build back or better" that is frequently repeated in the evidence. "Or better" is a recognition that all the needs of the community may not have been fulfilled before the disaster or that those needs may evolve over time, particularly if reconstruction takes a long time.

[104] Either in the specific context of housing or with respect to public services generally, the assessment of needs calls for an important measure of discretion. Defining need involves a degree of subjectivity and a measure of political judgment. It is an exercise in line-drawing. And in a complex situation such as housing, there is no single metric by which need can be measured.

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[105] In this case, the Regional Director General assessed need by a collective metric, the occupancy rate, that is, the number of residents divided by the number of houses. In my view, it was reasonable to do so and to reach the conclusion that, collectively, DRFN's housing needs were sufficiently met to end the evacuation.

[106] First, it was reasonable to resort to a collective metric. ISC respects First Nations' power to allocate housing in their communities. It does not require First Nations to report on how or to whom houses are allocated. As a result, ISC is unable to assess whether individual needs are met. Moreover, as part of the reconstruction efforts, ISC funded the construction of new collective infrastructure. It is difficult to measure the value of that infrastructure in individual terms.

[107] Second, it was reasonable to rely on the fact that the occupancy rate in DRFN has been brought from approximately 3.8 to approximately 3.3. In doing so, ISC recognized that it was necessary to build more houses than existed in 2011, because DRFN's population had increased in the meantime. This also constituted an improvement in comparison to the situation before the flood and gave effect to the promise to "build back or better." I also note that ISC's calculation includes the 45 families who have not been allocated houses so far, comprising 86 persons,

according to the Red Cross list. If those persons are excluded from the calculation, the occupancy rate is brought down to approximately 2.2.

[108] It was also reasonable to rely on the fact that DRFN's occupancy rate was significantly below the average occupancy rate of Manitoba First Nations. In doing so, I am not suggesting that an inadequate situation should be used as a yardstick. However, where budgetary resources are limited, it is not unreasonable to allocate them where the needs are most important first.

[109] Third, in my view, ISC was not required to match a lower target. Such a target would be difficult to define in the abstract. The parties did not suggest any basis for saying that the occupancy rate should be, for instance, 3.0, 2.8 or 2.5. Moreover, one should not lose sight of the purpose of the EMAP program, under which the evacuee benefits are funded – it is to restore the community to its pre-emergency state, not to fulfil housing needs that were then unmet.

[110] Fourth, it was reasonable to take into account the fact that the Red Cross list was potentially inaccurate and contained the names of persons that ISC described as "false evacuees," as well as the fact that DRFN has been able to keep certain old houses. In other words, because the allocation of houses is a matter for DRFN, and acknowledging the unreliability of the information before him, the Regional Director reasonably based his decision on what appeared to be the most reliable source of information to calculate the rate of occupancy, namely, the Red Cross evacuee list.

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[111] There is little information in the record as to how the Red Cross list was compiled. The FAQ documents and the agreement between ISC and the Red Cross suggest that names were put on that list with the consent of both DRFN and ISC.

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[112] DRFN has suggested that the list is incomplete and under-estimates the number of persons who currently live in the community or wish to return there. Chief John Stagg, in cross-examination (AR at 757-758), suggested as much, but it appears that he was mainly referring to the fact that some DRFN members who did not reside in the community might choose to move there in the future. In an affidavit filed pursuant to a direction I gave after the hearing, Mr. Emery Stagg provided additional information as to the allocation of houses. He indicated that the number of persons indicated on the Red Cross list for each household is not necessarily accurate. In an unspecified number of cases, relatives of the head of the household should be added to the list.

[113] On the other hand, there are indications that the list may over-estimate the housing needs of DRFN members. In his affidavit, Aaron O'Keefe states that he had observed that a number of houses existing in 2011 had not been demolished: RR at 8, para 21. This appears to be the basis of a statement to that effect in the April 26, 2018 decision note. DRFN did not cross-examine Mr. O'Keefe on that subject nor otherwise challenge that statement. Moreover, the Attorney General underlined that the Red Cross list contains six pairs of single persons listed as heads of households bearing the same family names who appear to share accommodations, as well as one case of a person who appears to share accommodations with another person bearing the same family name and two dependents.

[114] In those circumstances, it was reasonable for ISC to calculate the occupancy rate on the basis of the Red Cross list. Before leaving that topic, I would simply observe that ISC made a presentation to DRFN members in February 2018, which compared the occupancy rates of DRFN before the flood and after reconstruction with those of Manitoba First Nations and Manitoba in general, in support of its position that the emergency would soon be over: Affidavit of Aaron O'Keefe, RR at 28. DRFN did not seek to correct those numbers or to provide its own calculations.

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(3) Failure to Take Into Account Individual Situations

[115] From the above, we can conclude that the Regional Director General reasonably concluded that, collectively, DRFN now has enough housing available to put an end to the evacuee benefits program. But DRFN argues that this is not enough – the Regional Director General also had to consider each evacuee's personal circumstances. To put this bluntly, benefits should not be cut where that would result in sending a family to the street. In that perspective, "need" refers not only to a collective assessment of housing needs, but also to an individual, family-by-family assessment of housing arrangements. According to DRFN, this requires ISC to examine the circumstances of each person whose name appears on the Red Cross list, to ensure that appropriate living arrangements are available before evacuee benefits are terminated for that person.

[116] To define what is appropriate, DRFN referred to "national occupancy standards" published by CMHC. Those standards define the number of rooms that a house should have

depending on the composition of the family. I have no information as to the legal status of those standards.

[117] In this regard, DRFN submitted the affidavits of five of its members to whom no house has been allocated and who would have nowhere to live if their benefits are terminated. These witnesses explain how the threat to cut evacuee benefits made it difficult for them to conclude or renew satisfactory rental arrangements. Some describe their living conditions as “couchsurfing” with friends or family.

[118] I have much sympathy for persons who might suddenly lose the source of income that they have used over the last few years to pay for their rent. However, I have come to the conclusion that the Regional Director General did not have to consider individual situations before terminating the evacuee benefits program.

[119] The basic reason is simple: individual situations are the product of housing allocation decisions made by DRFN, over which ISC has no control, as well as the individual choices of the persons to whom houses have been allocated, regarding who will be invited to reside in their houses.

[120] In all fairness, ISC cannot be required to consider individual situations unless it is given all the information about the process of allocation and its outcome – which house was allocated to whom and who lives in each house? It would also be unfair to require ISC to remedy individual situations when it did not make the allocation decisions that gave rise to those

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situations. Moreover, ISC cannot be responsible for the consequences of individual choices as to who will live together. For example, DRFN's submissions refer to the situation of a couple who divorced during the evacuation – should they now be required to share a house in the newly rebuilt community? Obviously, people cannot be forced to live together against their wishes. However, such a situation cannot have the effect of increasing ISC's responsibility. Likewise, the situation of Tanita Cruly, which was often mentioned as an example in DRFN's argument, is not different from that of many First Nations young adults across the country who are on the waiting list for a house in their community. While this may cause personal hardship, the evacuee benefits program was not meant to address that situation.

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[121] DRFN's argument is based on the premise that every person whose name appears on the Red Cross list is entitled to a house and, in the meantime, to evacuee benefits. Yet, we know little about how that list was compiled. While it was suggested that the list includes only the names of persons residing in DRFN before the flood, it is difficult to accept that every person whose name appears on the list was a "head of household" to whom a house was then allocated. There are 115 names on the list, while there were 53 houses in DRFN before the flood. Moreover, 56 names on the list are those of single adults, with no spouses or children.

[122] Thus, the Red Cross list does not appear to be a reliable tool for ascertaining housing needs. Indeed, in response to a question I asked after the hearing, DRFN stated that the list was not necessarily accurate, in that a number of persons who are shown as single adults would actually be living with spouses, dependents or relatives.

[123] Moreover, to the extent that this Court is asked to make determinations of individual need, it should be provided with all the information required to understand why those needs are not met. One key component is the allocation of the 70 new houses to persons on the Red Cross list or other DRFN members. In this connection, it bears repeating that the satisfaction of the housing needs of DRFN members is a collaborative enterprise involving both DRFN and ISC and other federal entities. Yet, DRFN has taken the position that it need not explain its housing allocation policy and decisions, as "no one had argued that it had done anything wrong" in this regard and it could not be asked to "prove a negative." While DRFN provided some information after the hearing, this only increased the confusion, as DRFN now suggests that the Red Cross list is under-inclusive.

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[124] In those circumstances, it was reasonable for the Regional Director General to decline to consider the individual needs of DRFN members whose names appeared on the Red Cross list.

(4) Fiduciary Duties

[125] DRFN alleges that the termination of evacuee benefits was contrary to a fiduciary duty. These arguments do not appear to have been brought to the attention of the Regional Director General before the initial decision was made in May 2018, nor even before the decision was reiterated in August 2018. Be that as it may, DRFN has not proved that a fiduciary duty exists in this case.

[126] The Supreme Court of Canada has recognized that the relationship between the Crown and Indigenous peoples is fiduciary in nature, but that not every aspect of that relationship results

in a legally cognizable fiduciary duty: *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paragraph 48, [2013] 1 SCR 623 [*MMF*]. A fiduciary duty may arise where the Crown assumes discretionary control over a specific Indigenous interest: *MMF*, at paragraph 49. While the Supreme Court did not exhaustively define the kinds of interests that may give rise to a fiduciary duty, until now it has applied the doctrine to collective interests in land only: *MMF*, at paragraphs 51–59; *Guerin v The Queen*, [1984] 2 SCR 335; *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paragraphs 52–53, [2018] 1 SCR 83; see also *Coldwater Indian Band v Canada (Indian and Northern Affairs)*, 2017 FCA 199 and, in a somewhat different context, *Caron v Alberta*, 2015 SCC 56 at paragraph 106, [2015] 3 SCR 511. A fiduciary duty may also arise from an undertaking to act in the best interests of the beneficiary: *MMF*, at paragraph 50; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at paragraph 36, [2011] 2 SCR 261 [*Elder Advocates*].

[127] With respect to the first source of fiduciary duties, DRFN's present claim is not based on an interest in land, or even a private law interest, over which the Crown assumed discretionary control. It must be borne in mind that the present case is not about reserve lands as such – DRFN has advanced such a claim in another court. It is not even about the construction of houses. It pertains to the payment of evacuee benefits. In *Elder Advocates*, the Supreme Court held that benefits schemes do not ordinarily give rise to fiduciary duties, at paragraph 52:

> Access to a benefit scheme without more will not constitute an interest capable of attracting a fiduciary duty. Although the receipt of a statutory benefit may affect a person's financial welfare, absent evidence that the legislature intended otherwise, the

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> entitlement is a creation of public law and is subject to the government's public law obligations in the administration of the scheme.

[128] I am not aware of any case in which a court held that the provision of services to members of First Nations gives rise to a fiduciary duty. In *Grant v Canada (Attorney General)* (2005), 77 OR (3d) 418 (SCJ), the Ontario Superior Court of Justice declined to strike a statement of claim alleging, among other causes of action, a fiduciary duty in the context of housing in First Nations communities. This, however, does not mean that such a duty exists. It simply means that the issue will be decided at trial. To my knowledge, no judgment on the merits has been rendered in that matter.

[129] With respect to the second source of fiduciary duties, the argument appears to be a restatement of the argument regarding legitimate expectations that I discussed above. To the extent that I found that ISC made no promise to build a house for each head of family or to provide evacuee benefits until such a house is available, there can be no promise-based fiduciary duty. ISC's policies regarding housing generally have not been put in evidence before me. It is therefore impossible for me to find any fiduciary duty based on the contents of those policies.

(5) Aboriginal and Treaty Rights

[130] DRFN also argues that it has aboriginal and treaty rights with respect to the use and enjoyment of its reserve lands or harvesting rights on its traditional territory. Some of those rights have been consolidated and merged in the *Constitution Act, 1930*. It follows, says DRFN, that ISC had a duty to consult DRFN before engaging in conduct that might affect the exercise of

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those rights. In this connection, it argues that the termination of evacuee benefits is linked to those constitutionally-protected rights.

[131] Even assuming the existence of those rights, and that the evacuation made it more difficult for DRFN members to exercise them, it does not follow that a duty to consult was triggered by the decision to terminate evacuee benefits. Those benefits are aimed at helping DRFN members who needed to relocate, most of them to Winnipeg, as a result of the flood. The termination of those benefits may render life in Winnipeg more difficult for those affected. However, it does not impair their practical ability to exercise their constitutionally-protected rights. Conversely, continuing those benefits will not facilitate the exercise of those rights if no additional housing is made available in the community and the affected persons must remain in Winnipeg.

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III. Conclusion

[132] As a result, DRFN has not shown that the decision to terminate evacuee benefits was unreasonable or reached through an unfair process. I can only express the hope that ISC and DRFN will continue to collaborate in order to better address the housing needs of DRFN members.

[133] The application for judicial review will be dismissed, with costs.

JUDGMENT in T-1600-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. The applicants are ordered to pay the costs of the respondents.

"Sébastien Grammond"
Judge

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FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1600-18
STYLE OF CAUSE:	CHIEF JOHN STAGG, COUNCILLOR LEONARD SUMNER, COUNCILLOR OWEN STAGG IN THEIR PERSONAL CAPACITY AND AS REPRESENTATIVES OF THE DAUPHIN RIVER FIRST NATION, AND THE SAID DAUPHIN RIVER FIRST NATION AS REPRESENTATIVE FOR ALL ITS MEMBERS v THE ATTORNEY GENERAL OF CANADA, THE HONOURABLE RALPH GOODALE, MINISTER OF PUBLIC SAFETY, THE HONOURABLE JANE PHILPOTT, MINISTER OF INDIGENOUS SERVICES CANADA, THE HONOURABLE CAROLYN BENNETT, MINISTER OF CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MARCH 26, 2019
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	MAY 9, 2019

APPEARANCES:

Harley Schachter Kaitlyn Lewis	FOR THE APPLICANTS
John Faulhammer Alexander Menticoglou	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Duboff, Edwards, Haight & Schachter Barristers and Solicitors Winnipeg, Manitoba	FOR THE APPLICANTS
Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENTS

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TAB 19

Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)

Ontario Judgments

Ontario Superior Court of Justice

F.L. Myers J.

Heard: August 22, 2018.

Judgment: August 27, 2018.

Court File No.: DC 497/18

[2018] O.J. No. 4394 | 2018 ONSC 5062 | 20 C.E.L.R. (4th) 342 | 295 A.C.W.S. (3d) 659 | 144 O.R. (3d) 701 | 2018 CarswellOnt 13982

Between Tesla Motors Canada ULC, Applicant, and Ontario (Ministry of Transportation), Respondent

(68 paras.)

Case Summary

Government Law — Crown — Authority and powers — Discretionary powers — Abuse of — Application by Tesla Motors Canada to strike down decision of Ontario government to exclude Tesla from two-month extension of government subsidies for electric car buyers allowed — Government ended program but extended program for two months for consumers who bought cars before July 11, 2018 — Tesla was specifically excluded from extension by Minister of Transportation — Minister exercised discretion for improper purpose unrelated to purposes of subsidy program — Minister singled out Tesla for reprobation and harm without providing Tesla with opportunity to be heard or any fair process whatsoever — Climate Change Mitigation and Low-Carbon Economy Act, s. 7 — Public Transportation and Highway Improvement Act, s. 118(2).

Application by Tesla Motors Canada ULC (Tesla) to strike down the Ontario government's recent decision to exclude Tesla and its customers from a two-month extension of government subsidies for electric car buyers who bought cars before July 11, 2018. The government intended to end the subsidy program on September 10, 2018 but extended it for the two-month transition period. However, the government notified Tesla that the extension only applied to franchised automobile dealerships and not where vehicles were ordered directly from an original manufacturer by a consumer. Tesla argued that the government unlawfully targeted it without any rational basis. It said that had the government spoken to Tesla before excluding it from the program changes, Tesla could have shown the government that the exclusion of Tesla's customers from the two-month wind-down made no sense even on the grounds now advanced by the government. Tesla feared that it was being demonized for purposes that were outside the legitimate reach of the laws that governed electric car subsidies in Ontario.

HELD: Application allowed.

The unlawful exercise of discretion by the Minister of Transportation to implement the transition program was quashed and set aside. The decision to exclude Tesla by limiting the transition program to

franchised automobile dealerships was arbitrary and unrelated to the purposes of the statutory or regulatory discretion being exercised. The government's decision was egregious. It was made for an improper purpose that was unrelated to any of the conservationist purposes of the electric car subsidy program. The Minister singled out Tesla for reprobation and harm without providing Tesla with an opportunity to be heard or any fair process whatsoever. The decision was quashed. The Minister's unlawful exercises of discretion to implement the transition program on July 11, 2018 was set aside.

Statutes, Regulations and Rules Cited:

Climate Change Mitigation and Low-Carbon Economy Act, S.O. 2016, c. 7, s. 7(1)

Courts of Justice Act, s. 131

Judicial Review Procedure Act, *R.S.O. 1990, c. J.1, s. 6*(2)

Public Hospitals Act, R.S.O. 1970, c. 378, s. 4(5)

Public Transportation and Highway Improvement Act, *R.S.O. 1990, c. P.50, s. 118*(2)

Rules of Civil Procedure, Rule 57.01(1)(0.a), Rule 57.01(1) (0.b), Rule 57.01(0)(a), Rule 57.01(1)(c)

Counsel

Mark Polley, Jeffrey Haylock, and Sandy Lockhart for the Applicant.

Antonin Pribetic and Brent Kettles, for the Respondent.

REASONS FOR DECISION

F.L. MYERS J.

The Issue

1 Tesla Motors Canada ULC asks the court to intervene on an urgent basis to strike down the government's recent decision to exclude Tesla and its customers from the two month extension of government subsidies for electric car buyers who bought their cars before July 11, 2018. Tesla argues that the government unlawfully targeted it without any rational basis. It says that had the government spoken to Tesla before excluding it from the program changes, Tesla could have shown the government that the exclusion of Tesla's customers from the two month wind-down made no sense even on the grounds now advanced by the government. Tesla fears that it is being demonized for purposes that are outside the legitimate reach of the laws that govern electric car subsidies in Ontario.

Outcome

2 For the reasons set out below, the exercises of discretion by the Minister of Transportation to create the transition program announced July 11, 2018 (as amended by the Ministry's letter to Tesla of the same date and further apparently amended in the affidavit of Vrinda Vaidyanathan sworn August 17, 2018 filed herein) under the *Electric and Hydrogen Vehicle Incentive Program* under the *Climate Change Action Plan* created pursuant to s. 7 (1) of the *Climate Change Mitigation and Low-Carbon Economy Act*, *SO 2016, c. 7* and to fund that program under s. 118 (2) of the *Public Transportation and Highway Improvement Act* are quashed and set aside.

Urgency

3 Tesla has applied to the court under s.6 (2) of the *Judicial Review Procedure Act*, *RSO 1990, c J.1*. That provision allows Tesla to bring its case before a single judge of the Superior Court of Justice rather than waiting to be heard by a three judge panel of the Divisional Court. To do so, Tesla is required to show that the matter is so urgent that it cannot wait. It has done so.

4 The government subsidy extension expires on September 10, 2018. Tesla has hundreds of cars moving to Ontario to fill some 600 orders that were outstanding on the July 11, 2018 cutoff date. While it may well be possible to measure the harm to customers and to Tesla in dollars and cents if the government has acted illegally, the harm can be prevented altogether by a hearing now. The matter is unfolding in real time. If the government's program is unlawful, it can be struck down to avoid the creation of urgency for hundreds of families, order cancellations, litigation, and further harm to Tesla's goodwill. While everyone's rights could possibly be vindicated by damages claims in the fullness of time, lawsuits for $14,000 are uneconomical, will take too long, and will cause harm and distress that in my view would amount to a failure of justice as compared to simply resolving the matter before the September 10 cutoff.

5 The lawyers for the Province of Ontario argued that the matter was not urgent, but frankly and quite fairly agreed that they were prepared to argue the case on its merits if need be. For the reasons set out in the preceding paragraph, need be.

Background Facts

6 While there is a fair amount of technicality involved in the funding of the various government programs involved, I do not need to go through every last detail in order to make the issues and outcome understandable. Moreover, the need for an urgent resolution precludes a voluminous decision.

7 The legal authority for government funding of electric vehicle subsidies is provided to the Minister of Transportation in s. 118 (2) of the *Public Transportation and Highway Improvement Act*, *RSO 1990, c P.50*:

> (2) On and after January 1, 1997, the Minister may, out of money appropriated therefor by the Legislature and upon such conditions as he or she considers advisable, provide grants, loans

> and other financial assistance to any person...for specific projects that the Minister considers to be of provincial significance.[1]

8 For many years the province has had programs established under various environmental statutes and regulations to promote zero emission motor vehicles. Two of these programs provided subsidies to buyers of vehicles which the government listed as environmentally approved and eligible for subsidies on lists under the two programs. Subsidies could also be paid to the sellers directly if they passed on the savings to their customers. Most recently, the applicable programs were funded through "cap-and-trade" tax revenues.

9 Since March of this year, there has been no funding available for cars priced at more than $75,000. Since then, only Tesla customers who buy its Model 3 vehicle could qualify for subsidies. Tesla points out that there are luxury brand cars that remain on the approved list that are made by other manufacturers and sell for more than its Model 3.

10 On July 3, 2018 the government announced that it had revoked the cap-and-trade regulation and would begin the orderly wind-down of programs funded through cap-and-trade tax revenues.

11 On July 11, 2018, the government announced that it was ending the programs to fund electric cars. However, the announcement included a two month extension for some orders that had already been placed. The government announced two conditions under which it would continue to pay subsidies through the two month transition period:

> Applications will be accepted from dealerships, car owners or prospective car owners only if one of the following conditions has been met:
>
> * Eligible vehicles that have been delivered to consumers, registered, and plated on or before July 11 will receive the incentive.
>
> * Inventory that dealers have on lots or orders made by dealerships with manufacturers on or before July 11, will also be honoured for the incentive provided that the vehicle is delivered to consumers, registered, and plated by September 10.

12 The two terms of the transition plan aim at different things. Under the first bullet customers were protected as far as the government was willing to do so. Customers will receive subsidy payments provided they had received their cars by the July 11 cancellation date. It should be noted that the government application forms signed by all car purchasers who sought subsidies included the following terms:

> You agree that all decisions made by the Province of Ontario relating to [the program], including applicant and vehicle eligibility and the incentive amount, are final and binding and cannot be appealed.
>
> You acknowledge that...
>
> (e) the program may be changed or cancelled by the Province of Ontario at any time for the reason whatsoever, without notice...

(g) funding for [the program] is subject to appropriation from the legislature and is not guaranteed for any specific applicant.

13 There is no disagreement among the parties that governments are entitled to cancel their subsidy programs at any time. No one has a right to receive government funds. In *Skypower CL 1 LP v Ontario (Minister of Energy)*, 2012 ON SC 4979, at para. 84, Justice Nordheimer (as he then was) wrote for the Divisional Court:

> The applicants assumed the same risk making their applications for the [subsidy] program, that is, that the terms of the program might change because of changing government policy. While it may sometimes seem unfair when rules are changed in the middle of a game, that is the nature of the game when one is dealing with government programs.

14 There is no complaint in this proceeding regarding the government's right to end the subsidy to customers as it did under the first bullet above.

15 The second term of the transition program was aimed at car dealerships. The government agreed to honour subsidy requests made before July 11 provided that the cars purchased were either already on a dealer's lot or were on order by the dealer from the manufacturer before that date. The government provided two months, to September 10, for cars to be delivered by manufacturers to dealers and then to the customers who had already ordered them by July 11.

16 The government's announcement said that further letters would be sent to car dealers to explain the terms of the transition program. Tesla Motors Canada ULC is a registered dealer in Ontario. It is a direct or indirect wholly-owned subsidiary of the Tesla US auto manufacturer. However, although it is a duly registered Ontario dealer to whom the transition program as announced applied, it did not receive the government's letter. Rather, the government sent a customized letter just to Tesla. In this letter, the government explained that, although not stated in its public announcement, the transition program only applied to orders for cars made by a "franchised automobile dealership" and not where vehicles "have been ordered directly from an original manufacturer by a consumer."

17 As the government believed that all of Tesla's cars are ordered by customers online directly from the US parent manufacturer, this seemed to exclude Tesla customers from the transition program. However, the government may not have known that Ontario customers actually buy their cars from Tesla Motors Canada ULC - a registered Ontario dealership. Like the other major car manufacturers, Tesla US sells into Ontario through dealerships. That left only the word "franchised" as the term that excluded Tesla and its customers from the program. Tesla Motors Canada ULC is not a franchised business.

18 In trying to understand why customers who bought from franchised dealerships would remain qualified for subsidies rather than those who bought from dealerships integrated into the manufacturer's business model, Tesla points to a statement made to the Ontario Legislative assembly on July 26, 2018 by the Minister of Transportation who said:

> But we also were extremely fair in the way that we ended it. On July 11, we announced that until September 10, all dealers and anyone who had purchased a vehicle or had a vehicle on order, as

> long it was plated and delivered by September 10, **other than Tesla**--they would receive their rebate. [Emphasis added.]

19 The Minister said nothing about franchised dealers and simply referred to Tesla as having been excluded. On July 31, 2018, the Parliamentary Assistant to the Minister of the Environment, Conservation, and Parks explained to the Legislature the government's disagreement with certain policies of the prior government as follows:

> ... Under the current cap-and-trade program, the previous Liberal government used the funds they raised to balance their budget. I'm going to say it, Mr. Speaker, because that's what they did. We have seen that it actually has not reduced greenhouse emissions. Not only did they use it to balance their budget, they used it for programs like **Tesla subsidies**, through the greenhouse gas reduction account. [Emphasis added.]

20 She also told the Legislature that the former Environment Minister's Chief of Staff "landed a job [sic] none other than Tesla." She said,

> So I don't know if that's unethical or a conflict of interest, but all of a sudden, in that same month as he landed that great job at Tesla, they announce a major subsidy for a program providing up to $14,000 to consumers who buy electric cars like Tesla. Where's the accountability?

21 Once again, Tesla says, the government has singled it out for vilification. The zero emission vehicle subsidies applied to cars produced by some 17 manufacturers. Tesla complains that the government is punishing Tesla for its success in producing electric vehicles in accordance with the government's own environmental goals.

22 In addition, the Premier of Ontario recently stating the following in an interview with a member of the press:

> ...with the folks from Tesla, the common folks here in Hamilton have a big problem, giving rebates of up to $16,000 with our hard-earned money, to millionaires buying $80,000 cars, $100,000 cars. Uh we have an issue with that, we want to protect the little person.
>
> ...
>
> Tesla can do what they want, but maybe they should think of coming here, and opening up a manufacturing facility, like the big five are. That's what I have, uh, message for Tesla. Stop trying to get rebates for your millionaire buddies, and putting it on the backs of the hardworking people of Hamilton and the rest of the hardworking people of Ontario.

23 The evidence discloses that rebates are limited to $14,000, the maximum car price for which subsidies may be paid is $75,000; not $80,000 or $100,000, and Tesla's Model 3 is not the most expensive car receiving subsidies under the program.

24 Tesla tried to communicate with the Ministry of Transportation several times since the announcement of the cancellation of the subsidy programs and the terms of the transition program. The government has not responded.

25 There are approximately 600 customers in Ontario who had placed orders for Tesla Model 3 vehicles with Tesla Motors Canada ULC dealerships as at July 11, 2018. There were 34 unallocated vehicles on Tesla dealership lots at that time. While the government relies on Tesla's website to say that Tesla cannot deliver its cars in time, Tesla has adduced evidence that there are 256 vehicles currently on their way to Ontario by train and 63 more that are currently headed here by truck.

26 Tesla says that not only are its customers injured by the government's adoption of the franchised business term of the transition program, but it is harmed as well. It has suffered 175 order cancellations since July 11, 2018. More can be expected. In addition, the targeting and vilification by the government raises a legitimate concern, it says, that its business is not welcome in Ontario and that potential customers will likely be influenced to avoid purchasing vehicles from Tesla as a result.

27 The government's evidence was adduced through Vrinda Vaidyanathan. She is the Acting Manager of Policy and Programs in the Assistant Deputy Minister's Office, Ministry Of Transportation - Policy and Planning Division. She participated in the events leading to the adoption of the transition program although she was not a decision-maker.

28 Ms. Vaidyanathan swears that the transition program was, "only extended to independently-owned, franchised dealerships." This is the first time that the phrase "independently-owned" has appeared in any discussion of the terms of the transition program.[2] The government argues that it is totally within its discretion to determine that it will provide brief further funding to protect small to medium-sized Ontario businesses from the risk of harm and economic loss. The government says that if dealers had cars on their lots or already on order on July 11th, the cancellation of the subsidy could leave the dealers exposed to loss at the hands of the vehicle manufacturers. That is, customers may cancel their purchases after the dealerships had already ordered and had become required to pay the manufacturers for the cars. The government extended the subsidy program to protect small to mid-sized dealerships from this potential harm.

29 On cross-examination Ms. Vaidyanathan did not know whether any car dealerships in Ontario are very large businesses and are not small to mid-sized dealerships as defined by the Ministry. Tesla asserts that documents obtained online show that some very substantial businesses own large numbers of dealerships in Ontario. There is no admissible evidence before the court to support the truth of that submission. But it was clear that the witness was unable to point to any evidence of any consideration having been given to the actual economic design of the motor vehicle dealership industry in Ontario. Similarly, there is no evidence that Ontario dealers are more or less at risk to manufacturers than is Tesla Motors Canada ULC. With 17 different manufacturers and hundreds or thousands of dealerships operating in Ontario, one might surmise that there could be significant differences in the contractual terms applicable among dealers and manufacturers. There is no evidence before the court on the terms of payments due from dealers to manufacturers or whether refunds are available to any dealership for car orders that may be cancelled after the July 11 termination of the subsidy program.

30 The government has not produced any contemporaneous documents supporting its decision to include only purchases from franchised dealers in the transition program. It rightly claims that the doctrine of Executive Privilege protects some cabinet level documents from disclosure. However, if it had studies or business case rationales to explain or support the economic or business basis for the exclusion of non-

franchised dealerships (i.e. Tesla) from the transition, those documents would not likely be privileged. While this matter has been brought on quickly, there is a limited universe of documents that are fundamental to the decision and none has been accessed by the government or its witness for this proceeding. In fact, the government's witness confirms that she only looked at documents printed or put to her on the day that she swore her affidavit.

Analysis

(i) The Court does not Review the Wisdom of Government Policy Decisions

31 It is common ground that the decisions in this case were taken by the cabinet. That is not unusual or objectionable. Hogg, *Constitutional Law of Canada*, 5th ed., Vol 1, page 9-11 (Toronto, Carswell, loose-leaf).

32 The government says that its core policy decisions, including decisions to spend money, are not justiciable. That is, in our constitutional framework, some decisions are meant for the government alone. They are usually policy decisions or decisions that are highly political in nature. If those decisions are unwise or unpopular, then the citizens can vote for a new government at the next election. The court's role, by contrast, is to assess the legality or lawfulness of actions. The court has no business assessing the wisdom of core government policy decisions.

33 In *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)* (Div. Ct.), *1991 CanLII 7099* (ON SC), the Divisional Court was asked to review a government decision to stop funding a municipal expressway construction project. The court held:

> 42. The evidence leads to the conclusion that the decision was one announced by the Minister after approval of the Cabinet and in substance constitutes an expression of the intention of the government not to provide any further funding for construction of the project. The government has the right to order its priorities and direct its fiscal resources towards those initiatives or programs which are most compatible with the policy conclusions guiding that particular government's action. This was simply a statement of funding policy and priorities and not the exercise of a statutory power of decision attracting judicial review.
>
> 43. While it would appear that in basing its decision on environmental concerns the government is ignoring the statutory framework established to deal with environmental matters, that does not affect its jurisdiction to make the decision in question. Such a decision is not subject to judicial review. It is in substance a decision for the disbursement of public funds. It has been a constitutional principle of our parliamentary system for at least three centuries that such disbursement is within the authority of the legislature alone. The appropriation, allocation or disbursement of such funds by a court is offensive to principle.

34 In *Hamilton-Wentworth*, the court was very careful to state, in paras. 39, 46, and elsewhere in the decision, that in exercising its authority to decline funding, the government was not exercising a statutory authority. Rather it was determining its funding priorities on a policy basis and it must be free to do that. In that case, it decided to stop funding a project and nothing more. The court found that it does not set funding priorities for government and it does not tell the government how to spend public funds.

35 But the court went on to consider the decision of Grange J. in *Re Metropolitan General Hospital and Ontario (Minister of Health)*, 1979 CanLII 2058 (ON SC), and held:

> Like Grange J., I am forced to the conclusion that it is not for any court to oversee a Minister of the Crown in policy decisions or in the exercise of his or her discretion in the expenditure of public funds entrusted to his or her department by the legislature. As Grange J. said, "***The propriety of the payment or the withholding of payment may in some circumstances be inquired into***; the wisdom of the decision can never be the subject of judicial review. It is a political and not a judicial problem." [Emphasis added]

36 Justice Grange dealt with a key distinction. Just as it is not for the court to tell the government that it must fund a highway or it must spend public funds on this or that project, it is very much the role of the court to inquire into the *propriety* or the lawfulness of a payment or withholding of a payment under statutory or regulatory laws.

(ii) The Court Reviews the Lawfulness of Operational Exercises of Statutory and Regulatory Discretion

37 The cabinet decided to cancel cap-and-trade and to stop funding projects paid from cap-and-trade tax revenues. Those are policy decisions without doubt. They set high level political direction that can then be implemented by statutory or regulatory changes. Whether the decisions were good decisions or not will only be decided in the court of public opinion.

38 The cabinet then made a second decision. It decided to continue to fund the electric car subsidy program for a brief transition period of two months. The project that they decided to fund was one established under environmental legislation relating to the promotion of clean energy and electric motor vehicles. The decision to continue to fund that particular program for two months was also a political or policy decision in my view. It too was a high level or abstract decision about policy direction that required implementation by statutory or regulatory changes.

39 But then the cabinet or the Minister made a third decision. They actually established the terms and conditions of the electric vehicle subsidy transition. They looked at the program under the environmental regime and under the power to set terms and conditions in the *Public Transportation and Highway Improvement Act* and they designed program terms so as to include only franchised dealers and to exclude Tesla.

40 In my view, in setting the operative terms of the transition program, the government changed its role from policy-setting at a high level of abstraction to executive program administration. Cabinet descended from its high core policy role as priority-setter into the field of discretionary decision-maker under the environmental regulatory regime and discretionary term-setter under s. 118 (2) of the *Public Transportation and Highway Improvement Act*. It effectively told the Ministry to design a program to exclude from environmental subsidies non-franchise dealers i.e. Tesla.[3] It is the legality of that decision under the *Public Transportation and Highway Improvement Act* and the applicable environmental laws that is the subject of this application.

(iii) The Law of Judicial Review has narrowed the Class of Non-Justiciable Decisions

41 The law of judicial review of government action has evolved. Mr. Justice Stratas discussed the current place of judicial review in our constitutional structure recently in *Tsleil-Waututh Nation v. Canada (Attorney General)*, *2017 FCA 128* (CanLII), at para. 78:

> In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, *1998 CanLII 793* (SCC), *[1998] 2 S.C.R. 217*, *161 D.L.R. (4th) 385* at paragraph 70. Put another way, all holders of public power are to be accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of law: *Slansky* at paras. 313-315. **Subject to any concerns about justiciability**, when a judicial review of executive action is brought the courts are institutionally and practically capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility. That assessment is the proper, constitutionally guaranteed role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, [Emphasis added.]

42 Subject to the issue of justiciability of the government's actions, judicial review of executive action is a fundamental pillar of our legal and constitutional structure.

43 In *Black v Chretien*, the Court of Appeal considered the question of justiciability of Crown prerogatives such as its power to spend public funds and to set funding priorities. The Court of Appeal adopted the following words of the House of Lords from *Civil Service Unions v Minster for the Civil Service*, [1985] 1 AC 374 at p. 417:

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

44 Justice Laskin, speaking for the Court of Appeal, at para. 50 of *Black*, wrote:

> The court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch": Reference re Canada Assistance Plan (British Columbia), *1991 CanLII 74* (SCC), *[1991] 2 S.C.R. 525* at p. 545, *58 B.C.L.R. (2d) 1*.

45 Justice Laskin adopted the test set out by the House of Lords as follows:

> ...the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter ***affects the rights or legitimate expectations of an individual***. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative. [Emphasis added.]

46 Under this test, matters of high policy i.e. purely political matters, like a decision to sign a treaty, or to declare war, or to cancel a subsidy program, affect no one's individual rights or legitimate expectations and, as such, are not subject to judicial review. I would add that, like the decision to cancel windmill subsidies in *Skypower*, the decision to cancel the cap-and-trade program and the electric car subsidy program are such decisions. At the opposite end of the spectrum, Justice Laskin referred to more mundane executive decisions such as issuing a passport. He wrote:

> A passport is the property of the Government of Canada, and no person, strictly speaking, has a legal right to one. However, common sense dictates that a refusal to issue a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable.

47 I note that in *Hamilton-Wentworth*, the Divisional Court had determined that the "doctrine of legitimate expectations" was not itself a basis to make government decisions justiciable. It is apparent that *Black* has changed the law in that regard and narrowed the class of non-justiciable activities to those which do not affect the rights or reasonable expectations of a person. The doctrine of legitimate expectations, as recognized in *Black*, does not create substantive rights. That is, as noted above, no one has a right to receive government subsidies generally. But, as found by the Court of Appeal, in appropriate cases the court will review executive action taken "**for improper reasons or without affording the applicant procedural fairness**."

(iv) The Doctrine of Improper Purpose Limits Executive Statutory and Regulatory Discretion

48 Among the grounds advanced by Tesla in its notice of application to challenge the government's decision in this case, Tesla argues that the decision to exclude it and its customers from the transition program has "no possible connection" to the conservationist purposes of the environmental laws under which electric vehicle subsidy program exists.

49 Without a detailed analysis of the complex environmental regulatory scheme, no one disagreed that the purposes of the electric car subsidy program included: reducing greenhouse gases in response to climate change, protecting the environment, and assisting Ontarians to transition to a low-carbon economy. The purposes of the *Public Transportation and Highway Improvement Act* include the development, construction, and operation of public highways in Ontario. Tesla argues that the decision to exclude it from the transition program met none of these purposes, is without a legitimate justification, and prejudiced its interests in an unfair manner.

50 Since at least 1959 it has been established in Canada that courts have the authority to review executive action taken for an improper purpose. In that year, the Supreme Court of Canada released its seminal decision *Roncarelli v Duplessis*, *[1959] SCR 121* at p. 143. In that case, the Premier of Québec had intervened in a liquor license proceeding and directed that Mr. Roncarelli's business be denied its liquor license because he was a member of the Christian religious sect known as Jehovah's Witnesses. In finding

the Premier's intervention unlawful, Mr. Justice Ivan Rand wrote at p. 142:

> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, [and] that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and the irrelevant purposes of public officers acting beyond their duty, [both] would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

51 Justice Rand explained further at p. 140:

> In public regulation of this sort there is no such thing as absolute and untrammeled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute... "Discretion" necessarily implies good faith in discharging public duties; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

52 Justice Rand defined "good faith" in the exercise of statutory discretion in this way:

> ...carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right: it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

53 Courts have since that time exercised the authority to ensure that executive discretion is not exercised for an improper purpose i.e. a purpose that is outside of the purposes for which the statute or regulation created the discretionary power that is purportedly exercised. For example, in *Re Doctors Hospital and Minister of Health et al.*, *(1976), 12 OR (2d) 164*, the Divisional Court struck down orders in council that revoked the operating authority of four hospitals under the *Public Hospitals Act*. The Minister of Health wrote letters to the hospital administrators advising that the government of the day had decided to close the hospitals to save costs as part of a "plan for greater overall cost-efficiency in the provincial health sector." It was clearly stated that the decision to close the hospitals was a funding decision in light of government funding priorities.

54 The statutory authority of the Minister of Health to close hospitals at the time was set out in s. 4 (5) of *The Public Hospitals Act*, RSO 1970, c 378:

> Any approval given or deemed to have been given under this Act in respect of a hospital may be suspended by the Minister or revoked by the Lieutenant-Governor in Council.

55 In that case, the court rejected the same arguments that counsel for the government has made in this

case. The court held that cabinet's power to suspend or revoke hospitals' operating authority set out in *The Public Hospitals Act* was intended to deal with matters of health and hospital administration. It was not intended to be used as a means of exercising financial controls over hospitals. The court held:

> In the absence of clear words in the statute, the discretion granted to the Lieutenant-Governor in Council could only be used to pursue the policy and objects of the act, which are be determined according to the standard canons of construction and to that extent, at least, reviewable by the Courts. That we take to be the view of Mr. Justice Lacourciere expressed Multi-Malls at page 18 of his reasons, where he in turn was relying upon and to a certain extent interpreting the speech of Lord Reid in Padfield et al. v Minister of Agriculture, Fisheries & Food et al., [1968] A.C. 977. At page 1030, Lord Reid stated:
>
> > [...]In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.[...]

56 In *Multi-Malls Inc. et al. and Minister of Transportation and Communications et al.*, 1976 CANLII 623 (ON CA) the Court of Appeal applied the same principles. In that case, a Minister had refused to issue permits under the law regulating highways as a means to prevent Multi-Malls from developing a shopping centre contrary to government planning policy. The court struck down the Minister's exercise of discretion under the highway statute for this reason:

> I am of opinion that the Minister of Transportation and Communications allowed himself to be influenced by extraneous, irrelevant and collateral considerations which should not have influenced him in the exercise of his discretion to refuse the entrance permit. It seems clear that the purpose of the Act in general is not to ensure proper land use planning but generally to control traffic. All of its provisions deal with the procedure for the designation, acquisition, construction, maintenance and financing of roads, for determining the need for and use of, King's Highways, secondary highways, tertiary resource, industrial, county, suburban, township, city, town, village and development roads.

57 In *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, *2013 SCC 64* (CanLII) the Supreme Court of Canada affirmed the *Doctors Hospital* case but with an important gloss. At para. 28 of the reasons, Abella J. wrote:

> It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, *1983 CanLII 20* (SCC), *[1983] 1 S.C.R. 106*, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, 1978 CanLII 40 (SCC), *[1979] 1 S.C.R. 2*, at p. 12; see also *Jafari*, at p. 602; Keyes, at p. 266). They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, 1981 CanLII 175 (SCC), *[1981] 1 S.C.R. 261*; *Re Doctors Hospital and Minister of Health* (1976), 1976 CanLII 739 (ON SC), *12 O.R. (2d) 164* (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, *1994 CanLII 115* (SCC), *[1994] 1 S.C.R. 231*, at p. 280; *Jafari*, at p. 604;

Brown and Evans, at 15:3261). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, **"it would take an egregious case to warrant such action"** (*Thorne's Hardware*, at p. 111)[4] [Emphasis added.]

(v) The Minister Exercised his Discretion for an Improper Purpose

58 Premier Ford's interview and the speeches in the Legislature are not admissible for the purpose of proving that the transition program has a colourable or improper purpose. "Speeches and public declarations by prominent figures in the public and political life" are political and are not credible sources of statutory or regulatory intention. *Reference re Upper Churchill Water Rights Reversion Act*, *[1984] 1 SCR 297*, at pa. 318.

59 It is clear nevertheless that the transition program had a distinct and unique effect on Tesla and that this was known and intended throughout. The government sent a unique letter to Tesla showing that it was treating Tesla differently than all other vehicle sellers in Ontario because it was not a franchised business -- a term that the government had not announced publicly.

60 As discussed above, if cabinet's goal is to protect small to mid-sized dealerships from the risk of loss if customers cancel orders and if the dealers are left with cars on their lots or on order and if they cannot sell the cars to others or return those cars to the manufacturers for refunds, then including franchised dealers and effectively excluding Tesla from the transition is no answer. Including franchised dealers is grossly over-inclusive as it catches all dealerships other than Tesla whether they are huge businesses or small. Including all franchised businesses does nothing to determine if:

a. any customer of a dealership cancelled an order;

b. if an order was cancelled, whether the dealer could sell the car anyway;

c. if an order was cancelled and the dealer could not sell the car, whether the dealer could cancel the order with the manufacturer; and

d. if an order was cancelled and the dealer could not sell the car or cancel the order, whether the dealer could return the car to the manufacturer or otherwise deal with the manufacturer to protect the dealer in some other way (such as adjusting its incentives, rebates, and the like).

That is, the discretionary decision to limit the transition to franchised dealers is not at all related to either protecting small to mid-sized dealers or to protecting dealers who may suffer losses to manufacturers. All it seems to do is to include in the transition all dealerships in Ontario who had eligible cars on their lots or on order except Tesla.[5] This conclusion is buoyed by the evolution of the program terms from the initial public announcement that included all dealers, to the letter to Tesla including only franchised dealers, to the affidavit filed herein that includes only "independently-owned" franchises. The evolution of the program terms propounded by the Minister lays bare the targeting of Tesla.

61 I am not assessing whether the goal of protecting small to mid-sized businesses that may be at risk of losses is wise policy. Rather, I am considering the actual exercise of discretion under which the Minister has adopted a condition of the transition program to limit it to franchised dealers as a manner to carry out that policy. Whether the goal was wise or not, the means implemented by the exercise of statutory and

regulatory discretion was arbitrary; it was unrelated to the achievement of the supposed policy goal. It was also not related to any of the conservationist purposes of the electric car subsidy program. It was not related to any purpose under the *Public Transportation and Highway Improvement Act.*[6] Therefore it cannot stand.

62 The government chose to refrain from filing contemporaneous evidence apart from the *ex post facto* explanation provided by its witness. While there was no formal "record of proceedings" for this type of decision-making, as Justice Stratas noted in *Tsleil-Waututh* at para. 79, it is not open to the government to say, "Trust us, we got it right."

63 Moreover, where an executive decision singles out a person or business for financial and reputational harm and is taken on certain assumed facts, basic fairness calls out for the target to be entitled to provide a response. The government's asserted rationale for limiting the transition program to franchised dealerships is laden with factual assumptions that were susceptible to being proved or disproved with evidence. Tesla was not asked to provide any facts that might have been relevant to those factual assumptions.

64 In conclusion, the decision to exclude Tesla by limiting the transition program to only franchised dealerships is arbitrary and unrelated to the purposes of the statutory or regulatory discretion being exercised. In my view, it is egregious, as that term was used by Dickson J. above, because, not only was it made for an improper purpose, but because the Minister singled out Tesla for reprobation and harm without provided Tesla any opportunity to be heard or any fair process whatsoever.

Remedy

65 Tesla asks that I set aside the limitation of the transition program to franchised dealers. However, doing that effectively re-shapes the transition program and requires the government to fund subsidies to Tesla's customers. I am not prepared to make such an order. The government's counsel argues that the inclusion of only franchised dealers is part and parcel and inextricably intertwined with the terms implemented to construct the transition program. I agree. If the government wants to transition out of the electric car subsidy program, the Minister must exercise his operational discretion in a lawful manner. He has yet to do so. I therefore quash and set aside the Minister's unlawful exercises of discretion to implement the transition program announced July 11, 2018 (as amended by its letter to Tesla of the same date and further amended in the affidavit filed herein) under the *Electric and Hydrogen Vehicle Incentive Program* under the *Climate Change Action Plan* created pursuant to s. 7 (1) of the *Climate Change Mitigation and Low-Carbon Economy Act*, *SO 2016, c. 7* and to fund that program under s. 118 (2) of the *Public Transportation and Highway Improvement Act*.

66 Tesla seeks costs of approximately $185,000 on a partial indemnity basis. Its efforts to contact the Ministry were never responded to. It was forced to bring urgent court proceedings to vindicate its rights. It is entitled to reimbursement for its reasonable costs.

67 The fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These include the principle of indemnity for the successful party (57.01(1)(0.a)), the expectations of the unsuccessful party (57.01(1)(0.b)), the amount claimed and recovered (57.01(1)(a)), and the complexity of the issues (57.01(1)(c)). Overall, the court is required to consider what is "fair and

reasonable" in fixing costs, and is to do so with a view to balancing compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario)*, *2004 CanLII 14579* (ON CA), *(2004), 71 O.R. (3d) 291*, at paras 26, 37.

68 In my view, it is fair and reasonable, and reasonably ought to have been expected by the government, that if unsuccessful in an urgent proceeding of this magnitude it will be required to reimburse Tesla for costs of $125,000 on a partial indemnity basis all-inclusive and it is so ordered.

F.L. MYERS J.

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1 Both the Minister's entitlement to fund and the right to impose terms and conditions are addressed by the statute. Therefore, the government's argument that the issues in the case deal with the Crown's prerogative spending power is not correct. Once a statute occupies ground formerly occupied by the royal prerogative, the prerogative goes into abeyance. *Black v Chretien et al*. (2001), 52 OR (3d) 215 (CA) at para. 26. *Kuki v Ontario*, *2013 ONSC 5574*, at para. 13.

2 There was no explanation for this late addition. It seems to me however that the only explanation for the addition of the qualifier "independently-owned" to the franchise limitation is to ensure that Tesla US cannot get around the exclusion by quickly signing a franchise agreement with Tesla Motors Canada ULC. No other manufacturer operates through owned dealerships.

3 Ms. Vaidyanathan learned later that Daimler-Chrysler may also sell directly to customers a few of its Mercedes Benz and Smart branded vehicles. But that was not known at the time that the decision was made.

4 In *Thorne's Hardware*, Dickson J. (as he then was) dealt with the review of cabinet's orders in council. It is therefore an apt analogy for this case.

5 plus a few models of cars that were accidentally swept up because they are bought directly from manufacturers. But no branded dealerships associated with those purchases, at whom the limitation is supposedly aimed are excluded or affected at all.

6 Said another way, it is not necessary to achieve the state's objective and it bears no relation to the state interest that lies behind the legislation. *Canada (Attorney General) v PHS Community Services Society*, 22011 SCC 44 at para. 77.

End of Document

TAB 20

Judicial Committee of the Highwood Congregation of Jehovah's Witnesses (Vaughn Lee — Chairman and Elders James Scott Lang and Joe Gurney) and Highwood Congregation of Jehovah's Witnesses *Appellants*

v.

Randy Wall *Respondent*

and

Canadian Council of Christian Charities, Association for Reformed Political Action Canada, Canadian Constitution Foundation, Evangelical Fellowship of Canada, Catholic Civil Rights League, Christian Legal Fellowship, World Sikh Organization of Canada, Seventh-day Adventist Church in Canada, Justice Centre for Constitutional Freedoms, Church of Jesus Christ of Latter-day Saints in Canada, British Columbia Civil Liberties Association and Canadian Muslim Lawyers Association *Interveners*

Judicial Committee of the Highwood Congregation of Jehovah's Witnesses (Vaughn Lee — Chairman et Elders James Scott Lang et Joe Gurney) et Highwood Congregation of Jehovah's Witnesses *Appelants*

c.

Randy Wall *Intimé*

et

Canadian Council of Christian Charities, Association for Reformed Political Action Canada, Canadian Constitution Foundation, Alliance évangélique du Canada, Catholic Civil Rights League, Alliance des chrétiens en droit, World Sikh Organization of Canada, Église adventiste du septième jour au Canada, Justice Centre for Constitutional Freedoms, Église de Jésus-Christ des saints des derniers jours au Canada, British Columbia Civil Liberties Association et Association canadienne des avocats musulmans *Intervenants*

INDEXED AS: HIGHWOOD CONGREGATION OF JEHOVAH'S WITNESSES (JUDICIAL COMMITTEE) *v.* WALL

2018 SCC 26

File No.: 37273.

2017: November 2; 2018: May 31.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Courts — Jurisdiction — Judicial review — Private parties — Whether superior court can review decision by religious organization regarding membership — Availability of judicial review to resolve disputes between private parties — Whether right to procedural fairness arises absent underlying legal right — Whether ecclesiastical issues justiciable.

RÉPERTORIÉ : HIGHWOOD CONGREGATION OF JEHOVAH'S WITNESSES (JUDICIAL COMMITTEE) *c.* WALL

2018 CSC 26

N° du greffe : 37273.

2017 : 2 novembre; 2018 : 31 mai.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

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

Tribunaux — Compétence — Contrôle judiciaire — Plaideurs privés — Une cour supérieure peut-elle contrôler la décision d'un organisme religieux concernant l'appartenance à celui-ci? — Est-il possible d'exercer un recours en contrôle judiciaire pour régler un différend entre plaideurs privés? — Existe-t-il un droit à l'équité procédurale en l'absence d'un droit légal sous-jacent? — Les questions ecclésiastiques sont-elles justiciables?

2018 SCC 26 (CanLII)

The Highwood Congregation of Jehovah's Witnesses is a voluntary, religious association. A member must live according to accepted standards of conduct and morality. A member who deviates and does not repent may be asked to appear before a Judicial Committee of elders and may be disfellowshipped. In 2014, W was disfellowshipped after he engaged in sinful behaviour and was considered to be insufficiently repentant. The decision was confirmed by an Appeal Committee. W filed an originating application for judicial review pursuant to Rule 3.15 of the *Alberta Rules of Court* seeking an order of *certiorari* quashing the Judicial Committee's decision on the basis that it was procedurally unfair. The Court of Queen's Bench dealt with the issue of jurisdiction in a separate hearing. Both the chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction to consider the merits of the application.

Held: The appeal should be allowed and the originating application for judicial review should be quashed.

Review of the decisions of voluntary associations, including religious groups, on the basis of procedural fairness is limited for three reasons. First, judicial review is limited to public decision makers, which the Judicial Committee is not. Not all decisions are amenable to a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Judicial review is a public law concept that allows courts to ensure that lower tribunals respect the rule of law. Private parties cannot seek judicial review to solve disputes between them and public law remedies such as *certiorari* may not be granted in litigation relating to contractual or property rights between private parties. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term nor would incorporation by a private Act operate as a statutory grant of authority to churches so constituted. The present case raises no issues about the rule of law. The Congregation in no way is exercising state authority.

La Highwood Congregation of Jehovah's Witnesses est une association religieuse volontaire. Ses membres doivent vivre selon des normes de conduite et de morale reconnues. Le membre qui s'écarte de ces normes et ne se repent pas peut être convoqué devant un comité de discipline religieuse formé d'anciens et être excommunié. En 2014, W a été excommunié parce qu'il a eu une conduite pécheresse et qu'on a estimé qu'il n'était pas suffisamment repentant. Un comité d'appel a confirmé la décision. W a présenté, en vertu de l'art. 3.15 des *Alberta Rules of Court*, une demande introductive d'instance en contrôle judiciaire sollicitant l'annulation de la décision du Comité de discipline religieuse au moyen d'une ordonnance de *certiorari*, au motif que cette décision n'était pas équitable sur le plan procédural. La Cour du Banc de la Reine a examiné la question de la compétence dans le cadre d'une audience distincte. Tant le juge en cabinet qui a examiné la demande que les juges majoritaires de la Cour d'appel ont conclu que les tribunaux avaient compétence pour statuer sur le fond de la demande.

Arrêt : Le pourvoi est accueilli et la demande introductive d'instance en contrôle judiciaire est annulée.

Trois raisons limitent la possibilité de demander, pour des raisons fondées sur l'équité procédurale, le contrôle judiciaire des décisions prises par des associations volontaires, y compris des groupes religieux. Premièrement, les procédures de contrôle judiciaire ne peuvent viser que les décisions des décideurs publics, et le Comité de discipline religieuse n'est pas un tel décideur. Ce ne sont pas toutes les décisions qui sont susceptibles de contrôle judiciaire en vertu du pouvoir de surveillance d'une cour supérieure. Un tel recours est possible uniquement lorsqu'un pouvoir étatique a été exercé et que l'exercice de ce pouvoir présente une nature suffisamment publique. Le contrôle judiciaire est un concept de droit public qui permet aux cours de veiller à ce que les juridictions inférieures respectent la primauté du droit. Des plaideurs privés ne peuvent pas présenter aux tribunaux une demande de contrôle judiciaire à l'égard de litiges les opposant, et des réparations de droit public tel le *certiorari* ne peuvent être accordées à l'occasion d'un litige entre plaideurs privés au sujet de droits contractuels ou de droits de propriété. Le simple fait qu'une décision ait des répercussions sur un large segment du public n'a pas pour effet de conférer à cette décision un caractère public au sens du droit administratif, non plus que la constitution d'une Église au moyen d'une loi d'intérêt privé n'a pour effet d'entraîner une attribution législative de pouvoirs en faveur de cette église. La présente affaire ne soulève aucune question relativement à la primauté du droit. La Congrégation n'exerce d'aucune façon des pouvoirs étatiques.

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Second, there is no free-standing right to procedural fairness absent an underlying legal right. Courts may only interfere to address procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake and the claim is founded on a valid cause of action, for example, contract, tort or restitution. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. It is not enough that a matter be of importance in some abstract sense. W has no cause of action. No basis has been shown that W and the Congregation intended to create legal relations. No contractual right exists. The Congregation does not have a written constitution, by-laws or rules to be enforced. The negative impact of the disfellowship decision on W's client base as a realtor does not give rise to an actionable claim. The matters in issue fall outside the courts' jurisdiction.

Third, even where review is available, the courts will consider only those issues that are justiciable. The ecclesiastical issues raised by W are not justiciable. Justiciability relates to whether the subject matter of a dispute is appropriate for a court to decide. There is no single set of rules delineating the scope of justiciability. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter. Even the procedural rules of a particular religious group may involve the interpretation of religious doctrine, such as in this case. The courts have neither legitimacy nor institutional capacity to deal with contentious matters of religious doctrine.

Cases Cited

Distinguished: *McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481; *Pederson v. Fulton*, 1994 CanLII 7483; *Lutz v. Faith Lutheran Church of Kelowna*, 2009 BCSC 59; *Hart v. Roman Catholic Episcopal Corp. of the Diocese of Kingston*, 2011 ONCA 728, 285 O.A.C. 354; *Shergill v. Khaira*, [2014] UKSC 33, [2015] A.C. 359; *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Hofer v. Hofer*, [1970] S.C.R. 958; *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555;

Deuxièmement, il n'existe aucun droit autonome à l'équité procédurale en l'absence d'un droit légal sous-jacent. Les tribunaux ne peuvent intervenir à l'égard de préoccupations liées à l'équité procédurale que soulèvent les décisions de groupes religieux ou autres associations volontaires que si des droits légaux sont en jeu et que la demande repose sur une cause d'action valable, par exemple en matière de contrat, de délit civil ou de restitution. Une simple allégation de violation des principes de justice naturelle ou le seul fait que le plaignant a épuisé les processus internes de l'organisation ne sauraient donner compétence aux tribunaux. Il ne suffit pas qu'une question revête de l'importance dans quelque sens abstrait. W ne dispose d'aucune cause d'action. Il n'a été présenté aucun élément indiquant que W et la Congrégation entendaient établir des rapports juridiques. Il n'existe aucun droit contractuel. La Congrégation n'a ni constitution écrite, ni règlement administratif, ni règles donnant ouverture à un recours devant les tribunaux. Les répercussions négatives de la décision d'excommunier W sur sa clientèle dans le cadre de ses activités de courtier immobilier ne font pas naître de droit d'action. Les questions en litige ne relèvent pas de la compétence des tribunaux.

Troisièmement, même lorsqu'il y a ouverture à contrôle judiciaire, les tribunaux n'examineront que les questions qui sont justiciables. Les questions ecclésiastiques soulevées par W ne sont pas justiciables. La justiciabilité est une notion qui s'attache à la question de savoir si l'on est en présence d'une question qu'il convient de faire trancher par un tribunal. Il n'existe pas un ensemble précis de règles délimitant le champ d'application de la notion de justiciabilité. Le tribunal doit se demander s'il dispose des attributions institutionnelles et de la légitimité requises pour trancher l'affaire. Il arrive parfois que même les règles de procédure d'un groupe religieux impliquent l'interprétation d'une doctrine religieuse, comme c'est le cas en l'espèce. Les tribunaux n'ont ni la légitimité ni les attributions institutionnelles requises pour se saisir de questions litigieuses touchant la doctrine religieuse.

Jurisprudence

Distinction d'avec les arrêts : *McCaw c. United Church of Canada* (1991), 4 O.R. (3d) 481; *Pederson c. Fulton*, 1994 CanLII 7483; *Lutz c. Faith Lutheran Church of Kelowna*, 2009 BCSC 59; *Hart c. Roman Catholic Episcopal Corp. of the Diocese of Kingston*, 2011 ONCA 728, 285 O.A.C. 354; *Shergill c. Khaira*, [2014] UKSC 33, [2015] A.C. 359; *Lee c. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; *Lakeside Colony of Hutterian Brethren c. Hofer*, [1992] 3 R.C.S. 165; *Hofer c. Hofer*, [1970] R.C.S. 958; *Senez c. Chambre d'Immeuble*

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disapproved: *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191; *Davis v. United Church of Canada* (1992), 8 O.R. (3d) 75; *Graff v. New Democratic Party*, 2017 ONSC 3578; *Erin Mills Soccer Club v. Ontario Soccer Assn.*, 2016 ONSC 7718, 15 Admin. L.R. (6th) 138; *West Toronto United Football Club v. Ontario Soccer Association*, 2014 ONSC 5881, 327 O.A.C. 29; **considered:** *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605; *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481; **referred to:** *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29; *Greaves v. United Church of God Canada*, 2003 BCSC 1365, 27 C.C.E.L. (3d) 46; *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586; *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229; *Mott-Trille v. Steed*, [1998] O.J. No. 3583, rev'd 1999 CanLII 2618; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Demiris v. Hellenic Community of Vancouver*, 2000 BCSC 733; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

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David M. Gnam and *Jayden MacEwan*, for the appellants.

Michael A. Feder and *Robyn Gifford*, for the respondent.

Barry W. Bussey and *Philip A. S. Milley*, for the intervener the Canadian Council of Christian Charities.

John Sikkema and *André Schutten*, for the intervener the Association for Reformed Political Action Canada.

Mark Gelowitz and *Karin Sachar*, for the intervener the Canadian Constitution Foundation.

Albertos Polizogopoulos, for the interveners the Evangelical Fellowship of Canada and the Catholic Civil Rights League.

Derek Ross and *Deina Warren*, for the intervener the Christian Legal Fellowship.

Balpreet Singh Boparai and *Avnish Nanda*, for the intervener the World Sikh Organization of Canada.

Gerald Chipeur, *Q.C.*, and *Jonathan Martin*, for the interveners the Seventh-day Adventist Church in Canada and the Church of Jesus Christ of Latter-day Saints in Canada.

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David M. Gnam et *Jayden MacEwan*, pour les appelants.

Michael A. Feder et *Robyn Gifford*, pour l'intimé.

Barry W. Bussey et *Philip A. S. Milley*, pour l'intervenant Canadian Council of Christian Charities.

John Sikkema et *André Schutten*, pour l'intervenante Association for Reformed Political Action Canada.

Mark Gelowitz et *Karin Sachar*, pour l'intervenante Canadian Constitution Foundation.

Albertos Polizogopoulos, pour les intervenantes l'Alliance évangélique du Canada et Catholic Civil Rights League.

Derek Ross et *Deina Warren*, pour l'intervenante l'Alliance des chrétiens en droit.

Balpreet Singh Boparai et *Avnish Nanda*, pour l'intervenante World Sikh Organization of Canada.

Gerald Chipeur, *c.r.*, et *Jonathan Martin*, pour les intervenantes l'Église adventiste du septième jour au Canada et l'Église de Jésus-Christ des saints des derniers jours au Canada.

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Jay Cameron, for the intervener the Justice Centre for Constitutional Freedoms.

Roy Millen and *Ariel Solose*, for the intervener the British Columbia Civil Liberties Association.

Shahzad Siddiqui and *Yavar Hameed*, for the intervener the Canadian Muslim Lawyers Association.

The judgment of the Court was delivered by

Rowe J. —

I. Overview

[1] The central question in this appeal is when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness. In 2014, the appellant, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses, disfellowshipped the respondent, Randy Wall, after he admitted that he had engaged in sinful behaviour and was considered to be insufficiently repentant. The Judicial Committee's decision was confirmed by an Appeal Committee. Mr. Wall brought an originating application for judicial review of the decision to disfellowship him before the Alberta Court of Queen's Bench. The court first dealt with the issue of whether it had jurisdiction to decide the matter. Both the chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction and could proceed to consider the merits of Mr. Wall's application.

[2] For the reasons that follow, I would allow the appeal. Mr. Wall sought to have the Judicial Committee's decision reviewed on the basis that the decision was procedurally unfair. There are several reasons why this argument must fail. First, judicial review is limited to public decision makers, which the Judicial Committee is not. Second, there is no free-standing right to have such decisions reviewed

Jay Cameron, pour l'intervenant Justice Centre for Constitutional Freedoms.

Roy Millen et *Ariel Solose*, pour l'intervenante British Columbia Civil Liberties Association.

Shahzad Siddiqui et *Yavar Hameed*, pour l'intervenante l'Association canadienne des avocats musulmans.

Version française du jugement de la Cour rendu par

Le juge Rowe —

I. Aperçu

[1] La principale question en litige dans le présent pourvoi est celle de savoir si les tribunaux ont compétence pour contrôler les décisions d'organismes religieux qui soulèvent des préoccupations en matière d'équité procédurale et, si oui, dans quelles circonstances. En 2014, l'appelant, le Judicial Committee of the Highwood Congregation of Jehovah's Witnesses (« Comité de discipline religieuse »), a excommunié l'intimé, Randy Wall, parce qu'il avait admis avoir eu une conduite pécheresse et qu'on avait estimé qu'il n'était pas suffisamment repentant. Un comité d'appel a confirmé la décision du Comité de discipline religieuse. M. Wall a présenté à la Cour du Banc de la Reine de l'Alberta une demande introductive d'instance en contrôle judiciaire visant la décision d'excommunication dont il fait l'objet. La cour s'est d'abord demandé si elle avait compétence pour trancher la question. Tant le juge en cabinet qui a examiné la demande que les juges majoritaires en Cour d'appel ont conclu que les tribunaux avaient compétence et pouvaient statuer sur le fond de la demande de M. Wall.

[2] Pour les motifs qui suivent, je suis d'avis d'accueillir le pourvoi. M. Wall a demandé le contrôle de la décision du Comité de discipline religieuse, au motif que celle-ci n'était pas équitable sur le plan procédural. Cet argument ne saurait être retenu, et ce, pour plusieurs raisons. Premièrement, les procédures de contrôle judiciaire ne peuvent viser que les décisions des décideurs publics, et le Comité

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on the basis of procedural fairness. In light of the foregoing, Mr. Wall has no cause of action, and, accordingly, the Court of Queen's Bench has no jurisdiction to set aside the Judicial Committee's membership decision. Finally, the ecclesiastical issues raised by Mr. Wall are not justiciable.

II. Facts and Judicial History

[3] The Highwood Congregation of Jehovah's Witnesses ("Congregation") is an association of about one hundred Jehovah's Witnesses living in Calgary, Alberta. The Congregation is a voluntary association. It is not incorporated and has no articles of association or by-laws. It has no statutory foundation. It does not own property. No member of the Congregation receives any salary or pecuniary benefit from membership. Congregational activities and spiritual guidance are provided on a volunteer basis by a group of elders.

[4] To become a member of the Congregation, a person must be baptized and must satisfy the elders that he or she possesses a sufficient understanding of relevant scriptural teachings and is living according to accepted standards of conduct and morality. Where a member deviates from these scriptural standards, elders meet and encourage the member to repent. If the member persists in the behaviour, he or she is asked to appear before a committee of at least three elders of the Congregation.

[5] The committee proceedings are not adversarial, but are meant to restore the member to the Congregation. If the elders determine that the member does not exhibit genuine repentance for his or her sins, the member is "disfellowshipped" from the Congregation. Disfellowshipped members may still attend congregational meetings, but within the Congregation they may speak only to their imme-

de discipline religieuse n'est pas un tel décideur. Deuxièmement, il n'existe pas de droit autonome permettant de solliciter le contrôle de telles décisions pour des raisons fondées sur l'équité procédurale. Compte tenu de ce qui précède, M. Wall ne dispose d'aucune cause d'action et, en conséquence, la Cour du Banc de la Reine n'avait pas compétence pour écarter la décision d'excommunication prononcée par le Comité de discipline religieuse. Enfin, les questions ecclésiastiques soulevées par M. Wall ne sont pas justiciables.

II. Faits et historique judiciaire

[3] La Highwood Congregation of Jehovah's Witnesses (« Congrégation ») est une association qui compte environ cent Témoins de Jéhovah résidant à Calgary, en Alberta. Elle est une association volontaire. Elle n'est pas constituée en personne morale et elle ne possède ni statut constitutif ni règlement administratif. Son existence ne repose sur aucune loi et elle n'est propriétaire d'aucun immeuble. Aucun membre de la Congrégation ne reçoit de salaire ou d'avantage pécuniaire en raison de son appartenance à celle-ci. Les activités et l'accompagnement spirituel offerts par la Congrégation le sont sur une base bénévole, par un groupe d'anciens.

[4] Quiconque souhaite adhérer à la Congrégation doit être baptisé et convaincre les anciens qu'il comprend suffisamment les enseignements pertinents des Saintes Écritures et qu'il vit selon des normes de conduite et de morale reconnues. Lorsqu'un membre s'écarte des normes prévues dans ces Écritures, les anciens rencontrent le membre et l'encouragent à faire acte de repentance. S'il ne corrige pas son comportement, il est convoqué devant un comité formé d'au moins trois anciens de la Congrégation.

[5] Les procédures de ce comité n'ont pas un caractère contradictoire, mais visent plutôt la réintégration du membre dans la Congrégation. Dans les cas où les anciens estiment que le membre ne manifeste pas un repentir sincère à l'égard de ses péchés, ce dernier est « excommunié » de la Congrégation. Les membres excommuniés peuvent continuer d'assister aux rassemblements de la Congrégation, mais, au sein de

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diate family and limit discussions to non-spiritual matters.

[6] Randy Wall became a member of the Congregation in 1980. He remained a member of the Congregation until he was disfellowshipped by the Judicial Committee.

[7] Mr. Wall unsuccessfully appealed the Judicial Committee's decision to elders of neighbouring congregations (Appeal Committee) and to the Watch Tower Bible and Tract Society of Canada. After the Congregation was informed that the disfellowship was confirmed, Mr. Wall filed an originating application for judicial review pursuant to Rule 3.15 of the *Alberta Rules of Court*, Alta. Reg. 124/2010, seeking an order of *certiorari* quashing and declaring void the Judicial Committee's decision. In his application, Mr. Wall claimed that the Judicial Committee breached the principles of natural justice and the duty of fairness, and that the decision to disfellowship him affected his work as a realtor as his Jehovah's Witness clients declined to work with him.

[8] An initial hearing was held to determine whether the Court of Queen's Bench had jurisdiction. The chambers judge found that the court did have jurisdiction as Mr. Wall's civil rights might have been affected by the Judicial Committee's decision: File No. 1401-10225, April 16, 2015. The judge also noted that expert evidence could be heard regarding the interpretation by Jehovah's Witnesses of Christian scripture as to what is sinful and the scriptural criteria used by elders to determine whether someone said to have sinned has sufficiently repented.

[9] The majority of the Court of Appeal of Alberta dismissed the Congregation's appeal, affirming that the Court of Queen's Bench had jurisdiction to hear Mr. Wall's originating application for judicial review: 2016 ABCA 255, 43 Alta. L.R. (6th) 33. The majority held that the courts may intervene in decisions

celle-ci, ils ne peuvent parler qu'aux membres de leur famille proche, et leurs discussions doivent se limiter à des questions non spirituelles.

[6] M. Wall a adhéré à la Congrégation en 1980, et il en est demeuré membre jusqu'à son excommunication par le Comité de discipline religieuse.

[7] M. Wall a interjeté appel sans succès de la décision du Comité de discipline religieuse devant les anciens des congrégations voisines (Comité d'appel), ainsi que la Tour de Garde Société de Bibles et de Tracts du Canada. Après que la Congrégation a été informée que l'excommunication était confirmée, M. Wall a présenté, en vertu de l'art. 3.15 des *Alberta Rules of Court*, Alta. Reg. 124/2010, une demande introductive d'instance en contrôle judiciaire sollicitant l'annulation de la décision du Comité de discipline religieuse au moyen d'une ordonnance de *certiorari*. Dans sa demande, M. Wall prétendait que le Comité de discipline religieuse avait violé les principes de justice naturelle et l'obligation d'équité qui lui incombaient, et que la décision de l'excommunier avait nui à ses activités de courtier immobilier, étant donné que ses clients Témoins de Jéhovah refusaient de faire appel à ses services.

[8] La Cour du Banc de la Reine a tenu une première audience pour décider si elle avait compétence. Le juge en cabinet a conclu que la cour avait effectivement compétence, puisque la décision du Comité de discipline religieuse était susceptible d'avoir porté atteinte aux droits civils de M. Wall : dossier nº 1401-10225, 16 avril 2015. Le juge a également indiqué que des experts pourraient témoigner sur la façon dont les Témoins de Jéhovah interprètent les Saintes Écritures chrétiennes pour déterminer ce qui constitue un péché, ainsi que sur les critères, tirés de ces Écritures, sur lesquels se fondent les anciens pour juger si une personne qui a commis un péché s'en est suffisamment repentie.

[9] La Cour d'appel de l'Alberta a rejeté, à la majorité, l'appel de la Congrégation et confirmé que la Cour du Banc de la Reine pouvait entendre la demande introductive de contrôle judiciaire de M. Wall : 2016 ABCA 255, 43 Alta. L.R. (6th) 33. Les juges majoritaires ont conclu que les tribunaux peuvent

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of voluntary organizations concerning membership where property or civil rights are at issue. The majority also held that even where no property or civil rights are engaged, courts may intervene in the decisions of voluntary associations where there is a breach of the rules of natural justice or where the complainant has exhausted internal dispute resolution processes.

[10] The dissenting judge would have allowed the Congregation's appeal on the basis that the Judicial Committee is a private actor, and as such is not subject to judicial review, and that in any event, Mr. Wall's challenge of the Judicial Committee's decision did not raise a justiciable issue.

III. Question on Appeal

[11] This appeal requires the Court to determine whether it has jurisdiction to judicially review the disfellowship decision for procedural fairness concerns.

IV. Analysis

[12] Courts are not strangers to the review of decision making on the basis of procedural fairness. However, the ability of courts to conduct such a review is subject to certain limits. These reasons address three ways in which the review on the basis of procedural fairness is limited. First, judicial review is reserved for state action. In this case, the Congregation's Judicial Committee was not exercising statutory authority. Second, there is no free-standing right to procedural fairness. Courts may only interfere to address the procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake. Third, even where review is available, the courts will consider only those issues that are justiciable. Issues of theology are not justiciable.

intervenir à l'égard des décisions prises par les organisations volontaires en matière d'adhésion lorsque des droits de propriété ou des droits civils sont en jeu. Ils ont également conclu que les tribunaux peuvent intervenir à l'égard des décisions de ces organisations, et ce, même si de tels droits ne sont pas en jeu, dans les cas où la plainte reproche la violation de principes de justice naturelle ou dans ceux où le plaignant a épuisé les processus internes de règlement des différends.

[10] Le juge dissident aurait accueilli l'appel de la Congrégation, au motif que le Comité de discipline religieuse est une entité privée, que ses décisions ne sont par conséquent pas susceptibles de contrôle judiciaire et que, de toute façon, la contestation de la décision du Comité de discipline religieuse par M. Wall ne soulevait pas de question justiciable.

III. Question en litige

[11] Dans le cadre du présent pourvoi, notre Cour doit décider si elle a compétence pour contrôler, sur la base de motifs fondés sur l'équité procédurale, la décision du Comité de discipline religieuse d'excommunier l'intimé.

IV. Analyse

[12] Les tribunaux sont familiers avec le contrôle de processus décisionnels au regard de l'équité procédurale. Toutefois, leur pouvoir de contrôle à cet égard est assujetti à certaines limites. Les présents motifs traitent de trois limites applicables au contrôle de décisions au regard de l'équité procédurale. Premièrement, le contrôle judiciaire est un recours qui ne peut être exercé qu'à l'encontre de mesures étatiques. En l'espèce, le Comité de discipline religieuse de la Congrégation n'exerçait pas un pouvoir conféré par la loi. Deuxièmement, il n'existe pas de droit autonome à l'équité procédurale. Ce n'est que si des droits légaux sont en jeu que les tribunaux peuvent intervenir à l'égard de préoccupations liées à l'équité procédurale que soulèvent les décisions de groupes religieux ou autres associations volontaires. Troisièmement, même lorsqu'il y a ouverture à contrôle judiciaire, les tribunaux n'examineront que les questions qui sont justiciables. Des questions de nature théologique ne sont pas justiciables.

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A. *The Availability of Judicial Review*

[13] The purpose of judicial review is to ensure the legality of state decision making: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at paras. 24 and 26; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 237-38; *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29, at paras. 14-15. Judicial review is a public law concept that allows s. 96 courts to "engage in surveillance of lower tribunals" in order to ensure that these tribunals respect the rule of law: *Knox*, at para. 14; *Constitution Act, 1867*, s. 96. The state's decisions can be reviewed on the basis of procedural fairness or on their substance. The parties in this appeal appropriately conceded that judicial review primarily concerns the relationship between the administrative state and the courts. Private parties cannot seek judicial review to solve disputes that may arise between them; rather, their claims must be founded on a valid cause of action, for example, contract, tort or restitution.

[14] Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (*ibid.*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

A. *La possibilité d'exercer un recours en contrôle judiciaire*

[13] Le contrôle judiciaire a pour objet d'assurer la légalité des décisions prises par l'État : voir *Canada (Procureur général) c. TeleZone Inc.*, 2010 CSC 62, [2010] 3 R.C.S. 585, par. 24 et 26; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, p. 237-238; *Knox c. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29, par. 14-15. Le contrôle judiciaire est un concept de droit public qui permet aux cours visées à l'art. 96 [TRADUCTION] « d'exercer un pouvoir de surveillance sur les juridictions inférieures », afin de veiller à ce que celles-ci respectent la primauté du droit : *Knox*, par. 14; *Loi constitutionnelle de 1867*, art. 96. Les décisions de l'État sont susceptibles de contrôle quant au fond ou quant au respect de l'équité procédurale. Les parties au présent pourvoi ont à juste titre reconnu que le contrôle judiciaire vise essentiellement l'examen par les tribunaux judiciaires des décisions des organismes administratifs de l'État. Des plaideurs privés ne peuvent pas présenter aux tribunaux une demande de contrôle judiciaire à l'égard de litiges les opposant; s'ils s'adressent aux tribunaux, leurs demandes doivent plutôt reposer sur une cause d'action valable, par exemple en matière de contrat, de délit civil ou de restitution.

[14] Ce ne sont pas toutes les décisions qui sont susceptibles de contrôle judiciaire en vertu du pouvoir de surveillance d'une cour supérieure. Un tel recours est possible uniquement lorsqu'un pouvoir étatique a été exercé et que l'exercice de ce pouvoir présente une nature suffisamment publique. En effet, même les organismes publics prennent des décisions de nature privée — par exemple pour louer des locaux ou pour embaucher du personnel — et de telles décisions ne sont pas assujetties au pouvoir de contrôle des tribunaux : *Air Canada c. Administration portuaire de Toronto*, 2011 CAF 347, [2013] 3 R.C.F. 605, par. 52. L'organisme public qui prend des décisions de nature contractuelle « n'exerce pas un pouvoir central à la mission administrative que lui a attribuée le législateur », mais plutôt un pouvoir de nature privée (*ibid.*). Des décisions de la sorte ne soulèvent pas de préoccupations relatives à la primauté du droit, car, pour que cela soit le cas, il faut être en présence de l'exercice d'un pouvoir délégué.

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[15] Further, while the private law remedies of declaration or injunction may be sought in an application for judicial review (see, for example, *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2)(b); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1)2; *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 2 and 3(3)), this does not make the reverse true. Public law remedies such as *certiorari* may not be granted in litigation relating to contractual or property rights between private parties: *Knox*, at para. 17. *Certiorari* is only available where the decision-making power at issue has a sufficiently public character: D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 1:2252.

[15] De plus, bien qu'il soit possible de solliciter un jugement déclaratoire ou une injonction — deux réparations de droit privé — dans le cadre d'une demande de contrôle judiciaire (voir, par exemple, *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, al. 2(2)(b); *Loi sur la procédure de révision judiciaire*, L.R.O. 1990, c. J.1, disposition 2(1)2; *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, art. 2 et par. 3(3)), l'inverse n'est pas vrai pour autant. Des réparations de droit public tel le *certiorari* ne peuvent être accordées à l'occasion d'un litige entre plaideurs privés au sujet de droits contractuels ou de droits de propriété : *Knox*, par. 17. Un *certiorari* ne peut être obtenu que dans les cas où le pouvoir décisionnel en question présente une nature suffisamment publique : D. J. M. Brown et J. M. Evans, avec le concours de D. Fairlie, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), rubrique 1:2252.

[16] The Attorney General has a right to be heard on an originating application for judicial review, and must be served notice where an application has been filed: *Alberta Rules of Court*, Rules 3.15 and 3.17. Other originating applications have no such requirements: *ibid.*, Rule 3.9. This suggests that judicial review is properly directed at public decision making.

[16] Le procureur général a le droit de se faire entendre relativement à une demande introductive instance en contrôle judiciaire, et un avis doit lui être signifié lorsqu'une telle demande est déposée : *Alberta Rules of Court*, art. 3.15 et 3.17. Aucun autre type de demande introductive d'instance n'est assorti d'une telle exigence : *ibid.*, art. 3.9. Ce fait tend à indiquer que le contrôle judiciaire vise effectivement les décisions prises par l'État.

[17] Although the public law remedy of judicial review is aimed at government decision makers, some Canadian courts, including the courts below, have continued to find that judicial review is available with respect to decisions by churches and other voluntary associations. These decisions can be grouped in two categories according to the arguments relied on in support of the availability of judicial review. Neither line of argument should be taken as authority for the broad proposition that private bodies are subject to judicial review. Both lines of cases fail to recognize that judicial review is about the legality of state decision making.

[17] Quoique le recours de droit public que constitue le contrôle judiciaire vise les décideurs gouvernementaux, certains tribunaux judiciaires canadiens, y compris les juridictions inférieures en l'espèce, continuent de conclure qu'il y a ouverture à contrôle judiciaire à l'encontre des décisions rendues par des églises ou autres associations volontaires. Les jugements de ces tribunaux peuvent être répartis en deux courants, selon le raisonnement suivi pour justifier la possibilité d'exercer un recours en contrôle judiciaire. Ni l'un ni l'autre de ces courants jurisprudentiels ne permet d'affirmer, de façon générale, que les décisions des organismes privés sont assujetties au contrôle judiciaire. Ils font tous deux abstraction du fait que ce recours porte sur la légalité des décisions prises par l'État.

[18] The first line of cases relies on the misconception that incorporation by a private Act operates

[18] Le premier courant jurisprudentiel s'appuie sur l'idée erronée selon laquelle le fait qu'une Église

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as a statutory grant of authority to churches so constituted: *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191 (Div. Ct.), at para. 21; *Davis v. United Church of Canada* (1992), 8 O.R. (3d) 75 (Gen. Div.), at p. 78. The purpose of a private Act is to "confer special powers or benefits upon one or more persons or body of persons, or to exclude one or more persons or body of persons from the general application of the law": Canada, Parliament, House of Commons, *House of Commons Procedure and Practice* (2nd ed. 2009), by A. O'Brien and M. Bosc, at p. 1177. Thus, by its nature, a private Act is not a law of general application and its effect can be quite limited. The federal *Interpretation Act*, R.S.C. 1985, c. I-21, s. 9, states that "[n]o provision in a private Act affects the rights of any person, except only as therein mentioned and referred to." For instance, *The United Church of Canada Act* (1924), 14 & 15 Geo. 5, c. 100, gives effect to an agreement regarding the transfer of property rights (from the Methodist, Congregationalist and certain Presbyterian churches) upon the creation of the United Church of Canada; it is not a grant of statutory authority.

soit constituée au moyen d'une loi d'intérêt privé a pour effet d'entraîner une attribution législative de pouvoirs en faveur de cette église : *Lindenberger c. United Church of Canada* (1985), 10 O.A.C. 191 (C. div.), par. 21; *Davis c. United Church of Canada* (1992), 8 O.R. (3d) 75 (Div. gén.), p. 78. Une loi d'intérêt privé a pour objet de « conférer à une ou plusieurs personnes, ou à un groupe de personnes, des pouvoirs ou avantages spéciaux, ou d'exclure de telles personnes de l'application générale d'un texte de loi » : Canada, Parlement, Chambre des Communes, *La procédure et les usages de la Chambre des communes* (2e éd. 2009), par A. O'Brien et M. Bosc, p. 1177-1178. En conséquence, de par sa nature, une telle loi n'est pas une loi d'application générale, et sa portée peut s'avérer très limitée. La *Loi d'interprétation* fédérale, L.R.C. 1985, c. I-21, art. 9, précise que « [l]es lois d'intérêt privé n'ont d'effet sur les droits subjectifs que dans la mesure qui y est prévue. » Par exemple, la loi intitulée *United Church of Canada Act* (1924), 14 & 15 Geo. 5, c. 100, a donné effet à un accord de transfert de droits de propriété (par les églises méthodistes et congrégationalistes, et par certaines églises presbytériennes) au moment de la création de l'Église unie du Canada, il ne s'agissait pas d'une attribution législative de pouvoirs.

[19] A second line of cases that allows for judicial review of the decisions of voluntary associations that are not incorporated by any Act (public or private) looks only at whether the association or the decision in question is sufficiently public in nature: *Graff v. New Democratic Party*, 2017 ONSC 3578, at para. 18 (CanLII); *Erin Mills Soccer Club v. Ontario Soccer Assn.*, 2016 ONSC 7718, 15 Admin. L.R. (6th) 138, at para. 60; *West Toronto United Football Club v. Ontario Soccer Association*, 2014 ONSC 5881, 327 O.A.C. 29, at paras. 17-18. These cases find their basis in the Ontario Court of Appeal's decision in *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481. The court in *Setia* found that judicial review was not available since the matter did not have a sufficient public dimension despite some indicators to the contrary (such as the existence of a private Act setting up the school) (para. 41).

[19] Le second courant jurisprudentiel autorisant le contrôle judiciaire des décisions rendues par des associations volontaires qui ne sont pas constituées par une loi (d'intérêt public ou privé) s'attache seulement à la question de savoir si l'association ou la décision en cause présente une nature suffisamment publique : *Graff c. New Democratic Party*, 2017 ONSC 3578, par. 18 (CanLII); *Erin Mills Soccer Club c. Ontario Soccer Assn.*, 2016 ONSC 7718, 15 Admin. L.R. (6th) 138, par. 60; *West Toronto United Football Club c. Ontario Soccer Association*, 2014 ONSC 5881, 327 O.A.C. 29, par. 17-18. Ces décisions s'appuient sur l'arrêt *Setia c. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481, de la Cour d'appel de l'Ontario. Dans cette affaire, la Cour d'appel a décidé qu'il n'y avait pas ouverture à contrôle judiciaire, parce que la question ne possédait pas une dimension suffisamment publique, malgré la présence de certains éléments tendant à indiquer le contraire (comme le fait que l'école avait été créée par une loi d'intérêt privé) (par. 41).

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[20] In my view, these cases do not make judicial review available for private bodies. Courts have questioned how a private Act — like that for the United Church of Canada — that does not confer statutory authority can attract judicial review: see *Greaves v. United Church of God Canada*, 2003 BCSC 1365, 27 C.C.E.L. (3d) 46, at para. 29; *Setia*, at para. 36. The problem with the cases that rely on *Setia* is that they hold that where a decision has a broad public impact, the decision is of a sufficient public character and is therefore reviewable: *Graff*, at para. 18; *West Toronto United Football Club*, at para. 24. These cases fail to distinguish between "public" in a generic sense and "public" in a public law sense. In my view, a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making.

[21] Part of the confusion seems to have arisen from the courts' reliance on *Air Canada* to determine the "public" nature of the matter at hand. But, what *Air Canada* actually dealt with was the question of whether certain public entities were acting as a federal board, commission or tribunal such that the judicial review jurisdiction of the Federal Court was engaged. The proposition that private decisions of a public body will not be subject to judicial review does not make the inverse true. Thus it does not follow that "public" decisions of a private body — in the sense that they have some broad import — will be reviewable. The relevant inquiry is whether the legality of state decision making is at issue.

[20] À mon avis, ces différents jugements n'ont pas pour effet d'autoriser le contrôle judiciaire des décisions d'organismes privés. Les tribunaux se sont demandé comment une loi d'intérêt privé — comme celle concernant l'Église unie du Canada —, qui ne confère aucun pouvoir d'origine législative, pouvait donner lieu à l'exercice de recours en contrôle judiciaire : voir *Greaves c. United Church of God Canada*, 2003 BCSC 1365, 27 C.C.E.L. (3d) 46, par. 29; *Setia*, par. 36. Les jugements qui se fondent sur l'arrêt *Setia* présentent le problème suivant : les tribunaux y concluent qu'une décision ayant des répercussions publiques considérables (« *broad public impact* ») possède une nature suffisamment publique et est donc susceptible de contrôle judiciaire : *Graff*, par. 18; *West Toronto United Football Club*, par. 24. Aucune distinction n'est faite dans ces jugements entre l'adjectif anglais « *public* » (« public, que » en français) utilisé dans son sens général et le sens de ce même mot dans l'expression « *public law* » (« droit public »). Selon moi, une décision est considérée comme étant de nature publique lorsqu'elle porte sur des questions relatives à la primauté du droit et aux limites de l'exercice par un décideur administratif de ses pouvoirs. Le simple fait qu'une décision ait des répercussions sur un large segment du public n'a pas pour effet de conférer à cette décision un caractère « public » au sens du droit administratif. Je le répète, le contrôle judiciaire vise la légalité des décisions prises par l'État.

[21] La confusion semble venir, du moins en partie, du fait que les tribunaux se sont appuyés sur l'arrêt *Air Canada* pour déterminer si la question dont ils étaient saisis possédait une nature « suffisamment publique ». Toutefois, la question qui se posait dans *Air Canada* était celle de savoir si certaines entités publiques agissaient en qualité d'offices fédéraux et étaient en conséquence assujetties au pouvoir de contrôle de la Cour fédérale. La proposition selon laquelle les décisions de nature privée des organismes publics ne sont pas susceptibles de contrôle judiciaire n'implique pas que l'inverse est vrai. Par conséquent, il ne s'ensuit pas que les décisions de nature « publique » prises par un organisme privé — c'est-à-dire celles ayant des répercussions considérables — sont susceptibles de contrôle. La question qu'il convient de se poser consiste à se demander si la légalité des décisions prises par l'État est en jeu.

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[22] The present case raises no issues about the rule of law. The Congregation has no constating private Act and the Congregation in no way is exercising state authority.

[23] Finally, Mr. Wall submitted before this Court that he was not seeking judicial review, but in his originating application for judicial review this is what he does. In his application, he seeks an order of *certiorari* that would quash the disfellowship decision. I recognize that Mr. Wall was unrepresented at the time he filed his application. These comments do not reflect that the basis for my disposition of the appeal is a matter of form alone or is related to semantic errors in the application. However, the implications of granting an appeal must still be considered. This appeal considers only the question of the court's jurisdiction; it is not clear what other remedy would be sought if the case were returned to the Court of Queen's Bench for a hearing on the merits. However, as I indicate above, judicial review is not available.

B. *The Ability of Courts to Review Decisions of Voluntary Associations for Procedural Fairness*

[24] Even if Mr. Wall had filed a standard action by way of statement of claim, his mere membership in a religious organization — where no civil or property right is granted by virtue of such membership — should remain free from court intervention. Indeed, there is no free-standing right to procedural fairness with respect to decisions taken by voluntary associations. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures.

[22] La présente affaire ne soulève aucune question relativement à la primauté du droit. La Congrégation n'est pas constituée par une loi d'intérêt privé et elle n'exerce d'aucune façon des pouvoirs étatiques.

[23] Enfin, bien que M. Wall ait fait valoir à la Cour qu'il ne demandait pas de contrôle judiciaire, c'est néanmoins ce qu'il fait dans sa demande introductive d'instance en contrôle judiciaire. En effet, dans cette demande, il sollicite une ordonnance de *certiorari* qui annulerait la décision d'excommunication dont il fait l'objet. Je reconnais que M. Wall n'était pas représenté lorsqu'il a déposé sa demande. Les commentaires qui précèdent ne doivent pas être considérés comme une indication que je rejette le pourvoi pour une simple question de forme ou pour cause d'erreurs sémantiques dans la demande. Toutefois, il faut néanmoins tenir compte des implications du fait d'accueillir un pourvoi. Le présent appel ne porte que sur la question de la compétence du tribunal concerné; il est difficile de déterminer quelle autre réparation serait demandée si l'affaire était renvoyée à la Cour du Banc de la Reine pour audition sur le fond. Cependant, comme je l'ai indiqué précédemment, le contrôle judiciaire n'est pas un recours ouvert en l'espèce.

B. *La capacité des tribunaux de contrôler les décisions d'associations volontaires pour des motifs fondés sur l'équité procédurale*

[24] Même si M. Wall avait intenté une action ordinaire en déposant une déclaration, la seule question de son appartenance à une organisation religieuse — appartenance qui ne confère ni droit civil ni droit de propriété — ne devrait pas faire l'objet d'intervention de la part des tribunaux. En effet, il n'existe aucun droit autonome à l'équité procédurale relativement aux décisions prises par des associations volontaires. Une simple allégation de violation des principes de justice naturelle ou le seul fait que le plaignant a épuisé les processus internes de l'organisation ne sauraient donner compétence aux tribunaux. Pour qu'ils aient compétence, il doit exister un droit légal qu'une partie cherche à faire valoir. Ce n'est que dans de tels cas que les tribunaux peuvent examiner le respect par une association de ses propres procédures et (dans certaines circonstances) l'équité de ces procédures.

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[25] The majority in the Court of Appeal held that there was such a free-standing right to procedural fairness. However, the cases on which they relied on do not stand for such a proposition. Almost all of them were cases involving an underlying legal right, such as wrongful dismissal (*McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481 (C.A.); *Pederson v. Fulton*, 1994 CanLII 7483 (Ont. S.C. (Gen. Div.)), or a statutory cause of action (*Lutz v. Faith Lutheran Church of Kelowna*, 2009 BCSC 59). Another claim was dismissed on the basis that it was not justiciable as the dispute was ecclesiastical in nature: *Hart v. Roman Catholic Episcopal Corp. of the Diocese of Kingston*, 2011 ONCA 728, 285 O.A.C. 354.

[26] In addition, it is clear that the English jurisprudence cited by Mr. Wall similarly requires the presence of an underlying legal right. In *Shergill v. Khaira*, [2014] UKSC 33, [2015] A.C. 359, at paras. 46-48, and *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.), the English courts found that the voluntary associations at issue were governed by contract. I do not view *Shergill* as standing for the proposition that there is a free-standing right to procedural fairness as regards the decisions of religious or other voluntary organizations in the absence of an underlying legal right. Rather, in *Shergill*, requiring procedural fairness is simply a way of enforcing a contract (para. 48). Similarly, in *Lee*, Lord Denning held that "[t]he jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied" (p. 1180).

[27] Mr. Wall argued before this Court that *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, could be read as permitting courts to review the decisions of voluntary organizations for procedural fairness concerns where the issues raised were "sufficiently important", even where no property or contractual right is in issue. This is a misreading of *Lakeside Colony*. What is required is that a *legal right* of sufficient importance — such as a property or contractual right — be at stake: see

[25] Les juges majoritaires de la Cour d'appel ont conclu à l'existence d'un tel droit autonome à l'équité procédurale. Toutefois, les affaires sur lesquelles ils se sont appuyés n'étayent pas cette proposition. Ces affaires portaient presque toutes sur un droit légal sous-jacent, par exemple un congédiement injustifié (*McCaw c. United Church of Canada* (1991), 4 O.R. (3d) 481 (C.A.); *Pederson c. Fulton*, 1994 CanLII 7483 (C.S. Ont. (Div. gén.)), ou une cause d'action prévue par la loi (*Lutz v. Faith Lutheran Church of Kelowna*, 2009 BCSC 59). Une autre demande avait été rejetée au motif qu'elle n'était pas justiciable en raison de la nature ecclésiastique du différend : *Hart c. Roman Catholic Episcopal Corp. of the Diocese of Kingston*, 2011 ONCA 728, 285 O.A.C. 354.

[26] En outre, il est évident que la jurisprudence anglaise citée par M. Wall requiert elle aussi l'existence d'un droit légal sous-jacent. Dans *Shergill c. Khaira*, [2014] UKSC 33, [2015] A.C. 359, par. 46-48, et *Lee c. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.), les tribunaux anglais ont jugé que les associations volontaires en cause étaient régies par des contrats. Je ne considère pas que l'arrêt *Shergill* appuie la proposition voulant qu'il existe un droit autonome à l'équité procédurale en ce qui concerne les décisions d'associations volontaires —religieuses ou autres — en l'absence d'un droit légal sous-jacent. Dans cet arrêt, l'exigence relative au respect de l'équité procédurale se voulait plutôt un moyen d'assurer l'exécution du contrat (par. 48). De même, dans l'arrêt *Lee*, lord Denning a conclu que [TRADUCTION] « [l]a compétence d'un tribunal interne, tel le comité de la Showmen's Guild, doit reposer sur un contrat, exprès ou implicite » (p. 1180).

[27] Devant la Cour, M. Wall a plaidé qu'il est possible d'interpréter l'arrêt *Lakeside Colony of Hutterian Bretheren c. Hofer*, [1992] 3 R.C.S. 165, d'une manière qui a pour effet de permettre aux tribunaux de contrôler, pour des motifs fondés sur l'équité procédurale, les décisions d'organisations volontaires lorsque les questions qu'elles soulèvent sont « suffisamment important[es] », et ce, même si aucun droit de propriété ni droit contractuel n'est en cause. Il s'agit là d'une interprétation erronée de

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also *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586. It is not enough that a matter be of "sufficient importance" in some abstract sense. As Gonthier J. pointed out in *Lakeside Colony*, the legal right at issue was of a different nature depending on the perspective from which it was examined: from the colony's standpoint the dispute involved a property right, while from the members' standpoint the dispute was contractual in nature. Either way, the criterion of "sufficient importance" was never contemplated as a basis to give jurisdiction to courts absent the determination of legal rights.

[28] Mr. Wall argues that a contractual right (or something resembling a contractual right) exists between himself and the Congregation. There was no such finding by the chambers judge. No basis has been shown that Mr. Wall and the Congregation intended to create legal relations. Unlike many other organizations, such as professional associations, the Congregation does not have a written constitution, by-laws or rules that would entitle members to have those agreements enforced in accordance with their terms. In *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229, at paras. 22-25, the Court of Appeal of Alberta ruled that membership in a similarly constituted congregation did not grant any contractual right in and of itself. The appeal can therefore be distinguished from *Hofer v. Hofer*, [1970] S.C.R. 958, at pp. 961 and 963, *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555, at pp. 566 and 568, and *Lakeside Colony*, at p. 174. In all of these cases, the Court concluded that the terms of these voluntary associations were contractually binding.

[29] Moreover, *mere* membership in a religious organization, where no civil or property right is formally granted by virtue of membership, should remain outside the scope of the *Lakeside Colony*

l'arrêt *Lakeside Colony*. Ce qui est requis, c'est qu'un *droit légal* revêtant une importance suffisante — tel un droit de propriété ou un droit contractuel — soit en jeu : voir également *Ukrainian Greek Orthodox Church of Canada c. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] R.C.S. 586. Il ne suffit pas qu'une question revête une « importance suffisante » dans quelque sens abstrait. Comme le soulignait le juge Gonthier dans *Lakeside Colony*, la nature du droit légal en jeu différait selon le point de vue à partir duquel il était considéré : pour la colonie, le différend portait sur un droit de propriété; pour les membres, il était de nature contractuelle. Dans un cas comme dans l'autre, le critère de l'« importance suffisante » n'a jamais été envisagé comme fondement justifiant de reconnaître compétence aux tribunaux en l'absence de décisions sur l'existence de droits légaux.

[28] M. Wall prétend que la Congrégation et lui sont liés par un droit contractuel (ou quelque chose qui s'en rapproche). Le juge en cabinet n'a pas tiré de conclusion en ce sens. Il n'a été présenté aucun élément indiquant que M. Wall et la Congrégation entendaient établir des rapports juridiques. Contrairement à bon nombre d'autres organismes, telles les associations professionnelles, la Congrégation n'a ni constitution écrite, ni règlement administratif, ni règles qui autoriseraient ses membres à demander et obtenir l'exécution de tels accords conformément à leurs modalités. Dans l'arrêt *Zebroski c. Jehovah's Witnesses* (1988), 87 A.R. 229, par. 22-25, la Cour d'appel de l'Alberta a jugé que l'appartenance à une congrégation de constitution similaire ne conférait pas en soi de droit contractuel. Par conséquent, le pourvoi peut être distingué des affaires *Hofer c. Hofer*, [1970] R.C.S. 958, p. 961 et 963, *Senez c. Chambre d'Immeuble de Montréal*, [1980] 2 R.C.S. 555, p. 566 et 568, et *Lakeside Colony*, p. 174. Dans toutes ces affaires, notre Cour a conclu que les modalités régissant les associations volontaires concernées constituaient des obligations contractuelles liant les parties.

[29] Qui plus est, la *simple* appartenance à une organisation religieuse, lorsque cette appartenance n'a pas pour effet de conférer formellement de droit civil ou de droit de propriété, devrait demeurer en

criteria. Otherwise, it would be devoid of its meaning and purpose. In fact, members of a congregation may not think of themselves as entering into a legally enforceable contract by merely adhering to a religious organization, since "[a] religious contract is based on norms that are often faith-based and deeply held": R. Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion" (2008), 42 *S.C.L.R.* (2d) 37, at p. 45. Where one party alleges that a contract exists, they would have to show that there was an intention to form contractual relations. While this may be more difficult to show in the religious context, the general principles of contract law would apply.

dehors du champ d'application du critère de l'arrêt *Lakeside Colony*. Autrement, ce critère serait dénué de tout sens et objet. En réalité, il est possible que les membres d'une congrégation ne considèrent pas que, par le simple fait d'adhérer à une organisation religieuse, ils se trouvent à conclure un contrat susceptible d'exécution devant les tribunaux, étant donné qu'[TRADUCTION] « un contrat religieux repose sur des normes souvent ancrées dans la foi et profondément respectées » : R. Moon, « *Bruker v. Marcovitz* : Divorce and the Marriage of Law and Religion » (2008), 42 *S.C.L.R.* (2d) 37, p. 45. La partie qui allègue l'existence d'un contrat doit démontrer que les parties avaient l'intention d'établir des rapports contractuels. Bien que cela puisse se révéler plus difficile à démontrer dans un contexte religieux, les principes généraux du droit des contrats s'appliqueront dans un tel cas.

[30] Before the chambers judge, Mr. Wall also argued his rights are at stake because the Judicial Committee's decision damaged his economic interests in interfering with his client base. On this point, I would again part ways with the courts below. Mr. Wall had no property right in maintaining his client base. As Justice Wakeling held in dissent in the court below, Mr. Wall does not have a right to the business of the members of the Congregation: Court of Appeal reasons, at para. 139. For an illustration of this, see *Mott-Trille v. Steed*, [1998] O.J. No. 3583 (C.J. (Gen. Div.)), at paras. 14 and 45, rev'd on other grounds, 1999 CanLII 2618 (Ont. C.A.).

[30] Devant le juge en cabinet, M. Wall a également plaidé que ses droits sont en jeu, car la décision du Comité de discipline religieuse a porté atteinte à ses intérêts financiers en réduisant sa clientèle. Sur ce point, je me dissocie une fois de plus des juridictions inférieures. Le maintien par M. Wall de sa clientèle ne constituait pas pour lui un droit de propriété. Comme l'a indiqué le juge Wakeling dans ses motifs de dissidence en Cour d'appel, M. Wall ne dispose pas du droit de faire affaire avec les membres de la Congrégation : motifs de la Cour d'appel, par. 139. À titre d'exemple, voir *Mott-Trille c. Steed*, [1998] O.J. No. 3583 (C.J. (Div. gén.)), par. 14 et 45, inf. pour d'autres motifs, 1999 CanLII 2618 (C.A. Ont.).

[31] Had Mr. Wall been able to show that he suffered some detriment or prejudice to his legal rights arising from the Congregation's membership decision, he could have sought redress under appropriate private law remedies. This is not to say that the Congregation's actions had no impact on Mr. Wall; I accept his testimony that it did. Rather, the point is that in the circumstances of this case, the negative impact does not give rise to an actionable claim. As such there is no basis for the courts to intervene in the Congregation's decision-making process; in other words, the matters in issue fall outside the courts' jurisdiction.

[31] Si M. Wall avait été en mesure de démontrer que ses droits légaux avaient subi un quelconque préjudice découlant de la décision concernant son appartenance à la Congrégation, il aurait pu demander réparation en se prévalant des recours de droit privé appropriés. Cela ne veut pas dire que les mesures prises par la Congrégation n'ont pas eu de répercussions sur M. Wall. J'accepte son témoignage qu'elles en ont eues. Toutefois, eu égard aux circonstances de l'espèce, ces répercussions négatives n'ont pas fait naître de droit d'action. En conséquence, rien ne justifie l'intervention des tribunaux dans le processus décisionnel de la Congrégation. Autrement dit, les questions en litige ne relèvent pas de la compétence des tribunaux.

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C. *Justiciability*

[32] This appeal may be allowed for the reasons given above. However, I also offer some supplementary comments on justiciability, given that it was an issue raised by the parties and dealt with at the Court of Appeal. In addition to questions of jurisdiction, justiciability limits the extent to which courts may engage with decisions by voluntary associations even when the intervention is sought only on the basis of procedural fairness. Justiciability relates to the subject matter of a dispute. The general question is this: Is the issue one that is appropriate for a court to decide?

[33] Lorne M. Sossin defines justiciability as

> a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.

(*Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7)

Put more simply, "[j]usticiability is about deciding whether to decide a matter in the courts": *ibid.*, at p. 1.

[34] There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would

C. *Justiciabilité*

[32] Il est possible de faire droit au présent pourvoi pour les motifs énoncés précédemment. Toutefois, je tiens à ajouter quelques observations sur la question de la justiciabilité, puisque celle-ci a été soulevée par les parties et examinée par la Cour d'appel. En plus d'être limitée par des questions de compétence, et ce, même lorsque leur intervention est demandée uniquement pour des raisons fondées sur l'équité procédurale, la capacité des tribunaux d'intervenir à l'égard des décisions d'associations volontaires est également limitée par la notion de justiciabilité. La justiciabilité est une notion qui s'attache à l'objet du différend et se traduit par la question générale suivante : Est-on en présence d'une question qu'il convient de faire trancher par un tribunal?

[33] Lorne M. Sossin définit ainsi la justiciabilité :

> [TRADUCTION] . . . un ensemble de règles, de normes et de principes jurisprudentiels qui délimitent le champ d'application de l'intervention judiciaire dans la vie sociale, politique et économique. Bref, si une question est considérée comme se prêtant à une décision judiciaire, on dit qu'elle est justiciable; si une question n'est pas considérée comme se prêtant à une décision judiciaire, on dit qu'elle n'est pas justiciable.

(*Boundaries of Judicial Review : The Law of Justiciability in Canada* (2e éd. 2012), p. 7)

En termes plus simples, [TRADUCTION] « [l]a justiciabilité ou non-justiciabilité d'une question consiste à décider si celle-ci doit être tranchée par les tribunaux » : *ibid.*, p. 1.

[34] Il n'existe pas un ensemble précis de règles délimitant le champ d'application de la notion de justiciabilité. En effet, la justiciabilité est dans une certaine mesure tributaire du contexte, et l'approche appropriée pour statuer sur la justiciabilité d'une question doit être empreinte de souplesse. Le tribunal qui est appelé à le faire doit se demander s'il dispose des attributions institutionnelles et de la légitimité requises pour trancher la question : voir Sossin, p. 294. Pour conclure au caractère justiciable d'une question, le tribunal doit être d'avis [TRADUCTION]

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be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid.*).

« que le fait pour lui de résoudre la question constituerait une utilisation économique et efficace de ses ressources, qu'il existe suffisamment de faits et d'éléments de preuve au soutien de la demande, qu'un exposé adéquat des positions contradictoires des parties sera présenté et qu'aucun organisme administratif ou corps politique ne s'est pas déjà vu conférer par voie législative compétence à l'égard de la question » (*ibid.*).

[35] By way of example, the courts may not have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding: Court of Appeal reasons, at paras. 82-84, per Wakeling J.A.

[35] À titre d'exemple, les tribunaux pourraient, faute de légitimité, n'être d'aucun secours pour régler un différend portant sur l'identité du meilleur joueur de hockey de tous les temps, sur un joueur de bridge que l'on écarte de son habituelle soirée de jeu hebdomadaire ou sur une cousine convaincue qu'elle aurait dû être invitée à un mariage : motifs de la Cour d'appel, par. 82-84, le juge d'appel Wakeling.

[36] This Court has considered the relevance of religion to the question of justiciability. In *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 41, Justice Abella stated: "The fact that a dispute has a religious aspect does not by itself make it non-justiciable." That being said, courts should not decide matters of religious dogma. As this Court noted in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 50: "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion." The courts have neither legitimacy nor institutional capacity to deal with such issues, and have repeatedly declined to consider them: see *Demiris v. Hellenic Community of Vancouver*, 2000 BCSC 733, at para. 33 (CanLII); *Amselem*, at paras. 49-51.

[36] La Cour s'est penchée sur l'interaction de la religion et de la justiciabilité. Dans *Bruker c. Marcovitz*, 2007 CSC 54, [2007] 3 R.C.S. 607, par. 41, la juge Abella a déclaré ce qui suit : « Le fait qu'un litige comporte un aspect religieux ne le rend pas nécessairement non justiciable. » Cela dit, les tribunaux ne devraient pas trancher les questions de dogmes religieux. Comme l'a indiqué notre Cour, dans l'arrêt *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551, par. 50 : « Statuer sur des différends théologiques ou religieux ou sur des questions litigieuses touchant la doctrine religieuse amènerait les tribunaux à s'empêtrer sans justification dans le domaine de la religion. » Les tribunaux n'ont ni la légitimité ni les attributions institutionnelles requises pour se saisir de questions de la sorte, et ils ont maintes fois refusé de le faire : voir *Demiris c. Hellenic Community of Vancouver*, 2000 BCSC 733, par. 33 (CanLII); *Amselem*, par. 49-51.

[37] In *Lakeside Colony*, this Court held (at p. 175 (emphasis added)):

> In deciding the membership or residence status of the defendants, the court must determine whether they have been validly expelled from the colony. It is not incumbent on the court to review the merits of the decision to expel. It is, however, called upon to determine whether the purported expulsion was carried out according to the

[37] La Cour a tiré la conclusion suivante dans *Lakeside Colony* (p. 175 (je souligne)) :

> Afin de trancher la question du statut de membre ou de résidant des défendeurs, la cour doit décider si leur expulsion de la colonie est valide. Il n'appartient pas à la cour d'examiner le bien-fondé de la décision d'expulser. Elle est appelée, toutefois, à décider si l'expulsion présumée a été faite conformément aux règles applicables, dans le

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applicable rules, with regard to the principles of natural justice, and without *mala fides*. This standard goes back at least to this statement by Stirling J. in *Baird v. Wells* (1890), 44 Ch. D. 661, at p. 670:

> The only questions which this Court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide*.

The foregoing passage makes clear that the courts will not consider the merits of a religious tenet; such matters are not justiciable.

[38] In addition, sometimes even the procedural rules of a particular religious group may involve the interpretation of religious doctrine. For instance, the *Organized to Do Jehovah's Will* handbook (2005) outlines the procedure to be followed in cases of serious wrongdoing: "After taking the steps outlined at Matthew 18:15, 16, some individual brothers or sisters may report to the elders cases of unresolved serious wrongdoing" (p. 151). The courts lack the legitimacy and institutional capacity to determine whether the steps outlined in Matthew have been followed. These types of procedural issues are also not justiciable. That being said, courts may still review procedural rules where they are based on a contract between two parties, even where the contract is meant to give effect to doctrinal religious principles: *Marcovitz*, at para. 47. But here, Mr. Wall has not shown that his legal rights were at stake.

[39] Justiciability was raised in another way. Both the Congregation and Mr. Wall argued that their freedom of religion and freedom of association should inform this Court's decision. The dissenting justice in the Court of Appeal made comments on this basis and suggested that religious matters were not justiciable due in part to the protection of freedom of religion in s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. As this Court held in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at

respect des principes de justice naturelle et sans mauvaise foi. Cette norme remonte au moins aussi loin que l'énoncé du juge Stirling dans l'arrêt *Baird c. Wells* (1890), 44 Ch. D. 661, p. 670 :

> [TRADUCTION] Les seules questions dont notre cour peut connaître sont les suivantes : Premièrement, les règles du club ont-elles été observées? Deuxièmement, a-t-on fait quelque chose de contraire à la justice naturelle? Et, troisièmement, la décision attaquée a-t-elle été prise de bonne foi?

Il ressort clairement de ce passage que les tribunaux n'examineront pas le bien-fondé d'un principe religieux; les questions de cette nature ne sont pas justiciables.

[38] En outre, il arrive parfois que même les règles de procédure d'un groupe religieux impliquent l'interprétation d'une doctrine religieuse. Par exemple, le manuel *Organisés pour faire la volonté de Jéhovah* (2005) expose la marche à suivre en cas de transgression grave : « Après avoir suivi la démarche définie en Matthieu 18:15, 16, un frère ou une sœur portera peut-être à l'attention des anciens un cas de faute grave qui n'a pu être réglé » (p. 151). Les tribunaux n'ont ni la légitimité ni les attributions institutionnelles pour évaluer si les étapes que prévoit l'Évangile selon Matthieu ont bel et bien été suivies. De telles questions d'ordre procédural sont, elles aussi, non justiciables. Cela étant posé, les tribunaux peuvent néanmoins contrôler les règles de procédure basées sur un contrat intervenu entre deux parties, même si ce contrat vise à mettre en œuvre des principes de doctrine religieuse : *Marcovitz*, par. 47. En l'espèce, toutefois, M. Wall n'a pas su démontrer que ses droits légaux étaient en jeu.

[39] La question de la justiciabilité s'est soulevée d'une autre façon. La Congrégation et M. Wall ont tous deux prétendu que leurs droits à la liberté de religion et à la liberté d'association devaient être pris en compte dans la décision de la Cour. Le juge d'appel dissident a formulé des commentaires à cet égard, affirmant que les questions religieuses n'étaient pas justiciables, en partie en raison de la protection dont jouit la liberté de religion garantie par l'al. 2*a*) de la *Charte canadienne des droits et libertés*. Comme a

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p. 603, the *Charter* does not apply to private litigation. Section 32 specifies that the *Charter* applies to the legislative, executive and administrative branches of government: *ibid.*, at pp. 603-4. The *Charter* does not directly apply to this dispute as no state action is being challenged, although the *Charter* may inform the development of the common law: *ibid.*, at p. 603. In the end, religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.

V. Disposition

[40] I would allow the appeal and quash the originating application for judicial review filed by Mr. Wall. As the appellants requested that no costs be awarded, I award none.

Appeal allowed.

Solicitors for the appellants: W. Glen How & Associates, Georgetown, Ontario.

Solicitors for the respondent: McCarthy Tétrault, Vancouver.

Solicitor for the intervener the Canadian Council of Christian Charities: Canadian Council of Christian Charities, Elmira, Ontario.

Solicitor for the intervener the Association for Reformed Political Action Canada: Association for Reformed Political Action Canada, Ottawa.

Solicitors for the intervener the Canadian Constitution Foundation: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the interveners the Evangelical Fellowship of Canada and the Catholic Civil Rights League: Vincent Dagenais Gibson, Ottawa.

conclu notre Cour dans *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, p. 603, la *Charte* ne s'applique pas aux litiges privés. L'article 32 de la *Charte* précise que celle-ci s'applique aux pouvoirs législatif, exécutif et administratif du gouvernement : *ibid.*, p. 603-604. La *Charte* ne s'applique pas directement en l'espèce, puisqu'aucune mesure étatique n'est contestée, mais elle peut néanmoins guider l'évolution de la common law : *ibid.*, p. 603. En définitive, les groupes religieux sont libres de décider qui peut être membre de leur organisation, et d'établir leurs propres règles de fonctionnement; les tribunaux n'interviendront pas à l'égard de telles questions, à moins qu'il ne soit nécessaire de le faire pour trancher un différend de nature juridique sous-jacent.

V. Dispositif

[40] Je suis d'avis d'accueillir l'appel et d'annuler la demande introductive d'instance en contrôle judiciaire déposée par M. Wall. Comme les appelants ont demandé qu'aucuns dépens ne soient adjugés, je n'en accorde pas.

Pourvoi accueilli.

Procureurs des appelants : W. Glen How & Associates, Georgetown, Ontario.

Procureurs de l'intimé : McCarthy Tétrault, Vancouver.

Procureur de l'intervenant Canadian Council of Christian Charities : Canadian Council of Christian Charities, Elmira, Ontario.

Procureur de l'intervenante Association for Reformed Political Action Canada : Association for Reformed Political Action Canada, Ottawa.

Procureurs de l'intervenante Canadian Constitution Foundation : Osler, Hoskin & Harcourt, Toronto.

Procureurs des intervenantes l'Alliance évangélique du Canada et Catholic Civil Rights League : Vincent Dagenais Gibson, Ottawa.

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Solicitor for the intervener the Christian Legal Fellowship: Christian Legal Fellowship, London, Ontario.

Solicitor for the intervener the World Sikh Organization of Canada: World Sikh Organization of Canada, Newmarket, Ontario.

Solicitors for the interveners the Seventh-day Adventist Church in Canada and the Church of Jesus Christ of Latter-day Saints in Canada: Miller Thomson, Calgary.

Solicitor for the intervener the Justice Centre for Constitutional Freedoms: Justice Centre for Constitutional Freedoms, Calgary.

Solicitors for the intervener the British Columbia Civil Liberties Association: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Canadian Muslim Lawyers Association: Abrahams, Toronto.

Procureur de l'intervenante l'Alliance des chrétiens en droit : Alliance des chrétiens en droit, London, Ontario.

Procureur de l'intervenante World Sikh Organization of Canada : World Sikh Organization of Canada, Newmarket, Ontario.

Procureurs des intervenantes l'Église adventiste du septième jour au Canada et l'Église de Jésus-Christ des saints des derniers jours au Canada : Miller Thomson, Calgary.

Procureur de l'intervenant Justice Centre for Constitutional Freedoms : Justice Centre for Constitutional Freedoms, Calgary.

Procureurs de l'intervenante British Columbia Civil Liberties Association : Blake, Cassels & Graydon, Vancouver.

Procureurs de l'intervenante l'Association canadienne des avocats musulmans : Abrahams, Toronto.

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TAB 21

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150109

Docket: A-324-13

Citation: 2015 FCA 4

2015 FCA 4 (CanLII)

CORAM: **NADON J.A.**
STRATAS J.A.
SCOTT J.A.

BETWEEN:

HUPACASATH FIRST NATION

Appellant

and

THE MINISTER OF FOREIGN AFFAIRS CANADA and THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Vancouver, British Columbia, on June 10, 2014.

Judgment delivered at Ottawa, Ontario, on January 9, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
SCOTT J.A.

Date: 20150109

Docket: A-324-13

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2015 FCA 4 (CanLII)

CORAM: **NADON J.A.**
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BETWEEN:

HUPACASATH FIRST NATION

Appellant

And

THE MINISTER OF FOREIGN AFFAIRS CANADA and THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] In the Federal Court, the appellant, Hupacasath First Nation, alleged that a foreign investment promotion and protection agreement between Canada and the People's Republic of China might affect Aboriginal rights and interests it has asserted over certain lands in British

Columbia. Due to that potential effect, the appellant submitted that, as a matter of law, the Minister of Foreign Affairs Canada and the Attorney General of Canada ("Canada") had to consult with it and, if necessary, accommodate its concerns before causing the agreement to come into force. Canada did not do this and so, the appellants said, Canada failed to fulfil its duty.

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[2] By judgment dated August 26, 2013, the Federal Court (*per* Crampton C.J.) ruled against the appellant: 2013 FC 900. It found that the agreement could not potentially cause harm to the appellant's asserted rights and interests. The Federal Court added that any effect on the appellant's asserted rights and interests was "non-appreciable" and "speculative."

[3] The appellant appeals to this Court.

[4] During oral argument in this Court, an issue arose concerning the jurisdiction of the Federal Courts to entertain this matter. Decisions by Canada to enter into international agreements and treaties are exercises of federal Crown prerogative power. A decision of the Court of Appeal for Ontario suggests that the Federal Courts do not have jurisdiction to review exercises of prerogative power. We invited the parties to provide written submissions on this after the hearing. We have now reviewed and considered those submissions.

[5] In those submissions, Canada also raises a new objection. It says that the appellant's case, directed at an exercise of Crown prerogative power, is not justiciable and should not be heard.

[6] Following oral argument, while this matter was under reserve, the Supreme Court of Canada released its decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. On some Aboriginal law issues, the decision is rather sweeping. So we invited the parties to provide supplementary written submissions on its effect on this appeal. We have now reviewed and considered those submissions too.

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[7] In my view, the Federal Courts system has the jurisdiction to review exercises of federal Crown prerogative power. Accordingly, the Federal Court and this Court have jurisdiction over this matter. I would also reject Canada's submission that the appellant's case is not justiciable.

[8] On the merits of the appeal, I agree with the result and much of the reasoning of the Federal Court. It applied proper legal principles to the evidence before it. The recent case of *Tsilhqot'in Nation* does not alter those legal principles. The Federal Court's overall conclusions – that the appellant had not established a causal relationship between the effects of the foreign investment promotion and protection agreement upon the appellant and its asserted rights and interests and that any effects upon the appellant were "non-appreciable" and "speculative" – were predominantly factual in nature and deserve deference. These conclusions were amply supported by the evidentiary record.

[9] Accordingly, Canada did not have to consult with the appellant before entering into the foreign investment promotion and protection agreement.

[10] Therefore, I would dismiss the appeal with costs.

B. Basic facts

[11] The appellant is a band under the *Indian Act*, R.S.C. 1985, c. I-5. Its 285 members live on two reserves covering roughly 56 acres of land on Vancouver Island. However, it asserts Aboriginal rights, including self-government rights, and title over roughly 573,000 acres of land on Vancouver Island, an area that overlaps with the territory claimed by nine other First Nations.

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[12] On September 9, 2012, Canada announced that it had signed a foreign investment promotion and protection agreement with the People's Republic of China. This agreement is known as the *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* (hereafter "Agreement"). The Agreement is similar to twenty-four other foreign investment promotion and protection agreements Canada has signed with other nations.

[13] Under the Agreement, Canada and the People's Republic of China must, among other things, treat investors from the other country and their investments in accordance with principles of non-discriminatory treatment and protection from expropriation without compensation. The Agreement implements these principles in the following provisions:

- *Article 4 (Minimum Standard of Treatment).* The host country must treat investments made by the investors of the other country in accordance with the customary international law minimum treatment of aliens.

- Article 5 (Most-Favoured Nation Treatment). The host country must accord investors of the other country, and their investments, treatment that is no less favourable than the treatment the host country accords, in like circumstances, to investors or investments of other countries.

- *Article 8 (Aboriginal Reservation).* Under Article 8(3) and Annex B.8, Canada has the right to provide rights and preferences to Aboriginal peoples that may be inconsistent with certain obligations under the Agreement; the appellant says this narrow exception, applicable only to articles 5-7, does nothing to prevent harm to the rights and interests of Aboriginal peoples.

- *Article 10 (Expropriation).* The host country may only directly or indirectly expropriate an investment of an investor of the other country for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and upon payment of compensation. Annex B.10 clarifies that good faith and non-discriminatory measures designed and applied to protect legitimate public policy objectives, such as health, safety and the environment, do not constitute indirect expropriation.

- *Article 33 (General Exceptions).* The host country may take measures, including environmental measures, necessary to protect human, animal or plant life or health, provided that the measures are not applied in an arbitrary or unjustifiable manner and are not a disguised restriction on trade or investment.

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[14] In certain circumstances, violations of the Agreement can result in proceedings before an arbitral tribunal: see Part C, articles 19-32. Violations of certain provisions can result in monetary awards against the host country: article 31(2) and see the Federal Court's reasons at paragraphs 87 and 133(h).

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[15] The Agreement does not empower any awards against a sub-national government, such as a First Nations government. Nor does it require a government to change or discontinue a measure that breaches the Agreement. In particular, an arbitral tribunal established under the Agreement cannot stop Canada from fully complying with its obligations to Aboriginal peoples.

[16] Broadly speaking, the appellant says that the Agreement changes the landscape in the sense that it creates incentives for Canada to act in a manner that avoids breaches of the Agreement and resulting monetary awards. This, it says, may cause Canada to act in a manner that injures the appellant and its interests.

[17] On the law set out in cases such as *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, and *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the appellant says that Canada became obligated in these circumstances to consult with it and accommodate its rights and interests. Before signing the Agreement and, indeed, before the matter was heard in the Federal Court, Canada did not consult with the appellant. The appellant maintains that had Canada consulted with it, Canada would have had to protect the appellant's rights in the Agreement. But Canada did not.

[18] Before the Federal Court, the parties adduced expert evidence concerning the interpretation and effects of the Agreement. The Federal Court assigned less weight to the expert evidence tendered by the appellant because of impartiality concerns (at paragraphs 37-38) and the presence of "assertions on key issues" that "were baldly stated and unsubstantiated" (at paragraph 42).

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[19] The Federal Court found uncertainty on how arbitral tribunals might interpret the Agreement. But overall, largely based on the expert evidence it preferred – that tendered by Canada – the Federal Court found no conflict, actual or potential, between the provisions of the Agreement on the one hand and the appellant's asserted rights, interests and title on the other (at paragraphs 133, 147-148).

[20] Among other things, it found that the Appellant had not offered sufficient evidence, beyond the speculative, that:

- the appellant would face potential adverse impacts arising from arbitral decisions (at paragraphs 100-105);

- absent article 10, Canada would have been prepared to expropriate land, and particularly land owned by Chinese investors, without compensation in order to settle the appellant's Aboriginal claims (at paragraphs 108-110);

- arbitral tribunals would rule that measures designed to protect or accommodate the appellant's asserted Aboriginal rights contravene article 10 (at paragraphs 106-120);

- Canada would refrain from taking measures to protect the appellant's asserted Aboriginal rights due to a fear of monetary awards made by arbitral tribunals under the Agreement (at paragraph 133(d));

- Canada has not retained sufficient policy flexibility through the exemptions under the Agreement to prevent or avoid potential adverse impacts upon the appellant's asserted Aboriginal rights (at paragraphs 121-131);

- any existing measures, including any enacted by the appellant, might contravene or conflict with any of the obligations under the Agreement (at paragraph 133(f)).

[21] In reaching these conclusions, the Federal Court drew in part upon Canada's experience under the twenty-four other similar foreign investment promotion and protection agreements it has entered into, particularly the *North American Free Trade Agreement*: at paragraph 133(a). The Federal Court concluded that the appellant had not shown that Canada's experience under the Agreement would be different: at paragraph 133(c).

[22] Overall, the Federal Court concluded that Canada did not fall under a duty to consult the appellant because the alleged potential adverse impacts on its asserted interests were "non-

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appreciable" and "speculative" and the appellant had not established the required causal link between the Agreement and those alleged impacts: at paragraphs 3, 147 and 148.

C. Analysis

(1) The matter under review and the nature of the jurisdictional issue

[23] The matter under review is the coming into effect of the Agreement. This, the appellant says, will happen without consultation with it, thereby violating its rights.

[24] How does this Agreement come into effect? The parties agree that this happens in two steps.

[25] First, the Governor in Council passes an order in council authorizing the Minister of Foreign Affairs to take the actions necessary to have the Agreement come into effect. At the time of the appellant's judicial review, this had not been done.

[26] Second, the Agreement comes into effect when the Minister signs an instrument of ratification and Canada delivers it to the People's Republic of China, confirming that all of Canada's internal legal procedures for bringing the Agreement into effect have been met. See Hugh M. Kindred *et al.*, eds., *International Law Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery 2006) at pages 120-121.

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[27] This process is reflected in section 35 of the Agreement. It provides that the parties will notify each other through diplomatic channels that they have completed the internal legal procedures for the entry into force of the Agreement.

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[28] While this matter was under reserve, the parties advised us that Canada has now taken the above steps and the Agreement is now in effect. This development does not affect our analysis of the issues in this appeal.

[29] In the Federal Court, the appellant primarily sought two forms of relief. First, it sought a declaration that "Canada is required to engage in a process of consultation and accommodation with First Nations, including the appellant, prior to taking steps which will bind Canada under the [Agreement]." Second, it sought an order restraining the Minister or any other official from taking steps to bring the Agreement into effect.

[30] Unlike the present case, in cases seeking review of orders or decisions made under legislation, this Court indisputably has jurisdiction. Under section 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, this Court can review the actions of federal boards, commissions or other tribunals. The Governor in Council is a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Courts Act* – it is exercising "jurisdiction or powers conferred by or under an Act of Parliament …".

[31] In this case, however, the Governor in Council's power to make the order is not conferred by or under an Act of Parliament. What is the source of its power?

[32] The Governor in Council's power to make the order comes from the Crown's prerogative powers. These are the Crown's remaining inherent or historical powers as the common law has shaped them: Peter W. Hogg, Q.C., *et al.*, *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011) at pages 19-20. Looking at it another way, prerogative powers are "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": A.V. Dicey, *Law of the Constitution*, 10th ed. (1959) at page 424.

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[33] The conduct of foreign affairs is one area where the Crown holds some prerogative powers. These include the power to enter into treaties and international agreements. Properly understood then, to bring the Agreement into effect, the Crown, acting through the Governor in Council, uses its prerogative power to make an order instructing the Minister of Foreign Affairs to issue an instrument of ratification. In turn, the Minister of Foreign Affairs complies with that order.

[34] In principle, exercises of pure Crown prerogative, such as the Governor in Council's exercise of power in this case, can be judicially reviewed: *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374, [1984] 3 All E.R. 935 (H.L.). However, in Canada, in the case of the federal Crown prerogative, the question is where that review can take place. Do the Federal Courts have the power under the *Federal Courts Act* to review exercises of pure Crown prerogative? If not, provincial superior courts have that power by default because of their inherent jurisdiction.

[35] The only appellate authority in Canada on this question is *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.). And that authority suggests that the Federal Courts do not have the power under the *Federal Courts Act* to review exercises of pure Crown prerogative. If *Black* is still good law, the appellant should not have gone to the Federal Courts to restrain or challenge the Governor in Council's exercise of pure Crown prerogative – here, its power to sign the Agreement and cause it to come into effect.

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(2) Analysis of the jurisdictional issue

[36] In their memoranda of fact and law submitted prior to this appeal, the parties did not address the jurisdiction of the Federal Courts to entertain this matter. Both assumed that the Federal Courts had jurisdiction.

[37] In response to questioning at the hearing of this appeal, both agreed that the Federal Courts had jurisdiction. However, both, understandably, were not fully prepared to address the authority of *Black*, a case neither had cited in its memorandum.

[38] Regardless of the parties' agreement that this Court has jurisdiction, this Court cannot proceed unless it is persuaded that it has jurisdiction. Therefore, at the hearing of this appeal, we heard full argument on the merits of the appeal but we also asked the parties to make further written submissions on the issue of jurisdiction.

[39] The parties have done so, and the Court has received and considered the parties submissions. The Court thanks the parties for their thorough, helpful submissions.

[40] As evident from the preliminary discussion, above, the jurisdiction of this Court turns upon two provisions of the *Federal Courts Act*, subsections 2(1) and 18.1(3). Subsection 18.1(3) provides as follows:

18.1. (3) On an application for judicial review, the Federal Court may	**18.1.** (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut.
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[41] As can be seen, the Federal Courts can only exercise these powers if they are reviewing a "federal board, commission or other tribunal." Subsection 2(1) defines that term:

2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une

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Crown… prérogative royale…

[42] Above, I noted that the making of an order by the Governor in Council authorizing the Minister of Foreign Affairs to issue an instrument of ratification is one founded upon the Crown prerogative and nothing else. When federal officials act purely under the federal Crown prerogative and nothing else, are they exercising a power "conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" within the meaning of subsection 2(1) of the *Federal Courts Act*?

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[43] *Black*, *supra* arose from the British government's nomination of Black, then a Canadian citizen, for a peerage. Acting under the Canadian Crown prerogative relating to the bestowal of honours, the then Prime Minister of Canada advised the Queen to block the peerage, advising that it was against Canadian law. As a result, Black did not become a peer. In the Ontario Superior Court of Justice, Black brought an action for damages against the Prime Minister, alleging that the Prime Minister wrongly interfered with the Queen and blocked his peerage.

[44] In *Black*, all agreed that the Federal Courts and provincial superior courts had concurrent jurisdiction over actions against the federal Crown and its servants: *Federal Courts Act*, *supra*, subsection 17(1). However, Canada, seeking to strike out Black's action, argued that the action was really a review of a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Court Act*. Under subsection 18(1) of the *Federal Court Act*, the Federal Court alone has jurisdiction to conduct such a review. Therefore, said Canada, Black was barred from bringing his proceeding anywhere but the Federal Court.

[45] The Court of Appeal for Ontario disagreed, adopting a purely textual approach to subsection 2(1) of the *Federal Courts Act*. It held (at paragraphs 69-76) that the Prime Minister's actions were an exercise of the pure prerogative power of the Crown relating to honours. In its view, subsection 2(1) does not empower the Federal Courts to review exercises of pure prerogative power. It only authorizes reviews of conduct under an "order made pursuant to a prerogative of the Crown." As there was no order under which the Prime Minister was acting, the Federal Courts could not entertain the matter. Only the Ontario Court system with its inherent jurisdiction could.

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[46] Today, on the facts of *Black*, it might not have been necessary for the Court of Appeal for Ontario to consider the definition of "federal board, commission or other tribunal" and define it as narrowly as it did. We now know that in certain circumstances, an action against the federal Crown may be brought in a provincial superior court even where the conduct of a "federal board, commission or other tribunal" is bound up in it in some way: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585. Through today's lens, the Ontario Courts may well have had jurisdiction over Black's action even though the conduct of the Prime Minister was very much part of it. I would distinguish *Black* on that basis.

[47] However, it is important to clarify matters of jurisdiction where possible and ensure that the law on such a fundamental point is clear: *Steel v. Canada (Attorney General)*, 2011 FCA 153, [2011] 1 F.C. 143 at paragraphs 62-73. In my view, certain jurisprudential developments have overtaken the reasoning of the Court of Appeal in *Black*. Its conclusion that the Federal Courts cannot review exercises of federal Crown prerogative power can stand no longer.

[48] The Supreme Court of Canada has emphasized that in interpreting legislative provisions one must look at the text, context and purpose of the provision: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559. In a case postdating *Black*, the Supreme Court has emphasized that while the text of the provision may predominate in the analysis, the analysis cannot stop with the text as it did in *Black*. Instead, one must go on to examine the context of that text in the wider statute and its purpose: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.

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[49] I begin with the text. I agree that the text of subsection 2(1) of the *Federal Courts Act* can be construed in the manner done by the Court of Appeal in *Black*. However, it can also be construed in a manner that supports the jurisdiction of the Federal Courts to review pure exercises of federal Crown prerogative.

[50] As mentioned above, the issue in this case is whether federal officials exercising a pure prerogative power are exercising a power "conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" within the meaning of subsection 2(1) of the *Federal Courts Act*. The answer is yes if we construe subsection 2(1) as allowing reviews of powers "conferred…by…a prerogative of the Crown." The rival interpretation of subsection 2(1), adopted in *Black*, is that "by or under" modifies "an order" and so unless an official is acting under an order made under the prerogative, this Court does not have jurisdiction.

[51] Either reading of the text of subsection 2(1) is plausible. So to decide the matter, we must consider the context of subsection 2(1) and its purpose.

[52] Parliament intended to grant to the Federal Courts general administrative, supervisory jurisdiction over all federal decision makers: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paragraph 36; *M.N.R. v. Derakhshani*, 2009 FCA 190, 400 N.R. 311 at paragraphs 10-11. Parliament established the Federal Courts under the *Federal Courts Act* to supervise federal administrative decision-makers to ensure consistency across the country: *Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465 at page 481 (C.A.); *Canada v. Tremblay*, 2004 FCA 172, [2004] 4 F.C. 165 at paragraph 10 (C.A.).

[53] It is true that provincial superior courts have inherent jurisdiction. But, as the Supreme Court has held, "[t]he doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court." Nor does it justify reading "statutes which purport to grant jurisdiction to [the Federal Court]…narrowly so as to protect the jurisdiction of the superior court": *Canadian Liberty Net*, *supra* at paragraphs 32 and 34. The Supreme Court has also emphasized that gaps should not be found in the *Federal Courts Act* unless the "words clearly created them": *Canadian Liberty Net*, *supra* at paragraph 34. Given these authoritative statements from the Supreme Court, unless there are clear words to the contrary, the text of the *Federal Courts Act* must be interpreted to achieve its purposes.

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[54] An interpretation that the Federal Court has the power to review federal exercises of pure prerogative power is consistent with the Parliament's aim to have the Federal Courts review all federal administrative decisions. The contrary interpretation would carve out from the Federal Courts a wide swath of administrative decisions that stem from the federal prerogative, some of which can have large national impact: for a list of the federal prerogative powers, see Peter W. Hogg, Q.C., *et al.*, *Liability of the Crown*, *supra* at pages 23-24 and S. Payne, "The Royal Prerogative" in M. Sunkin and S. Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).

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[55] One must also appreciate the wider context surrounding the nature of the federal Crown prerogative. It can be exercised through a variety of instruments and means: A. Berriedale Keith, *The King and the Imperial Crown* (London: Longmans, Green and Co., 1936) at page 68. The particular language used in section 2 of the *Federal Courts Act* to capture the exercise of the prerogative can be explained as merely an attempt to mirror the way that the prerogative is habitually or commonly understood to be exercised, *i.e.*, by officials acting under an order made under the prerogative. Or it can be interpreted in the manner I have done in paragraph 49, above or in the manner done by the Federal Court in *Khadr v. Canada (Attorney General)*, 2006 FC 727, [2007] 2 F.C. 218.

[56] The contrary interpretation – an interpretation that hives off exercises of federal prerogative power from exercises of powers under orders made by or under the prerogative power – is a technical distinction that serves only to trap the unwary and obstruct access to justice. In *TeleZone*, *supra*, a case postdating *Black*, the Supreme Court underscored (at

paragraphs 18-19 and 32) the need to interpret these provisions with a view to avoiding these concerns.

[57] In the case at bar, these concerns are very much in play. If the contrary interpretation is adopted, the Governor in Council's making of the order in this case authorizing the Minister to issue the instrument of ratification – a pure exercise of prerogative power – would have to be reviewed in the provincial superior courts. But the Minister's issuance of the instrument of ratification in this case – an exercise of power "by or under an order made under the prerogative" under subsection 2(1) of the *Federal Courts Act* – would have to be reviewed under this Court's exclusive jurisdiction under subsection 18 (1) of the *Federal Courts Act*. There would have to be two separate proceedings in two separate courts, with every potential for unnecessary expense, delay, confusion and inconsistency.

[58] In light of the foregoing, I conclude that the Federal Courts can review exercises of jurisdiction or power rooted solely in the federal Crown prerogative.

(3) The justiciability issue

[59] In the course of its written submissions on this Court's jurisdiction, Canada says that if exercises of pure federal Crown prerogative are potentially reviewable, then this Court still cannot consider them. The subject-matter, being policy-oriented and concerned with foreign relations, is not justiciable, *i.e.*, it is not appropriately reviewable in a court of law.

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[60] In support of this, Canada submits that exercises of pure federal Crown prerogative are reviewable only where Charter rights are in issue. They cite *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraphs 36-37 and *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.

[61] It is true that these cases do stand for the narrow proposition that Charter cases are justiciable regardless of the nature of the government action, be it an exercise of the Crown prerogative or otherwise. But these cases do not stand for the broad proposition that all other exercises of the Crown prerogative are not justiciable. In fact, as I shall demonstrate, some are.

[62] Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.

[63] Whether the question before the Court is justiciable bears no relation to the source of the government power: *R. v. Ministry of Defence, ex parte Smith*, [1995] 4 All E.R. 427, aff'd [1996] Q.B. 517, [1996] 1 All E.R. 257 (C.A.). For some time now, it has been accepted that for the purposes of judicial review there is no principled distinction between legislative sources of power and prerogative sources of power: *Council of Civil Service Unions*, *supra*. I agree with the following passage from Lord Roskill's speech in that case (at page 417 A.C.):

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the

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> exercise of that power may be challenged on one or more…grounds…. If the executive instead of acting under a statutory power acts under a prerogative power…I am unable to see…that there is any logical reason why the fact that the source of the power is the prerogative and not statute should deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

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[64] I also agree with the Court of Appeal for Ontario in *Black*, *supra* at paragraph 44 that "the source of the power – statute or prerogative – should not determine whether the action complained of is reviewable."

[65] So what is or is not justiciable?

[66] In judicial review, courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility, and that assessment is the proper role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to

conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way. See generally *Operation Dismantle*, *supra* at pages 459-460 and 465; *Canada (Auditor General)*, [1989] 2 S.C.R. 49 at pages 90-91; *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at page 545; *Black*, *supra* at paragraphs 50-51.

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[67] These cases show that the category of non-justiciable cases is very small. Even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a very large margin of appreciation. For that reason, it is often said that in such cases an applicant must establish an "egregious" case: see, *e.g.*, *Thorne's Hardware v. Canada*, [1983] 1 S.C.R. 106 at page 111, 143 D.L.R. (3d) 577; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 at paragraph 28. But the matter is still justiciable.

[68] There are authorities suggesting that executive decisions to sign a treaty, without more, are not justiciable: see, e.g., *R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex. P. Everett*, [1989] 1 All E.R. 655 at page 690, [1989] Q.B. 811, cited in *Black*, *supra* at paragraph 52. This makes sense, as the factors underlying a decision to sign a treaty are beyond the courts' ken or capability to assess, and any assessment of them would take courts beyond their proper role within the separation of powers.

[69] But here the gist of the appellant's challenge is different. It alleges that, regardless of the factors prompting the Agreement, the decision of the executive to bring the Agreement into

effect would be unacceptable and indefensible because the appellant has enforceable legal rights to be consulted before that happens. In this case, acceptability and defensibility turns on whether or not the appellant has those legal rights.

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[70] Assessing whether or not legal rights exist on the facts of a case lies at the core of what courts do. Under the constitutional separation of powers, determining this is squarely within our province. Canada's justiciability objection has no merit.

(4) The standard of review in this Court

[71] At the outset, we must assess the true or real nature of the appellant's application: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] DTC 5001 at paragraph 50.

[72] In reality, the appellant's request for a declaration arises in the context of a decision made by the Government of Canada. The Government of Canada decided, implicitly or explicitly in the face of the appellant's stated position, that it could bring the Agreement into effect without consulting with the appellant or other Aboriginal peoples. Through the use of a declaration, the appellant seeks to invalidate that decision. The appellant also seeks an order restraining Canada from taking steps that would bring the Agreement into effect.

[73] I need not consider whether the standard of review of the decision is correctness or reasonableness. If the standard of review is reasonableness, the only acceptable and defensible

outcome available to the Government of Canada in this case is compliance with the law concerning the duty of consultation. The question before us is a binary one. Either there is a duty or there is not, and since Canada did not consult, Canada's decision either stands or falls on that question alone.

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[74] As will be evident from the discussion below, in the course of its reasons, the Federal Court made certain findings heavily suffused by its appreciation of the evidence. In this Court, what standard of review applies to those sorts of findings?

[75] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, 2013 SCC 36 at paragraph 46 stands for the proposition that we are to stand in the shoes and consider whether the Federal Court properly applied the standard of review. I do not believe that this allows us to substitute our factual findings for those made by the Federal Court.

[76] In my view, as is the case in all areas of appellate review, absent some extricable legal principle, we are to defer to findings that are heavily suffused by the first instance court's appreciation of the evidence, not second-guess them. Only palpable and overriding error can vitiate such findings. In the context of the existence of Aboriginal title, the Supreme Court held to similar effect in *Tsilhqot'in Nation*, *supra* at paragraph 52.

[77] In other words, in this case, absent legal error, deference is owed to the Federal Court's largely factual findings described above in paragraphs 13-15 and 18-22.

[78] However, in this case, nothing turns on this. As is evident from some of the discussion below, had I been in the Federal Court's position I would have made the same factual findings.

(5) Was a duty to consult triggered?

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[79] The parties agree that the Federal Court identified the correct law concerning what triggers the duty to consult and, if necessary, accommodate Aboriginal rights and title which have been asserted but not yet proven. That law is found in *Rio Tinto, Mikisew,* and *Haida Nation*, all *supra*.

[80] As mentioned above, while this matter was under reserve the Supreme Court of Canada released *Tsilhqot'in Nation*, *supra*. We asked for further submissions. Having considered those submissions, I conclude that *Tsilhqot'in Nation* has not changed the law concerning when Canada's duty to consult is triggered. Indeed, it confirms that *Rio Tinto, Mikisew,* and *Haida*, all *supra*, still set out the correct law on this point: see *Tsilhqot'in Nation* at paragraphs 78, 80 and 89.

[81] Of the three cases, *Rio Tinto* comes later and incorporates the earlier holdings in *Mikisew* and *Haida* concerning the duty to consult. In *Rio Tinto*, the Supreme Court set out specific elements that must be present to trigger the duty to consult. However, it also set out certain aims the duty is meant to fulfil. These aims are best kept front of mind when assessing whether the specific elements are present.

[82] The Supreme Court identified two aims the duty to consult is meant to further. First is "the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests": *Rio Tinto*, *supra* at paragraph 50. Second is the need to "recognize that actions affecting unproven Aboriginal title or rights or Agreement rights can have irreversible [adverse] effects that are not in keeping with the honour of the Crown": *Rio Tinto*, *supra* at paragraph 46.

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[83] This last-mentioned idea – that the duty is aimed at preventing a present, real possibility of harm caused by dishonourable conduct that cannot be addressed later – is key:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of [Agreement] negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

(*Haida*, *supra* at paragraph 27.)

[84] Given those aims, the Supreme Court in *Rio Tinto*, *supra* at paragraphs 40-50 has told us three elements must be present for the duty to consult to be triggered:

- a "real or constructive knowledge of [an Aboriginal] claim to the resource or land to which it attaches" (at paragraph 40);

- "Crown conduct or a Crown decision that engages a potential Aboriginal right," meaning conduct even at the level of "strategic, higher level decisions" (at paragraph 44) that "may adversely impact on the claim or right in question" (at paragraph 42) or create a "potential for adverse impact" (at paragraph 44);

- a "possibility that the Crown conduct may affect the Aboriginal claim or right" in the sense of "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights" (at paragraph 45).

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[85] Both before the Federal Court and in this Court, the central issue was whether the third of these requirements – a causal relationship between the Crown conduct and potential adverse impacts on pending Aboriginal claims or rights – was met. The degree of causal relationship and whether it has been met in this case lies at the core of the debate between the parties.

[86] On this, the parties agree that the Federal Court accurately identified the law concerning the degree or quality of causal relationship that must be present in order to trigger a duty to consult. That law is found, once again, in *Rio Tinto*, *supra* and contains two elements:

- The focus of the analysis must be the effect caused by the Crown conduct on Aboriginal rights or the exercise of rights (at paragraph 46). A general "adverse impact" or an effect caused on matters divorced from rights, such as "a First Nation's future negotiating position," is irrelevant (at paragraphs 46 and 50);

- While a "generous, purposive approach [must] be taken," the effect on rights must be one of "appreciable adverse effect." While "possible" impacts can qualify, those that are "[m]ere[ly] speculative…will not suffice" (at paragraph 46).

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[87] As mentioned, the Federal Court identified and stated all of this law. What the appellant raises in this appeal is whether the Federal Court applied this law correctly to the facts of this case.

[88] On the facts, the Federal Court concluded that the potential adverse effects the Agreement may have upon the appellant's Aboriginal rights are "non-appreciable" and "speculative" and so a duty to consult with the appellant does not arise. Put another way, the appellant had not demonstrated a causal relationship between the Agreement and potential adverse impacts on asserted Aboriginal claims or rights.

[89] As will be evident from the discussion below, in this Court the appellant has not shown any palpable and overriding error in how the Federal Court applied the law to the facts of this case or in its fact-finding. In any event, I agree with the Federal Court's factually suffused conclusions.

[90] In this Court, the appellant submits that the Federal Court's conclusion that the Agreement's effects were "speculative" was primarily based on its view of the content of obligations assumed by Canada under the Agreement. But, the appellant says, that was based on the Federal Court's fundamental misapprehension of the evidence before it about those

obligations. The Federal Court stated that the appellant had failed to lead enough persuasive evidence about the consequences of other foreign investment promotion and protection agreements that would shed light on Canada's obligations under the Agreement. In fact, says the appellant, those other agreements and their consequences were before the Court. The Federal Court's error in overlooking these was a palpable and overriding error.

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[91] The problem with the appellant's submission is that notwithstanding the existence of other agreements, there is no evidence deserving of sufficient weight that these agreements are causing or might cause Canada to make decisions that are contrary to law. In particular, there is no evidence that those agreements are causing Canada to make decisions that do not respect Aboriginal rights.

[92] It bears noting that, as the Federal Court found (at paragraphs 87, 133(f) and 144), the Agreement does not contravene or contradict any domestic law at either the federal or sub-national government level, does not change the way in which the appellant could exercise its rights under a future treaty, or give arbitral tribunals the power to invalidate any measures that may be adopted by the appellant or by Canada in the future to protect the appellant's asserted Aboriginal rights: see also paragraph 20, above. There is no basis to interfere with these factual findings.

[93] The appellant also submits that the Federal Court applied the wrong legal test when it held that the adverse effects identified by the appellant were too "speculative," insignificant and "non-appreciable" to trigger the duty to consult. The appellant suggests that the threshold to

trigger the duty to consult is "very low" – even quite insignificant effects on asserted rights or title can suffice.

[94] The appellant adds that the Federal Court overlooked a "chilling effect" that will arise when the Agreement takes effect. It says that the Agreement inhibits Canada's ability or willingness to take steps to regulate or prevent the use of lands and resources by Chinese investors that are the subject of the appellant's rights and title claims. The appellant suggests that Canada will fear the monetary awards imposed for non-compliance under the Agreement and will exercise its regulatory and other powers less aggressively.

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[95] The appellant adds that the Federal Court wrongly required the appellant to provide actual evidence of a chilling effect as opposed to reliance on "logic and common sense" to make inferences from known facts. The appellant notes that a chilling effect is not susceptible to easy proof.

[96] At the root of this allegation of chilling effect is a speculation that Canada will not want to incur an adverse monetary award so it would likely avoid taking action barred by the Agreement that would prevent infringements of Aboriginal rights. In effect, the speculation is that when push comes to a shove Canada will subordinate Aboriginal rights to its desire to avoid economic penalties under the Agreement.

[97] The appellant calls this logic and common sense. It is actually pure guesswork. We cannot assume that there will be a collision between protecting Aboriginal rights and a monetary

award under the Agreement, nor can we assume that Canada will prioritize the latter over the former; indeed we cannot assume that that will happen even once: *Gitxaala National v. Canada*, 2012 FC 1336, 421 F.T.R. 169 at paragraph 54. We have no idea whether the two will ever clash.

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[98] On the information in this record, it is equally possible to assume that Canada will prioritize the protection of rights over economic penalties. Government priorities can shift over time according to the circumstances, can shift in accordance with the particular decision to be made, and can shift in accordance with popular opinion and electoral results that express that opinion. And sometimes governments affirm rights regardless of the financial cost or public opinion. At this time, we can only guess as to what will happen under the Agreement and what decisions or events will arise, or whether there will ever be any decisions or events requiring response. And, as we shall see, after the Agreement comes into effect, if any actual non-speculative effects on the appellant's rights appear on the horizon and become possible, the appellant will have many opportunities to protect its rights fully and prevent any harm, especially irreversible harm.

[99] Until there is at least a prospect of a decision or event prompted by the Agreement and until we know the nature of that decision or event, we cannot say with any degree of confidence or estimate any possibility that there will be a collision between protecting Aboriginal rights and a monetary award under the Agreement. If a decision or an event prompted by an agreement affecting Aboriginal rights were in prospect, a duty to consult might then arise depending on whether it causes a possibility of harm. But nothing is in prospect at this time, nothing can be defined, nor can we even say that anything problematic might ever arise. At this time, all we can

do is imagine decisions or events and impacts from them that might or might not happen as a result of the Agreement. However, the duty to consult is triggered not by imaginings but by tangibilities.

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[100] Indeed, the evidence we do have at this time – evidence of what has happened under other foreign investment promotion and protection agreements – suggests that concerns arising from these agreements have not arisen: see the Federal Court's reasons at paragraphs 133(a), (c) and (d) and paragraph 69 of the main affidavit Canada has adduced. There is no evidence to suggest that these agreements have impaired the ability of any level of government to protect Aboriginal rights and interests, or the rights and interests themselves, whenever the need arises.

[101] Before us, the appellant emphasized that there is a difference between "possibilities" and "speculations" and that while the Supreme Court said the duty to consult does not arise in the case of the latter, it does in the case of the former. The mere possibility of harm is enough.

[102] The appellant is right to draw this distinction to our attention. And in some cases the line between the two might be a fine one. However, the aims behind the recognition of the duty can assist us in drawing the line. To reiterate, they are to protect Aboriginal rights from injury, to protect against irreversible effects and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests: see paragraphs 82-83 above. An impact that is, at best, indirect, that may or may not happen at all (such that we cannot estimate any sort of probability), and that can be fully addressed later is one that falls on the

speculative side of the line, the side that does not trigger the duty to consult. As the Federal Court found on the facts, this case falls on that side of the line.

[103] Once the Agreement comes into effect, it may be expected to increase Chinese investment into Canada. It may be that some of that new investment finds its way into resource development companies. Might those companies eye resources on Aboriginal lands or lands claimed by Aboriginal peoples for development? Maybe. Or maybe not. We just don't know.

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[104] But what we do know is that upon the concrete possibility of that development and certainly by the time of application for development permits and approvals by those companies from governments and their agencies, Aboriginal peoples will have access, if necessary, to administrative decision-makers and the Courts for protection. That protection may be by way of application for interim or permanent injunctive relief, prohibition, *certiorari* or, if Canada is somehow not involved and should be, *mandamus*. In these ways, an aggrieved party may allege, with evidence in support, among other things that Canada is improperly prioritizing the risk of a monetary award under the Agreement over Aboriginal rights and interests. The jurisprudence of this Court on direct standing to bring a judicial review is liberal enough to fully protect those concerned about non-speculative effects on their legal rights or practical interests: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, 409 N.R. 298 at paragraphs 57-58.

[105] Bearing in mind the aims the duty to consult is meant to fulfil, I cannot say that imposing a duty to consult in this case would further those aims at all. There is no apprehended, evidence-

based potential or possible impact on Aboriginal rights. The imposition of a duty here is not necessary to preserve the future use of the resources claimed by Aboriginal peoples. Any adverse impact on rights stemming from the Agreement, if any, can be addressed later when they rise beyond the speculative and trigger the duty to consult. The appellants have failed to show that anything will be evasive of review before any harm is caused, if ever it is caused.

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[106] The appellant further submits that Canada's obligations under the Agreement will last for at least thirty years and cannot be set aside by any government or Canadian court during that period. The Agreement "cannot be undone." That is so, but it adds nothing to the analysis. Until there is a non-speculative impact on rights of the sort I have described above – if there ever is one – a duty to consult simply does not arise.

[107] Next, the appellant says that the Federal Court failed to address one of its arguments. It argued that Canada, by agreeing to be bound by the obligations in the Agreement, has also agreed to ensure that the appellant's exercise of its rights of self-government would be constrained by those same obligations.

[108] I do not accept that Canada has agreed to ensure that the appellant's exercise of whatever rights of self-government it has will be constrained by the provisions of the Agreement. Nothing in the Agreement suggests that, nor is there anything that suggests that result. There is no evidence on this record to suggest any possible impact on rights to self-government.

[109] Again, to the extent that a decision is made or a power is exercised that affects any rights of self-government the appellant has, the appellant will have its legal recourses. Again, a decision in prospect might trigger a duty to consult, but here we have no idea what events or decisions might follow as a result of the Agreement, or even whether any events or decisions might ever be in prospect, let alone whether the appellant's asserted self-government rights might be affected by those events or decisions.

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[110] The appellant submits that the Federal Court wrongly required evidence of the presence of investors on its traditional territory with rights under the Agreement and that measures were being contemplated that would impact on those rights.

[111] I do not read the Federal Court's decision so narrowly. The Federal Court was alive to broader impacts said by the appellant to trigger the duty to consult. Those broader impacts, as I have said above and as the Federal Court has found, are speculative at this time.

[112] In the Federal Court and in this Court, the appellant submitted that the Agreement would prevent Canada from enacting a moratorium on resource development, something that would respect the rights of Aboriginal peoples. But as the Federal Court noted (at paragraph 131), that submission relies on layers of speculations or assumptions, conjectures and guesswork, not evidence. Among other things, there was no evidence that Canada is considering or would ever consider, let alone implement such a moratorium, that such a moratorium might adversely impact a potential Chinese investment in the appellant's territory, that the moratorium would be found

by an arbitral tribunal to contravene the Agreement, and that Canada would not retain sufficient policy flexibility to prevent impacts upon the appellant.

[113] The appellant cites several cases showing that high-level management decisions or structural changes can trigger a duty to consult: *Huu-Ay-Aht First Nation v The Minister of Forests*, 2005 BCSC 697, 33 Admin. L.R. (4th) 123; *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, 303 F.T.R. 106; *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517, 409 F.T.R. 87; *Squamish Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, 34 B.C.L.R. (4th) 280.

[114] I agree that high-level management decisions or structural changes can trigger a duty to consult, but only where the legal test is met. The cases the appellant cites are distinguishable. I agree with the Federal Court's observation (at paragraph 78) that the Crown conduct in those cases "directly concern[ed] the applicant First Nation's claimed territories or the resources situated upon those territories." In each case, there was, in the words of *Rio Tinto*, *supra* at paragraph 45, "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights." I agree with the Federal Court's assessment that the case before us is different (at paragraph 78):

> They are all distinguishable from the ratification of the [Agreement], because the [Agreement] does not address any specific lands, potential projects involving specific lands, or specific resources. It is simply a broad, national, framework agreement that provides additional legal protections to Chinese investors in Canada, and Canadian investors in China, which parallel the rights provided in several existing investment protection and trade agreements to which Canada is already a party.

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[115] Overall, I believe that at the root of all of the appellant's submissions is its definition of "speculative," a definition that cannot be accepted.

[116] The appellant defines "speculative" as situations where "there is no reasonable basis to conclude that an impact might occur." Applying that definition in this case, the appellant says that there is a reasonable basis for concluding that an impact caused by the Agreement might occur.

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[117] What is missing from the appellant's definition of "speculative" is the idea of assumption, conjecture or guesswork. A conclusion is not speculative when it is reached by way of a chain of reasoning all of whose links are proven facts and inferences, joined together by logic. A conclusion is speculative when it is reached by way of a chain of reasoning where one or more of the links are assumptions, conjectures or guesses or where assumptions, conjectures or guesses are needed to join them.

[118] Assuming the Agreement is successful in achieving its objectives, it is true that there will be more investment in Canada from the People's Republic of China. But more investment in Canada does not necessarily lead to the conclusion that the appellant's Aboriginal rights will be affected. The appellant's case founders on that break in the chain of reasoning, a break that can only be repaired by resort to assumptions, conjectures or guesses. In short, the appellant has failed to show, in the words of *Rio Tinto* at paragraph 45, "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on [its] pending Aboriginal claims or rights" that rises above the speculative.

[119] If the appellant's definition of "speculative" were accepted, then just about every decision or action by governments would trigger the duty to consult. Governments announce high-level policies all the time. For example, often measures are proposed to encourage Canadians and others to invest in Canadian businesses and developments, just like the Agreement before us. Does the duty to consult arise every time the government intends to announce measures of that sort?

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[120] Taken to its extreme, the appellant's position would require the Minister of Finance – before the annual budget speech in the House of Commons, on every measure in it that might possibly affect the investment and development climate – to consult with every First Nation, large or small, whose claimed lands might conceivably or imaginatively be affected, no matter how remotely, no matter how insignificantly. Such a tenuous triggering and aggressive application of the duty to consult would undercut one of its aims, namely respect for "countervailing Crown interests" – in this example, the Crown's interest in workable governance: *Rio Tinto*, *supra* at paragraph 50.

[121] Finally, just before this Court's judgment in this matter was released, the appellant drew to our attention the recent decision of the Federal Court in *Mikisew Cree Nation v. The Governor General in Council et al.*, 2014 FC 1244, a decision not binding upon us. I see no need for further submissions from the parties on this new authority. In *Mikisew*, the Federal Court noted (at paragraph 93) that the possible or "potential existence" of a harm is sufficient to trigger the duty to consult, a legal proposition supported by Supreme Court case law (see paragraph 86, above). On the particular facts of *Mikisew*, the Federal Court found a possible effect that went

beyond the appreciable and the speculative. For the reasons above, and as found by the Federal Court in this case, the appellant has failed to show on the facts a causal link between the Agreement and any possible harm, let alone any harm that rises above the appreciable and speculative.

[122] Therefore, there are no grounds to set aside the judgment of the Federal Court.

D. Proposed disposition

[123] Therefore, for the foregoing reasons, I would dismiss the appeal with costs. I wish to thank the parties for their helpful submissions.

"David Stratas"
J.A.

“I agree
M. Nadon J.A.”

“I agree
A.F. Scott J.A.”

2015 FCA 4 (CanLII)

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-324-13
APPEAL FROM A JUDGMENT OF THE HONOURABLE CHIEF JUSTICE CRAMPTON DATED AUGUST 26, 2013, NO. T-153-13	
STYLE OF CAUSE:	HUPACASATH FIRST NATION v. THE MINISTER OF FOREIGN AFFAIRS CANADA AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 10, 2014
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A. SCOTT J.A.
DATED:	JANUARY 9, 2015

APPEARANCES:

Mark G. Underhill Catherine J. Boies Parker	FOR THE APPELLANT
Lorne Lachance Mara Tessier Shane Spelliscy	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Underhill, Boies Parker Law Corp Inc. Vancouver, British Columbia	FOR THE APPELLANT

2015 FCA 4 (CanLII)

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENTS

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TAB 22

Luciuk (Guardian ad litem of) v. Canada

Federal Court Judgments

Federal Court

Vancouver, British Columbia (Court

and Parties) and Victoria, British

Columbia (Parties)

M.D. Manson J.

Heard: September 30 and October 1, 2020 by videoconference.

Judgment: October 27, 2020.

Docket: T-1750-19

[2020] F.C.J. No. 1037 | *[2020] A.C.F. no 1037* | *2020 FC 1008*

Between Cecilia La Rose, by her Guardian ad litem Andrea Luciuk, Sierra Raine Robinson, by her Guardian ad litem Kim Robinson, Sophia Sidarous, Ira James Reinhart-Smith, by his Guardian ad litem Lindsey Ann Reinhart, Montay Jesse Beaubien-Day, by his Guardian ad litem Sarah Dawn Beaubien, Sadie Ava Vipond, by her Guardian ad litem Joseph Conrad Vipond, Haana Edenshaw, By Her Guardian ad litem Jaalen Edenshaw, Lucas Blake Prud'homme, by his Guardian ad litem Hugo Prud'homme, Zoe Grames-Webb, by her Guardian ad litem Annabel Webb, Lauren Wright, by her Guardian ad litem Heather Wright, S j Milan Gray Starcevich, by her Guardian ad litem Shawna Lynn Gray, Mikaeel Mahmood, by his Guardian ad litem Asiya Atcha, Albert Jerôme Lalonde, by his Guardian ad litem Philippe Lalonde, Madeline Laurendeau, by her Guardian ad litem Heather Dawn Plett and Daniel Masuzumi, Plaintiffs, and Her Majesty the Queen in Right of Canada and the Attorney General of Canada, Defendants

(103 paras.)

Counsel

Written representations by:

Joseph J. Arvay, Catherine Boies Parker, Christopher Tollefson, Anthony Ho, for the Plaintiffs.

Joseph Cheng, Andrew Law, Shaun Ramdin, Katrina Longo, for the Defendants.

ORDER AND REASONS

M.D. MANSON J.

I. Introduction

1 This is a motion to strike the Plaintiffs' Statement of Claim without leave to amend. This motion is brought by the Defendants, Her Majesty the Queen in Right of Canada and the Attorney General of Canada, on the basis that the Statement of Claim discloses no reasonable cause of action, pursuant to Rule 221 of the *Federal Courts Rules*, *SOR/98-106*.

II. Background

A. *The Plaintiffs*

2 The Plaintiffs are fifteen children and youth from across Canada. The Statement of Claim describes each of the Plaintiffs' specific experiences with climate change. While their locations and particular circumstances vary, the Plaintiffs collectively describe that climate change has negatively impacted their physical, mental and social health and well-being. They allege it has further threatened their homes, cultural heritage and their hopes and aspirations for the future. As children and youth, they claim a particular vulnerability to climate change, owed to their stage of development, increased exposure risk and overall susceptibility.

B. *Climate Change*

3 The Plaintiffs' Statement of Claim is particularly focused on the contribution of greenhouse gases (GHGs) to climate change, discussing the link between the cumulative impacts of GHGs and changes occurring in the environment. It challenges the entirety of the Defendants' alleged conduct that the Plaintiffs associate with GHG emissions.

4 The Plaintiffs and Defendants agree that climate change is serious, real and measurable. Each party has described the wide ranging impacts of climate change, including extreme weather events, ocean acidification and warming, the degradation of natural resources, air pollution and the expansion of vector-borne illnesses. The parties also agree that climate change particularly threatens Indigenous cultures and communities. The negative impact of climate change to the Plaintiffs and all Canadians is significant, both now and looking forward into the future.

5 However, at issue is the justifiability of the claim and whether the Plaintiffs raise valid causes of action under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* [*Charter*]. As well, the parties also disagree on whether a "public trust doctrine" can be relied upon and argued at trial, based on the common law or as an unwritten constitutional principle. This forms the basis of both the Defendants' Statement of Defence (filed on February 7, 2020) and the current motion to strike the Plaintiffs' Statement of Claim.

C. *Plaintiffs' Statement of Claim*

(1) Causes of Actions

6 The Plaintiffs filed their Statement of Claim on October 25, 2019. They allege that various conduct on the part of the Defendants [the "Impugned Conduct"] continues to cause, contribute to and allow GHG emissions that are incompatible with a "Stable Climate System". This is described as a stable climate capable of sustaining human life and liberties (Plaintiffs' Statement of Claim at para 3).

7 The Plaintiffs allege that the Impugned Conduct has unjustifiably infringed their rights (and the rights of all children and youth in Canada, present and future, due to an asserted public interest standing) under sections 7 and 15 of the *Charter*. The Plaintiffs further allege that the Defendants have failed to discharge their public trust obligations with respect to identified public resources, arguing a breach of obligations they claim fall under the "public trust doctrine".

(2) The Impugned Conduct of the Defendants

8 The Impugned Conduct involves the following actions and inactions on the part of the Defendants (Plaintiffs' Statement of Claim at para 5):

a. Continuing to cause, contribute to and allow a level of GHG emissions incompatible with a Stable Climate System;

b. Adopting GHG emission targets that are inconsistent with the best available science about what is necessary to avoid dangerous climate change and restore a Stable Climate System;

c. Failing to meet the Defendants' own GHG emission targets; and

d. Actively participating in and supporting the development, expansion and operation of industries and activities involving fossil fuels that emit a level of GHGs incompatible with a Stable Climate System.

9 The Defendants' causation of, contribution to and allowance of GHG emissions is further pleaded in paragraphs 45 to 51 of the Statement of Claim, including broad activities under various statutory authorities (Plaintiffs' Statement of Claim at para 47). The Defendants are further alleged to support fossil fuel exploration, extraction, production and consumption through subsidies to the fossil fuel industry and through the acquisition of the Trans Mountain Pipeline System, the Trans Mountain Expansion Project and the Puget Sound Pipeline System.

10 In paragraphs 52 to 63 of the Statement of Claim, the Plaintiffs set out facts alleging the failure of the Defendants to fulfill their own commitments to limit GHG emissions under a variety of international agreements and conventions, spanning the period of 1988 to 2015.

(3) Harms Associated with Climate Change

11 The impact of climate change on the individual Plaintiffs is set out in paragraphs 94 to 221 of the Statement of Claim. The Statement of Claim lists approximately thirteen different alleged harms to the Plaintiffs in paragraph 4. As indicated above, the impacts of climate change that are described by the

Plaintiffs are wide ranging, significant and felt across Canada.

(4) Relief Sought

12 The Plaintiffs claim various forms of relief at paragraph 222 of the Plaintiffs' Statement of Claim, including the following:

a. an order declaring that the Defendants have a common law and constitutional obligation to act in a manner compatible with maintaining a Stable Climate System, i.e. one that is capable of sustaining human life and liberties, and to refrain from acting in a manner that disrupts a Stable Climate System;

b. an order declaring that, as a result of their Impugned Conduct, the Defendants have and continue to unjustifiably infringe the Plaintiffs' rights under section 7 of the Charter and put at risk the section 7 rights of all children and youth now and in the future;

c. an order declaring that, as a result of their Impugned Conduct, the Defendants have and continue to unjustifiably infringe the Plaintiffs' rights under section 15 of the Charter and put at risk the section 15 rights of all children and youth now and in the future;

d. an order declaring that, as a result of their Impugned Conduct, the Defendants have breached and continue to be in breach of their obligation to protect and preserve the integrity of public trust resources and have violated the right of the Plaintiffs and put at risk the rights of all children and youth now and in the future to access, use and enjoy public trust resources including navigable waters, the foreshores and the territorial sea, the air including the atmosphere, and the permafrost ("Public Trust Resources");

e. an order requiring the Defendants to prepare an accurate and complete accounting of Canada's GHG emissions, including the GHG emissions released in Canada, the emissions caused by the consumption of fossil fuels extracted in Canada and consumed out of the country, and emissions embedded in the consumption of goods and services within Canada;

f. an order requiring the Defendants to develop and implement an enforceable climate recovery plan that is consistent with Canada's fair share of the global carbon budget plan to achieve GHG emissions reductions compatible with the maintenance of a Stable Climate System, the protection of Public Trust Resources subject to federal jurisdiction and the Plaintiffs' constitutional rights;

g. an order retaining jurisdiction over this action until the Defendants have fully complied with the orders of this Court and there is reasonable assurance that the Defendants will continue to comply in the future absent continuing jurisdiction; and

h. costs, including special costs and applicable taxes on those costs; and

i. such further and other relief as this Honourable Court deems just.

III. Issue

13 The issue is whether it is plain and obvious that the pleadings disclose no reasonable cause of action, or that the claim has no reasonable prospect of success?

14 This inquiry involves four sub-issues:

a. Are the claims justiciable?

b. Does the section 7 *Charter* claim disclose a reasonable cause of action?

c. Does the section 15 *Charter* claim disclose a reasonable cause of action?

d. Does the claim pursuant to a "public trust doctrine" disclose a reasonable cause of action?

IV. Relevant Provisions

15 *Federal Courts Rules*, Rule 221:

> **Motion to strike**
>
> **221(1)** On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> **(a)** discloses no reasonable cause of action or defence, as the case may be,
>
> **(b)** is immaterial or redundant,
>
> **(c)** is scandalous, frivolous or vexatious,
>
> **(d)** may prejudice or delay the fair trial of the action,
>
> **(e)** constitutes a departure from a previous pleading, or
>
> **(f)** is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.
>
> **Evidence**
>
> **(2)** No evidence shall be heard on a motion for an order under paragraph (1)(a).

V. Test on a Motion to Strike

16 The test on a motion to strike is whether it is plain and obvious that the pleadings disclose no reasonable cause of action, or that the claim has no reasonable prospect of success (*Hunt v Carey Canada Inc*, *[1990] 2 SCR 959* at 980; *R v Imperial Tobacco Canada Ltd*, *2011 SCC 42* at para 17 [*Imperial Tobacco*]). The threshold to strike a claim is high and the matter must proceed to trial where a reasonable prospect of success exists.

17 The material facts pleaded in the Statement of Claim must be taken as true, unless the allegations are based on assumption and speculation (*Operation Dismantle v The Queen*, *[1985] 1 SCR 441* at para 27 [*Operation Dismantle*]). It is incumbent on the Plaintiffs to clearly plead the facts in sufficient detail to support the claims and the relief sought. The material facts form the basis upon which to evaluate the possibility of the success of the claim (*Imperial Tobacco*, above at para 22; *Mancuso v Canada (National*

Health and Welfare), *2015 FCA 227* at paras 16-17, leave to appeal to SCC refused, 36889 (23 June 2016)).

18 Further, the pleadings must be read as generously as possible, erring on the side of permitting a novel but arguable claim to proceed to trial (*Imperial Tobacco* at para 21; *Atlantic Lottery v Corp Inc v Babstock*, *2020 SCC 19* at para 19 [*Atlantic Lottery*]).

19 The test on a motion to strike considers the context of the law and the litigation process. It "operates on the assumption that the claim will proceed through the court system in the usual way -- in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedents" (*Imperial Tobacco* at para 25).

VI. Analysis

A. *Parties' Position*

20 It is the Plaintiffs' position that what is really being asked of the Court, through the relief being claimed, is to require the Defendants, through the disclosure and application of scientific data, on a justifiably manageable standard, to comply with their common law and constitutional obligations and act in a manner compatible with maintaining a Stable Climate System.

21 The Plaintiffs argue that the relief claimed in paragraph 222 of the Statement of Claim are all "conventional" legal remedies to correct breaches of section 7 and section 15 of the *Charter*. Further, the Plaintiffs ask this Court to recognize a new or novel cause of action, the breach of the public trust doctrine. They claim the Defendants have failed to meet the duty to safeguard Public Trust Resources in a manner that does not "substantially" impair the integrity of those resources or impair the right of the public to access, use and enjoy those resources.

22 The Defendants argue that the broad and sweeping claim of the Plaintiffs is not justiciable, in that the breadth of the claim is incompatible with the basic rules of *Charter* analysis. Further, the Plaintiffs are effectively seeking that this Court intervene in Canada's overall approach to climate policy, for which there is no judicially manageable legal standard. Additionally, the remedies sought by the Plaintiffs are not legal remedies. The Defendants also allege that the claim does not disclose a reasonable cause of action. This is because the Charter claims are positive rights claims and because they would also fail to meet the tests under sections 7 and 15 of the Charter. Lastly, the public trust doctrine holds no reasonable prospect of success, as this cause of action does not exist in Canadian law.

B. *Moving to Strike Charter Claims*

23 As a preliminary matter, the parties have raised the appropriateness of this Court to consider a motion to strike on the basis that the Statement of Claim raises *Charter* claims, novel questions of law and novel *Charter* claims. The Plaintiffs state that novel claims, particularly novel *Charter* claims, ought not to be decided on a motion to strike. The Defendants' position is that the *Charter* claims in this case are not novel because they engage traditional *Charter* frameworks. Further, the Defendants assert that a Court

may strike a novel claim, where it is not in line with the principles of proper judicial restraint and where it extends beyond an incremental change in the law.

24 First, I note that the parties have raised several cases throughout their pleadings in which a motion to strike of a *Charter* claim was considered. I do not find that the presence of a *Charter* claim alone prevents me from considering this motion to strike (see *Operation Dismantle*, above; *Tanudjaja v Canada (Attorney General)*, *2014 ONCA 852* [*Tanudjaja*]).

25 Second, it is clear that a Court can hear and decide novel questions of law on a motion to strike. In fact, a claim should not survive a motion to strike based on novelty alone. Disposing of novel claims that are doomed to fail is "critical to the viability of civil justice and public access" (*Atlantic Lottery*, above at para 19). Nor am I convinced that I am required to allow the *Charter* claims to survive the motion to strike simply because they are new *Charter* claims. The Plaintiffs rely on the dissenting decision in *Nevsun Resources Ltd v Araya*, *2020 SCC 5* at paragraph 145, for this proposition. While I agree with the Plaintiffs that the framing of their *Charter* claim is novel, I do not find that this overrides the "housekeeping" role of the Court on a motion to strike, without more (*Imperial Tobacco* at para 19).

C. *Justiciability*

(1) Conclusions on Justiciability

26 For the reasons below, I find both *Charter* claims, under sections 7 and 15 of the *Charter*, are not justiciable. However, the question in relation to the public trust doctrine is a justiciable issue.

(2) Law of Justiciability

(a) **Test for Justiciability**

27 Justiciability is concerned with the Court's proper role within Canada's constitutional framework and the "time-honoured" demarcation of powers between the Courts and the other branches of government. It relates to the subject matter of a dispute and whether the issue is appropriate for a Court to decide (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, *2018 SCC 26* at para 32 [*Highwood*]; *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, *2015 FCA 4* at para 62 [*Hupacasath*]). The inquiry into justiciability was described in *Canada (Auditor General) v Canada (Minister of Energy, Mines & Resources)*, *[1989] 2 SCR 49* at 90-91, as:

> 50 ... first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead, deferring to other decision making institutions of the polity.

28 In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, Lorne M. Sossin defines justiciability as:

> ... a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial

> determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.
>
> [Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 7 [Sossin], cited in *Highwood*, above at para 33]

29 The question to be decided is whether the Court has the institutional capacity and legitimacy to adjudicate the matter. Or, more generally, is the issue one that is appropriate for a Court to decide (*Highwood* at paras 32, 34). The terms "legitimacy" and "capacity" can also be understood as the "appropriateness" and "ability" of the Court to deal with a matter (*Hupacasath*, above at para 62).

30 There is no single set of rules delineating the scope of justiciability, the approach to which is flexible and to some degree contextual. Courts have often inquired whether there is a sufficient legal component to warrant judicial intervention, "[s]ince only a court can authoritatively resolve a legal question, its decision will serve to resolve a controversy or it will have some other practical significance" (*Highwood* at para 34; *Reference Re Canada Assistance Plan (BC), [1991] 2 SCR 525* at 546).

31 In determining whether it has the institutional capacity and legitimacy to adjudicate the matter, the Supreme Court in *Highwood* provides that a Court should consider that the matter before it "would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (Sossin, above at 294, cited in *Highwood* at para 34).

(b) **Novelty or Complexity of the Claim**

32 The parties agree that simply because a cause of action is novel or complex per se does not make it non-justiciable or without merit. While this Court is not dissuaded by the complexity of the matter or the novelty of the claim, neither can these factors permit judicial involvement in subject matters where the Court does not have institutional legitimacy or capacity. The importance of a societal issue cannot extend the boundaries of a Court's role within Canada's constitutional framework (*Tanudjaja*, above at para 35):

> 35 I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, Chaoulli, at para. 107. *Again, the issue is one of institutional competence. The question is whether there is a sufficient legal component to anchor the analysis.*
>
> [Emphasis added]

(c) **Policy and Political Questions**

33 Policy and political questions are not a bar to judicial involvement, however, "[s]ome questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and other branches of government" (*Hupacasath* at para 62). Questions in the realm of policy and political issues must be demonstrably

unsuitable for adjudication (Sossin at 162):

> Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.

34 To engage the Court's adjudicative functions, the question must be one that can be resolved by the application of law.

35 It is within the Court's role to consider the constitutionality of government action and the accountability of the executive in light of the supremacy of the Constitution, including the *Charter*. *Charter* cases have been considered justiciable, regardless of the nature of government action, be it an exercise of Crown prerogative or otherwise (*Hupacasath* at paras 61, 70).

36 Several cases discuss the crystallization of a policy or political issue into a justiciable one, as it relates to a Court's role in upholding constitutional supremacy. The Supreme Court in *Canada (Attorney General) v PHS Community Services Society*, *2011 SCC 44* at paragraph 105 [*PHS*], states:

> 105 The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. *It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the Charter* ... The issue before the Court at this point is not whether harm or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.
>
> [Emphasis added]

37 The Supreme Court in *Chaoulli v Quebec (Attorney General)*, *2005 SCC 35* at paragraph 107 [*Chaoulli*], in a different context found:

> 107 *While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for Charter compliance when citizens challenge it ...
>
> [Emphasis added]

38 Policy choices must be translated into law or state action in order to be amenable to *Charter* review and otherwise justiciable.

(3) Justiciability of the *Charter* claims

39 The Plaintiffs argue that their claim is systemic and complex in nature. However, this should not render their claim non-justiciable. Asking this Court to declare the Defendants' conduct to be unconstitutional, it is argued, is justiciable and well within the institutional legitimacy and capacity of the Courts. There is no issue as to institutional capacity because the Courts are well equipped to handle complexity, which in this case is based on scientific data and the assessment of that data. Furthermore, an underlying social or policy context is not an impediment to a Court's legitimacy. The Plaintiffs further argue that their case is narrow in formulation, in that they are not asking this Court to review each independent action and inaction on the part of the Defendants, but rather to assess the cumulative effects of GHG emissions occurring from that conduct. Without considering the totality of the Defendants' conduct, Canada's contribution to global warming would be evasive of review.

40 The Plaintiffs' position fails on the basis that there are some questions that are so political that the Courts are incapable or unsuited to deal with them. These include questions of public policy approaches -- or approaches to issues of significant societal concern. As found in *PHS*, above at paragraph 105, and *Chaoulli*, above at paragraph 107, to be reviewable under the *Charter*, policy responses must be translated into law or state action. While this is not to say a government policy or network of government programs cannot be subject to *Charter* review, in my view, the Plaintiffs' approach of alleging an overly broad and unquantifiable number of actions and inactions on the part of the Defendants does not meet this threshold requirement and effectively attempts to subject a holistic policy response to climate change to *Charter* review.

41 My finding on justiciability is supported both by the undue breadth and diffuse nature of the Impugned Conduct and the inappropriate remedies sought by the Plaintiffs.

(a) **Breadth of the Impugned Conduct**

42 As described above, the Impugned Conduct refers broadly to categories of the Defendants' actions and inactions, including Canada's participation in various industries and its causation of, contribution to and allowance of GHG emissions incompatible with a Stable Climate System. These categories are somewhat sub-categorized throughout the Statement of Claim, through descriptions of a broad range of activities, as identified above.

43 The diffuse nature of the Impugned Conduct, as described by the Plaintiffs, has effectively put the entirety of Canada's policy response to climate change in issue. The Plaintiffs adamantly disagree with this characterization. In their Written Representations, they attempt to clarify their claim, suggesting that they are asking this Court to review the cumulative effects of GHG emissions, not each and every law or state action that underpins these emissions. I find this position to be problematic, as the purpose of *Charter* review is to ensure the constitutionality of laws and state action. The Plaintiffs' position undermines this function of *Charter* review, if assessments of *Charter* infringement cannot be connected to specific laws or state action.

44 Moreover, the diffuse nature of the claim that targets all conduct leading to GHG emissions cannot be characterized in a way other than to suggest the Plaintiffs' are seeking judicial involvement in Canada's overall policy response to climate change. There is little difference between the choices the Defendants

make in relation to addressing climate change and other policy choices the Courts have consistently recognized as falling more appropriately within the sphere of the other branches of government. These include choices in relation to the type of healthcare system (*Chaoulli* at para 107), approaches to illegal drug use and addiction (*PHS* at para 105), limits on how and where prostitution may be conducted (*Canada (Attorney Genera) v Bedford*, *2013 SCC 72* at para 5), addressing physician-assisted death (*Carter v Canada (Attorney General)*, *2015 SCC 5* at para 98) and the prioritization of homeless and inadequate housing (*Tanudjaja* at para 33). These are all important societal issues, the decisions in relation to which fall more appropriately on the legislative and executive branches of government. They attract a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people about how these issues should be addressed (*PHS* at para 105).

45 However, when policy choices are translated into law or state action, that resulting law or state action must not infringe the constitutional rights of the Plaintiffs. As such, it is the specific law or state action -- or possibly a network thereof -- that is subject to *Charter* review and that forms the basis upon which the rest of the *Charter* analysis can occur. "A challenge to a particular law or particular application of such law is an archetypal feature of *Charter* challenges under s. 7 and s. 15" (*Tanudjaja* at para 22).

46 The Plaintiffs do not plead definable law or state action in issue, or for that matter a network in respect thereof. I agree with the statement made by the Ontario Court of Appeal in *Tanudjaja*, that it is not the case that a Court could never consider the constitutionality of a network of programs. In fact, Courts have already considered the constitutionality of a network of laws in some cases. For example, in *Bedford*, the Supreme Court considered three impugned provisions that prevented prostitutes from implementing certain safety measures (*Bedford*, above at para 6). My concern is not that the Plaintiffs are asking this Court to consider a network of Canada's actions and inactions related to climate change, but with the undue breadth and diffuse nature of that network, which puts Canada's overall policy choices at issue.

47 The Plaintiffs rely on *Youth Environment v Attorney General of Canada*, *2019 QCCS 2885* [*Youth Environment*] as a case which demonstrates that "constitutional claims about climate action are justiciable". The claimants in *Youth Environment* argued that Canada's failure to set appropriate GHG emission reduction targets, and to meet the targets that had been set, amounted to a violation of rights, including those under the *Charter*. The Quebec Superior Court in *Youth Environment* was clear it was not prepared to find the claim "unjusticiable" at the certification stage of the action (*Youth Environment*, above at para 71). This case is not binding on this Court and I remain unpersuaded of its assistance, considering the differences in the breadth of conduct alleged in *Youth Environment* and in the current case.

48 As it relates to the evasiveness of review, my comments above are not to be taken as suggesting that the Defendants should not be responsible or unaccountable in addressing climate change. The Defendants acknowledge that climate change posses a serious societal issue of our times, requiring responsiveness from all stakeholders. However, justiciability is an important underpinning of Canada's constitutional framework and this Court cannot circumvent its constitutional boundaries of the subject matter pleaded on the sole basis that the issue in question is one of societal importance, no matter how critical climate change is and will be to Canadians' health and well-being, which is acknowledged.

(b) **Remedies**

49 The Plaintiffs ask for various forms of relief at paragraph 222 of their Statement of Claim. They provide that the relief sought is within the bounds of justiciable orders, as they are all "conventional" legal remedies to correct breaches of sections 7 and 15 of the *Charter*, or are otherwise appropriate in relation to the "public trust doctrine", if this cause of action is found to exist at common law or an unwritten constitutional principle.

50 While the *Charter* remedies have the air of *prima facie* legal remedies, the Plaintiffs fail to consider that the overall context of the relief sought, in relation to the undue breadth of the claim, pushes this Court into a role outside the confines imposed by justiciability. In this respect, I agree with the Defendants that while the availability of *Charter* remedies are broad, the proposed remedies in this case are not legitimate within the framework of Canada's constitutional democracy.

51 The first order proposed by the Plaintiffs, asking this Court to declare that the Defendants have a common law and constitutional obligation to act in a manner compatible with maintaining a Stable Climate System, is unrelated to the constitutionality of the Impugned Conduct. Even if this was the case, the breadth of the Impugned Conduct effectively means that the Plaintiffs are seeking a legal opinion on the interpretation of the *Charter*, in the absence of clearly defined law or state action that brings the *Charter* into play (*Borowski v Canada (Attorney General)*, *[1989] 1 SCR 342* at 365).

52 The declaratory relief related to a finding that the Plaintiffs' section 7 and section 15 *Charter* rights have been unjustifiably infringed, as well as that the Defendants are in breach of the public trust doctrine, does not address the underlying harms created by law or state action. The breadth of the Impugned Conduct subject to review effectively asks this Court to take on a public inquiry role, whereby it determines whether or not the Defendants' overall approach to climate change is effective.

53 The proposed remedies include that this Court require action on the part of the Defendants to prepare an accounting of GHG emissions and to develop and implement an enforceable climate recovery plan, as well as retain supervision of the Defendants' compliance in relation to these orders. These remedies are similar to the wide-ranging remedies sought at paragraph 15 of *Tanudjaja*, including declarations, mandatory orders and supervision. The Ontario Court of Appeal in *Tanudjaja* was of the view that (at para 34):

> 34 Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity ...

54 These considerations are also applicable in the current case. This Court, in *Friends of the Earth*, found the evaluation of the content of a climate change plan to be non-justiciable (*Friends of the Earth v Canada (Governor in Council)*, *2008 FC 1183* at paras 34-36, aff'd *2009 FCA 297*, leave to appeal to SCC refused, 33469 (25 March 2010)). Although this finding was based on this Court's interpretation of the *Kyoto Protocol Implementation Act*, it suggests that the remedies in the context of climate change must be carefully circumscribed to the appropriate separation of powers.

55 The Plaintiffs are seeking an order requiring the Defendants to develop and implement an enforceable

climate recovery plan, without specifying the specific content of that plan. Instead, they specify the method for devising such a plan, which involves a comprehensive accounting of Canada's GHG emissions and the alignment of the "enforceable" climate recovery plan with Canada's fair share of the global carbon budget plan. This remedy is devoid of content and meaning in addressing the Plaintiffs' alleged rights, if violated. Further, it poses an incursion into the policy-making functions of the executive and legislative branches by requiring specific standards that the climate recovery plan must meet, including that it be compatible with maintaining a Stable Climate System and the protection of Public Trust Resources.

56 An appropriate and just remedy in the context of a *Charter* claim "must employ means that are legitimate within the framework of our constitutional democracy" (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, *2003 SCC 62* at para 56 [*Doucet-Boudreau*]). While I agree with the Plaintiffs that novel and creative remedies may be warranted in order to be responsive to the needs of a given case, this is not such a case. In *Doucet-Boudreau*, the Supreme Court considered the decision of a trial judge who ordered a provincial government to do its best to build French-language schools within a set timeframe. The trial judge declared himself competent to hear reports on the efforts. The orders were made in light of section 23 of the *Charter*, which provides for language rights, and the supervisory jurisdiction was limited. I find the context in *Doucet-Boudreau* to be distinguishable from the current case.

(4) Justiciability of the Public Trust Doctrine

57 I do not find that the justiciability arguments relied upon by the Defendants apply in the same manner to the public trust doctrine. In relation to this particular claim, the Plaintiffs are seeking that this Court recognize the existence of a *sui generis* doctrine, in which the Defendants have obligations to protect and preserve various identified inherently public resources, within the jurisdiction of the federal government.

58 The existence of the public trust doctrine at common law or as an unwritten constitutional principle is clearly a legal question, which the Courts can resolve. This question does not engage the same considerations in relation to the constitutional demarcation of powers and there is no policy or political context or component to the claim. The novelty of the doctrine is not a bar to its justiciability. The real question in relation to this particular claim is whether such a doctrine discloses a reasonable cause of action or has a reasonable prospect of success.

D. *Reasonable Cause of Action*

(1) Conclusion on whether the Statement of Claim Discloses a Reasonable Cause of Action

59 Even if I am wrong on the question of justiciability, I find that the Statement of Claim does not disclose a reasonable cause of action. For the reasons that follow, on the basis of the pleadings, the facts of which are taken to be true, both the section 7 and section 15 *Charter* claims, as well as the claim in relation to the public trust doctrine, have no reasonable prospect of success. Specifically, the undue breadth and diffuse nature of the Impugned Conduct cannot sustain a section 7 *Charter* analysis. The Plaintiffs have failed to disclose a distinction on the basis of state action or law, required for the purposes of a section 15 *Charter* analysis. Moreover, the existence of the public trust doctrine, as pleaded by the

Plaintiffs, is not supported in Canadian law.

(2) Section 7 of the *Charter*

60 To establish a section 7 *Charter* infringement, the Plaintiffs are required to demonstrate that: (1) the legislation or state action interferes with, or deprives them of, their life, liberty or security of the person; and (2) once they have established that section 7 of the *Charter* is engaged, they must show that the deprivation in question is not in accordance with the principles of fundamental justice (*Carter*, above at para 55).

61 The test on a motion to strike operates on the assumption that the claim will proceed through the Court system in the usual way (*Imperial Tobacco* at para 25). The Defendants argue that: (1) there is no reasonable cause of action because section 7 of the *Charter* does not confer positive rights, requiring Canada to enact, fund and enforce climate change policies consistent with the Plaintiffs' standards; (2) the claim is speculative and incapable of proof; and (3) the Defendants have also brought into issue the breadth of the Impugned Conduct, which does not disclose a discrete law, state action or network thereof as the foundation for a section 7 *Charter* analysis. I find that the claim discloses no reasonable prospect of success on the basis of this third reason. However, I will nonetheless address each argument the Defendants have raised.

(a) **Impugned Law or State Action**

62 In my view, the section 7 *Charter* claim fails to disclose a reasonable cause of action because the undue breadth and diffuse nature of the Impugned Conduct cannot sustain a section 7 *Charter* analysis. As identified in *Tanudjaja*, a challenge to a *particular* law or application thereof is an archetypal feature of section 7 *Charter* challenges.

63 As discussed above, while I would be prepared to find that a network of laws or state action could be reviewable under section 7 of the *Charter*, it is the diffuse and unconstrained nature of the proposed Impugned Conduct that fails to provide an anchor for the analysis in this case. As such, the claim has no reasonable prospect of success under section 7 of the *Charter*.

64 While this finding forms the basis for striking the section 7 *Charter* claim, I will address the additional arguments of the Defendants below.

(b) **Positive Rights**

65 While no longer determinative, I will offer some comments in regards to the Defendants' argument in relation to the positive rights framing of the section 7 *Charter* claim. I do not find this argument sufficient to find that the claim discloses no reasonable cause of action for the reasons below.

66 The Defendants assert that the Plaintiffs' section 7 *Charter* claim discloses no reasonable cause of action because the claim is seeking recognition of positive rights to the climate change policies preferred by the Plaintiffs. Section 7 of the *Charter* does not instill positive obligations, rather it is premised on the

finding of a deprivation resulting from law or state action. The Defendants further indicate that the Plaintiffs' claim is not consistent with an incremental step in the evolution of section 7 *Charter* interpretation and that there is allegedly a lack of special circumstances in this case that would allow for a positive rights framing.

67 I am not prepared to find that the Plaintiffs would be unable to argue a negative rights claim or that they are otherwise barred from arguing a positive rights claim at this stage in the proceedings. Therefore, this argument has not been accepted as an additional basis for striking the section 7 *Charter* claim.

68 I am cognizant of the Plaintiffs' objection to this "positive rights" characterization of their claim. They are seeking to argue that the Impugned Conduct deprives them of a healthy climate and that both the actions and inactions of the Defendants have deprived them of a Stable Climate System. Considering the high threshold that must be met on a motion to strike, I am not prepared to characterize the Plaintiffs' claim as one that only engages positive rights.

69 Additionally, the Plaintiffs have raised authorities to suggest that section 7 may be interpreted as engaging positive rights in appropriate cases. Notably, in *Gosselin v Quebec (Attorney General)*, *2002 SCC 84* at paragraphs 81-82 [*Gosselin*], Chief Justice McLachlin, writing for the majority provided:

> 81 ... Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.
>
> 82 ... The question therefore is not whether s. 7 has ever been - or will ever be - recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

70 Furthermore, Justice Rennie, speaking for an unanimous Federal Court of Appeal in *Kreishan v Canada (Citizenship and Immigration)*, *2019 FCA 223* at paragraph 139, stated:

> 139 I am cognizant of the fact that section 7 is not frozen in time, nor is its content exhaustively defined, and that it may, some day, evolve to encompass positive obligations -- possibly in the domain of social, economic, health or *climate rights* ...
>
> [Emphasis added]

71 The Plaintiffs further rely on a British Columbia Supreme Court decision, *Single Mothers' Alliance of BC Society v British Columbia*, *2019 BCSC 1427* at paragraph 112, as an example of when a section 7 *Charter* claim was not struck on the basis that section 7 of the *Charter* has not yet been interpreted to impose positive obligations. The British Columbia Supreme Court found that it should err on the side of permitting a novel, but arguable, case to proceed to trial.

72 As found by the Supreme Court in *Gosselin*, "[i]t would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases" (*Gosselin*, above at para 82). In is within this context of *Charter* interpretation that the door has been opened for growth and expansion, within its

natural limits, to potentially consider positive rights under section 7. The Plaintiffs have pleaded facts that may support the existence of "special circumstances". Within this context, I do not accept the Defendants' argument that the Plaintiffs' claim discloses no reasonable cause of action on this basis alone.

(c) **Speculation**

73 I will also address the Defendants' arguments in relation to the speculative nature of the section 7 *Charter* claim, although I have already determined that the section 7 *Charter* claim discloses no reasonable cause of action on the basis of the undue breadth and diffuse nature of the Impugned Conduct. For the reasons below, I do not agree with the Defendants' arguments on this narrow issue.

74 The Defendants further allege that the Charter claims are speculative because they are incapable of proof, owed to the cumulative and global nature of climate change. Climate change is driven from historical and global human activities and requires a comprehensive, international approach to address. In this way, the Defendants liken the current case to *Operation Dismantle*, where a "sufficient causal link" could not be established. In *Operation Dismantle*, the Federal Cabinet's decision to approve cruise missile testing could not be linked to the result the appellants were alleging -- the increased threat of nuclear war. This amounted to speculation, which could never be proven (*Operation Dismantle* at para 18).

75 I cannot find that there is no reasonable prospect of success on the basis of the speculation arguments alone. Unlike the speculation inherent in the assumption in *Operation Dismantle* - that the reaction of foreign powers to cruise missile testing will increase the risk of nuclear war, the Plaintiffs in this case are alleging that Canada's role in climate change has led to the alleged harms. Canada has a role in GHG emissions that is more than speculative in this current case.

(3) Section 15 of the *Charter*

76 To establish a limitation of their section 15 *Charter* rights, the Plaintiffs must demonstrate that an impugned law, on its face or in its impact, creates (1) a distinction based on an enumerated or analogous ground, and (2) that the distinction perpetuates a disadvantage (*Quebec (Attorney General) v Alliance of professional and technical personnel in health and social services*, *2018 SCC 17* at para 25 [*Alliance professional*]).

77 Section 15 of the *Charter* is not limited to evaluating the constitutionality of legislation, but will apply to government action in a variety of forms, for example the implementation of statute in a discriminatory way by government officials (*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, *2000 SCC 69*). However, the law in question must be the source of the distinction, whether on its face or in its impact.

78 The Plaintiffs claim that a "law" under section 15 of the *Charter* includes what the Plaintiffs have characterized as "Impugned Conduct". I note that the Plaintiffs have described the particular vulnerability of children and youth to climate change at paragraphs 78 to 89 of the Plaintiffs' Statement of Claim. Further, the Plaintiffs allege discrimination on the basis of age and "indigeneity" at paragraph 232 of the Plaintiffs' Statement of Claim.

79 The Defendants argue that section 15 of the *Charter* cannot offer protection in the abstract and there is no allegation of a particular law bearing benefits or burdens, distributed unequally on the basis of a prohibited ground. I agree with the Defendants. It is unclear what impugned law creates the claimed distinction, whether on its face or in its impact. I understand that the Plaintiffs are claiming that climate change has a disproportionate impact on children and youth. However, by using this as a starting point, they have circumvented the step of defining a law that creates a distinction on the basis of an enumerated ground.

80 On the basis of the above, I do not find it helpful to address the argument at paragraphs 59 to 60 of the Defendants' Written Representations, that section 15 of the *Charter* does not impose positive obligations on the part of Canada. The Defendants' arguments were primarily focused on positive rights concerns as it relates to section 7 of the *Charter*, and the above is otherwise determinative of the issue on section 15 of the *Charter*. There is no reasonable cause of action under section 15 of the *Charter* for the reasons above.

(4) The Public Trust Doctrine

81 The Plaintiffs describe the public trust doctrine as a trust-like, *parens patriae*, or fiduciary obligation on the part of the Defendants to preserve and protect the integrity of inherently public resources so that the public is not deprived of the benefits they provide to all. In their Written Representations on this motion to strike, the Plaintiffs clarified that the public trust doctrine is a *sui generis* doctrine. They allege it is both a common law and an unwritten constitutional principle. The Defendants have allegedly both general and specific obligations under the public trust doctrine with respect to the identified Public Trust Resources.

82 As beneficiaries of the public trust, and on account of having public interest standing, the Plaintiffs claim they may enforce the public trust in circumstances in which the Defendants have failed to discharge their obligations as trustee (Plaintiffs' Statement of Claim at para 242).

83 The following resources are suggested by the Plaintiffs as falling under the public trust doctrine, which by their nature, are public resources that Canada has an obligation to preserve and protect. The Public Trust Resources include:

a. Navigable waters, the foreshores and the territorial sea, including the lands submerged thereunder and the resources located therein;
b. The air, including the atmosphere; and
c. The permafrost.

84 The Plaintiffs also assert that the general obligations owed by the Defendants under the public trust doctrine include:

a. A duty to exercise continuous supervision and control over the Public Trust Resources;

b. A duty to protect the right of the public to access, use and enjoy such resources whenever feasible, including those rights that are fundamental to the ability of the public to enjoy the benefit of the resource as one held in common; and

c. A duty to safeguard the Public Trust Resources in a manner that does not substantially impair the integrity of these resources or substantially impair the right of the public to access, use and enjoy such resources.

(a) **Public Trust Doctrine at Common Law**

85 The Plaintiffs assert that the public trust doctrine is an open, long standing question that remains unanswered and deserves adjudication. In this respect, they distinguish an "unrecognized" legal right from a "non-existent" legal right. They seek to distinguish prior case law that has failed to recognize the public trust doctrine, arguing their case ought to be heard at trial to assess the existence of and the boundaries of the proposed public trust obligations. The Plaintiffs further provide that a motion to strike is a gate-keeping tool meant to eliminate clearly meritless claims. It is not a means of thwarting the potential of the law to adapt to changing circumstances. The Plaintiffs therefore assert that they are entitled to make their case about how this *sui generis* doctrine may apply in the specific and unprecedented context of climate change.

86 The Plaintiffs attempt to distinguish the Supreme Court decision in *Alberta v Elder Advocates of Alberta Society*, *2011 SCC 24* [*Elder Advocates*] from the type of public trust obligations they are seeking that the Court find in this case (*Elder Advocates*, above at paras 36-37). In *Elder Advocates*, the Supreme Court found that the Crown does not owe fiduciary obligations to the public at large (*Elder Advocates* at para 50). In the current case, the Plaintiffs are claiming a formulation of the public trust doctrine, whereby the duty is owed to all Canadians. The public trust doctrine described by the Plaintiffs therefore does not fall under the concept of an *ad hoc* fiduciary duty in their view.

87 I find that there is no legal foundation to suggest that the public trust doctrine, as described by the Plaintiffs, discloses a reasonable cause of action. For the reasons that follow, this claim has no reasonable prospect of success.

88 The breadth of the claim under the alleged public trust doctrine and the lack of material facts to support any legal basis suggests this claim is reflective of an "outcome" in search of a "cause of action". The scope of the obligations proposed by the Plaintiffs are both extensive and without definable limits. The Plaintiffs rely on *obiter* in *British Columbia v Canadian Forest Products Ltd*, *2004 SCC 38* [*Canfor*] for the proposition that the door has been opened for the public trust doctrine to be considered in Canada, whereby public rights are vested in the Crown (*Canfor*, above at paras 72-83):

> 74 The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law: see, e.g., J.C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997), 7 J.E.L.P. 1. Indeed, the notion of "public rights" existed in Roman law:
>
> > By the law of nature these things are common to mankind - the air, running water, the sea ...
> >
> > (T.C. Sandars, The Institutes of Justinian (5th ed. 1876), at 2.1.1)

> ...
>
> 81 It seems to me there is no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case on account of public nuisance, or negligence causing environmental damage to public lands, and perhaps other torts such as trespass, but there are clearly important and novel policy questions raised by such actions. These include the Crown's potential liability for inactivity in the face of threats to the environment, the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard, the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources, and the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage.

89 *Canfor* concerned the Attorney General's ability to recover damages for environmental loss (*Canfor* at para 8). In this case, the Crown in right of British Columbia claimed it sued not only in its capacity as a property owner, but as the representative of the people of British Columbia. In this context, *obiter* comments in relation to the public trust doctrine cannot be taken to suggest a basis for the extensive scope of rights as suggested by the Plaintiffs, where the Plaintiffs have an actionable right against the Crown (Plaintiffs' Statement of Claim at para 242). The Supreme Court's *obiter* comments in *Canfor* were made in the context of whether the Crown was limited to suing in its capacity as an ordinary landowner. As such, if any door was opened, it is in relation to the entitlement of the Crown in the context of a tort action.

90 The American public trust doctrine and secondary sources relied on by the Plaintiffs to this effect are also not applicable in my view. Specifically, the Plaintiffs rely on *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) [*Waters*], which surveys the doctrine under American law. This text discusses the American public trust doctrine, before clarifying that "[t]he public trust doctrine has not been adopted in Canada" (*Waters*, above at 603; see also: Maguire, John C, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997) 7 J Env L & Prac 1).

91 In *Burns Bog Conservation Society v Canada*, *2014 FCA 170* [*Burns Bog* (FCA)], the Federal Court of Appeal agreed with a decision of the Federal Court, recognizing that the public trust doctrine has not been recognized in Canadian law (*Burns Bog* (FCA) at paras 43-47; *Burns Bog* (FC) at para 107). The Federal Court of Appeal specified at paragraph 44:

> 44 It is clear that in reaching his conclusion, the Judge carefully considered *Canfor*. He found that at best *Canfor* opens the door to the application of the public trust doctrine developed in the United States in respect of land owned by the Crown (see *Canfor* at paragraphs 74-81). Here, as mentioned, the respondent does not own Burns Bog.

92 While it is clear the determining issue in *Burns Bog* was that of ownership, I do not find these cited cases have "opened the door" to an expansive public trust doctrine, as described by the Plaintiffs, that could be crystalized in a different factual context. I have reviewed the reasons in *Canfor* and *Burns Bog* (*Canfor* at paras 72-83; *Burns Bog* (FC) at paras 74-81) and while there is a "notion" that public rights in

the environment reside in the Crown, these authorities do not approach the breadth of the rights and actionable interests that the Plaintiffs claim could exist at common law.

93 I remain unconvinced that a claim for the public trust doctrine should proceed to trial on the basis that it is a novel claim and that I must err on the side of caution. Rather, the public trust doctrine is a concept that Canadian Courts have consistently failed to recognize. It does not exist in Canadian law. In this respect, I do not agree with the Plaintiffs' attempt at distinguishing an unrecognized from non-existent cause of action.

94 This is a claim that may be appropriately struck. As provided by the Supreme Court in *Atlantic Lottery*, "[i]f a court does not recognize an unprecedented claim where the alleged facts are taken to be true, the claim is clearly doomed and must be struck out" (*Atlantic Lottery* at para 19).

95 Moreover, the recognition of this principle is not consistent with the Courts' approach to the development of the common law, namely that these evolutions are incremental, unlike the developments in the law that may be taken by the legislature. The Courts are constrained in this regard, unlike the legislature, and the breadth of the proposed public trust doctrine is not reflective of such an incremental step.

(b) **Public Trust Doctrine as an Unwritten Constitutional Principle**

96 The Plaintiffs also claim that the public trust doctrine is an unwritten constitutional principle. They rely on secondary sources, pointing to remarks by Chief Justice McLachlin in *Unwritten Constitutional Principles: What is going on?* [Given at the 2005 Lord Cooke Lecture in Wellington, New Zealand]. The remarks discussed how constitutional principles are rooted in natural law. In the Plaintiffs' view, this is not unlike the alleged public trust doctrine they describe. The remarks by the Chief Justice include the following statement:

> The contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law.

97 The Plaintiffs claim it would therefore be premature to reject this claim on a motion to strike.

98 This said, the Plaintiffs' Statement of Claim has not pleaded material facts to support the public trust doctrine as an unwritten constitutional principle, outside its allegation that this is in fact the case. The failure to offer any material facts which, taken to be true, would support this finding in their Statement of Claim, is fatal to the proposed cause of action.

99 The Supreme Court in *Reference re Succession of Quebec*, *[1998] 2 SCR 217* at paras 50, 51, describe that "it would be impossible to conceive of our constitutional structure without them [underlying constitutional principles]. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood". There are no material facts, which taken to be true, could demonstrate this threshold has been met.

100 On the basis of the above, it is plain and obvious that the claims related to the public trust doctrine

fail to disclose a reasonable cause of action.

VII. Conclusion

101 On the basis of the above findings, I would grant the Defendants' motion to strike the Plaintiffs' Statement of Claim without leave to amend.

102 The *Charter* claims, under section 7 and section 15, are not justiciable and otherwise disclose no reasonable cause of action. The public trust doctrine, while justiciable, does not disclose a reasonable cause of action.

103 The Defendants did not seek costs in their motion. Given the novel and challenging nature of the statement of claim, I exercise my discretion in ordering no costs.

ORDER IN T-1750-19

THIS COURT ORDERS that:

1. The Defendants' motion to strike the Plaintiffs' Statement of Claim is granted without leave to amend;
2. No costs are awarded.

M.D. MANSON J.

End of Document

TAB 23

CITATION: Bowman et al. v. Her Majesty the Queen, 2019 ONSC 1064
DIVISIONAL COURT FILE NO.: 102/18
DATE: 20190214

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THORBURN, REID, and MYERS JJ.

BETWEEN:	)	
	)	
DANA BOWMAN, GRACE MARIE DOYLE HILLION, SUSAN LINDSAY, and TRACEY MECHEFSKE	)	*Mike Perry* for the Applicants, Dana Lindsay Bowman, Grace Marie Doyle Hillion, Susan and Tracey Mechefske
	)	
Applicants	)	
	)	
– **and** –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER OF CHILDREN, COMMUNITY AND SOCIAL SERVICES	)	*Christopher P. Thompson and Chantelle Blom* for the Respondent, Her Majesty the Queen in Right of Ontario
	)	
Respondent	)	
	)	
	)	
	)	**HEARD at Toronto:** January 28, 2019

BY THE COURT

OVERVIEW

[1] The government of Ontario announced a basic income pilot research study ("the Pilot Project") in April of 2017.

[2] The objective of the Pilot Project was to: "study whether a basic income can better support vulnerable workers and give people the security and opportunity they need to achieve their potential."

[3] It was envisaged that data would be gathered over a prolonged period in the hope of identifying whether providing recipients with a basic income would increase and stabilize income; reduce economic anxiety and/or improve housing stability, mental health and

2019 ONSC 1064 (CanLII)

employment outcomes; and enable recipients to be better able to make choices and decisions about their future. The compilation of this data would assist in determining whether to adopt the basic income approach across the province.

[4] The Minister of Children, Social and Community Services ("the Respondent") decided to cancel the Pilot Project on July 31, 2018 with payments to end in March 2019.

[5] The Applicants seek judicial review to quash the decision cancelling the Pilot Project.

THE POSITION OF THE PARTIES

The Applicants' Position

[6] The Applicants agree that governments are entitled to make policy decisions to fund or not to fund certain initiatives. They also agree that the Minister's decision to cancel the Pilot Project is a policy decision.

[7] However, the Applicants submit that the decision to cancel the Pilot Project is subject to judicial review because the Minister's decision affects their financial interests, they relied on the Pilot Project to their detriment, and the decision to cancel adversely affects their well-being. Moreover, they claim the decision was irrational, made in bad faith and/or unethical and should therefore be quashed.

[8] The Applicants also claim the Respondent breached an agreement with Veritas, the Independent Review Board ("IRB") retained for the Pilot Project, which requires the Respondent to consult with Veritas and adhere to the terms of the agreement.

[9] Lastly, while the Applicants seek an order quashing the decision to cancel the Pilot Project, they do not seek an order requiring the Respondent to continue funding the Pilot Project. Rather, they concede there is no legal authority to require the Respondent to continue funding the Pilot Project.

The Respondent's Position

[10] The Respondent submits that the Pilot Project is a government funding decision which does not give rise to individual rights enforceable on judicial review. The decision to cancel the Pilot Project is therefore not justiciable because a policy decision as to how to spend public funds is a political decision that cannot be questioned or reviewed by the courts.

[11] Secondly, and only if this court decides that there is a justiciable issue, the fact that the Respondent's policy choices may be contrary to the interests of some does not render the decision irrational or in bad faith.

[12] Moreover, the Respondent argues that the statements made by members of the Legislature are not "reasons for decision" and the opinions of research ethicists cannot fetter

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Cabinet's policy-making authority. In any event, the Respondent's two experts concluded that the decision to cancel the Pilot Project was not an ethical violation.

[13] The Respondent submits that it had no obligation to consult with Veritas prior to cancelling the funding for the Pilot Project.

[14] Finally, the Respondent argues that the inevitable effect of an order to quash the decision to cancel the Pilot Project is to require the Respondent to continue funding, which, it is agreed, this Court has no authority to do.

THE EVIDENCE

[15] The Pilot Program was created pursuant to the Crown's common law spending powers. The authority for expenditures is derived from the *Supply Act* and expenditures are approved by the Treasury Board of Cabinet.

[16] The Applicants are all residents of Lindsay, Ontario. All of them receive Basic Income payments pursuant to the Pilot Project. Dana Bowman is 57-years old with long-term disabilities. Grace Hillion is a 20-year old student at Durham College. Susan Lindsay is a 57-year old person who stopped work in 2017 owing to health issues. Tracey Mechefske is a 46-year old person living with long-term disabilities who owns a small business.

[17] Pursuant to the Pilot Project, a randomized controlled trial was conducted in Hamilton and Thunder Bay with 1,000 participants assigned to a control group and 1,000 participants receiving payments. In Lindsay, a "saturation site", all 2,000 participants received payments.

[18] Participants in the control group receive up to $16,989 per year for a single person or $24,027 for a couple, plus an additional amount of up to $6,000 per year for each person with a disability. Payments are reduced by 100% of Employment Insurance and Workplace Safety and Insurance Board benefits and 50% of employment income. Recipients who were receiving income support from Ontario Works at the time of enrollment in the Pilot Project receive drug benefits and those who received income support from the Ontario Disability Support Program ("ODSP") continue to receive drug and dental benefits. Other benefits were not provided in the Pilot Project.

[19] Each of the Applicants was provided with an Information Booklet.

[20] In the Booklet, the Pilot Project is identified as "a three-year study" and later as lasting "up to three years".

[21] The Information Booklet provides that participants must complete surveys containing questions about their experiences while in the Pilot Project, such as regarding "stress levels, work, family, health, education and housing" and consent to the collection and disclosure of their personal information and tax records. The Information Booklet provides that:

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> Participation in the pilot is temporary. Any decision you make about your future based on the amount you receive should take this into account. Participants will get notifications about the close of the pilot in advance.
>
> …
>
> The pilot will run for up to three years. When the pilot enters its final year, the Basic Income payments will be reduced gradually to prepare participants for the end of the study. The intent of this gradual reduction is to reduce any impact of ending Basic Income payments. Participants will receive information about this before any payments are reduced.

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[22] Two of the four Applicants say they were told by Pilot Project staff that the Pilot Project would last three years. There was a phased enrollment of participants.

[23] As the Pilot Project was essentially a social science experiment with human participants, the Respondent engaged Veritas to "perform the initial and ongoing ethical review of the research study with the Research Participants' rights and welfare in mind."

[24] The Respondent acknowledged in writing that Veritas had the authority to review, oversee, and suspend approval of the Pilot Project and agreed to implement the Pilot Project "in accordance with the guiding ethical principles and normative documents abided by the IRB".

[25] In March 2018, the Respondent stated in a report to Veritas that the study closure date was May 27, 2021.

[26] Consistent with the Respondent's objectives of the Pilot Project:

a. Dana Bowman renewed her plan to upgrade her education toward a career in social work, which she said had not been financially feasible under ODSP;

b. Grace Hillion was able to pay her tuition and continue her college education which she said was in jeopardy due to financial issues;

c. Susan Lindsay, planned to use the Pilot Project payments to resume working; and

d. Tracey Mechefske used the payments in her small business.

[27] The Applicants say they also used the basic income from the Pilot Project to pay their bills, eat healthier food, and purchase clothes and medications. The Applicants say their independence, self-esteem and sense of personal accountability increased.

[28] On July 31, 2018, just over one year from the announcement of the Pilot Project, the Minister cancelled the Pilot Project. The Applicants first learned of the cancellation through family, the news, and social media.

[29] The Applicants state that the cancellation of the Pilot Project on July 31, 2018 effective March 31, 2019, has had a devastating impact on them and they feel that, as a result of the cancellation, their futures are in jeopardy, their health has suffered, and their futures are uncertain.

[30] Media releases were followed up with letters to the participants who were informed that payments would continue until March 2019, whereupon all payments would cease.

[31] When asked about the reason for the cancellation, the Executive Director of Policy in the Office of the Premier said that he thought cost was a big factor and that paperwork was another. He also cited "[r]emoval of work ethic/driving people to quit jobs," as well as anti-competitive business environment leading to more layoffs and "usage/uptake". The Minister stated that the Pilot Project was "actually disincentivizing people from working" and that a basic income program would be too expensive, "costing $17 billion and leading to a 20% HST".

[32] On September 6, 2018, Veritas expressed "concern over the news reports indicating the government's intention to wind down the Ontario Basic Income Pilot." Veritas further noted that, as the IRB responsible for oversight of the project, it must review any proposed changes to the research protocol, evaluate their ethical acceptability, and approve them before they are implemented or disapprove them as the case may be.

[33] On October 4, 2018, the Respondent submitted its wind down strategy to Veritas. Veritas did not approve the strategy. Veritas said the wind down timeline was inconsistent with the three-year term of the Pilot Project and the Respondent's initial statement that those who receive the basic income would receive it for two years, with another year in which the benefits would be gradually reduced to ease the transition back to standard benefits and because it appeared no justification for approval of the 'winding down' plan was forthcoming. Finally, Veritas made a finding of Serious Non-Compliance based on evidence that, despite Veritas' insistence, the 'winding down' of the Pilot Project was started by the Respondent without Veritas' approval.

[34] Veritas stated that its finding of Serious Non-Compliance was also made "considering that the situation will have profound adverse effects on the rights and welfare of Research Participants." Veritas directed that a plan to rectify the Serious Non-Compliance be submitted by the Respondent to Veritas for review and approval. The Respondent advised Veritas that it disagreed with Veritas' characterization of the documents and terminated its engagement with Veritas, "in light of [its] position", effective immediately.

ANALYSIS OF THE ISSUES

Issue #1: When are Policy Decisions Subject to Judicial Review?

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[35] In choosing to wind-down the Pilot Project, Cabinet made a policy decision. The authority to implement the Pilot Project is based on the Crown's common law spending powers.

[36] The allocation of public resources does not give rise to enforceable rights on judicial review: See *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)* (1991), 2 O.R. (3d) 716 (Div. Ct), at paras. 43-44, leave to appeal dismissed [1991] O.J. No. 3201 (C.A.) and *Apotex Inc. v. Ontario (Minister of Health)* (2004), 73 O.R. (3d) 1 (C.A.), at paras. 33-37, 39-40, leave to appeal refused [2005] S.C.C.A. No. 8.

[37] In *Hamilton-Wentworth*, at paras. 43-47, the Minister of Transportation refused to fund the building of an expressway despite the government's agreement almost 20 years earlier to fund the project. The Applicant alleged that the cancellation of funding was based on environmental grounds, which were extraneous to the purposes of the relevant statute. The Court found that Cabinet's decision not to fund the expressway was a policy decision that was not subject to judicial review. In so doing, it held (at paras. 42-44) that:

> The government has the right to order its priorities and direct its fiscal resources towards those initiatives or programs which are most compatible with the policy conclusions guiding that particular government's action. This was simply a statement of funding policy and priorities and not the exercise of a statutory power of decision attracting judicial review.
>
> While it would appear that in basing its decision on environmental concerns the government is ignoring the statutory framework established to deal with environmental matters that does not affect its jurisdiction to make the decision in question. Such a decision is not subject to judicial review. It is in substance a decision for the disbursement of public funds. It has been a constitutional principle of our parliamentary system for at least three centuries that such disbursement is within the authority of the legislature alone. The appropriation, allocation or disbursement of such funds by a court is offensive to principle.
>
> As was said by Lush J. in *R. v. Treasury Lords Commissioners* (1872), L.R. 7 Q.B. 387, at p. 402:
>
> > I think that the applicants have failed to make out that which is essential to entitle them to a writ of mandamus, namely, that there is a legal duty imposed upon the Lords of the Treasury -- a duty as between them and the applicants -- to pay over this sum of money.

[38] Government cannot be required by the court to make or continue to fund an expenditure, as the distribution of government funds is a political not a judicial function: See *Re Metropolitan General Hospital and Minister of Health* (1979), 25 O.R. (2d) 699 (H.C.), at paras. 10-13.

[39] Moreover, the fact that funds were provided in the past does not mean government must continue to offer the same level of service nor does the decision to reduce or eliminate funding

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alone, create enforceable rights: See *St. Joseph Island Hospital Assn. (c.o.b. Matthews Memorial Hospital Assn.) v. Plummer Memorial Public Hospital,* [1996] O.J. No. 4663 (C.J. (Gen. Div.)), at paras. 39-40.

[40] This is because courts have no power to review the policy considerations which motivate Cabinet decisions. The responsibility for the management of public funds rests with the government and not the court, as does the correctness of the government's decisions and policies: See: *Apotex*, at para. 39.

[41] For this reason alone, the Application is dismissed.

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Issue #2: Does this Decision alter individual rights, obligations or legitimate expectations?

[42] The Applicants submit that although policy decisions are not usually justiciable, judicial review is nonetheless appropriate in this case as the decision affects their financial interests, they rely on the Basic Income payments, and the decision to cancel has adversely affected their well-being. They submit that an application for judicial review is appropriate to protect their legitimate rights and expectations.

[43] We do not agree.

[44] A motion to quash is only available when the decision at issue:

a. alters the person(s)' rights or obligations that are enforceable in private law, or

b. deprives the person(s) of a benefit (i) she had been given and legitimately expects to continue to enjoy pending receipt of rational grounds for withdrawing it and an opportunity to comment; or (ii) for which assurance has been given that the benefit or advantage would not be withdrawn without first having an opportunity to advance reasons why they should not be withdrawn. (See: *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.), at paras. 44, 47-51; *Pharmaceutical Manufacturers Assn. of Canada v. British Columbia (Attorney General)* (1997), 149 D.L.R. (4th) 613 (B.C.C.A.), at paras. 27-28)

[45] In this case, the Applicants do not seek private law remedies such as damages for breach of contract or for negligence. They seek only to quash the decision to cancel the Pilot Program.

[46] Nor does the Respondent's decision deprive the Applicants of a "legitimate expectation" within the meaning of the law. There is no legitimate expectation to be consulted on policy decisions to fund. Nor is there any obligation to hold public hearings or consult with stakeholders: See *Gigliotti v. Conseil d'Administration du College des Grands Lacs* (2005), 76

O.R. (3d) 561 (Div. Ct.), at paras. 62-63 and *Canadian Union of Public Employees v. Ontario*, 2018 ONCA 309, at para. 8, affirming 2017 ONSC 4874.

[47] As Nordheimer J. (as he then was) noted: "While it may sometimes seem unfair when rules are changed in the middle of a game; that is the nature of the game when one is dealing with government programs." See *Skypower CL I LP et al. v. Minister of Energy (Ontario) et al.,* 2012 ONSC 4979 (Div. Ct.), at para. 84.

[48] The Applicants point to the decision in *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, 2018 ONSC 5062, where the Court held that the government's decision to implement a wind-down of a subsidy program wrongfully singled out Tesla. *Tesla* is, however, distinguishable from the case before us as the court was not being asked to review the government's decision to stop funding the electric car subsidy program. Rather, the decision in *Tesla* involved the regulatory details as to how a winding down program was going to operate under a statutory scheme. This brought the decision out of the realm of a broad policy decision and into the realm of a reviewable administrative implementation decision for which Tesla had a legitimate expectation of consultation.

[49] As such this ground of review must fail.

Issue # 3: Was the Decision Irrational or in Bad Faith?

[50] The Applicants further submit that the Respondent's decision to cancel the Pilot Project was irrational and in bad faith and should therefore be quashed.

[51] However, policy decisions taken without consultation do not constitute bad faith because there is no right to procedural fairness or any legitimate expectation to be consulted on policy decisions: See *Canadian Union of Public Employees v. Ontario,* at para. 8. To the extent that contracts are breached in so doing, governments are permitted to change government policy subject to private law remedies.

[52] Moreover, the Applicants concede that comments by politicians in the Legislature are not admissible to prove improper purpose as public declarations are not credible sources of government intention though they "represent, no doubt, the considered views of the speakers, at the time they were made." See: *Reference re Upper Churchill Water Rights Reversion Act, 1980,* [1984] 1 S.C.R. 297, at para. 31.

[53] The Applicants have commenced a class action in which they seek private law remedies. In this application for judicial review they only ask the court to quash the decision cancelling the Pilot Project. Because the decision to cancel the Pilot Program was a core policy decision made by the Respondent based on political considerations or electoral expediency, the Court has no authority to grant that request.

Issue #4: Does this Court have the authority to Grant the Order to Quash?

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[54] An order to quash the decision cancelling the Pilot Program would inevitably result in a further allocation of funds to the Pilot Program.

[55] The Respondent cannot be required to make a particular expenditure, since an order for judicial review cannot compel a particular result, such as the payment of funds, the conduct of research, or the continuation of a program. (See *Metropolitan General Hospital*, at paras. 9-10).

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CONCLUSION

[56] The Applicants made clear and cogent submissions in respect of:

a. The importance of the Pilot Project in collecting data to better understand the effect of a guaranteed annual income on those who are most vulnerable, and

b. The harm the Applicants say they suffered and their concern about the decision and the effect of the decision on their futures and others like them.

[57] However, the Pilot Project is a government funding decision which does not give rise to individual rights enforceable on judicial review. This Court has no power to review the considerations which motivate a Cabinet policy decision. As such, the decision to cancel the Pilot Project is not justiciable.

[58] Moreover, the inevitable effect of an order to quash the decision to cancel the Pilot Project would require the Respondent to continue funding, which, it is agreed, this Court has no authority to do. The distribution of government funds *per se* is a political not a judicial function.

[59] For these reasons, the Application is dismissed.

[60] This order has no effect on the Applicants' class action for damages for breach of duty of care, breach of contract and/or other private law remedies. This order only addresses the question of whether the court can quash the government's decision.

[61] Given the nature of this proceeding and in view of the agreement between the parties, we make no order as to costs.

Thorburn J.

Reid J.

Myers J.

Date of Release: February 14, 2019

2019 ONSC 1064 (CanLII)

CITATION: Bowman et al. v. Her Majesty the Queen, 2019 ONSC 1064
DIVISIONAL COURT FILE NO.: 102/18
DATE: 20190214

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THORBURN, REID, and MYERS JJ.

BETWEEN:

DANA BOWMAN, GRACE MARIE DOYLE HILLION, SUSAN LINDSAY, and TRACEY MECHEFSKE

Applicants

– **and** –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER OF CHILDREN, COMMUNITY AND SOCIAL SERVICES

Respondent

REASONS FOR DECISION

BY THE COURT

Date of Release: February 14, 2019

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TAB 24

Canadian Forest Products Ltd. *Appellant*

v.

Her Majesty The Queen in Right of the Province of British Columbia *Respondent*

and between

Her Majesty The Queen in Right of the Province of British Columbia *Appellant*

v.

Canadian Forest Products Ltd. *Respondent*

and

Attorney General of Canada, Forest Practices Board, Sierra Club of Canada, David Suzuki Foundation, Council of Forest Industries, Forest Products Association of Canada and Coast Forest & Lumber Association *Interveners*

Canadian Forest Products Ltd. *Appelante*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Intimée*

et entre

Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Appelante*

c.

Canadian Forest Products Ltd. *Intimée*

et

Procureur général du Canada, Conseil des pratiques forestières, Sierra Club du Canada, David Suzuki Foundation, Council of Forest Industries, Association des produits forestiers du Canada et Coast Forest & Lumber Association *Intervenants*

INDEXED AS: BRITISH COLUMBIA *v.* CANADIAN FOREST PRODUCTS LTD.

Neutral citation: 2004 SCC 38.

File No.: 29266.

2003: October 16; 2004: June 11.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Damages — Environmental damages to public lands — Compensation — Forest fire — Valuation of loss of harvestable trees, and of non-harvestable trees in environmentally sensitive areas — Appropriate basis to calculate compensation — Province suing for compensation logging company responsible for fire — Whether Province can sue not only as ordinary landowner but

RÉPERTORIÉ : COLOMBIE-BRITANNIQUE *c.* CANADIAN FOREST PRODUCTS LTD.

Référence neutre : 2004 CSC 38.

N° du greffe : 29266.

2003 : 16 octobre; 2004 : 11 juin.

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

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Dommages-intérêts — Dommages environnementaux à des terres domaniales — Indemnité — Incendie de forêt — Évaluation de la perte d'arbres récoltables, et d'arbres protégés dans des zones écosensibles — Fondement approprié du calcul de l'indemnité — Poursuite en indemnisation de la province contre la société forestière responsable de l'incendie — La province peut-elle

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also as parens patriae — Whether Comparative Value Pricing system can be taken into account to reduce compensation — Whether Province entitled to "auction value" of harvestable trees — Whether Province entitled to commercial value of non-harvestable trees plus a premium for environmental value — Whether common law provides for environmental damages.

In 1992, a fire swept through the Stone Creek area in the interior of British Columbia, damaging 1491 hectares of forest in a region where tenure holders are licensed to log. There is no dispute that the appellant ("Canfor"), a major licensee, is largely responsible for the blaze. After the fire, the burned-over cutting areas were logged. The fire-damaged timber was sold at a reduced price. The burned trees in some areas were left standing for environmental reasons, primarily to add stability to the soil, and the Crown adopted a rehabilitation plan. The Crown claimed damages against Canfor for three categories of loss: (1) expenditures for suppression of the fire and restoration of the burned-over areas; (2) loss of stumpage revenue from trees that would have been harvested in the ordinary course (harvestable trees); and (3) loss of trees set aside for various environmental reasons (non-harvestable or protected trees) in sensitive areas as established by the Crown.

In 1987, as part of its strategy to deal with the softwood lumber dispute with the United States, the Province adopted a stumpage "target rate" for wood harvested in the British Columbia Interior, together with a Comparative Value Pricing ("CVP") system, which the Crown's expert testified operates to ensure "that provincial revenues are not affected by low timber values" in any particular area. Forest productivity and costs of production varied from licence area to licence area within the British Columbia Interior, and the Province's regulatory rate system was calculated to ensure cost sensitivity to local conditions. If the "value" of the standing timber was reduced in one area, therefore giving rise to a reduced stumpage rate in that area, the regulatory system, through the CVP mechanism, adjusted the rates paid by other licensees in the following quarter to compensate. This was known as the "waterbed effect", which affected approximately 35 percent of the harvested timber from the Stone Creek

poursuivre non seulement en sa qualité de propriétaire foncier ordinaire mais aussi en sa qualité de parens patriae? — Le système de fixation des prix en fonction de la valeur comparative peut-il être pris en compte pour diminuer le montant de l'indemnité? — La province a-t-elle droit à la « valeur aux enchères » des arbres récoltables? — La province a-t-elle droit à la valeur marchande des arbres protégés et à une indemnité additionnelle pour leur valeur environnementale? — La common law permet-elle des dommages environnementaux?

En 1992, un incendie de forêt a ravagé la région de Stone Creek dans l'intérieur de la Colombie-Britannique, endommageant 1 491 hectares de forêt dans une région où des titulaires de tenure forestière étaient autorisés à exploiter la forêt. Nul ne conteste que l'appelante (« Canfor »), un important titulaire de permis, est en grande partie responsable de l'incendie. Après l'incendie, les arbres ont été coupés dans les parterres de coupe ravagés par le feu. Le bois endommagé par le feu a été vendu à prix réduit. Dans certaines zones, des arbres brûlés ont été laissés debout à des fins écologiques, principalement pour assurer la stabilité des sols, et la Couronne a adopté un plan de restauration. La Couronne a réclamé des dommages-intérêts pour trois catégories de pertes : (1) les dépenses supportées pour la lutte contre l'incendie et la restauration des aires incendiées, (2) la perte des droits de coupe à l'égard des arbres qui auraient été récoltés dans le cours normal des activités (les arbres récoltables), et (3) la perte des arbres réservés pour diverses fins liées à l'environnement dans les zones désignées écosensibles par la Couronne (les arbres réservés ou protégés).

En 1987, dans le cadre de sa stratégie à l'égard du différend sur le bois d'œuvre résineux avec les États-Unis, la province a adopté un « taux cible » des droits de coupe pour le bois récolté dans l'intérieur de la Colombie-Britannique, ainsi qu'un système de fixation des prix en fonction de la valeur comparative (« PVC ») qui, selon l'expert de la Couronne, garantissent « que la moindre valeur du bois » dans une aire donnée « n'a pas d'incidence sur les recettes de la province ». La productivité de l'exploitation forestière et les coûts de production variaient d'une aire de permis à l'autre dans le secteur de l'intérieur de la Colombie-Britannique, et le système de tarification réglementaire de la province a été conçu pour assurer l'élasticité du coût par rapport aux conditions locales. Si, dans une aire, la « valeur » du bois sur pied était diminuée, entraînant par conséquent une diminution du taux des droits de coupe, la réglementation, par le mécanisme du PVC, rajustait les droits payés par les autres titulaires de permis au cours du

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fire. The stumpage system, including the CVP, was the only source of revenue for the Province under the *Forest Act*, pursuant to which it was entitled to recover revenues.

The trial judge awarded the Crown $3,575,000 (an amount agreed upon by the parties) under the first category of loss, but otherwise dismissed the claim on the basis that the Crown had failed to prove a compensable loss with respect to either harvestable or non-harvestable trees. The trial judge concluded that, as the fire had accelerated the Province's receipt of revenue that would otherwise have been spread over a period of up to 66 years and that as the fire damage was not so severe as to make the salvaged timber significantly less valuable than it was before the fire, the Province had not suffered a loss in purely financial terms other than restoration costs. The trial judge also held that Canfor was entitled to have the increased revenue obtained by the Province from other licensees under the CVP system taken into account to determine if the Province had suffered a financial loss. In the result, he concluded, the fire left the Province in a financial position no worse than it would have enjoyed had the fire not occurred. With respect to the non-harvestable trees, the trial judge indicated that while the Province had lost something of value, there was no proof of loss other than restoration costs, which had been agreed to.

The Court of Appeal dismissed the Crown's appeal on damages with respect to the harvestable trees, but awarded compensation for diminution of the value of the non-harvestable trees at a figure equivalent to one-third of their commercial value.

Held (Bastarache, LeBel and Fish JJ. dissenting): The appeal should be allowed and the cross-appeal dismissed. The decision of the trial judge is restored.

Per McLachlin C.J. and Iacobucci, Major, Binnie, Arbour and Deschamps JJ.: A claim for environmental loss, as in the case of any loss, must be put forward based on a coherent theory of damages, a methodology suitable for their assessment, and supporting evidence. No one doubts the need for environmental protection but, in this case, apart from the cost of reforestation, which was agreed to, the Crown claims only stumpage and "diminution of the value of the timber" within the burned-over area. The environment includes more than timber, but

trimestre suivant pour compenser. On appelait cela « l'effet stabilisateur », qui touchait environ 35 pour 100 du bois récolté dans la zone ravagée de Stone Creek. Le système des droits de coupe, y compris le PVC, était la seule source de recettes de la province sous le régime de la *Forest Act* donnant ouverture à indemnisation.

Le juge de première instance a accordé à la Couronne 3 575 000 $ (un chiffre arrêté de concert) à l'égard de la première catégorie de perte, mais a rejeté la demande pour le reste parce que la Couronne n'avait pas prouvé une perte indemnisable soit pour les arbres récoltables, soit pour les arbres réservés. Le juge de première instance a conclu que, comme le feu avait accéléré la perception par la province de recettes qui, sans cela, auraient pu s'étaler sur 66 ans et que le dommage causé par le feu n'était pas grave au point de diminuer de manière significative la valeur du bois récupéré par rapport à celle du bois vert, la province n'avait pas subi de perte d'ordre purement financier, abstraction faite des coûts de restauration. Le juge de première instance a également décidé que Canfor avait droit à ce que les recettes supplémentaires obtenues par la province des autres titulaires de permis en application du système de PVC soient prises en compte pour déterminer si la province avait subi une perte financière. En fin de compte, il a conclu que la province se trouvait dans une situation financière aussi avantageuse que si l'incendie n'avait pas eu lieu. En ce qui concerne les arbres réservés, le juge de première instance a affirmé que la province avait perdu quelque chose de valeur, mais que la preuve relative à la perte portait uniquement sur les coûts de restauration, qui avaient fait l'objet d'un accord.

La Cour d'appel a rejeté l'appel de la Couronne concernant les dommages-intérêts pour ce qui est des arbres récoltables, mais elle a accordé une indemnité en ce qui concerne la diminution de la valeur des arbres réservés, la fixant à un tiers de leur valeur marchande.

Arrêt (les juges Bastarache, LeBel et Fish sont dissidents) : Le pourvoi est accueilli et le pourvoi incident est rejeté. La décision du juge de première instance est rétablie.

La juge en chef McLachlin et les juges Iacobucci, Major, Binnie, Arbour et Deschamps : Une demande d'indemnité pour une perte environnementale, comme pour toute perte, doit être basée sur une théorie cohérente des dommages, sur une méthode permettant d'évaluer ces dommages et sur une preuve suffisante. Nul ne met en doute la nécessité de protéger l'environnement, mais en l'espèce, hormis le coût du reboisement, dont les parties ont convenu, la Couronne ne réclame que les droits de coupe et la « diminution de la

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no allegation of such additional losses were made in that regard. The pleadings proceeded on a fairly narrow commercial focus and that is how the claim was defended.

The Crown's entitlement to compensation for both harvestable and non-harvestable trees should be limited to entitlement in the role the Crown adopted in its statement of claim, namely that of the landowner of a tract of forest. While it is open to the Crown in a proper case to take action as *parens patriae*, for compensation and injunctive relief on account of public nuisance, or negligence causing environmental damage to public lands, such litigation would raise important and novel policy issues. Since the Crown sought compensation here on the same basis as any other landowner for stumpage and "diminution of the value of the timber", this is not a proper appeal for the Court to embark on a consideration of those difficult issues. It would be unfair to the other parties to inject such a wide-ranging and important debate into the proceedings at this late date.

The Crown claimed "auction value" as the appropriate basis on which to calculate compensation for the harvestable trees. However, under the regulatory licensing system in effect in 1992 in British Columbia, the Province was not entitled to auction off the right to an immediate cut of the entire territory eventually burned over, which is what auction value measures. The Provincial regulatory scheme schedules the right to log its forests from year to year and decade to decade in exchange for long-term stability, as well as the economic well-being of communities dependent on a sustainable forest industry. The rights of the licensees were reciprocated in the imposition of corresponding obligations on the Province. The practical effect was that the Province had tied up its forest assets in such a way as to render the auction approach at odds with the Province's own regulatory regime. The Crown is as bound by the legislative scheme of the *Forest Act* as are the private operators, subject to any special exemption. There are no special exemptions applicable here.

The CVP system provides a relevant source of income to the Province which can properly be taken into account to determine if it has suffered a loss. The Province's claim is restricted to the impact of the fire on its projected revenue stream and the assessment of compensable loss is therefore heavily influenced by the regulatory structure which the Province itself designed and implemented. The

valeur de la ressource » dans la zone ravagée par le feu. L'environnement ne se limite pas au bois, mais aucun préjudice additionnel à cet égard n'a été allégué. Les actes de procédure visaient un aspect commercial assez restreint et c'est sur cette base que la demande a été contestée.

Le droit de la Couronne à une indemnité à l'égard tant des arbres récoltables que des arbres réservés est limité à celui du propriétaire d'une aire forestière, le rôle qu'elle a adopté dans sa déclaration. Bien que la Couronne à titre de *parens patriae* ait toute latitude pour engager, quand les faits y donnent ouverture, des poursuites en indemnisation et en injonction pour cause de nuisance publique ou pour négligence causant un dommage environnemental à des terres domaniales, ces poursuites soulèveraient des questions de politique générale nouvelles et importantes. Comme la Couronne demande, au même titre que tout propriétaire foncier, d'être indemnisée pour la perte de droits de coupe et la « diminution de la valeur du bois », le présent pourvoi ne se prête pas à l'examen par la Cour de ces questions difficiles. Il serait injuste pour les autres parties de présenter à une étape aussi tardive des questions dont la portée et l'importance sont aussi grandes.

La Couronne prétend que la « valeur aux enchères » constitue le fondement qui convient pour calculer l'indemnité quant aux arbres récoltables. Toutefois, suivant le système de permis réglementaire en vigueur en Colombie-Britannique en 1992, la province ne pouvait pas vendre aux enchères le droit de couper immédiatement tout le bois de la zone qui allait être ravagée par le feu, ce que permet de mesurer la valeur aux enchères. La réglementation provinciale fixe la coupe du bois pour les années et les décennies à venir en contrepartie de la stabilité à long terme ainsi que du bien-être économique des collectivités qui dépendent d'une industrie forestière stable. Aux droits des titulaires de permis correspondent des obligations de la province. L'effet pratique de ce système est que la province a bloqué ses actifs forestiers et que la méthode des enchères est incompatible avec sa propre réglementation. La Couronne, sous réserve d'exemption spéciale, est liée par les règlements d'application de la *Forest Act* au même titre que les exploitants privés. Aucune exemption spéciale ne s'applique en l'espèce.

Le système de PVC fournit à la province une source de revenu pertinente qu'il y a lieu de prendre en compte pour déterminer si elle a subi une perte. La demande de réparation de la province est limitée à l'incidence de l'incendie sur le flux anticipé de ses recettes et, donc, l'appréciation de la perte indemnisable dépend grandement de la réglementation que la province a elle-même

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trial judge's analysis of the regulatory system was correct and it was open to him to conclude that the Province had defined the British Columbia Interior Region, and not the Stone Creek area itself, as the appropriate frame of reference for revenue purposes. Canfor therefore was entitled to rely on the "revenue-neutral" system the Province had implemented. Thus the Province had not, because of the fire, suffered a loss in the relevant revenue-generating unit.

The Crown's tactic to isolate the Stone Creek fire area from the regulatory region of which it forms a part must be rejected as an attempt to construct a financial loss that was not in fact suffered. If the Crown were permitted to ignore its own regulatory system, and calculate a notional loss by treating the Stone Creek fire area in isolation, it would by collection of that amount exceed the revenue otherwise intended to be collected by its own regulatory scheme and to that extent make a windfall rather than receive fair compensation for a proven loss.

The legislative scheme put in place by the *Forest Act* is central to the analysis of the Province's claim. According to the testimony of Canfor's expert, which was accepted by the trial judge, the CVP stumpage system was designed to ensure that the loss was never incurred. If there was no revenue loss, there was nothing to mitigate. Thus the principles governing mitigation of damages are not pertinent. Similarly, the Crown's argument that Canfor should not be allowed to "pass on" the loss to other forest licensees through the "waterbed effect" is misplaced. If no revenue loss was suffered in the first place, there was no loss to "pass on".

Nor did the Crown prove any financial loss with respect to the non-harvestable trees. Commercial logging of the steep, sensitive slopes would cost more than it was worth and according to the expert evidence would not have produced additional revenue for the Crown. With respect to the riparian areas (which could have been logged in 1992), the trial judge accepted the calculations of Canfor's expert witness which showed that any loss in the commercial value of expected stumpage revenue was more than offset by the receipt of accelerated payments for the immediate harvest of salvaged timber. There was thus no revenue shortfall in that respect either. While stumpage money may well not be a satisfactory financial proxy for the value of forest areas preserved for environmental purposes, the Crown

élaborée et mise en œuvre. Le juge de première instance a correctement analysé le régime réglementaire et il lui était loisible de conclure que la province avait défini le secteur de l'intérieur de la Colombie-Britannique, et non la zone de Stone Creek elle-même, comme étant le cadre de référence approprié pour déterminer les recettes. Canfor était donc fondée à invoquer le système « sans incidence sur les recettes » que la province avait mis en place. Dans cette zone génératrice de recettes, la province n'avait donc pas subi de perte attribuable à l'incendie.

La tactique de la Couronne consistant à isoler la zone ravagée de Stone Creek du secteur réglementé dont elle fait partie doit être rejetée parce qu'elle constitue une tentative de créer une perte financière qu'elle n'a pas subie. Si l'on permettait à la Couronne de faire fi de sa propre réglementation et de calculer une perte théorique en prenant isolément la zone ravagée de Stone Creek, elle toucherait, avec cette somme, des recettes supérieures à celles qu'elle était censée percevoir en vertu de sa propre réglementation et, dans cette mesure, elle obtiendrait un paiement injustifié au lieu de recevoir la juste indemnisation de la perte prouvée.

La réglementation mise en place par la *Forest Act* est essentielle à l'analyse de la demande de la province. Selon la déposition de l'expert de Canfor, que le juge de première instance a retenue, le système de PVC des droits de coupe était conçu pour garantir qu'il n'y ait jamais de perte. S'il n'y avait pas de perte de recettes, il n'y avait rien à limiter. Les principes régissant la limitation des dommages ne sont donc pas pertinents. De même, l'argument de la Couronne selon lequel il ne fallait pas permettre à Canfor de « transférer » la perte à d'autres titulaires de permis par application de « l'effet stabilisateur » porte à faux. Si aucune perte de recettes n'a été subie, il va de soi qu'aucune perte ne peut être « transférée ».

La Couronne n'a pas non plus prouvé qu'elle avait subi une perte financière en ce qui concerne les arbres réservés. L'exploitation commerciale en terrain escarpé vulnérable aurait été déficitaire et, selon les experts, la Couronne n'en aurait tiré aucune recette additionnelle. Pour ce qui est des aires riveraines (qui auraient pu être exploitées en 1992), le juge de première instance a accepté les calculs de l'expert de Canfor qui montraient que toute perte de la valeur marchande des droits de coupe anticipés était plus que compensée par la perception de versements anticipés pour la récolte immédiate du bois récupéré. Il n'y avait donc pas ici non plus de manque à gagner. Même si la somme tirée des droits de coupe n'est peut-être pas un indicateur financier de la valeur des aires forestières réservées à

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asserted a claim for commercial value and a finding by the trial judge that there was no commercial loss precludes an award of damages on that basis.

The Crown's claim to an environmental premium with respect to the non-harvestable trees is grounded neither in the pleadings nor in the evidence. While the fire damage had both commercial and environmental dimensions, the trial judge was not given the evidence to quantify a distinct ecological or environmental loss. The lack of probative evidence, reliable measurement and proper pleading lie at the root of this case. No evidence was led about the nature of the wildlife, plants and other organisms protected by the environmental resource in question, the uniqueness of the ecosystem, the environmental services provided or recreational opportunities afforded by the resource, or the emotional attachment of the public to the damaged or destroyed area. The Crown's claim to an environmental premium of 20 percent of commercial value is therefore overly arbitrary and simplistic. Less arbitrary techniques are available and will have to be carefully considered when and if properly presented. Courts should not strangle legitimate claims that are properly pleaded because of overly technical objections to novel methods of assessment, but the Crown cannot succeed in an unpleaded claim for ecological or environmental damage simply because the Crown on this issue occupies the moral high ground. The courts and the alleged wrongdoer are entitled to require a proper evidentiary basis.

Canfor's argument that environmental losses should only be recoverable under a special statutory remedy such as the United States' *Comprehensive Environmental Response, Compensation and Liability Act* should be rejected. There is nothing so peculiar about environmental damages as to cause the courts to neglect the potential of the common law which, if developed in a principled and incremental fashion, can assist in achieving the fundamental value of environmental protection. However, a court cannot act on generalizations and unsupported assertions. In the absence of a statutory regime to address environmental loss, the Court must proceed cautiously with the development of the common law. The trial judge in this case rejected the Crown's claim for financial compensation for

des fins environnementales, la Couronne s'est appuyée sur la valeur marchande comme point de référence, et la conclusion du juge de première instance selon laquelle il n'y a eu aucune perte commerciale empêche d'accorder des dommages-intérêts à ce titre.

La réclamation, par la Couronne, d'une indemnité additionnelle pour perte environnementale à l'égard des arbres réservés est dénuée de fondement tant dans les actes de procédure qu'au regard de la preuve. Le dommage causé par le feu avait des dimensions à la fois commerciales et environnementales, mais le dossier ne donnait au juge de première instance aucun moyen de quantifier une perte écologique ou environnementale distincte. L'absence de preuves factuelles, de mesure fiable et d'exposé convenable de la demande dans les actes de procédure est un aspect fondamental en l'espèce. On n'a présenté aucune preuve relativement à la nature de la faune, de la flore et des autres organismes protégés par la ressource environnementale en question, au caractère unique de l'écosystème, aux avantages environnementaux qu'offre la ressource, à ses possibilités récréo-touristiques ou à l'attachement subjectif ou émotif du public à la zone endommagée ou détruite. La réclamation, par la Couronne, d'une indemnité additionnelle de 20 pour 100 de la valeur marchande est donc trop arbitraire et simpliste. Des méthodes moins arbitraires existent et devront faire l'objet d'un examen sérieux quand elles seront valablement présentées. Les tribunaux ne doivent pas paralyser les demandes légitimes présentées comme il se doit en opposant des objections excessivement techniques aux méthodes d'évaluation nouvelles, mais la Couronne ne peut avoir gain de cause en ce qui concerne une demande non alléguée pour un préjudice écologique ou environnemental, simplement parce qu'elle a sur ce point une moralité inattaquable. Le tribunal et le présumé auteur de la faute ont droit d'exiger que la Couronne étaye sa position par des éléments de preuve.

Il faut rejeter l'argument de Canfor selon lequel seule l'adoption d'un recours distinct, dans une loi spéciale telle que la *Comprehensive Environmental Response, Compensation and Liability Act* des États-Unis, permettrait le recouvrement des pertes environnementales. Les dommages-intérêts environnementaux ne sont pas à ce point particuliers que les tribunaux doivent négliger la possibilité que la common law, si elle évolue de façon progressive et conforme aux principes, contribue à concrétiser la valeur fondamentale qu'est la protection de l'environnement. Un tribunal ne peut cependant pas s'autoriser de généralisations et d'assertions non étayées pour intervenir. En l'absence d'un régime législatif encadrant la perte environnementale, la Cour doit user de circonspection dans son élaboration de la common law.

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"environmental loss" on the facts of this case and, on the record, he was right to do so.

Per Bastarache, LeBel and Fish JJ. (dissenting): The Crown's entitlement in this particular case is not limited to the damages that a private landowner would receive. The fact that the Crown is trying to recover commercial value, or using commercial value as a proxy for the recovery of damages, should not limit the Crown's *parens patriae* jurisdiction. The Crown, in seeking damages, is still fulfilling its general duty, its *parens patriae* function to protect the environment and the public's interest in it.

The Crown suffered a compensable loss in respect of harvestable trees despite the CVP system. This system is nothing more than a means of attempting to pass losses on to other forest licensees. Until the fire-damaged forest has grown back to its original state this source of revenue for the Crown — the trees — is lost. The fact that the Crown has a system in place by which it charges higher prices to other customers within the British Columbia Interior should not prevent the Crown from recovering damages for its very real loss. The loss is all the more real when one considers that the Crown lost not only stumpage, but a bundle of rights attached to the harvestable trees through the licensing system.

The argument that the effective rate of stumpage that the Crown receives is the same, forest fire or no forest fire, is faulty and the lower courts' acceptance of it was wrong in fact and in law. There is no guarantee that the CVP system is revenue-neutral. Canfor has only established that the target rate is maintained by charging higher stumpage rates to others. That the target revenue is maintained as a result is by no means certain. Even for a monopolistic supplier of timber licences, as the Crown is in the British Columbia Interior, there are consequences to raising stumpage rates as a result of forest fires, consequences which are too numerous to consider and beyond the competence of the courts. If a court wishes to allow the defence that the Crown has recouped all of its losses from the forest fire by charging higher stumpage rates to other customers in the British Columbia Interior, then it should carry this analysis to its end and inquire into whether the Crown suffered any economic loss as a result of increased stumpage fees charged to other licensees. This type of analysis, however, would be endless and futile and would tax the institutional capacities of the

Le juge de première instance a rejeté la réclamation de la Couronne relative à une indemnité financière pour « perte environnementale » au regard des faits de l'espèce et, au vu du dossier, il a eu raison de le faire.

Les juges Bastarache, LeBel et Fish (dissidents) : Le droit de la Couronne en l'espèce n'est pas limité aux dommages-intérêts qu'un propriétaire ordinaire pourrait obtenir. Le fait que la Couronne cherche à recouvrer la valeur marchande, ou qu'elle utilise celle-ci comme indicateur de valeur en vue de recouvrer des dommages-intérêts, ne doit pas limiter le rôle de la Couronne à titre de *parens patriae*. En demandant des dommages-intérêts, la Couronne remplit toujours sa fonction générale, sa fonction *parens patriae* qui consiste à protéger l'environnement et l'intérêt du public à cet égard.

Même avec le système de PVC, la Couronne a subi une perte indemnisable en ce qui a trait aux arbres récoltables. Ce système n'est rien de plus qu'un mécanisme permettant de transférer les pertes aux autres titulaires de permis d'exploitation forestière. Jusqu'à ce que la forêt ravagée par le feu retrouve son état initial, cette source de recettes — ces arbres — est perdue. Le fait que la Couronne ait mis en place un système par lequel elle demande aux autres clients du secteur de l'intérieur de la Colombie-Britannique un prix plus élevé ne devrait pas l'empêcher d'obtenir un dédommagement pour sa perte bien tangible. La perte est d'autant plus tangible quand on considère que la Couronne a perdu non seulement les droits de coupe, mais encore un ensemble de droits rattachés aux arbres récoltables dans le cadre du régime d'octroi de permis.

L'argument selon lequel le taux effectif des droits de coupe que la Couronne perçoit reste le même, avec ou sans incendie, est erroné et son acceptation par les tribunaux inférieurs était mal fondée en fait et en droit. Rien ne garantit que le système de PVC n'aura aucune incidence sur les recettes. Canfor a établi seulement que le taux cible est maintenu du fait que l'on exige des autres exploitants des droits plus élevés. Il n'est pas du tout acquis que les recettes anticipées soient perçues pour autant. Même pour un fournisseur qui détient le monopole des permis d'exploitation, comme c'est le cas de la Couronne dans le secteur de l'intérieur de la Colombie-Britannique, l'augmentation des droits de coupe par l'effet des incendies de forêt a des conséquences trop nombreuses pour être étudiées, des conséquences qui excèdent la compétence des tribunaux. Si une cour veut admettre le moyen de défense selon lequel la Couronne a recouvré toutes ses pertes causées par l'incendie en imposant des taux des droits de coupe plus élevés aux autres clients du secteur de l'intérieur de la Colombie-Britannique, elle devrait pousser son analyse jusqu'au bout et examiner

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courts. To the extent that the Crown has shown that it has received less stumpage revenue in the Stone Creek fire area as a result of Canfor's negligence, it has established a right of recovery in damages. Even if the CVP system were in fact revenue-neutral, such a finding would be irrelevant to an assessment of damages in tort. The law of damages only requires the Province to establish damages in a proximate sense.

si la Couronne a subi une perte financière en raison de l'augmentation des droits de coupe imposée aux autres titulaires de permis. Une telle analyse serait interminable et futile et grèverait les capacités institutionnelles des tribunaux. Dans la mesure où la Couronne a montré qu'en raison de la négligence de Canfor, elle a perçu moins de droits de coupe dans le secteur ravagé de Stone Creek, elle a prouvé un droit à des dommages-intérêts. Même si le système de PVC a fait en sorte d'éviter toute incidence négative sur les recettes de la Couronne, cette conclusion ne serait pas pertinente à l'évaluation des dommages-intérêts accordés en droit de la responsabilité civile délictuelle. En matière de dommages-intérêts, le droit oblige seulement la province à établir que le préjudice est une conséquence immédiate du délit.

The CVP system cannot be viewed as a form of mitigation. The principles behind mitigation, in particular the principle of economic efficiency, require the injured party to exploit any new "capacity to earn" triggered by the defendant's tort. Mitigation principles do not require the injured party to attempt to recoup its losses by charging higher prices to other customers. The CVP system is therefore not a mitigating factor in the assessment of damages against Canfor.

Le système de PVC ne peut être considéré comme un moyen de limitation du préjudice. Les principes régissant la limitation du préjudice, en particulier le principe de l'efficience économique, commandent que la personne lésée tire parti de la « capacité de gain » nouvellement acquise du fait de la faute du défendeur. Ces principes n'exigent pas que la personne lésée essaie de recouvrer ses pertes en demandant des prix plus élevés aux autres clients. Le système de PVC ne constitue donc pas un facteur de limitation du préjudice dont il faut tenir compte dans l'évaluation des dommages-intérêts réclamés à Canfor.

The rule against double recovery is not violated by allowing the Crown to recover damages in addition to the increased revenue it received from other licensees under the CVP system. To deny the Crown recovery at bar would amount to recognizing in tort law the defence of passing on, which must not be allowed to take hold in Canadian jurisprudence. The trial judge erred in law in accepting the approach for valuing damages advocated by Canfor's expert, because the expert was essentially advocating a legal defence of passing on, even if cast in a factual light.

Le fait d'autoriser la Couronne à recouvrer une indemnité en sus des recettes accrues des droits de coupe perçues des autres titulaires de permis grâce au système de PVC ne viole pas la règle interdisant la double indemnisation. Priver la Couronne de l'indemnité dans le présent pourvoi équivaut à reconnaître en droit de la responsabilité civile délictuelle le moyen de défense fondé sur le transfert de la perte, qu'il ne faut pas laisser s'enraciner dans la jurisprudence canadienne. Le juge de première instance a commis une erreur de droit en acceptant la méthode d'évaluation des dommages-intérêts préconisée par l'expert de Canfor, parce que ce dernier se trouvait essentiellement à préconiser le moyen de défense en droit fondé sur le transfert de la perte, même si c'était sous la forme d'un exposé factuel.

The Province should be allowed to recover damages for the non-harvestable trees in the environmentally sensitive areas, both in the riparian zones and on the steep slopes. These trees have intrinsic value at least equal to their commercial value (i.e., stumpage value), despite their non-commercial use. In the absence of better evidence, the value of nearby harvestable trees can serve as a yardstick to measure the value of the trees on the steep slopes, and Canfor's own expert report includes the commercial value for the non-harvestable trees in the riparian

La province devrait pouvoir recouvrer des dommages-intérêts à l'égard des arbres réservés des zones écosensibles, tant pour ce qui est des aires riveraines que des terrains escarpés. Ces arbres ont une valeur intrinsèque au moins égale à leur valeur marchande (soit la valeur des droits de coupe), en dépit de l'usage non commercial qui en est fait. Faute de meilleure preuve, la valeur des arbres récoltables des aires voisines peut servir de point de référence pour mesurer la valeur des arbres en terrain escarpé, et le rapport de l'expert de Canfor inclut déjà la

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zones. To say as the Court of Appeal did that the value of the trees in question is only a portion of their commercial value is to significantly and fundamentally devalue the Crown's and society's loss. It is agreed with the majority that no damages for an environmental premium can be awarded.

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By Binnie J.

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valeur marchande des arbres réservés des aires riveraines. Dire, comme la Cour d'appel, que la valeur des arbres en question n'est qu'une fraction de leur valeur marchande revient à sous-évaluer grandement la perte fondamentale qu'ont subie la Couronne et la société. Comme l'ont décidé les juges majoritaires, il n'y a pas lieu d'accorder une indemnité additionnelle au titre de l'environnement.

Jurisprudence

Citée par le juge Binnie

Arrêts mentionnés : *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3; *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031; *114957 Canada Ltée (Spraytech, Société d'arrosage) c. Hudson (Ville)*, [2001] 2 R.C.S. 241, 2001 CSC 40; *Wood c. Grand Valley Railway Co.* (1915), 51 R.C.S. 283; *Penvidic Contracting Co. c. International Nickel Co. of Canada*, [1976] 1 R.C.S. 267; *Ratych c. Bloomer*, [1990] 1 R.C.S. 940; *Prince Rupert (City) c. Pederson* (1994), 98 B.C.L.R. (2d) 84; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201; *Stein c. Gonzales* (1984), 14 D.L.R. (4th) 263; *Bazley c. Curry*, [1999] 2 R.C.S. 534; *La Reine c. Le navire Sun Diamond*, [1984] 1 C.F. 3; *Procureur général de l'Ontario c. Fatehi*, [1984] 2 R.C.S. 536; *Glasgow Corp. c. Barclay, Curle & Co.* (1923), 93 L.J.P.C. 1; *Scarborough c. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255; *North Dakota c. Minnesota*, 263 U.S. 365 (1923); *Missouri c. Illinois*, 180 U.S. 208 (1901); *Kansas c. Colorado*, 206 U.S. 46 (1907); *Georgia c. Tennessee Copper Co.*, 206 U.S. 230 (1907); *New York c. New Jersey*, 256 U.S. 296 (1921); *Illinois Central Railroad Co. c. Illinois*, 146 U.S. 387 (1892); *New Jersey, Department of Environmental Protection c. Jersey Central Power and Light Co.*, 336 A.2d 750 (1975); *State of Washington, Department of Fisheries c. Gillette*, 621 P.2d 764 (1980); *State of California, Department of Fish and Game c. S.S. Bournemouth*, 307 F.Supp. 922 (1969); *State of Maine c. M/V Tamano*, 357 F.Supp. 1097 (1973); *State of Maryland, Department of Natural Resources c. Amerada Hess Corp.*, 350 F.Supp. 1060 (1972); *Toronto Transportation Commission c. The King*, [1949] R.C.S. 510; *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359; *Sunrise Co. c. Lake Winnipeg (Le)*, [1991] 1 R.C.S. 3; *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.*, [2003] B.C.J. No. 84 (QL), 2003 BCSC 77; *Kelliher (Village of) c. Smith*, [1931] R.C.S. 672; *Aerlinte Eireann Teoranta c. Canada (Ministre des Transports)* (1990), 68 D.L.R. (4th) 220; *British Westinghouse Electric and Manufacturing Co. c. Underground Electric Railways Co. of London, Ltd.*, [1912] A.C. 673; *Andros Springs c. World Beauty*, [1970] P. 144; *Bellingham c. Dhillon*, [1973] Q.B. 304;

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(4th) 466; *Karas v. Rowlett*, [1944] S.C.R. 1; *Cemco Electrical Manufacturing Co. v. Van Snellenberg*, [1947] S.C.R. 121; *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385; *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633; *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); *Oshawa Group Ltd. v. Great American Insurance Co.* (1982), 36 O.R. (2d) 424; *Attorney-General for Nova Scotia v. Christian* (1974), 49 D.L.R. (3d) 742; *Hussain v. New Taplow Paper Mills Ltd.*, [1988] 1 All E.R. 541; *Bilambil-Terranora Pty Ltd. v. Tweed Shire Council*, [1980] 1 N.S.W.L.R. 465; *State of Ohio v. U.S. Department of the Interior*, 880 F.2d 432 (1989); *Soutzo v. Canterra Energy Ltd.*, [1988] A.J. No. 506 (QL); *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322; *Chappell v. Barati* (1982), 30 C.C.L.T. 137; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Woelk v. Halvorson*, [1980] 2 S.C.R. 430.

By LeBel J. (dissenting)

Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918); *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.*, [2003] B.C.J. No. 84 (QL), 2003 BCSC 77; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London, Ltd.*, [1912] A.C. 673; *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385; *Karas v. Rowlett*, [1944] S.C.R. 1; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940; *Bradburn v. Great Western Rail. Co.*, [1874-80] All E.R. 195; *Browning v. War Office*, [1962] 3 All E.R. 1089; *Parry v. Cleaver*, [1969] 1 All E.R. 555; *Hussain v. New Taplow Paper Mills Ltd.*, [1988] 1 All E.R. 541; *Law Society of Upper Canada v. Ernst & Young* (2002), 59 O.R. (3d) 214, rev'd (2003), 65 O.R. (3d) 577; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *Oshawa Group Ltd. v. Great American Insurance Co.* (1982), 36 O.R. (2d) 424, leave to appeal refused, [1982] 1 S.C.R. viii; *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25; *Air Canada v. Liquor Control Board of Ontario* (1995), 24 O.R. (3d) 403; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Aerlinte Eireann Teoranta v. Canada (Minister of Transport)* (1990), 68 D.L.R. (4th) 220; *Dykhuizen v. Saanich (District)* (1989), 63 D.L.R. (4th) 211; *Prince Rupert (City) v. Pederson* (1994), 98 B.C.L.R. (2d) 84; *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322; *Scarborough v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.

1874000 Nova Scotia Ltd. c. Adams (1997), 146 D.L.R. (4th) 466; *Karas c. Rowlett*, [1944] R.C.S. 1; *Cemco Electrical Manufacturing Co. c. Van Snellenberg*, [1947] R.C.S. 121; *Apeco of Canada, Ltd. c. Windmill Place*, [1978] 2 R.C.S. 385; *Asamera Oil Corp. c. Sea Oil & General Corp.*, [1979] 1 R.C.S. 633; *Southern Pacific Co. c. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); *Oshawa Group Ltd. c. Great American Insurance Co.* (1982), 36 O.R. (2d) 424; *Attorney-General for Nova Scotia c. Christian* (1974), 49 D.L.R. (3d) 742; *Hussain c. New Taplow Paper Mills Ltd.*, [1988] 1 All E.R. 541; *Bilambil-Terranora Pty Ltd. c. Tweed Shire Council*, [1980] 1 N.S.W.L.R. 465; *State of Ohio c. U.S. Department of the Interior*, 880 F.2d 432 (1989); *Soutzo c. Canterra Energy Ltd.*, [1988] A.J. No. 506 (QL); *Kates c. Hall* (1991), 53 B.C.L.R. (2d) 322; *Chappell c. Barati* (1982), 30 C.C.L.T. 137; *Andrews c. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229; *Woelk c. Halvorson*, [1980] 2 R.C.S. 430.

Citée par le juge LeBel (dissident)

Southern Pacific Co. c. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918); *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.*, [2003] B.C.J. No. 84 (QL), 2003 BCSC 77; *British Westinghouse Electric and Manufacturing Co. c. Underground Electric Railways Co. of London, Ltd.*, [1912] A.C. 673; *Apeco of Canada, Ltd. c. Windmill Place*, [1978] 2 R.C.S. 385; *Karas c. Rowlett*, [1944] R.C.S. 1; *Ratych c. Bloomer*, [1990] 1 R.C.S. 940; *Bradburn c. Great Western Rail. Co.*, [1874-80] All E.R. 195; *Browning c. War Office*, [1962] 3 All E.R. 1089; *Parry c. Cleaver*, [1969] 1 All E.R. 555; *Hussain c. New Taplow Paper Mills Ltd.*, [1988] 1 All E.R. 541; *Law Society of Upper Canada c. Ernst & Young* (2002), 59 O.R. (3d) 214, inf. par (2003), 65 O.R. (3d) 577; *Air Canada c. Colombie-Britannique*, [1989] 1 R.C.S. 1161; *Oshawa Group Ltd. c. Great American Insurance Co.* (1982), 36 O.R. (2d) 424, autorisation de pourvoi refusée, [1982] 1 R.C.S. viii; *Garland c. Consumers' Gas Co.*, [2004] 1 R.C.S. 629, 2004 CSC 25; *Air Canada c. Liquor Control Board of Ontario* (1995), 24 O.R. (3d) 403; *Hanover Shoe, Inc. c. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Aerlinte Eireann Teoranta c. Canada (Ministre des Transports)* (1990), 68 D.L.R. (4th) 220; *Dykhuizen c. Saanich (District)* (1989), 63 D.L.R. (4th) 211; *Prince Rupert (City) c. Pederson* (1994), 98 B.C.L.R. (2d) 84; *Kates c. Hall* (1991), 53 B.C.L.R. (2d) 322; *Scarborough c. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255; *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031; *114957 Canada Ltée (Spraytech, Société d'arrosage) c. Hudson (Ville)*, [2001] 2 R.C.S. 241, 2001 CSC 40; *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213.

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APPEAL from a judgment of the British Columbia Court of Appeal (2002), 100 B.C.L.R. (3d) 114, 166 B.C.A.C. 122, 271 W.A.C. 122, 11 C.C.L.T. (3d) 1, 49 C.E.L.R. (N.S.) 1, [2002] B.C.J. No. 692 (QL), 2002 BCCA 217, allowing in part the Province's appeal and dismissing the logging company's cross-appeal from a decision of the British Columbia Supreme Court, [1999] B.C.J. No. 1945 (QL). Appeal allowed and cross-appeal dismissed, Bastarache, LeBel and Fish JJ. dissenting.

G. Bruce Butler and *Birgitta von Krosigk*, for the appellant/cross-respondent.

J. Douglas Eastwood, *Karen Horsman* and *J. Gareth Morley*, for the respondent/cross-appellant.

Donald J. Rennie and *Mark Kindrachuk*, for the intervener the Attorney General of Canada.

John R. Pennington, for the intervener the Forest Practices Board.

Jerry V. DeMarco, *Anastasia M. Lintner* and *Robert V. Wright*, for the interveners the Sierra Club of Canada and the David Suzuki Foundation.

John J. L. Hunter, *Q.C.*, and *K. Michael Stephens*, for the interveners the Council of Forest Industries, the Forest Products Association of Canada and the Coast Forest & Lumber Association.

The judgment of McLachlin C.J. and Iacobucci, Major, Binnie, Arbour and Deschamps JJ. was delivered by

BINNIE J. — In the summer of 1992, a forest fire swept through the Stone Creek area of the Interior of British Columbia about 35 kilometres south of Prince George. Approximately 1,491 hectares were

Waddams, S. M. *The Law of Damages*, loose-leaf ed. Toronto : Canada Law Book, 1991 (release No. 12, December 2003).
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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (2002), 100 B.C.L.R. (3d) 114, 166 B.C.A.C. 122, 271 W.A.C. 122, 11 C.C.L.T. (3d) 1, 49 C.E.L.R. (N.S.) 1, [2002] B.C.J. No. 692 (QL), 2002 BCCA 217, qui a accueilli en partie l'appel interjeté par la province et qui a rejeté l'appel incident interjeté par la société forestière contre une décision de la Cour suprême de la Colombie-Britannique, [1999] B.C.J. No. 1945 (QL). Pourvoi accueilli et pourvoi incident rejeté, les juges Bastarache, LeBel et Fish sont dissidents.

G. Bruce Butler et *Birgitta von Krosigk*, pour l'appelante/intimée.

J. Douglas Eastwood, *Karen Horsman* et *J. Gareth Morley*, pour l'intimée/appelante au pourvoi incident.

Donald J. Rennie et *Mark Kindrachuk*, pour l'intervenant le procureur général du Canada.

John R. Pennington, pour l'intervenant le Conseil des pratiques forestières.

Jerry V. DeMarco, *Anastasia M. Lintner* et *Robert V. Wright*, pour les intervenants le Sierra Club du Canada et David Suzuki Foundation.

John J. L. Hunter, *c.r.*, et *K. Michael Stephens*, pour les intervenants Council of Forest Industries, l'Association des produits forestiers du Canada et Coast Forest & Lumber Association.

Version française du jugement de la juge en chef McLachlin et des juges Iacobucci, Major, Binnie, Arbour et Deschamps rendu par

LE JUGE BINNIE — Pendant l'été de 1992, un incendie de forêt a ravagé la région de Stone Creek, une région de l'intérieur de la Colombie-Britannique située à quelque 35 kilomètres au sud de Prince

1

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The trial judge awarded the Crown $3,575,000 under the first heading (which was an agreed figure), but otherwise dismissed the claim on the basis the Crown had failed to prove a compensable loss with respect either to harvestable or non-harvestable trees. In doing so, he expressly accepted as "compelling" the valuation evidence of C. H. Gairns, Canfor's expert, and rejected the analysis of G. W. Reznik of Deloitte & Touche, the Crown's valuation expert, as "not persuasive".

Le juge de première instance a accordé à la Couronne 3 575 000 $ à l'égard de la première catégorie (un chiffre arrêté de concert), mais a rejeté la demande pour le reste parce que la Couronne n'avait pas prouvé une perte indemnisable soit pour les arbres récoltables, soit pour les arbres réservés. Ce faisant, il a expressément accepté comme [TRADUCTION] « probante » l'expertise de C. H. Gairns, l'expert présenté par Canfor, et il a rejeté l'analyse de G. W. Reznik du cabinet Deloitte & Touche, l'expert en estimation produit par la Couronne, la trouvant [TRADUCTION] « non convaincante ». 4

The Court of Appeal dismissed the Crown's appeal on damages with respect to the harvestable trees, but awarded compensation for "diminution of the value" of the non-harvestable trees at a figure equivalent to one third of their commercial value. The task of assessing the commercial value of the non-harvestable trees, if the parties could not agree to it, was referred back to the trial court. This award is the subject matter of Canfor's appeal.

La Cour d'appel a rejeté l'appel de la Couronne concernant les dommages-intérêts pour ce qui est des arbres récoltables, mais elle a accordé une indemnité en ce qui concerne la « diminution de la valeur » des arbres réservés, la fixant à un tiers de leur valeur marchande. Elle a renvoyé à la cour de première instance la tâche de déterminer la valeur marchande des arbres réservés, advenant que les parties ne puissent s'entendre à ce sujet. Cette indemnité fait l'objet du pourvoi de Canfor. 5

The Crown considers the award of compensation to be inadequate and in its cross-appeal claims the "auction value" of the standing timber in both harvestable and non-harvestable areas as of the date of the fire plus a premium over and above auction value for the degradation of the environment caused by destruction of the non-harvestable trees. In the alternative, it seeks an award of stumpage fees, plus the environmental premium on the non-harvestable trees. Canfor attacks the Crown's methodology and says that, on the evidence, the Crown has been overcompensated, not undercompensated, by the courts in British Columbia.

La Couronne estime l'indemnité insuffisante et réclame, dans son pourvoi incident, la [TRADUCTION] « valeur aux enchères » du bois sur pied tant dans les zones exploitables que dans les zones non exploitables à la date de l'incendie, ainsi qu'une indemnité additionnelle au titre de la dégradation de l'environnement causée par la destruction des arbres protégés. Subsidiairement, elle demande à l'égard des arbres réservés que les droits de coupes lui soient accordés, à quoi s'ajouterait une indemnité pour dommage environnemental. Canfor conteste la méthode employée par la Couronne et affirme que, au vu de la preuve, la Couronne a obtenu des tribunaux de la Colombie-Britannique une indemnité excessive, et non une indemnité insuffisante. 6

The question of compensation for environmental damage is of great importance. As the Court observed in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 85, legal measures to protect the environment "relate to a public purpose of superordinate importance". In *Friends of the Oldman River*

La question de l'indemnité pour dommage environnemental revêt une grande importance. Comme la Cour l'a fait observer dans *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213, par. 85, les mesures législatives prises en vue de protéger l'environnement « visent un objectif public d'une importance supérieure ». 7

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Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, the Court declared, at p. 16, that "[t]he protection of the environment has become one of the major challenges of our time." In *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, "stewardship of the natural environment" was described as a fundamental value (para. 55 (emphasis deleted)). Still more recently, in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, the Court reiterated, at para. 1:

. . . our common future, that of every Canadian community, depends on a healthy environment. . . . This Court has recognized that "(e)veryone is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection [has] emerged as a fundamental value in Canadian society" . . . .

Dans *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, la Cour a déclaré, à la p. 16, que « [l]a protection de l'environnement est devenue l'un des principaux défis de notre époque. » Dans *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, « la *responsabilité* de l'être humain envers l'environnement naturel » a été qualifiée de valeur fondamentale (par. 55 (italiques supprimés)). Encore plus récemment, dans *114957 Canada Ltée (Spraytech, Société d'arrosage) c. Hudson (Ville)*, [2001] 2 R.C.S. 241, 2001 CSC 40, la Cour a affirmé ce qui suit, au par. 1 :

. . . notre avenir à tous, celui de chaque collectivité canadienne, dépend d'un environnement sain. [. . .] Notre Cour a reconnu que « (n)ous savons tous que, individuellement et collectivement, nous sommes responsables de la préservation de l'environnement naturel [. . .] la protection de l'environnement est [. . .] devenue une valeur fondamentale au sein de la société canadienne » . . .

8 If justice is to be done to the environment, it will often fall to the Attorney General, invoking both statutory and common law remedies, to protect the public interest. In this case, the Attorney General has not resorted to statutory remedies (as under s. 161(1) of the *Forest Act*, R.S.B.C. 1979, c. 140 (now R.S.B.C. 1996, c. 157), for payment where timber is damaged or destroyed) but has sought damages at common law. The present appeal raises, therefore, the Attorney General's ability to recover damages for environmental loss, the requirement of proof of such loss and a principled approach to the assessment of environmental compensation at common law.

Pour assurer une juste prise en considération de l'environnement, il revient souvent au procureur général de protéger l'intérêt public en exerçant les voies de droit prévues par la loi et par la common law. En l'espèce, le procureur général ne s'est pas prévalu des recours prévus par la loi (par exemple, le par. 161(1) de la *Forest Act*, R.S.B.C. 1979, ch. 140 (maintenant R.S.B.C. 1996, ch. 157), pour obtenir paiement si du bois est endommagé ou détruit) mais il a réclamé des dommages-intérêts suivant la common law. Le présent pourvoi soulève donc la possibilité, pour le procureur général, de recouvrer des dommages-intérêts pour perte environnementale, les exigences de preuve de cette perte et la méthode permettant d'évaluer l'indemnité pour dommage environnemental en common law.

9 The Crown in right of British Columbia says it sues not only in its capacity as property owner but as the representative of the people of British Columbia, for whom the Crown seeks to maintain an unspoiled environment. Thus the claim for an environmental premium is made "in recognition of the fact that it [the Crown], and the public on whose behalf it owned the Protected Trees, valued them more highly as part of a protected

La Couronne du chef de la Colombie-Britannique dit agir non seulement en qualité de propriétaire foncier, mais encore à titre de représentante des habitants de la Colombie-Britannique, au bénéfice desquels elle cherche à préserver un environnement intact. Ainsi, la revendication d'une indemnité additionnelle au titre de l'environnement est-elle formulée [TRADUCTION] « pour reconnaître le fait qu'elle [la Couronne],

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TAB 25

1997 CanLII 318 (SCC)

The Attorney General of Canada, acting for and on behalf of Her Majesty The Queen *Appellant*

v.

Hydro-Québec *Respondent*

and

The Attorney General of Quebec *Mis en cause*

and

The Attorney General for Saskatchewan, IPSCO Inc., Société pour vaincre la pollution inc. ("S.V.P."), Pollution Probe, Great Lakes United (Canada), Canadian Environmental Law Association and Sierra Legal Defence Fund *Interveners*

INDEXED AS: R. *v.* HYDRO-QUÉBEC

File No.: 24652.

1997: February 10; 1997: September 18.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Distribution of legislative powers — Environmental protection — Federal legislation empowering Ministers to determine what substances are toxic and to prohibit introduction of such substances into environment except in accordance with specified terms and conditions — Whether federal legislation valid — Whether legislation falls within Parliament's jurisdiction to make laws for peace, order and good government of Canada — Whether legislation falls within Parliament's criminal law jurisdiction — Canadian Environmental Protection Act, R.S.C., 1985, c. 16 (4th Supp.), ss. 3 "environment", "substance", 11, 34, 35 — Chlorobiphenyls Interim Order, P.C. 1989-296, s. 6(a) — Constitution Act, 1867, ss. 91 preamble, 91(27).

Le procureur général du Canada, agissant pour le compte de Sa Majesté la Reine *Appelant*

c.

Hydro-Québec *Intimée*

et

Le procureur général du Québec *Mis en cause*

et

Le procureur général de la Saskatchewan, IPSCO Inc., Société pour vaincre la pollution inc. («S.V.P.»), Pollution Probe, Great Lakes United (Canada), Association canadienne du droit de l'environnement et Sierra Legal Defence Fund *Intervenants*

RÉPERTORIÉ: R. *c.* HYDRO-QUÉBEC

N° du greffe: 24652.

1997: 10 février; 1997: 18 septembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Partage des compétences législatives — Protection de l'environnement — Loi fédérale habilitant des ministres à déterminer quelles substances sont toxiques et à interdire le rejet de ces substances dans l'environnement à moins que certaines conditions particulières soient respectées — La loi fédérale est-elle valide? — Relève-t-elle de la compétence du Parlement de légiférer pour la paix, l'ordre et le bon gouvernement du Canada? — Relève-t-elle de la compétence du Parlement en matière de droit criminel? — Loi canadienne sur la protection de l'environnement, L.R.C. (1985), ch. 16 (4e suppl.), art. 3 «environnement», «substance», 11, 34, 35 — Arrêté d'urgence sur les biphényles chlorés, C.P. 1989-296, art. 6a) — Loi constitutionnelle de 1867, art. 91 (préambule), 91(27).

The respondent allegedly dumped polychlorinated biphenyls (PCBs) into a river in early 1990. It was charged with two infractions under s. 6(*a*) of the *Chlorobiphenyls Interim Order*, which was adopted and enforced pursuant to ss. 34 and 35 of the *Canadian Environmental Protection Act*. Sections 34 and 35 appear in Part II of the Act, entitled "Toxic Substances". Part II deals first with the identification of substances that could pose a risk either to the environment or to human life and health, and then provides a procedure for adding them to the List of Toxic Substances in Schedule I (which contains a list of dangerous substances carried over from pre-existing legislation) and for imposing by regulations requirements respecting the terms and conditions under which substances so listed may be released into the environment. According to s. 11 of the Act, a substance is toxic where "it is entering or may enter the environment" under conditions "having or that may have an immediate or long-term harmful effect on the environment", "constituting or that may constitute a danger to the environment on which human life depends", or "constituting or that may constitute a danger in Canada to human life or health". Section 3 defines a "substance" as "any distinguishable kind of organic or inorganic matter, whether animate or inanimate" and the "environment" as "the components of the Earth". Section 34 provides for the regulation of substances on the List of Toxic Substances. Section 35 is ancillary to s. 34. It provides that where a substance is not listed in Schedule I (or where it is listed but the Ministers of the Environment and of Health believe it is not adequately regulated) and the Ministers believe that immediate action is required, an "interim order" may be made in respect of the substance. Such orders may contain any regulation which could have been made under s. 34, but they remain in effect for only 14 days unless they are approved by the Governor in Council. Failure to comply with regulations made under s. 34 or an order made under s. 35 constitutes an offence under s. 113 of the Act. The respondent brought a motion seeking to have ss. 34 and 35 of the Act as well as s. 6(*a*) of the Interim Order itself declared *ultra vires* the Parliament of Canada on the ground that they do not fall within the ambit of any federal head of power set out in s. 91 of the *Constitution Act, 1867*. The Attorney General of Quebec intervened in support of the respondent's position. The motion was granted in the Court of Québec, and an

L'intimée aurait déversé des biphényles polychlorés (BPC) dans une rivière, au début de 1990. Elle a été accusée d'avoir commis deux infractions en vertu de l'al. 6*a*) de *l'Arrêté d'urgence sur les biphényles chlorés*, qui a été pris et mis à exécution conformément aux art. 34 et 35 de la *Loi canadienne sur la protection de l'environnement*. Les articles 34 et 35 figurent à la partie II de la Loi, intitulée «Substances toxiques». La partie II traite d'abord de l'identification de substances susceptibles de mettre en danger l'environnement ou la vie et la santé humaines, et elle établit ensuite la procédure à suivre pour les ajouter à la liste des substances toxiques de l'annexe I (qui contient une liste de substances dangereuses provenant d'un texte législatif antérieur), et pour imposer, par voie de règlement, les conditions à respecter pour que les substances ainsi énumérées puissent être rejetées dans l'environnement. Selon l'art. 11 de la Loi, est toxique toute substance «qui pénètre ou peut pénétrer dans l'environnement» dans des conditions «de nature à [. . .] avoir, immédiatement ou à long terme, un effet nocif sur l'environnement», à «mettre en danger l'environnement essentiel pour la vie humaine» ou à «constituer un danger au Canada pour la vie ou la santé humaine». L'article 3 définit le terme «substance» comme étant «[t]oute matière organique ou inorganique, animée ou inanimée, distinguable» et le terme «environnement» comme étant l'«[e]nsemble des conditions et des éléments naturels de la terre». L'article 34 prescrit la réglementation des substances inscrites sur la liste des substances toxiques. L'article 35 est accessoire à l'art. 34. Il prévoit que, lorsqu'une substance n'est pas inscrite sur la liste de l'annexe I (ou lorsqu'elle y est inscrite mais que les ministres de l'Environnement et de la Santé croient qu'elle n'est pas réglementée comme il convient) et que les ministres croient qu'une intervention immédiate est nécessaire, un «arrêté d'urgence» peut être pris relativement à celle-ci. Ces arrêtés peuvent comporter les mêmes dispositions qu'un règlement pris aux termes de l'art. 34, mais ils ne demeurent en vigueur que pendant 14 jours, à moins d'être approuvés par le gouverneur en conseil. Le défaut de se conformer à un règlement pris sous le régime de l'art. 34 ou à un arrêté pris aux termes de l'art. 35 constitue une infraction en vertu de l'art. 113 de la Loi. L'intimée a déposé une requête en vue de faire déclarer que les art. 34 et 35 de la Loi ainsi que l'art. 6*a*) de l'arrêté d'urgence lui-même excèdent la compétence du Parlement du Canada pour le motif qu'ils ne relèvent d'aucun chef de compétence fédérale énoncé à l'art. 91 de la *Loi constitutionnelle de 1867*. Le procureur général du Québec est intervenu à l'appui de la position de l'intimée. La requête a été accueillie par la Cour du Québec et un appel interjeté devant la Cour

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appeal to the Superior Court was dismissed. A further appeal to the Court of Appeal was also dismissed.

Held (Lamer C.J. and Sopinka, Iacobucci and Major JJ. dissenting): The appeal should be allowed. The impugned provisions are valid legislation under the criminal law power.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.: The environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial. If a provision relating to the environment in pith and substance falls within the parameters of any power assigned to the body that enacted the legislation, then it is constitutionally valid.

Under s. 91(27) of the *Constitution Act, 1867*, Parliament has been accorded plenary power to make criminal law in the widest sense. It is entirely within Parliament's discretion to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard. Under s. 91(27), it is also within the discretion of Parliament to determine the extent of blameworthiness that it wishes to attach to a criminal prohibition. This power is of course subject to the "fundamental justice" requirements of s. 7 of the *Canadian Charter of Rights and Freedoms*, which may dictate a higher level of *mens rea* for serious or "true" crimes. The *Charter* apart, the only qualification that has been attached to Parliament's plenary power over criminal law is that it cannot be employed colourably. Like other legislative powers, it cannot permit Parliament simply by legislating in the proper form to colourably invade areas of exclusively provincial legislative competence. To determine whether such an attempt is made, it is appropriate to determine whether a legitimate public purpose underlies the prohibition.

The protection of the environment, through prohibitions against toxic substances, constitutes a wholly legitimate public objective in the exercise of the criminal law power. Protection of the environment is an international problem that requires action by governments at all levels. The legitimate use of the criminal law in no way constitutes an encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit. Parliament may validly enact prohibitions

supérieure a été rejeté. Un autre appel interjeté devant la Cour d'appel a, lui aussi, été rejeté.

Arrêt (le juge en chef Lamer et les juges Sopinka, Iacobucci et Major sont dissidents): Le pourvoi est accueilli. Les dispositions contestées sont valides en vertu de la compétence en matière de droit criminel.

Les juges La Forest, L'Heureux-Dubé, Gonthier, Cory et McLachlin: L'environnement n'est pas, comme tel, un domaine de compétence législative en vertu de la *Loi constitutionnelle de 1867*. Il s'agit plutôt d'un sujet diffus qui touche plusieurs domaines différents de responsabilité constitutionnelle, dont certains sont fédéraux et d'autres provinciaux. Si une disposition relative à l'environnement relève, de par son caractère véritable, de l'un des pouvoirs attribués au corps législatif qui l'a adoptée, elle est alors constitutionnellement valide.

En vertu du par. 91(27) de la *Loi constitutionnelle de 1867*, le Parlement a été investi du plein pouvoir d'adopter des règles de droit criminel au sens le plus large du terme. Il relève entièrement du pouvoir discrétionnaire du Parlement de décider quel mal il désire supprimer au moyen d'une interdiction pénale et quel intérêt menacé il souhaite ainsi sauvegarder. Aux termes du par. 91(27), il relève également du pouvoir discrétionnaire du Parlement de déterminer le degré de culpabilité qu'il souhaite attacher à une interdiction criminelle. Ce pouvoir est assujetti, naturellement, aux exigences de la «justice fondamentale» prescrites à l'art. 7 de la *Charte canadienne des droits et libertés*, qui peuvent dicter un degré plus élevé de *mens rea* dans le cas des crimes graves ou «proprement dits». La *Charte* mise à part, la seule réserve dont a été assorti le plein pouvoir du Parlement en matière de droit criminel est qu'il ne peut pas être utilisé de façon déguisée. Comme d'autres pouvoirs législatifs, il ne peut pas permettre au Parlement, simplement en légiférant de la manière appropriée, d'empiéter spécieusement sur des domaines de compétence législative provinciale exclusive. Pour déterminer si on est en présence d'une telle tentative, il convient de déterminer si l'interdiction se fonde sur un objectif public légitime

La protection de l'environnement, au moyen d'interdictions concernant les substances toxiques, constitue un objectif public tout à fait légitime dans l'exercice de la compétence en matière de droit criminel. La protection de l'environnement est un problème international qui exige une action des gouvernements de tous les niveaux. Le recours légitime au droit criminel ne constitue nullement un empiétement sur la compétence législative provinciale, bien qu'il puisse toucher à des matières qui en

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under its criminal law power against specific acts for the purpose of preventing pollution. This does not constitute an interference with provincial legislative powers. The use of the federal criminal law power in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or in co-operation with federal action.

Broad wording is unavoidable in environmental protection legislation because of the breadth and complexity of the subject. The effect of requiring greater precision would be to frustrate the legislature in its attempt to protect the public against the dangers flowing from pollution. Part II of the *Canadian Environmental Protection Act* does not deal with the protection of the environment generally, but simply with the control of toxic substances that may be released into the environment under certain restricted circumstances, through a series of prohibitions to which penal sanctions are attached. There was no intention that the Act should bar the use, importation or manufacture of all chemical products, but rather that it should affect only those substances that are dangerous to the environment, and then only if they are not otherwise regulated by law. The broad purpose and effect of Part II is to provide a procedure for assessing whether out of the many substances that may conceivably fall within the ambit of s. 11, some should be added to the List of Toxic Substances in Schedule I and, when an order to this effect is made, whether to prohibit the use of the substance so added in the manner provided in the regulations made under s. 34(1) subject to a penalty. These listed substances, toxic in the ordinary sense, are those whose use in a manner contrary to the regulations the Act ultimately prohibits. This is a limited prohibition applicable to a restricted number of substances. The prohibition is enforced by a penal sanction and is undergirded by a valid criminal objective, and so is valid criminal legislation. Specific targeting of toxic substances based on individual assessment avoids resort to unnecessarily broad prohibitions and their impact on the exercise of provincial powers.

The interim order is also valid under s. 91(27) of the *Constitution Act, 1867*. PCBs are not only highly toxic but long lasting and very slow to break down in water, air or soil. They are also extremely mobile. As well,

relèvent. Le Parlement peut, en vertu de sa compétence en matière de droit criminel, édicter validement des interdictions relatives à des actes précis en vue de prévenir la pollution. Cela ne constitue pas un empiétement sur les compétences législatives d'une province. Le recours à la compétence fédérale en matière de droit criminel n'empêche nullement les provinces d'exercer les vastes pouvoirs que leur confère l'art. 92 pour réglementer et limiter la pollution de l'environnement de façon indépendante ou de concert avec des mesures fédérales.

La formulation large est inévitable dans une loi sur la protection de l'environnement en raison de l'ampleur et de la complexité du sujet. Exiger une plus grande précision aurait pour effet de faire échouer la législature dans sa tentative de protéger le public contre les dangers découlant de la pollution. La partie II de la *Loi canadienne sur la protection de l'environnement* traite non pas de la protection de l'environnement en général, mais simplement du contrôle de substances toxiques qui peuvent être rejetées dans l'environnement dans certains circonstances limitées, au moyen d'une série d'interdictions assorties de sanctions pénales. La Loi visait non pas à interdire l'utilisation, l'importation ou la fabrication de tous les produits chimiques, mais plutôt à ne toucher que les substances qui sont dangereuses pour l'environnement, et seulement si elles ne sont pas par ailleurs réglementées par la loi. La partie II a généralement pour objet et pour effet de prescrire une procédure permettant d'évaluer si, parmi les nombreuses substances qui peuvent, en théorie, être visées par l'art. 11, certaines devraient être ajoutées à la liste des substances toxiques de l'annexe I, et de déterminer, lorsqu'on prend un arrêté en ce sens, s'il y a lieu d'interdire, sous peine de sanction, l'utilisation de la substance ainsi ajoutée de la manière prévue dans le règlement pris en vertu du par. 34(1). Ces substances inscrites sur la liste, toxiques au sens ordinaire du terme, sont celles que la Loi interdit, en fin de compte, d'utiliser d'une manière contraire au règlement. C'est une interdiction limitée qui s'applique à un nombre limité de substances. L'interdiction est assortie d'une peine en cas de non-respect et s'appuie sur un objectif pénal valide et est donc une mesure législative pénale valide. Le ciblage précis de substances toxiques fondé sur une évaluation individuelle évite de recourir à des interdictions inutilement larges et à leur incidence sur l'exercice de pouvoirs provinciaux.

L'arrêté d'urgence est également valide en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*. Les BPC sont non seulement très toxiques, mais encore ils durent longtemps et se décomposent très lentement dans l'eau,

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they dissolve readily in fat tissues and other organic compounds, with the result that they move up the food chain. They pose significant risks of serious harm to both animals and humans.

It is not necessary to consider whether the impugned provisions fall within Parliament's jurisdiction to make laws for the peace, order and good government of Canada.

Per Lamer C.J. and Sopinka, Iacobucci and Major JJ. (dissenting): The pith and substance of Part II of the *Canadian Environmental Protection Act* lies in the wholesale regulation by federal agents of any and all substances which may harm any aspect of the environment or which may present a danger to human life or health. While Parliament has been given broad and exclusive power to legislate in relation to criminal law by virtue of s. 91(27) of the *Constitution Act, 1867*, the criminal law power has always been made subject to two requirements: laws purporting to be upheld under s. 91(27) must contain prohibitions backed by penalties, and they must be directed at a legitimate public purpose. Although the protection of human health has been held to be a legitimate public purpose, the impugned legislation goes well beyond this goal. However, the protection of the environment is also a valid purpose of the criminal law.

While the impugned provisions have a legitimate criminal purpose, they fail to meet the other half of the test. They are not intended to prohibit environmental pollution, but simply to regulate it, and so do not qualify as criminal law under s. 91(27). While a criminal law may validly contain exemptions for certain conduct without losing its status as criminal law, in order to have an exemption, there must first be a prohibition in the legislation from which that exemption is derived. There are no such prohibitions in the legislation at issue here. Sections 34 and 35 do not define an offence at all. Rather, they establish a regulatory regime whereby the Ministers of Health and the Environment can place substances on the List of Toxic Substances and define the norms of conduct regarding those substances on an ongoing basis. It would be an odd crime whose definition was made entirely dependent on the discretion of the executive. The prohibitions in s. 113, such as they are, are ancillary to the regulatory scheme, not the other way around. This strongly suggests that the focus of the legislation is regulation rather than prohibition. Section

l'air ou le sol. Ils sont aussi extrêmement mobiles. De même, ils se dissolvent facilement dans les tissus adipeux et autres composés organiques, de sorte qu'ils remontent la chaîne alimentaire. Ils posent des risques importants de préjudice grave pour les animaux et les humains.

Il n'est pas nécessaire de déterminer si les dispositions contestées relèvent de la compétence du Parlement pour légiférer relativement à la paix, à l'ordre et au bon gouvernement du Canada.

Le juge en chef Lamer et les juges Sopinka, Iacobucci et Major (dissidents): Le caractère véritable de la partie II de la *Loi canadienne sur la protection de l'environnement* réside dans la réglementation systématique, par des organismes fédéraux, de toutes les substances susceptibles d'avoir un effet nocif sur un aspect de l'environnement, ou de présenter un danger pour la vie ou la santé humaine. Même si le par. 91(27) de la *Loi constitutionnelle de 1867* a attribué au Parlement la compétence vaste et exclusive pour légiférer en matière de droit criminel, la compétence en matière de droit criminel a toujours été assujettie à deux exigences: les lois censées être maintenues en vertu du par. 91(27) doivent contenir des interdictions assorties de peines et elles doivent viser un objectif public légitime. Bien qu'il ait été déterminé que la protection de la santé humaine constitue un objectif public légitime, la mesure législative contestée va bien au-delà de cet objectif. Cependant, la protection de l'environnement constitue également un objectif valide du droit criminel.

Même si les dispositions contestées visent un objectif légitime en matière criminelle, elles ne satisfont pas à l'autre moitié du critère. Elles visent non pas à interdire la pollution de l'environnement, mais simplement à la réglementer et ne peuvent donc pas être qualifiées de droit criminel au sens du par. 91(27). Bien qu'une loi en matière criminelle puisse validement comporter des exemptions relativement à certaines conduites sans pour autant perdre son caractère, pour qu'il y ait exemption, il faut d'abord qu'il y ait une interdiction dans la loi dont découle cette exemption. La loi faisant l'objet du présent pourvoi ne contient aucune interdiction de cette nature. Les articles 34 et 35 ne définissent pas une infraction. Ils établissent plutôt un régime de réglementation en vertu duquel les ministres de la Santé et de l'Environnement peuvent, de manière continue, inscrire des substances sur la liste des substances toxiques et définir les normes de conduite relatives à ces substances. Ce serait un crime singulier dont la définition a été laissée à l'entière discrétion du pouvoir exécutif. Les interdictions prévues à l'art. 113, telles qu'elles existent,

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34 allows for the regulation of every conceivable aspect of toxic substances. It is highly unlikely that Parliament intended to leave the criminalization of such a sweeping area of behaviour to the discretion of the Ministers. Moreover, the equivalency provisions in s. 34(6) of the Act, under which a province may be exempted from the application of regulations if it already has equivalent regulations in force there, creates a strong presumption that the federal regulations are regulatory, not criminal, since any environmental legislation enacted by the provinces must be regulatory in nature. Finally, granting Parliament the authority to regulate so completely the release of substances into the environment by determining whether or not they are "toxic" would inescapably preclude the possibility of shared environmental jurisdiction and would infringe severely on other heads of power assigned to the provinces.

Assuming that the protection of the environment and of human life and health against any and all potentially harmful substances could be a "new matter" which would fall under the peace, order and good government power, that matter does not have the required singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. The definition of "toxic substances" in s. 11, combined with the definition of "substance" found in s. 3, is an all-encompassing definition with no clear limits. While s. 15 does specify some criteria to refine the notion of "toxic substance", it does not narrow the broad definition of that notion, but only offers investigatory guidelines. Moreover, the investigatory process provided for in s. 15 can be totally bypassed where an interim order is issued pursuant to s. 35. With respect to geographical limits, although the preamble of the Act suggests that its ambit is restricted to those substances that "cannot always be contained within geographic boundaries", nowhere in Part II or the enabling provisions at issue is there any actual limitation based on territorial considerations. Part II's failure to distinguish between types of toxic substances, either on the basis of degree of persistence and diffusion into the environment and the severity of their harmful effect or on the basis of their extraprovincial aspects, demonstrates that the enabling provisions lack the necessary singleness, distinctiveness and indivisibility. To the extent that Part II of the Act includes the regulation of "toxic substances" that may only affect the

sont accessoires au régime de réglementation, et non l'inverse. Cela laisse fortement entendre que la Loi est axée sur la réglementation plutôt que sur les interdictions. L'article 34 permet la réglementation de tous les aspects imaginables des substances toxiques. Il est fort improbable que le Parlement ait eu l'intention de laisser la criminalisation d'un aussi vaste domaine de comportement à la discrétion des ministres. De plus, les dispositions équivalentes mentionnées au par. 34(6) de la Loi, selon lequel une province peut être exemptée de l'application des règlements lorsque des dispositions équivalentes à ces règlements y sont déjà en vigueur, laissent fortement présumer que les règlements fédéraux sont de nature réglementaire et non pas criminelle, puisque toute loi en matière d'environnement adoptée par une province doit être de nature réglementaire. Enfin, le fait d'accorder au Parlement le pouvoir de réglementer de façon aussi complète le rejet de substances dans l'environnement par la détermination de leur nature «toxique» ou non éliminerait inévitablement la possibilité d'avoir une compétence partagée en matière d'environnement et empiéterait de façon considérable sur d'autres chefs de compétence provinciale.

Tenant pour acquis que la protection de l'environnement et de la vie et de la santé humaines contre toutes les substances potentiellement nocives pourrait constituer une «nouvelle matière» relevant de la compétence concernant la paix, l'ordre et le bon gouvernement, cette matière n'a pas l'unicité, la particularité et l'indivisibilité requises qui la distinguent clairement des matières d'intérêt provincial. La définition des «substances toxiques» à l'art. 11, conjuguée à celle du mot «substance» à l'art. 3, est une définition générale sans limites précises. Même si l'art. 15 énonce effectivement certains critères pour raffiner la notion de «substance toxique», il ne restreint pas la définition large donnée à cette notion, mais ne fait qu'offrir des lignes directrices en matière d'enquête. En outre, le processus d'enquête prévu à l'art. 15 peut être complètement évité lorsqu'un arrêté d'urgence est pris conformément à l'art. 35. Quant aux limites géographiques, même si le préambule de la Loi laisse entendre qu'elle ne s'applique qu'aux substances «qu'il n'est pas toujours possible de circonscrire au territoire touché», ni la partie II ni les dispositions habilitantes en cause ne contiennent une véritable restriction fondée sur des considérations territoriales. Le fait que la partie II n'établisse aucune distinction entre des types de substances toxiques, que ce soit en fonction de leur degré de persistance et de diffusion dans l'environnement et de la sévérité de leur effet nocif, ou de leurs aspects extraprovinciaux, démontre que les dispositions habilitantes n'ont pas l'unicité, la particularité et

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particular province within which they originate, the appellant bears a heavy burden to demonstrate that provinces themselves would be incapable of regulating such toxic emissions, a burden which it has not discharged.

The impugned legislation cannot be justified as an exercise of the federal trade and commerce power.

Cases Cited

By La Forest J.

Referred to: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Fowler v. The Queen*, [1980] 2 S.C.R. 213; *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524; *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Rube*, [1992] 3 S.C.R. 159; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226; *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *Standard Sausage Co. v. Lee*, [1933] 4 D.L.R. 501; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *R. v. Cosman's Furniture (1972) Ltd.* (1976), 32 C.C.C. (2d) 345; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. Wetmore*, [1983] 2 S.C.R. 284; *R. v. Furtney*, [1991] 3 S.C.R. 89; *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368; *Boggs v. The Queen*, [1981] 1 S.C.R. 49; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662.

By Lamer C.J. and Iacobucci J. (dissenting)

R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299;

l'indivisibilité requises. Dans la mesure où la partie II de la Loi inclut la réglementation de «substances toxiques» susceptibles de toucher uniquement la province où elles émanent, l'appelant a le lourd fardeau d'établir que les provinces elles-mêmes seraient incapables de réglementer ces émissions toxiques, fardeau dont il ne s'est pas acquitté.

La loi contestée ne peut pas se justifier en tant qu'exercice de la compétence fédérale en matière d'échanges et de commerce.

Jurisprudence

Citée par le juge La Forest

Arrêts mentionnés: *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3; *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Whitbread c. Walley*, [1990] 3 R.C.S. 1273; *Renvoi sur la Loi anti-inflation*, [1976] 2 R.C.S. 373; *Fowler c. La Reine*, [1980] 2 R.C.S. 213; *Attorney-General for Ontario c. Hamilton Street Railway Co.*, [1903] A.C. 524; *Proprietary Articles Trade Association c. Attorney-General for Canada*, [1931] A.C. 310; *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154; *R. c. Rube*, [1992] 3 R.C.S. 159; *Scowby c. Glendinning*, [1986] 2 R.C.S. 226; *Lord's Day Alliance of Canada c. Attorney General of British Columbia*, [1959] R.C.S. 497; *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031; *Standard Sausage Co. c. Lee*, [1933] 4 D.L.R. 501; *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297; *R. c. Cosman's Furniture (1972) Ltd.* (1976), 32 C.C.C. (2d) 345; *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616; *R. c. Wetmore*, [1983] 2 R.C.S. 284; *R. c. Furtney*, [1991] 3 R.C.S. 89; *Attorney-General for British Columbia c. Attorney-General for Canada*, [1937] A.C. 368; *Boggs c. La Reine*, [1981] 1 R.C.S. 49; *Schneider c. La Reine*, [1982] 2 R.C.S. 112; *Reference re Farm Products Marketing Act*, [1957] R.C.S. 198; *Nova Scotia Board of Censors c. McNeil*, [1978] 2 R.C.S. 662.

Citée par le juge en chef Lamer et le juge Iacobucci (dissidents)

R. c. Crown Zellerbach Canada Ltd., [1988] 1 R.C.S. 401; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3; *R. c. Sault Ste-Marie*, [1978] 2

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Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226; *Boggs v. The Queen*, [1981] 1 S.C.R. 49; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914; *R. v. Wetmore*, [1983] 2 S.C.R. 284; *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *R. v. Hauser*, [1979] 1 S.C.R. 984; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497; *R. v. Furtney*, [1991] 3 S.C.R. 89; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.

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APPEAL from a judgment of the Quebec Court of Appeal, [1995] R.J.Q. 398, 67 Q.A.C. 161, 17 C.E.L.R. (N.S.) 34, [1995] Q.J. No. 143 (QL), affirming a judgment of the Superior Court, [1992] R.J.Q. 2159, affirming a decision of Babin Q.C.J., [1991] R.J.Q. 2736, declaring certain legislative provisions to be *ultra vires* the Parliament of Canada. Appeal allowed, Lamer C.J. and Sopinka, Iacobucci and Major JJ. dissenting.

Claude Joyal, James Mabbutt, Q.C., *Yves Lebœuf* and *Jean Rhéaume*, for the appellant.

François Fontaine, Sophie Perreault and *Jean Piette*, for the respondent.

Alain Gingras, for the *mis en cause*.

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Robert G. Richards, for the intervener IPSCO Inc.

Robert Astell, for the intervener the Société pour vaincre la pollution inc.

Stewart A. G. Elgie and *Paul R. Muldoon*, for the interveners Pollution Probe, Great Lakes United (Canada), Canadian Environmental Law Association and Sierra Legal Defence Fund.

The reasons of Lamer C.J. and Sopinka, Iacobucci and Major JJ. were delivered by

THE CHIEF JUSTICE and IACOBUCCI J. (dissenting) — This appeal arose as a result of an interim order made in 1989 by the then Minister of the

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POURVOI contre un arrêt de la Cour d'appel du Québec, [1995] R.J.Q. 398, 67 Q.A.C. 161, 17 C.E.L.R. (N.S.) 34, [1995] A.Q. nº 143 (QL), confirmant un jugement de la Cour supérieure, [1992] R.J.Q. 2159, qui avait confirmé une décision du juge Babin de la Cour du Québec, [1991] R.J.Q. 2736, déclarant que certaines dispositions législatives excédaient la compétence du Parlement du Canada. Pourvoi accueilli, le juge en chef Lamer et les juges Sopinka, Iacobucci et Major sont dissidents.

Claude Joyal, James Mabbutt, c.r., *Yves Lebœuf* et *Jean Rhéaume*, pour l'appelant.

François Fontaine, Sophie Perreault et *Jean Piette*, pour l'intimée.

Alain Gingras, pour le mis en cause.

Thomson Irvine, pour l'intervenant le procureur général de la Saskatchewan.

Robert G. Richards, pour l'intervenante IPSCO Inc.

Robert Astell, pour l'intervenante la Société pour vaincre la pollution inc.

Stewart A. G. Elgie et *Paul R. Muldoon*, pour les intervenants Pollution Probe, Great Lakes United (Canada), Association canadienne du droit de l'environnement et Sierra Legal Defence Fund.

Version française des motifs du juge en chef Lamer et des juges Sopinka, Iacobucci et Major rendus par

LE JUGE EN CHEF et LE JUGE IACOBUCCI (dissidents) — Le présent pourvoi fait suite à un arrêté d'urgence pris en 1989 par le ministre de l'Envi- 1

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Environment of Canada, the Honourable Lucien Bouchard. It restricted the emission of chlorobiphenyls ("PCBs") to 1 gram per day. The respondent, Hydro-Québec, was charged with breaching this Interim Order and challenged the charges by claiming that the Interim Order, as well as the underlying provisions supporting it, were *ultra vires* Parliament as invading provincial territory.

2 We have had the advantage of reading the lucid reasons of La Forest J. While we share his concern for the protection of the environment, we are of the view that the impugned provisions cannot be justified under s. 91 of the *Constitution Act, 1867*, and are therefore *ultra vires* the federal government. Because of our disagreement with our colleague's approach, we will set out the relevant factual and judicial background.

1. Facts

3 The respondent Hydro-Québec was charged with two infractions under s. 6(*a*) of the *Chlorobiphenyls Interim Order*, P.C. 1989-296 (hereinafter "the Interim Order"), adopted and enforced pursuant to ss. 34 and 35 of the *Canadian Environmental Protection Act*, R.S.C., 1985, c.16 (4th Supp.). It was alleged that the respondent:

[TRANSLATION]

[1] From January 1 to January 3, 1990, did unlawfully release more than 1 gram per day of chlorobiphenyls into the environment contrary to s. 6(*a*) of the *Chlorobiphenyls Interim Order*, P.C. 1989-29[6] of February 23, 1989, thereby committing an offence under ss. 113(*i*) and (*o*) of the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.);

[2] On or about January 8, 1990, following the release into the environment, in contravention of s. 6(*a*) of the *Chlorobiphenyls Interim Order*, P.C. 1989-296 of February 23, 1989, of a substance specified in Schedule I to the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.), to wit: chlorobiphenyls . . . did fail to report the matter to an inspector as soon as possible in the circumstances contrary to s. 36(1)(*a*) of the said Act, thereby com-

ronnement de l'époque, l'honorable Lucien Bouchard. L'arrêté limitait à 1 g par jour les émissions de biphényles chlorés (BPC). L'intimée Hydro-Québec, accusée d'avoir contrevenu à cet arrêté d'urgence, a contesté les accusations portées contre elle en soutenant que l'arrêté d'urgence et les dispositions le sous-tendant excédaient la compétence du Parlement, car ils envahissaient un domaine de compétence provinciale.

Nous avons pris connaissance des motifs limpides du juge La Forest. Bien que nous partagions son intérêt pour la protection de l'environnement, nous sommes d'avis que les dispositions contestées ne peuvent être justifiées en vertu de l'art. 91 de la *Loi constitutionnelle de 1867* et qu'elles excèdent donc la compétence du gouvernement fédéral. Vu notre désaccord avec le point de vue adopté par notre collègue, nous allons exposer les contextes factuel et judiciaire pertinents.

1. Les faits

L'intimée Hydro-Québec a été accusée de deux infractions en vertu de l'al. 6*a*) de l'*Arrêté d'urgence sur les biphényles chlorés*, C.P. 1989-296 (ci-après l'«arrêté d'urgence»), qui a été pris et mis à exécution conformément aux art. 34 et 35 de la *Loi canadienne sur la protection de l'environnement*, L.R.C. (1985), ch. 16 (4e suppl.). L'intimée a été accusée des faits suivants:

[1] Du 1er janvier au 3 janvier 1990, a illégalement rejeté, dans l'environnement, plus d'un gramme par jour de biphényles chlorés contrairement à l'alinéa 6*a*) de *l'Arrêté d'urgence sur les biphényles chlorés*, C.P. 1989-29[6] du 23 février 1989, commettant ainsi l'infraction prévue aux alinéas 113*i*) et *o*) de la *Loi canadienne sur la protection de l'environnement*, L.R.C. de 198[5], 4e suppl., c. 16;

[2] Le ou vers le 8 janvier 1990, après le rejet dans l'environnement en violation de l'alinéa 6*a*) de *l'Arrêté d'urgence sur les biphényles chlorés*, C.P. 1989-296 du 23 février 1989, d'une substance inscrite à l'annexe I de la *Loi canadienne sur la protection de l'environnement*, L.R.C. de 198[5], 4e suppl., c. 16, à savoir: des biphényles chlorés [. . .] a omis de faire rapport de la situation à l'inspecteur dans les meilleurs délais possible, contrairement à l'alinéa 36(1)*a*)

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mitting an offence under ss. 113(*h*) and (*o*) of the said Act.

On July 23, 1990, the respondent pleaded not guilty to both these charges. It brought a motion before the Court of Québec to have ss. 34 and 35 of the Act as well as s. 6(*a*) of the Interim Order declared unconstitutional as outside the federal government's sphere of competence. On August 12, 1991, the court granted this motion and struck down the provisions in question: [1991] R.J.Q. 2736. An appeal to the Quebec Superior Court was dismissed on August 6, 1992 ([1992] R.J.Q. 2159), as was a further appeal to the Quebec Court of Appeal, on February 14, 1995 ([1995] R.J.Q. 398, 67 Q.A.C. 161, 17 C.E.L.R. (N.S.) 34, [1995] Q.J. No. 143 (QL)). On October 12, 1995, this Court granted leave to appeal ([1995] 4 S.C.R. vii) and a constitutional question, set forth below, was stated.

2. Relevant Statutory and Constitutional Provisions

Chlorobiphenyls Interim Order, P.C. 1989-296

6. The quantity of chlorobiphenyls that may be released into the environment shall not exceed 1 gram per day in respect of any item of equipment or any receptacle or material containing equipment in the course of the operation, servicing, maintenance, decommissioning, transporting or storage of

(*a*) electrical capacitors and electrical transformers and associated electrical equipment manufactured in or imported into Canada before July 1, 1980;

Canadian Environmental Protection Act, R.S.C., 1985, c. 16 (4th Supp.)

It is hereby declared that the protection of the environment is essential to the well-being of Canada.

WHEREAS the presence of toxic substances in the environment is a matter of national concern;

de ladite loi, commettant ainsi l'infraction prévue aux alinéas 113*h*) et *o*) de ladite Loi.

Le 23 juillet 1990, l'intimée a plaidé non coupable à ces deux accusations. Elle a déposé une requête devant la Cour du Québec en vue de faire déclarer inconstitutionnels les art. 34 et 35 de la Loi ainsi que l'al. 6*a*) de l'arrêté d'urgence, pour le motif qu'ils excédaient le champ de compétence du gouvernement fédéral. Le 12 août 1991, la cour a accueilli la requête et annulé les dispositions en question: [1991] R.J.Q. 2736. L'appel interjeté devant la Cour supérieure du Québec a été rejeté le 6 août 1992 ([1992] R.J.Q. 2159), et un autre appel interjeté devant la Cour d'appel du Québec a été rejeté le 14 février 1995 ([1995] R.J.Q. 398, 67 Q.A.C. 161, 17 C.E.L.R. (N.S.) 34, [1995] A.Q. nº 143 (QL)). Le 12 octobre 1995, notre Cour a accordé l'autorisation de pourvoi ([1995] 4 R.C.S. vii) et formulé la question constitutionnelle reproduite plus loin.

2. Les dispositions législatives et constitutionnelles pertinentes

Arrêté d'urgence sur les biphényles chlorés, C.P. 1989-296

6. La quantité de biphényles chlorés qui peut être rejetée, dans l'environnement, dans une région du Canada ne peut excéder 1 g par jour pour chaque pièce d'équipement ou contenant ou emballage d'équipement au cours de l'exploitation, de l'entretien, de la maintenance, de la mise hors service, du transport ou de l'entreposage de l'équipement suivant:

a) des condensateurs électriques ainsi que des transformateurs électriques et de l'équipement connexe, fabriqués ou importés au Canada avant le 1er juillet 1980;

Loi canadienne sur la protection de l'environnement, L.R.C. (1985), ch. 16 (4e suppl.)

Il est déclaré que la protection de l'environnement est essentielle au bien-être de la population du Canada.

Attendu:

que la présence de substances toxiques dans l'environnement est une question d'intérêt national;

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WHEREAS toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;

WHEREAS the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines and codes of practice;

WHEREAS it is necessary to control the dispersal of nutrients in Canadian waters;

WHEREAS some of the laws under which federal lands, works and undertakings are administered or regulated do not make provision for environmental protection in respect of federal lands, works and undertakings;

AND WHEREAS Canada must be able to fulfil its international obligations in respect of the environment;

3. (1) In this Act,

. . .

"environment" means the components of the Earth and includes

(*a*) air, land and water,

(*b*) all layers of the atmosphere,

(*c*) all organic and inorganic matter and living organisms, and

(*d*) the interacting natural systems that include components referred to in paragraphs (*a*) to (*c*);

. . .

"substance" means any distinguishable kind of organic or inorganic matter, whether animate or inanimate, and includes

(*a*) any matter that is capable of being dispersed in the environment or of being transformed in the environment into matter that is capable of being so dispersed or that is capable of causing such transformations in the environment,

(*b*) any element or free radical,

(*c*) any combination of elements of a particular molecular identity that occurs in nature or as a result of a chemical reaction, and

(*d*) complex combinations of different molecules that originate in nature or are the result of chemical reactions but that could not practicably be formed by simply combining individual constituents,

qu'il n'est pas toujours possible de circonscrire au territoire touché la dispersion de substances toxiques ayant pénétré dans l'environnement;

que le gouvernement fédéral, à titre de chef de file national en la matière, se doit d'établir des objectifs, des directives et des codes de pratiques nationaux en matière de qualité de l'environnement;

qu'il est nécessaire de limiter la dispersion des substances nutritives dans les eaux canadiennes;

que la législation régissant les terres, entreprises et ouvrages fédéraux ne prévoit pas toujours à leur égard de mesures de protection de l'environnement;

que le Canada se doit d'être en mesure de respecter ses obligations internationales en matière d'environnement,

3. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

«environnement» Ensemble des conditions et des éléments naturels de la terre, notamment:

a) l'air, l'eau et le sol;

b) toutes les couches de l'atmosphère;

c) toutes les matières organiques et inorganiques ainsi que les êtres vivants;

d) les systèmes naturels en interaction qui comprennent les éléments visés aux alinéas *a*) à *c*).

. . .

«substance» Toute matière organique ou inorganique, animée ou inanimée, distinguable. La présente définition vise notamment:

a) les matières susceptibles soit de se disperser dans l'environnement, soit de s'y transformer en matières dispersables, ainsi que les matières susceptibles de provoquer de telles transformations dans l'environnement;

b) les radicaux libres ou les éléments;

c) les combinaisons d'éléments à l'identité moléculaire précise soit naturelles, soit consécutives à une réaction chimique;

d) des combinaisons complexes de molécules différentes, d'origine naturelle ou résultant de réactions chimiques, mais qui ne pourraient se former dans la pratique par la simple combinaison de leurs composants individuels.

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and, except for the purposes of sections 25 to 32, includes

(*e*) any mixture that is a combination of substances and does not itself produce a substance that is different from the substances that were combined,

(*f*) any manufactured item that is formed into a specific physical shape or design during manufacture and has, for its final use, a function or functions dependent in whole or in part on its shape or design, and

(*g*) any animate matter that is, or any complex mixtures of different molecules that are, contained in effluents, emissions or wastes that result from any work, undertaking or activity;

11. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions

(*a*) having or that may have an immediate or long-term harmful effect on the environment;

(*b*) constituting or that may constitute a danger to the environment on which human life depends; or

(*c*) constituting or that may constitute a danger in Canada to human life or health.

15. For the purpose of assessing whether a substance is toxic or is capable of becoming toxic, or for the purpose of assessing whether to control, or the manner in which to control, a substance, either Minister may

(*a*) collect data and conduct investigations respecting

(i) the nature of the substance,

(ii) the presence of the substance in the environment and the effect of its presence on the environment or on human life or health,

(iii) the extent to which the substance can become dispersed and will persist in the environment,

(iv) the ability of the substance to become incorporated or accumulate in biological tissues or to interfere with biological processes,

(v) methods of controlling the presence of the substance in the environment,

(vi) methods for testing the effects of the presence of the substance in the environment,

(vii) development and use of alternatives to the substance,

Elle vise aussi, sauf pour l'application des articles 25 à 32:

e) les mélanges combinant des substances et ne produisant pas eux-mêmes une substance différente de celles qui ont été combinées;

f) les articles manufacturés dotés d'une forme ou de caractéristiques matérielles précises pendant leur fabrication et qui ont, pour leur utilisation finale, une ou plusieurs fonctions en dépendant, en tout ou en partie;

g) les matières animées ou les mélanges complexes de molécules différentes qui sont contenus dans les effluents, les émissions ou les déchets attribuables à des travaux, des entreprises ou des activités.

11. Pour l'application de la présente partie, est toxique toute substance qui pénètre ou peut pénétrer dans l'environnement en une quantité ou une concentration ou dans des conditions de nature à:

a) avoir, immédiatement ou à long terme, un effet nocif sur l'environnement;

b) mettre en danger l'environnement essentiel pour la vie humaine;

c) constituer un danger au Canada pour la vie ou la santé humaine.

15. Afin de déterminer si une substance est effectivement ou potentiellement toxique, d'apprécier s'il y a lieu de prendre des mesures de contrôle et, dans l'affirmative, de déterminer la nature de celles-ci, l'un ou l'autre ministre peut:

a) recueillir des données sur cette substance et mener des enquêtes sur:

(i) sa nature,

(ii) sa présence dans l'environnement et l'effet qu'elle a sur celui-ci, la vie ou la santé humaine,

(iii) la mesure dans laquelle elle peut se disperser et persister dans l'environnement,

(iv) sa capacité d'infiltration et d'accumulation dans les tissus biologiques ainsi que sa capacité de nuire à des processus biologiques,

(v) les méthodes permettant de limiter sa présence dans l'environnement,

(vi) les méthodes de vérification des effets de sa présence dans l'environnement,

(vii) la mise au point et l'utilisation de substituts,

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(viii) quantities, uses and disposal of the substance, and

(ix) methods of reducing the amount of the substance used, produced or released into the environment;

(*b*) correlate and evaluate any data collected pursuant to paragraph (*a*) and publish results of any investigations carried out pursuant to that paragraph; and

(*c*) provide information and consultative services and make recommendations respecting measures to control the presence of the substance in the environment.

34. (1) Subject to subsection (3), the Governor in Council may, on the recommendation of the Ministers and after the federal-provincial advisory committee is given an opportunity to provide its advice under section 6, make regulations with respect to a substance specified on the List of Toxic Substances in Schedule I, including regulations providing for, or imposing requirements respecting,

(*a*) the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source;

(*b*) the places or areas where the substance may be released;

(*c*) the commercial, manufacturing or processing activity in the course of which the substance may be released;

(*d*) the manner in which and conditions under which the substance may be released into the environment, either alone or in combination with any other substance;

(*e*) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;

(*f*) the purposes for which the substance or a product containing the substance may be imported, manufactured, processed, used, offered for sale or sold;

(*g*) the manner in which and conditions under which the substance or a product containing the substance may be imported, manufactured, processed or used;

(*h*) the quantities or concentrations in which the substance may be used;

(*i*) the quantities or concentrations of the substance that may be imported;

(viii) ses quantités, ses utilisations et son élimination,

(ix) les méthodes permettant de réduire la quantité utilisée, produite ou rejetée dans l'environnement;

b) corréler et analyser les données recueillies et publier le résultat des enquêtes effectuées;

c) fournir des services d'information et de consultation et faire des recommandations concernant les mesures à prendre pour limiter la présence de cette substance dans l'environnement.

34. (1) Sous réserve du paragraphe (3), le gouverneur en conseil peut, sur recommandation des ministres et après avoir donné au comité consultatif fédéro-provincial la possibilité de formuler ses conseils dans le cadre de l'article 6, prendre des règlements concernant une substance inscrite sur la liste de l'annexe I, notamment en ce qui touche:

a) la quantité ou la concentration dans lesquelles elle peut être rejetée dans l'environnement, seule ou combinée à une autre substance émise par quelque source ou type de sources que ce soit;

b) les lieux ou zones de rejet;

c) les activités commerciales, de fabrication ou de transformation au cours desquelles le rejet est permis;

d) les modalités et conditions de son rejet, seule ou en combinaison avec une autre substance;

e) la quantité qui peut être fabriquée, transformée, utilisée, mise en vente ou vendue au Canada;

f) les fins pour lesquelles la substance ou un produit qui en contient peut être importé, fabriqué, transformé, utilisé, mis en vente ou vendu;

g) les modalités et conditions d'importation, de fabrication, de transformation ou d'utilisation de la substance ou d'un produit qui en contient;

h) la quantité ou la concentration dans lesquelles celle-ci peut être utilisée;

i) la quantité ou la concentration dans lesquelles celle-ci peut-être importée;

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(*j*) the countries from or to which the substance may be imported or exported;

(*k*) the conditions under which, the manner in which and the purposes for which the substance may be imported or exported;

(*l*) the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for sale, import or export of the substance or a product containing the substance;

(*m*) the quantity or concentration of the substance that may be contained in any product manufactured, imported, exported or offered for sale in Canada;

(*n*) the manner in which and conditions under which and the purposes for which the substance or a product containing the substance may be advertised or offered for sale;

(*o*) the manner in which and conditions under which the substance or a product or material containing the substance may be stored, displayed, handled, transported or offered for transport;

(*p*) the packaging and labelling of the substance or a product or material containing the substance;

(*q*) the manner, conditions, places and method of disposal of the substance or a product or material containing the substance, including standards for the construction, maintenance and inspection of disposal sites;

(*r*) the submission to the Minister, on request or at such times as are prescribed, of information relating to the substance;

(*s*) the maintenance of books and records for the administration of any regulation made under this section;

(*t*) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister;

(*u*) the submission of samples of the substance to the Minister;

(*v*) the methods and procedures for conducting sampling, analyses, tests, measurements or monitoring of the substance;

(*w*) circumstances or conditions under which the Minister may, for the proper administration of this Act, modify

j) les pays d'exportation ou d'importation;

k) les conditions, modalités et objets de l'importation ou de l'exportation;

l) l'interdiction totale, partielle ou conditionnelle de la fabrication, de l'utilisation, de la transformation, de la vente, de la mise en vente, de l'importation ou de l'exportation de la substance ou d'un produit qui en contient;

m) la quantité ou concentration de celle-ci que peut contenir un produit fabriqué, importé, exporté ou mis en vente au Canada;

n) les modalités, les conditions et l'objet de la publicité et de la mise en vente de la substance ou d'un produit qui en contient;

o) les modalités et les conditions de stockage, de présentation, de transport, de manutention ou d'offre de transport soit de la substance, soit d'un produit ou d'une matière qui en contient;

p) l'emballage et l'étiquetage soit de la substance, soit d'un produit ou d'une matière qui en contient;

q) les modalités, lieux et méthodes d'élimination soit de la substance, soit d'un produit ou d'une matière qui en contient, notamment les normes de construction, d'entretien et d'inspection des sites d'élimination;

r) la transmission au ministre, sur demande ou au moment fixé par règlement, de renseignements concernant la substance;

s) la tenue de livres et de registres pour l'exécution des règlements d'application du présent article;

t) l'échantillonnage, l'analyse, l'essai, la mesure ou la surveillance de la substance et la transmission des résultats au ministre;

u) la transmission d'échantillons de la substance au ministre;

v) les méthodes et procédures à suivre pour les opérations mentionnées à l'alinéa *t*);

w) les cas ou conditions de modification par le ministre, pour l'exécution de la présente loi, soit des exigences imposées pour les opérations mentionnées à l'alinéa *t*), soit des méthodes et procédures afférentes;

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(i) any requirement for sampling, analyses, tests, measurements or monitoring, or

(ii) the methods and procedures for conducting any required sampling, analyses, tests, measurements or monitoring; and

(*x*) any other matter necessary to carry out the purposes of this Part.

(2) The Governor in Council may, on the recommendation of the Ministers, make regulations providing for the exemption of the following activities from the application of this Part and any regulations made under it, namely,

(*a*) the import, export, manufacture, use, processing, transport, offering for transport, handling, packaging, labelling, advertising, sale, offering for sale, displaying, storing, disposing or releasing into the environment of any substance or a product or material containing any substance; and

(*b*) the release of any substance into the environment, for a period specified in the regulations, from any source or type of source.

(3) The Governor in Council shall not make a regulation under subsection (1) in respect of any substance if, in the opinion of the Governor in Council, the regulation regulates an aspect of the substance that is regulated by or under any other Act of Parliament.

(4) A regulation made under subsection (1) with respect to a substance may amend the List of Toxic Substances in Schedule I so as to specify the type of regulation that applies with respect to the substance.

(5) Except with respect to Her Majesty in right of Canada, the provisions of a regulation made under subsection (1) do not apply in any province in respect of which there is in force an order, made under subsection (6), declaring that the provisions do not apply.

(6) Where the Minister and the government of a province agree in writing that there are in force by or under the laws of the province

(*a*) provisions that are equivalent to the provisions of a regulation made under subsection (1), and

(*b*) provisions that are similar to sections 108 to 110 for the investigation of alleged offences under provincial environmental legislation,

x) toute autre mesure d'application de la présente partie.

(2) Sur recommandation des ministres, le gouverneur en conseil peut, par règlement, soustraire à l'application de la présente partie et de ses règlements:

a) l'importation, l'exportation, la fabrication, l'utilisation, la transformation, le transport, l'offre de transport, la manutention, l'emballage, l'étiquetage, la publicité, la vente, la mise en vente, la présentation, le stockage, l'élimination ou le rejet dans l'environnement soit d'une substance, soit d'un produit ou d'une matière qui en contient;

b) le rejet dans l'environnement d'une substance provenant d'une source donnée, ou d'un type de sources donné, pendant un certain temps.

(3) Les règlements prévus au paragraphe (1) ne peuvent toutefois être pris que si, selon le gouverneur en conseil, ils ne visent pas un point déjà réglementé sous le régime d'une autre loi fédérale.

(4) Les règlements d'application du paragraphe (1) peuvent modifier la liste de l'annexe I de manière à y préciser le type de règlement qui s'applique à la substance visée.

(5) Sauf à l'égard de Sa Majesté du chef du Canada, les règlements pris aux termes du paragraphe (1) ne s'appliquent pas dans la province visée par un décret pris aux termes du paragraphe (6).

(6) Sur recommandation du ministre, le gouverneur en conseil peut, par décret, déclarer que les règlements pris en application du paragraphe (1) ne s'appliquent pas dans la province lorsque le ministre et le gouvernement provincial sont convenus par écrit que sont en vigueur dans le cadre de la législation provinciale:

a) d'une part, des dispositions équivalentes à ces règlements;

b) d'autre part, des dispositions similaires aux articles 108 à 110 concernant les enquêtes pour infractions aux lois provinciales sur l'environnement.

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the Governor in Council may, on the recommendation of the Minister, make an order declaring that the provisions of the regulation do not apply in the province.

(7) The Minister shall make public any agreement referred to in subsection (6).

(8) An agreement referred to in subsection (6) may be terminated by either party giving to the other at least six months notice of termination.

(9) The Governor in Council may, on the recommendation of the Minister, revoke an order made under subsection (6) where the agreement referred to in that subsection is terminated.

(10) The Minister shall include in the annual report required by section 138 a report on the administration of subsections (5) to (9).

35. (1) Where

(*a*) a substance

(i) is not specified on the List of Toxic Substances in Schedule I and the Ministers believe that it is toxic, or

(ii) is specified on that List and the Ministers believe that it is not adequately regulated, and

(*b*) the Ministers believe that immediate action is required to deal with a significant danger to the environment or to human life or health,

the Minister may make an interim order in respect of the substance and the order may contain any provision that may be contained in a regulation made under subsection 34(1) or (2).

(2) Subject to subsection (3), an interim order has effect

(*a*) from the time it is made; and

(*b*) as if it were a regulation made under section 34.

(3) An interim order ceases to have effect unless it is approved by the Governor in Council within fourteen days after it is made.

(7) Le ministre rend public l'accord visé au paragraphe (6).

(8) Une partie à l'accord peut y mettre fin en donnant un préavis de six mois à l'autre partie.

(9) Sur recommandation du ministre, le gouverneur en conseil peut révoquer le décret d'exemption lorsqu'il a été mis fin à l'accord.

(10) Le ministre rend compte, dans le rapport annuel visé à l'article 138, de la mise en œuvre des paragraphes (5) à (9).

35. (1) Le ministre peut prendre un arrêté d'urgence pouvant comporter les mêmes dispositions qu'un règlement d'application des paragraphes 34(1) ou (2), lorsque les conditions suivantes sont réunies:

a) la substance n'est pas inscrite sur la liste de l'annexe I et les ministres la croient toxique, ou bien elle y est inscrite et ils estiment qu'elle n'est pas réglementée comme il convient;

b) les ministres croient qu'une intervention immédiate est nécessaire afin de parer à tout danger appréciable soit pour l'environnement, soit pour la vie humaine ou la santé.

(2) Sous réserve du paragraphe (3), l'arrêté prend effet dès sa prise comme s'il s'agissait d'un règlement pris en vertu de l'article 34.

(3) L'arrêté cesse toutefois d'avoir effet à défaut d'approbation par le gouverneur en conseil dans les quatorze jours qui suivent.

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(4) The Governor in Council shall not approve an interim order unless

(*a*) the Minister has, within twenty-four hours after making the order, offered to consult the governments of all the affected provinces to determine whether they are prepared to take sufficient action to deal with the significant danger; and

(*b*) the Minister has consulted with other ministers of the Crown in right of Canada to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger.

(5) Where the Governor in Council approves an interim order, the Ministers shall, within ninety days after the approval, recommend to the Governor in Council

(*a*) that a regulation having the same effect as the order be made under section 34; and

(*b*) if the order was made in respect of a substance that was not specified on the List of Toxic Substances in Schedule I, that the substance be added to that List under section 33.

(6) An interim order

(*a*) is exempt from the application of sections 3, 5 and 11 of the *Statutory Instruments Act*; and

(*b*) shall be published in the *Canada Gazette* within twenty-three days after it is approved under subsection (3).

(7) No person shall be convicted of an offence consisting of a contravention of an interim order that, at the time of the alleged contravention, was not published in the *Canada Gazette* in both official languages unless it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the order to the notice of those persons likely to be affected by it.

(8) An interim order ceases to have effect when a regulation referred to in subsection (5) is made or two years after the order was made, whichever is the earlier.

Constitution Act, 1867

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act

(4) Le gouverneur en conseil ne peut approuver l'arrêté d'urgence que si le ministre:

a) d'une part, dans les vingt-quatre heures suivant la prise de l'arrêté, a offert de consulter tous les gouvernements des provinces concernées afin de déterminer s'ils sont disposés à prendre les moyens nécessaires pour parer au danger en question;

b) d'autre part, a consulté les autres ministres fédéraux afin de déterminer si des mesures peuvent être prises sous le régime de toute autre loi fédérale pour parer au danger en question.

(5) Dans les quatre-vingt-dix jours qui suivent l'approbation par le gouverneur en conseil, les ministres recommandent à celui-ci, à la fois:

a) la prise d'un règlement d'application de l'article 34 ayant le même effet que l'arrêté;

b) l'inscription, sous le régime de l'article 33, de la substance visée sur la liste de l'annexe I dans les cas où elle n'y figure pas.

(6) L'arrêté est soustrait à l'application des articles 3, 5 et 11 de la *Loi sur les textes réglementaires* et publié dans la *Gazette du Canada* dans les vingt-trois jours suivant son approbation.

(7) Nul ne peut être condamné pour violation d'un arrêté d'urgence qui, à la date du fait reproché, n'était pas publié dans la *Gazette du Canada* dans les deux langues officielles, sauf s'il est établi qu'à cette date les mesures nécessaires avaient été prises pour porter la teneur de l'arrêté à la connaissance des personnes susceptibles d'être touchées par celui-ci.

(8) L'arrêté cesse d'avoir effet à la prise du règlement visé au paragraphe (5) ou, au plus tard, deux ans après sa prise.

Loi constitutionnelle de 1867

91. Il sera loisible à la Reine, sur l'avis et avec le consentement du Sénat et de la Chambre des communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets exclusivement

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assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —

. . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

. . .

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

assignés aux législatures des provinces par la présente loi mais, pour plus de certitude, sans toutefois restreindre la généralité des termes employés plus haut dans le présent article, il est par les présentes déclaré que (nonobstant toute disposition de la présente loi) l'autorité législative exclusive du Parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets énumérés ci-dessous, à savoir:

. . .

27. le droit criminel, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle;

. . .

Et aucune des matières ressortissant aux catégories de sujets énumérés au présent article ne sera réputée tomber dans la catégorie des matières d'une nature locale ou privée comprises dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.

3. Judicial History

A. *Court of Québec*

In Judge Babin's view, the fundamental question was whether Parliament had the power to regulate the emission of substances harmful to the environment when that environment was situated within a province. Applying the criteria set out by this Court in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, to the Act, he held that the scope of the legislation was unacceptably broad, largely owing to the sweeping definitions given to "environment" and to "toxic". The subject matter of the Act did not exhibit the "singleness, distinctiveness and indivisibility" required by *Crown Zellerbach*. Since a substance could be labelled "toxic" without even necessarily having a harmful effect on human health, he held that the Act was too broad to be sustained under the peace, order and good government power.

For similar reasons, he held that it could not be upheld as criminal law either. Since risk to human health was not necessary for the federal government to move in and impose regulations, he ruled

3. L'historique des procédures judiciaires

A. *Cour du Québec*

6 Selon le juge Babin, la question fondamentale était de savoir si le Parlement avait le pouvoir de réglementer les émissions de substances nocives pour l'environnement lorsque l'environnement en cause se trouve à l'intérieur d'une province. Appliquant à la Loi les critères énoncés par notre Cour dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, il a conclu que la loi en question avait une portée large inacceptable, principalement en raison des définitions générales données aux mots «environnement» et «toxique». Le sujet visé par la Loi n'avait pas «l'unicité, la particularité et l'indivisibilité» requises par l'arrêt *Crown Zellerbach*. Étant donné qu'une substance pouvait être qualifiée de «toxique» sans même avoir nécessairement un effet nocif sur la santé humaine, il a conclu que la Loi avait une portée trop large pour être justifiée en vertu de la compétence en matière de paix, d'ordre et de bon gouvernement.

7 Pour des motifs similaires, il a conclu qu'elle ne pouvait pas non plus être maintenue comme étant du droit criminel. Vu qu' il n'était pas nécessaire qu'il y ait un risque pour la santé humaine pour

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that Part II of the Act was legislation aimed primarily at protecting the environment, not at protecting health. Applying the *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (hereinafter the "*Margarine Reference*"), he held that the impugned provisions were essentially regulatory, with some [TRANSLATION] "provisions of a criminal nature", and that they entrenched on areas of jurisdiction reserved to the provinces. He declared s. 6(*a*) of the Interim Order *ultra vires* and struck it down.

B. *Quebec Superior Court*

8 Trottier J. found that the definitions of "environment" and "toxic" in the Act made it clear that the legislation was aimed at regulating toxic substances generally, not just cases where there might be effects spreading beyond the borders of a single province. He examined *Crown Zellerbach*, *supra*, and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, and agreed with Judge Babin that the peace, order and good government power did not justify the Act. In order for the emission of toxic substances anywhere in the environment to qualify as a matter of "national concern" within *Crown Zellerbach*, he held that the provinces would have to be unable to deal with this matter themselves, that it would have to concern Canada as a whole, and that incapacity on the part of one province would have to have real consequences outside the borders of that province. He did not feel these criteria were met in this case, and so he could not support the Act under the peace, order and good government power.

9 He also agreed that the Act was not supportable as criminal law. Examining the provisions at issue, particularly s. 34, he concluded that their aim was truly to regulate, not to prohibit, and that they were accordingly not criminal law within the meaning of *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

que le gouvernement fédéral intervienne et prescrive un règlement, il a décidé que la partie II de la Loi visait principalement à protéger l'environnement et non pas la santé. Appliquant le renvoi *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1 (ci-après le «*Renvoi sur la margarine*»), il a conclu que les dispositions contestées étaient essentiellement de nature réglementaire, qu'elles comprenaient quelques «dispositions de nature criminelle» et qu'elles empiétaient sur des champs de compétence réservés aux provinces. Il a déclaré inconstitutionnel l'al. 6*a*) de l'arrêté d'urgence et l'a annulé.

B. *Cour supérieure du Québec*

Le juge Trottier a conclu qu'il ressortait clairement des définitions des mots «environnement» et «toxique», contenues dans la Loi, que la mesure législative en cause visait à réglementer les substances toxiques en général, et non pas seulement les cas où des effets pourraient se faire sentir au-delà des frontières d'une seule province. Il a examiné les arrêts *Crown Zellerbach*, précité, et *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, et s'est dit d'accord avec le juge Babin pour affirmer que la compétence en matière de paix, d'ordre et de bon gouvernement ne justifiait pas la Loi. Il a statué que, pour que le rejet de substances toxiques n'importe où dans l'environnement constitue une question d'«intérêt national» au sens de l'arrêt *Crown Zellerbach*, il faudrait que les provinces soient incapables de régler elles-mêmes le problème, qu'il s'agisse d'une question qui intéresse le Canada en entier et que l'incapacité d'une province ait des conséquences réelles au-delà de ses propres frontières. Comme il n'avait pas le sentiment que ces critères étaient respectés en l'espèce, il ne pouvait pas justifier la Loi en vertu de la compétence en matière de paix, d'ordre et de bon gouvernement.

Il a également convenu que la Loi n'était pas justifiable en tant que droit criminel. Examinant les dispositions en cause, en particulier l'art. 34, il a conclu que leur véritable objet était de réglementer et non pas d'interdire, et qu'elles ne constituaient donc pas du droit criminel au sens de l'arrêt

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Since the Act could not be supported under either head of jurisdiction, he dismissed the appeal.

C. *Quebec Court of Appeal*

Tourigny J.A. (Nichols and Chamberland JJ.A. concurring) characterized the impugned provisions as being in pith and substance aimed at protecting the environment. Applying *Crown Zellerbach*, *supra*, she held that the broad provisions of the Act lacked the "singleness, distinctiveness and indivisibility" necessary for a matter of national concern. Nor could the Act be upheld under the emergency doctrine of the peace, order and good government power. It was not a temporary measure, and the subject matter had not been proved to be "urgent" within the meaning of the *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373.

Tourigny J.A. also held that the provisions of the Act greatly exceeded the legitimate domain of criminal law, even though they took the form of a set of prohibitions backed by penalties. She could not uphold the legislation under peace, order and good government or under s. 91(27), and so she too dismissed the appeal.

4. Issues

On December 21, 1995, the following constitutional question was stated:

Do s. 6(*a*) of the *Chlorobiphenyls Interim Order*, P.C. 1989-296, and the enabling legislative provisions, ss. 34 and 35 of the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.), fall in whole or in part within the jurisdiction of the Parliament of Canada to make laws for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867* or its criminal law jurisdiction under s. 91(27) of the *Constitution Act, 1867* or otherwise fall within its jurisdiction?

R. c. Sault Ste-Marie, [1978] 2 R.C.S. 1299. Vu que la Loi ne pouvait pas se justifier en vertu de l'un ou l'autre chef de compétence, il a rejeté l'appel.

C. *Cour d'appel du Québec*

Le juge Tourigny (avec l'appui des juges Nichols et Chamberland) a affirmé que les dispositions contestées visaient, de par leur caractère véritable, la protection de l'environnement. Appliquant l'arrêt *Crown Zellerbach*, précité, elle a conclu que les dispositions larges de la Loi n'avaient pas «l'unicité, la particularité et l'indivisibilité» requises pour constituer une question d'intérêt national. La Loi ne pouvait pas non plus être maintenue en vertu de la théorie de l'urgence nationale justifiant l'application de la compétence en matière de paix, d'ordre et de bon gouvernement. Il ne s'agissait pas d'une mesure temporaire et il n'a pas été prouvé qu'il s'agissait d'une matière «urgente» au sens du *Renvoi sur la Loi anti-inflation*, [1976] 2 R.C.S. 373. 10

Le juge Tourigny a également conclu que les dispositions de la Loi dépassaient largement le champ légitime du droit criminel, même si elles formaient un ensemble d'interdictions assorties de peines. Comme elle ne pouvait confirmer la validité de la loi en cause ni en vertu de la compétence en matière de paix, d'ordre et de bon gouvernement, ni en vertu du par. 91(27), elle a, elle aussi, rejeté l'appel. 11

4. Les questions en litige

Le 21 décembre 1995, la question constitutionnelle suivante a été formulée: 12

L'alinéa 6*a*) de l'*Arrêté d'urgence sur les biphényles chlorés*, C.P. 1989-296, ainsi que les dispositions législatives habilitantes, les art. 34 et 35 de la *Loi canadienne sur la protection de l'environnement*, L.R.C. (1985), ch. 16 (4e suppl.), relèvent-ils en tout ou en partie de la compétence du Parlement du Canada de légiférer pour la paix, l'ordre et le bon gouvernement du Canada en vertu de l'art. 91 de la *Loi constitutionnelle de 1867* ou de la compétence en matière criminelle suivant le par. 91(27) de la *Loi constitutionnelle de 1867*, ou autrement?

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5. Analysis

13 While the constitutional question mentions the Interim Order and its enabling provisions separately, there can be no doubt that the question of the constitutional validity of the Interim Order will be raised only if its enabling provisions themselves are found to be constitutional. That is, if ss. 34 and 35 of the Act are found to be *ultra vires* Parliament, it will then become purely theoretical to analyse the constitutionality of the Interim Order. See P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at p. 14-7, and D. C. Holland and J. P. McGowan, *Delegated Legislation in Canada* (1989), at pp. 170-71. Accordingly, these reasons will focus on the constitutionality of the enabling provisions, ss. 34 and 35.

14 In order to address the issues raised by this appeal, it is necessary to understand the legislative context of the impugned provisions. We will therefore begin by briefly setting out this context.

A. *The Legislative Structure of the Act*

15 The *Canadian Environmental Protection Act* was adopted by Parliament in 1988. It consolidated and replaced several other laws dealing with various kinds of environmental protection. Part II of the Act, which contains ss. 34 and 35, is called "Toxic Substances" and deals with the identification and regulation of substances which could potentially pose a risk to the environment and/or to human health. According to s. 11 of the Act, a substance is toxic where "it is entering or may enter the environment" under conditions "having or that may have an immediate or long-term harmful effect on the environment", "constituting or that may constitute a danger to the environment on which human life depends", or "constituting or that may constitute a danger in Canada to human life or health". Section 3 broadly defines a "substance" as "any distinguishable kind of organic or inorganic matter, whether animate or inanimate" and the "environment" as "the components of the

5. Analyse

Bien que la question constitutionnelle mentionne séparément l'arrêté d'urgence et ses dispositions habilitantes, il n'y a pas de doute que la question de la constitutionnalité de l'arrêté d'urgence ne se posera que si ses dispositions habilitantes sont jugées constitutionnelles. Autrement dit, s'il est jugé que les art. 34 et 35 de la Loi excèdent la compétence du Parlement, l'analyse de la constitutionnalité de l'arrêté d'urgence deviendra purement théorique. Voir P. W. Hogg, *Constitutional Law of Canada* (3e éd. 1992 (feuilles mobiles)), vol. 1, à la p. 14-7, et D. C. Holland et J. P. McGowan, *Delegated Legislation in Canada* (1989), aux pp. 170 et 171. Par conséquent, les présents motifs seront axés sur la constitutionnalité des dispositions habilitantes, soit les art. 34 et 35.

Pour aborder les questions soulevées dans le présent pourvoi, il est nécessaire de comprendre le contexte législatif dans lequel se situent les dispositions contestées. Nous commencerons donc par un bref exposé de ce contexte.

A. *La structure de la Loi*

La *Loi canadienne sur la protection de l'environnement* a été adoptée par le Parlement en 1988. Elle réunissait et remplaçait plusieurs autres lois traitant de divers types de protection de l'environnement. La partie II de la Loi, qui contient les art. 34 et 35, s'intitule «Substances toxiques» et porte sur l'identification et la réglementation de substances susceptibles de présenter un risque pour l'environnement ou la santé humaine, ou pour les deux à la fois. Selon l'art. 11 de la Loi, est toxique toute substance «qui pénètre ou peut pénétrer dans l'environnement» dans des conditions «de nature à [. . .] avoir, immédiatement ou à long terme, un effet nocif sur l'environnement», à «mettre en danger l'environnement essentiel pour la vie humaine» ou à «constituer un danger au Canada pour la vie ou la santé humaine». L'article 3 donne une définition large du terme «substance» en la décrivant comme étant «[t]oute matière organique ou inorganique, animée ou inanimée, distinguable», et du terme «environnement», qu'il décrit comme étant l'«[e]nsemble des conditions et des éléments natu-

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Earth". "Harmful effect" and "danger" are not defined.

The Act instructs the Ministers of the Environment and Health to compile and maintain four lists: the Domestic Substances List (DSL), the Non-Domestic Substances List (NDSL), the Priority Substances List (PSL) and the List of Toxic Substances (LTS). The DSL includes all substances in use in Canada since 1986 (some 21,700 substances as of January 1991). The NDSL contains all other substances. At present, the NDSL list includes over 41,000 substances. See E. A. Fitzgerald, "The Constitutionality of Toxic Substances Regulation Under the Canadian Environmental Protection Act" (1996), 30 *U.B.C. L. Rev.* 55, at p. 70. There is a blanket restriction on importing NDSL substances into Canada until they are approved (s. 26).

Sections 12 and 13 of the Act require the Ministers to compile a "Priority Substances List" specifying those substances to which priority should be given in determining whether or not they should be placed on the List of Toxic Substances. Under s. 15, either the Minister of the Environment or the Minister of Health may conduct investigations with a view to determining whether a given substance is toxic. The Ministers may examine, *inter alia*, the nature of the substance in question, its effects on natural biological processes, the extent to which the substance will persist in the environment, its ability to bio-accumulate, methods of controlling it, and methods of reducing the amount of it used. Section 16 provides that the Minister of the Environment can require private citizens to provide him or her with information about, or samples of, substances which the Minister suspects may be toxic and under s. 18, the Minister can order that persons with information about a substance which might be toxic provide that information to him or her.

Once a priority listed substance is found to be toxic within the meaning of s. 11, the Ministers may recommend adding it to the List of Toxic Substances.

rels de la terre». Les expressions «effet nocif» et «danger» ne sont pas définis.

16 En vertu de la Loi, les ministres de l'Environnement et de la Santé doivent établir et tenir quatre listes de substances: la liste intérieure, la liste extérieure, la liste prioritaire et la liste des substances toxiques. La liste intérieure comprend toutes les substances utilisées au Canada depuis 1986 (quelque 21 700 substances en janvier 1991). La liste extérieure énumère toutes les autres substances. À l'heure actuelle, cette dernière liste comprend plus de 41 000 substances. Voir E. A. Fitzgerald, «The Constitutionality of Toxic Substances Regulation Under the Canadian Environmental Protection Act» (1996), 30 *U.B.C. L. Rev.* 55, à la p. 70. Il existe une interdiction générale d'importer au Canada les substances figurant sur la liste extérieure aussi longtemps qu'elles ne sont pas approuvées (art. 26).

17 En vertu des art. 12 et 13 de la Loi, les ministres doivent établir une «liste prioritaire» qui énumère les substances pour lesquelles il est prioritaire de déterminer si elles doivent ou non être inscrites sur la liste des substances toxiques. L'article 15 prévoit que le ministre de l'Environnement ou le ministre de la Santé peut tenir des enquêtes afin de déterminer si une substance donnée est toxique. Les ministres peuvent examiner, notamment, la nature de la substance en question, ses effets sur des processus biologiques naturels, la mesure dans laquelle elle persistera dans l'environnement, sa capacité d'accumulation dans les tissus biologiques, les méthodes permettant d'en limiter la présence et celles permettant d'en réduire la quantité utilisée. L'article 16 prévoit que le ministre de l'Environnement peut exiger de simples citoyens qu'ils lui fournissent des renseignements sur les substances qu'il juge susceptibles d'être toxiques, ou des échantillons de ces substances, et, en vertu de l'art. 18, le Ministre peut ordonner que les personnes qui possèdent des renseignements sur une substance susceptible d'être toxique lui fournissent ces renseignements.

18 Dès qu'il est jugé qu'une substance figurant sur la liste prioritaire est toxique au sens de l'art. 11, les ministres peuvent recommander son ajout à la

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stances. After a federal-provincial advisory committee (established under s. 6) has been given an opportunity to provide its advice, the Governor in Council may add the substance to the list and bring it under the regulatory control of s. 34.

19 Section 34 provides for the regulation of substances on the List of Toxic Substances. The Governor in Council is given extensive powers to prescribe regulations dealing with every conceivable aspect of the listed substance, including: the quantity or concentration in which it can be released; the commercial or manufacturing activity in the course of which it can be released; the quantity of that substance that can be manufactured, imported, owned, sold, or used — including total prohibitions on its manufacture, importation, ownership, use or sale — and likewise the manner in and purposes for which it can be manufactured, imported, processed, used, offered for sale or sold; the manner and conditions in which the substance may be advertised, stored, displayed, handled, transported or offered for transport; the manner, conditions, places and method of disposal of the substance; the maintenance of books and records in respect of the substance; and the extent to which reports must be made to the Minister regarding the monitoring of the substance. Section 34(1)(*x*) allows the Governor in Council to regulate "any other matter necessary to carry out the purposes of this Part".

20 Where a substance is not on the List of Toxic Substances (or where it is listed, but the Ministers believe that it is not adequately regulated), and where the Ministers believe that immediate action is necessary in respect of that substance, s. 35 allows for the making of "interim orders" without going through the usual procedure. These orders can contain any regulation which could have been made under s. 34, but they remain in effect for only 14 days unless they are approved by the Governor in Council. Approval can be given only if, *inter alia*, the Ministers have offered to consult with the governments of any affected provinces to

liste des substances toxiques. Après qu'un comité consultatif fédéro-provincial (constitué en vertu de l'art. 6) a eu la possibilité de formuler ses conseils, le gouverneur en conseil peut ajouter la substance à la liste et la soumettre au contrôle réglementaire de l'art. 34.

L'article 34 prescrit la réglementation des substances inscrites sur la liste des substances toxiques. Le gouverneur en conseil est investi de pouvoirs considérables de prendre des règlements concernant tous les aspects imaginables de la substance inscrite sur la liste, dont la quantité ou la concentration dans lesquelles elle peut être rejetée, les activités commerciales ou de fabrication au cours desquelles son rejet est permis, la quantité de cette substance qui peut être fabriquée, importée, possédée, vendue ou utilisée — y compris les interdictions absolues de la fabriquer, de l'importer, de la posséder, de l'utiliser ou de la vendre — de même que les modalités et l'objet de la fabrication, de l'importation, de la transformation, de l'utilisation, de la mise en vente et de la vente de la substance, les modalités et les conditions de publicité, de stockage, de présentation, de manutention, de transport ou d'offre de transport de la substance, les modalités, lieux et méthodes d'élimination de la substance, la tenue de livres et de registres la concernant et la mesure dans laquelle des rapports doivent être faits au Ministre en ce qui concerne sa surveillance. L'alinéa 34(1)*x*) permet au gouverneur en conseil de prendre des règlements touchant «toute autre mesure d'application de la présente partie».

Si une substance n'est pas inscrite sur la liste des substances toxiques (ou si, bien qu'elle y soit inscrite, les ministres estiment qu'elle n'est pas convenablement réglementée) et si les ministres croient qu'une intervention immédiate est nécessaire à son égard, l'art. 35 permet de prendre des «arrêtés d'urgence» sans suivre la procédure habituelle. Ces arrêtés peuvent comporter les mêmes dispositions qu'un règlement pris aux termes de l'art. 34, mais ils ne demeurent en vigueur que pendant 14 jours, à moins d'être approuvés par le gouverneur en conseil. Cette approbation ne peut être donnée que si, notamment, les ministres ont

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see whether they are prepared to take sufficient action to deal with the threat posed by the substance (s. 35(4)). According to s. 35(8), interim orders expire after two years, even if such approval is granted.

offert de consulter le gouvernement de toute province concernée afin de déterminer s'il est disposé à prendre les moyens nécessaires pour parer à la menace que constitue la substance (par. 35(4)). Selon le par. 35(8), les arrêtés d'urgence cessent d'être en vigueur au bout de deux ans, même si une telle approbation est donnée.

As stated above, this appeal arose as a result of an interim order made in 1989 by the then Minister of the Environment, the Honourable Lucien Bouchard. It restricted the emission of chlorobiphenyls ("PCBs") to 1 gram per day. The respondent was charged with breaching this Interim Order and challenged the charges by claiming that the Interim Order, as well as the underlying provisions supporting it, were *ultra vires* Parliament.

21 Comme nous l'avons vu, le présent pourvoi fait suite à un arrêté d'urgence pris en 1989 par le ministre de l'Environnement de l'époque, l'honorable Lucien Bouchard. L'arrêté limitait à 1 g par jour les émissions de biphényles chlorés (BPC). L'intimée, accusée d'avoir contrevenu à cet arrêté d'urgence, a contesté les accusations portées contre elle en soutenant que l'arrêté d'urgence et les dispositions le sous-tendant excédaient la compétence du Parlement.

Finally, the Act prescribes a number of civil and criminal penalties. Section 113(*f*), for example, creates an offence of contravening regulations made under s. 34. The punishment ranges from a maximum $300,000 fine or six months imprisonment (or both) on summary conviction to a maximum $1 million fine or three years imprisonment (or both) on indictment. A defence of due diligence is allowed for all offences under the Act except those under s. 114 (knowingly providing false or misleading information), s. 115(1)(*a*) (intentionally or recklessly causing an environmental disaster) or s. 115(1)(*b*) (showing wanton or reckless disregard for the lives or safety of other persons). These offences require a higher standard of moral culpability.

22 Enfin, la Loi prescrit un certain nombre de peines civiles et criminelles. Selon l'al. 113*f*), par exemple, commet une infraction quiconque ne se conforme pas aux règlements pris sous le régime de l'art. 34. Cette infraction est punissable, par procédure sommaire, d'une amende maximale de 300 000 $ ou d'un emprisonnement maximal de six mois (ou des deux à la fois), ou, par mise en accusation, d'une amende maximale d'un million de dollars ou d'un emprisonnement maximal de trois ans (ou des deux à la fois). Une défense de diligence convenable ou raisonnable est permise pour toutes les infractions prévues à la Loi, sauf celles décrites à l'art. 114 (communiquer sciemment des renseignements faux ou trompeurs), à l'al. 115(1)*a*) (provoquer, intentionnellement ou par imprudence grave, une catastrophe environnementale) ou à l'al. 115(1)*b*) (faire preuve d'imprudence ou d'insouciance graves à l'endroit de la vie ou de la sécurité d'autrui). Ces infractions requièrent une norme plus stricte de culpabilité morale.

B. *The Pith and Substance of the Legislation*

B. *Le caractère véritable de la loi en cause*

The manner of analysing matters involving division of powers is well established: see Hogg, *supra*, at p. 15-6. The law in question must first be characterized in relation to its "pith and substance", that is, its dominant or most important characteristic. One must then see if the law, seen in

23 La méthode d'analyse des questions concernant le partage des compétences est bien établie: voir Hogg, *op. cit.*, à la p. 15-6. La loi en question doit d'abord être qualifiée en fonction de son «caractère véritable», c'est-à-dire de sa caractéristique dominante ou la plus importante. Il faut ensuite se

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this light, can be successfully assigned to one of the government's heads of legislative power.

24 In this case, the Quebec Court of Appeal held that, although one of the effects of Part II of the Act is to protect human life and health, its pith and substance lies in the protection of the environment (at p. 405):

> [TRANSLATION] It can be seen from a careful examination of the provisions at issue that Parliament has chosen to regulate the release of toxic substances into the environment for the stated purpose of protecting human life and health. There is of course no question that one of the effects of the adopted measures is to promote the protection of human life and health. However, it is my view that the pith and substance of both the *Chlorobiphenyls Interim Order* and the enabling provisions pursuant to which it was made is the protection of the environment.

25 The respondent Hydro-Québec and the *mis en cause* the Attorney General of Quebec agree with this characterization and suggest that the true goal of the legislation is the regulation of environmental protection, writ large. The appellant, on the other hand, argues that the true object of Part II of the Act is simply the control of pollution caused by toxic substances (like PCBs), which are capable of being dispersed into the environment and whose level of toxicity is such as to pose a serious risk of harm to the environment and to human health and life. Several interveners support this claim, submitting that the impugned provisions seek simply to create national standards for the control of toxic substances. They cite in this regard various government ministry and legislative committee reports: see, e.g., Environment Canada and Health and Welfare Canada, *Final Report of the Environmental Contaminants Act Amendments Consultative Committee* (1986); Environment Canada, *The Right to a Healthy Environment: An Overview of the Proposed Environmental Protection Act* (1987).

26 In our view, the dominant characteristic of the impugned legislation is apparent from its plain text. Part II of the Act seeks, at first glance, to pro-

demander si la loi, vue sous cet angle, relève à bon droit de l'un des chefs de compétence législative du gouvernement.

En l'espèce, la Cour d'appel du Québec a statué que, même si l'un des effets de la partie II de la Loi est de protéger la vie et la santé humaines, son caractère véritable réside dans la protection de l'environnement (à la p. 405):

> L'étude attentive des dispositions en cause révèle que le législateur a choisi de réglementer le rejet de substances toxiques dans l'environnement dans le but déclaré de protéger la vie humaine et la santé. Il n'est certes pas douteux que l'un des effets des mesures adoptées soit de favoriser la protection de la vie humaine et de la santé. J'estime cependant que, dans leur caractère véritable, tant l'*Arrêté d'urgence sur les biphényles chlorés* que les dispositions habilitantes en vertu desquelles il a été pris visent la protection de l'environnement.

L'intimée Hydro-Québec et le mis en cause le procureur général du Québec acceptent cette qualification et affirment que le véritable objectif de la Loi est nettement la réglementation de la protection de l'environnement. L'appelant, pour sa part, soutient que le véritable objet de la partie II de la Loi est simplement le contrôle de la pollution causée par des substances toxiques (comme les BPC) qui peuvent se disperser dans l'environnement et dont le degré de toxicité est tel qu'elles présentent un risque grave pour l'environnement ainsi que la santé et la vie humaines. Plusieurs intervenants appuient cette prétention en soutenant que les dispositions contestées visent simplement à établir des normes nationales de contrôle des substances toxiques. Ils citent à cet égard divers rapports de ministères et de comités législatifs: voir, par exemple, Environnement Canada et Santé et Bien-être social Canada, *Rapport final du Comité consultatif sur les modifications à la Loi sur les contaminants de l'environnement* (1986); Environnement Canada, *Le droit à un environnement sain: Aperçu du projet de loi sur la protection de l'environnement* (1987).

À notre avis, la caractéristique dominante de la loi contestée ressort à sa lecture même. La partie II de la Loi vise, à première vue, à protéger l'envi-

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tect the environment, human health and life from harm owing to the release of toxic substances. As noted above, it seeks to do so through extensive — indeed, comprehensive — regulation of these substances and the ways in which they may come into contact with the environment. That being said, we believe it is also necessary to consider the sweeping definitions given by the Act to "environment" and "toxic substance". Section 3 defines the "environment" as follows:

3. (1) In this Act,

. . .

"environment" means the components of the Earth and includes

(*a*) air, land and water,

(*b*) all layers of the atmosphere,

(*c*) all organic and inorganic matter and living organisms, and

(*d*) the interacting natural systems that include components referred to in paragraphs (*a*) to (*c*);

Even broader is the definition given to "substance":

"substance" means any distinguishable kind of organic or inorganic matter, whether animate or inanimate, and includes

(*a*) any matter that is capable of being dispersed in the environment or of being transformed in the environment into matter that is capable of being so dispersed or that is capable of causing such transformations in the environment,

(*b*) any element or free radical,

(*c*) any combination of elements of a particular molecular identity that occurs in nature or as a result of a chemical reaction, and

(*d*) complex combinations of different molecules that originate in nature or are the result of chemical reactions but that could not practicably be formed by simply combining individual constituents,

and, except for the purposes of sections 25 to 32, includes

ronnement ainsi que la santé et la vie humaines contre les effets nocifs du rejet de substances toxiques. Comme nous l'avons vu, elle cherche à réaliser cela par l'entremise d'une réglementation détaillée, voire exhaustive, de ces substances et des façons dont elles peuvent entrer en contact avec l'environnement. Cela dit, nous croyons qu'il est également nécessaire de tenir compte des définitions larges des expressions «environnement» et «substance toxique» contenues dans la Loi. Voici comment l'art. 3 définit le mot «environnement»:

3. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

«environnement» Ensemble des conditions et des éléments naturels de la terre, notamment:

a) l'air, l'eau et le sol;

b) toutes les couches de l'atmosphère;

c) toutes les matières organiques et inorganiques ainsi que les êtres vivants;

d) les systèmes naturels en interaction qui comprennent les éléments visés aux alinéas *a*) à *c*).

La définition du terme «substance» est encore plus large: 27

«substance» Toute matière organique ou inorganique, animée ou inanimée, distinguable. La présente définition vise notamment:

a) les matières susceptibles soit de se disperser dans l'environnement, soit de s'y transformer en matières dispensables, ainsi que les matières susceptibles de provoquer de telles transformations dans l'environnement;

b) les radicaux libres ou les éléments;

c) les combinaisons d'éléments à l'identité moléculaire précise soit naturelles, soit consécutives à une réaction chimique;

d) des combinaisons complexes de molécules différentes, d'origine naturelle ou résultant de réactions chimiques, mais qui ne pourraient se former dans la pratique par la simple combinaison de leurs composants individuels.

Elle vise aussi, sauf pour l'application des articles 25 à 32:

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(*e*) any mixture that is a combination of substances and does not itself produce a substance that is different from the substances that were combined,

(*f*) any manufactured item that is formed into a specific physical shape or design during manufacture and has, for its final use, a function or functions dependent in whole or in part on its shape or design, and

(*g*) any animate matter that is, or any complex mixtures of different molecules that are, contained in effluents, emissions or wastes that result from any work, undertaking or activity;

28 The Act is not, as was suggested by the appellant, aimed specifically at chemical substances; rather, it purports to cover "any distinguishable kind of organic or inorganic matter, whether animate or inanimate". Section 11 determines when a substance will be "toxic", and therefore subject to federal regulation:

11. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions

(*a*) having or that may have an immediate or long-term harmful effect on the environment;

(*b*) constituting or that may constitute a danger to the environment on which human life depends; or

(*c*) constituting or that may constitute a danger in Canada to human life or health.

29 Paragraphs 11(*a*) through (*c*) are not cumulative. It will suffice to bring a substance under federal regulatory control that it pose a risk to human life or health, part of the environment upon which human life depends, or the environment itself.

30 In this regard, we note that we cannot, with respect, agree with our colleague, La Forest J., that the criteria found in s. 11 are simply a "drafting tool" or that to speak of s. 11 as a definition is "misleading". The purpose of this section is to delineate from the category of "substances" (as defined by s. 3) those particular substances which qualify for regulation under ss. 34 and 35. It does so by specifying that "toxic" substances are, for the purposes of Part II, those which are capable of

e) les mélanges combinant des substances et ne produisant pas eux-mêmes une substance différente de celles qui ont été combinées;

f) les articles manufacturés dotés d'une forme ou de caractéristiques matérielles précises pendant leur fabrication et qui ont, pour leur utilisation finale, une ou plusieurs fonctions en dépendant, en tout ou en partie;

g) les matières animées ou les mélanges complexes de molécules différentes qui sont contenus dans les effluents, les émissions ou les déchets attribuables à des travaux, des entreprises ou des activités.

Contrairement à ce qu'a prétendu l'appelant, la Loi ne vise pas les substances chimiques en particulier; elle a plutôt pour objet de réglementer «[t]oute matière organique ou inorganique, animée ou inanimée, distinguable». L'article 11 définit la substance «toxique» qui, du fait même, est assujettie à la réglementation fédérale:

11. Pour l'application de la présente partie, est toxique toute substance qui pénètre ou peut pénétrer dans l'environnement en une quantité ou une concentration ou dans des conditions de nature à:

a) avoir, immédiatement ou à long terme, un effet nocif sur l'environnement;

b) mettre en danger l'environnement essentiel pour la vie humaine;

c) constituer un danger au Canada pour la vie ou la santé humaine.

Les alinéas 11*a*) à *c*) ne sont pas cumulatifs. Pour qu'une substance soit assujettie au contrôle réglementaire fédéral, il suffit qu'elle présente un risque pour la vie ou la santé humaine, pour une partie de l'environnement essentielle à la vie humaine, ou pour l'environnement même.

À cet égard, nous soulignons que nous ne pouvons pas, en toute déférence, être d'accord avec notre collègue le juge La Forest pour dire que les critères énoncés à l'art. 11 ne sont qu'un «moyen rédactionnel» ou qu'il est «trompeur» de qualifier de définition l'art. 11. L'objet de cet article est d'extraire de la catégorie des «substances» (définies à l'art. 3) celles qui peuvent être réglementées sous le régime des art. 34 et 35. Il le fait en précisant que les substances «toxiques» sont, aux fins

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posing one of the threats listed above. This seems to us a clear statement of Parliament's intentions in this area. As was held in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at p. 1050:

> [T]he first task of a court construing a statutory provision is to consider the meaning of its words in the context of the statute as a whole. If the meaning of the words when they are considered in this context is clear, there is no need for further interpretation. The basis for this general rule is that when such a plain meaning can be identified this meaning can ordinarily be said to reflect the legislature's intention.

Nothing in the Act suggests that "toxic" is to be defined by any criteria other than those given in s. 11. Moreover, no special definition is given to the terms "harmful effect" and "danger". It is, in our view, accordingly clear from the wording of the legislation that "toxicity" is intended to be conditional upon meeting the criteria set out in ss. 3 and 11(*a*) to (*c*). If a substance (which can be essentially anything) poses or may pose a risk to human life or health, or to the environment upon which human life depends, or to any aspect of the environment itself, it qualifies as toxic according to the Act and may be made the subject of comprehensive federal regulation.

Nor are we convinced that the federal-provincial consultative process contemplated in s. 35(4) of the Act has the effect of changing the character of the impugned provisions. Although we understand why Parliament might wish to seek the opinion of provincial legislatures before enacting regulations which would affect areas under their supervision, nothing in the Act requires that this process be anything other than consultative. That is, once having consulted affected provincial governments, Parliament is left free to pass whatever regulations it sees fit in order to address the threat posed by substances qualifying as "toxic".

de la partie II, celles qui sont susceptibles de constituer l'une des menaces énumérées plus haut. Il nous semble que cela constitue un énoncé clair des intentions du Parlement dans ce domaine. Comme il a été décidé dans l'arrêt *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, à la p. 1050:

> [L]a première tâche du tribunal appelé à interpréter une disposition législative consiste à examiner le sens de ses mots dans le contexte global de la loi. Si le sens des mots examinés dans ce contexte est clair, il n'est pas nécessaire de poursuivre l'interprétation. Le fondement de cette règle générale est que lorsqu'il est ainsi possible d'identifier un sens clair, on peut généralement présumer que ce sens reflète l'intention du législateur.

31 Rien dans la Loi ne porte à croire que le terme «toxique» doit être défini selon des critères autres que ceux énoncés à l'art. 11. En outre, elle ne contient aucune définition particulière des expressions «effet nocif» et «danger». À notre avis, il ressort clairement du libellé de la Loi qu'on a voulu que, pour qu'une substance soit qualifiée de «toxique», elle doit satisfaire aux critères énoncés à l'art. 3 et aux al. 11*a*) à *c*). La substance (qui peut essentiellement être n'importe quoi) qui présente ou est susceptible de présenter un risque pour la vie ou la santé humaine, pour l'environnement essentiel à la vie humaine ou pour tout autre aspect de l'environnement lui-même, est toxique au sens de la Loi et elle peut faire l'objet d'une réglementation fédérale détaillée.

32 Nous ne sommes pas convaincus non plus que le processus de consultation fédéro-provincial envisagé au par. 35(4) de la Loi a pour effet de modifier la nature des dispositions contestées. Bien que nous comprenions pourquoi le Parlement pourrait vouloir consulter des assemblées législatives provinciales avant de prendre un règlement ayant une incidence sur des domaines assujettis à leur contrôle, rien dans la Loi n'exige que ce processus soit de nature autre que consultative. Autrement dit, une fois qu'il a consulté les gouvernements provinciaux concernés, le Parlement est libre de prendre tout règlement qu'il juge nécessaire pour contrer la menace que constituent des substances qui présentent les caractéristiques requises pour être qualifiées de «toxiques».

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33 In light of these factors, we believe the pith and substance of Part II of the Act lies in the wholesale regulation by federal agents of any and all substances which may harm any aspect of the environment or which may present a danger to human life or health. That is, the impugned provisions are in pith and substance aimed at protecting the environment and human life and health from any and all harmful substances by regulating these substances. It remains to be seen whether this can be justified under any of the heads of power listed in s. 91 of the *Constitution Act, 1867*. In that connection, we will begin by considering s. 91(27), the criminal law power.

Compte tenu de ces facteurs, nous estimons que le caractère véritable de la partie II de la Loi réside dans la réglementation systématique, par des organismes fédéraux, de toutes les substances susceptibles d'avoir un effet nocif sur un aspect de l'environnement, ou de présenter un danger pour la vie ou la santé humaine. En d'autres termes, les dispositions contestées visent, de par leur caractère véritable, à protéger l'environnement ainsi que la vie et la santé humaines contre les substances nocives en réglementant celles-ci. Il reste à voir si cela peut être justifié en vertu de l'un ou l'autre des chefs de compétence énumérés à l'art. 91 de la *Loi constitutionnelle de 1867*. À ce propos, nous allons commencer par examiner le par. 91(27), soit la compétence en matière de droit criminel.

C. *The Criminal Law Power*

C. *La compétence en matière de droit criminel*

34 Parliament has been given broad and exclusive power to legislate in relation to criminal law by virtue of s. 91(27): *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226. This power has traditionally been construed generously. As La Forest J. noted in *RJR-MacDonald*, at p. 240, "[i]n developing a definition of the criminal law, this Court has been careful not to freeze the definition in time or confine it to a fixed domain of activity".

Le paragraphe 91(27) a attribué au Parlement la compétence vaste et exclusive pour légiférer en matière de droit criminel: *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *Scowby c. Glendinning*, [1986] 2 R.C.S. 226. Cette compétence a traditionnellement été interprétée libéralement. Comme l'a souligné le juge La Forest dans l'arrêt *RJR-MacDonald*, à la p. 240, «[d]ans l'élaboration d'une définition du droit criminel, notre Cour a pris soin de ne pas geler la définition à une époque déterminée ni de la restreindre à un domaine d'activité fixe».

35 Nevertheless, the criminal law power has always been made subject to two requirements: laws purporting to be upheld under s. 91(27) must contain prohibitions backed by penalties; and they must be directed at a "legitimate public purpose" (*Scowby*, at p. 237). As Rand J. stated in the *Margarine Reference*, *supra*, at pp. 49-50:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legisla-

Néanmoins, la compétence en matière de droit criminel a toujours été assujettie à deux exigences: les lois censées être maintenues en vertu du par. 91(27) doivent contenir des interdictions assorties de peines et elles doivent viser «un objectif public légitime» (*Scowby*, à la p. 237). Comme le juge Rand l'a affirmé dans le *Renvoi sur la margarine*, précité, aux pp. 49 et 50:

> [TRADUCTION] Le crime est l'acte que la loi interdit et auquel elle attache une peine; les interdictions portant sur quelque chose, l'on peut toujours trouver à leur base une situation contre laquelle le législateur veut, dans l'intérêt public, lutter. La situation que le législateur a voulu faire cesser ou les intérêts qu'il a voulu sauvegarder peuvent être autant du domaine social que du domaine économique ou politique; et la législature avait

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ture has had in mind to suppress the evil or to safeguard the interest threatened.

. . .

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law. . . .

These two criteria have been consistently applied: see e.g. *Boggs v. The Queen*, [1981] 1 S.C.R. 49; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914; *R. v. Wetmore*, [1983] 2 S.C.R. 284; *Scowby*, *supra*; *RJR-MacDonald*, *supra*; see also *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at p. 348. Criminal law under s. 91(27) must attempt to achieve a criminal public purpose through the imposition of prohibitions and penalties. Colourable attempts to invade areas of provincial jurisdiction under the guise of criminal legislation will be declared *ultra vires.* As La Forest J. wrote in *RJR-MacDonald*, at p. 246:

The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not otherwise a "colourable" intrusion upon provincial jurisdiction, then it is valid as criminal law. . . . [Emphasis added.]

These comments were made in the context of criminal legislation concerning health, but we see no reason why they should not be of general application as regards s. 91(27). See also *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *R. v. Hauser*, [1979] 1 S.C.R. 984.

The next step is therefore to examine the impugned provisions and determine whether they meet these criteria. In our view, they fall short.

à l'esprit de supprimer le mal ou de sauvegarder les intérêts menacés.

. . .

La prohibition est-elle alors adoptée en vue d'un objectif public qui peut la faire considérer comme relative au droit criminel? La paix publique, l'ordre, la sécurité, la santé, la moralité: ce sont là des buts habituels, bien que non exclusifs, que poursuit ce droit . . .

Ces deux critères ont été constamment appliqués: voir, par exemple, *Boggs c. La Reine*, [1981] 1 R.C.S. 49; *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 914; *R. c. Wetmore*, [1983] 2 R.C.S. 284; *Scowby*, précité; *RJR-MacDonald*, précité; voir également *Knox Contracting Ltd. c. Canada*, [1990] 2 R.C.S. 338, à la p. 348. Le droit criminel au sens du par. 91(27) doit tenter d'atteindre un objectif public en matière criminelle par l'imposition d'interdictions et de peines. Les tentatives déguisées d'empiéter sur des champs de compétence provinciale sous le couvert d'une loi criminelle seront déclarées inconstitutionnelles. Comme le juge La Forest l'a écrit dans l'arrêt *RJR-MacDonald*, à la p. 246: 36

Le fédéral possède une vaste compétence pour ce qui est de l'adoption de lois en matière criminelle relativement à des questions de santé, et cette compétence n'est circonscrite que par les exigences voulant qu'elles comportent une interdiction accompagnée d'une sanction pénale, et qu'elles visent un mal légitime pour la santé publique. Si une loi fédérale donnée possède ces caractéristiques et ne constitue pas par ailleurs un empiétement «spécieux» sur la compétence provinciale, c'est alors une loi valide en matière criminelle . . . [Je souligne.]

Ces commentaires ont été faits à l'égard d'une loi criminelle concernant la santé, mais nous ne voyons pas pourquoi ils ne devraient pas avoir une application générale en ce qui concerne le par. 91(27). Voir également *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *R. c. Hauser*, [1979] 1 R.C.S. 984. 37

La prochaine étape consiste donc à examiner les dispositions contestées pour déterminer si elles satisfont à ces critères. À notre avis, elles n'y satis- 38

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While the protection of the environment is a legitimate public purpose which could support the enactment of criminal legislation, we believe the impugned provisions of the Act are more an attempt to regulate environmental pollution than to prohibit or proscribe it. As such, they extend beyond the purview of criminal law and cannot be justified under s. 91(27).

(i) A Legitimate Public Purpose

39 The appellant and several interveners urged us to uphold the provisions as related to health, one of the criminal public purposes recognized in the *Margarine Reference*, *supra*. In this regard, they cited numerous studies outlining the hazardous effects of PCBs, which were the subject of the Interim Order that gave rise to this litigation. See e.g. Canadian Council of Resource and Environment Ministers, *The PCB Story* (1986); Health and Welfare Canada, *A Review of the Toxicology and Human Health Aspects of PCB's (1978-1982)* (1985). With respect, the toxicity of PCBs, while clearly important to the environment itself, is not directly relevant to this appeal, since what is at issue is not simply the Interim Order, but the enabling provisions under which that order was enacted. That is, the question is not whether PCBs pose a danger to human health, which it appears they clearly do, but whether the Act purports to grant federal regulatory power over substances which may not pose such a danger.

40 In our view, there is no question but that the Act does so. Section 11 provides as follows:

11. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions

(*a*) having or that may have an immediate or long-term harmful effect on the environment;

font pas. Bien que la protection de l'environnement soit un objectif public légitime qui pourrait justifier l'adoption d'une loi criminelle, nous croyons que les dispositions contestées de la Loi constituent plus une tentative de réglementer la pollution de l'environnement qu'une tentative de l'interdire ou de la proscrire. Pour cette raison, elles excèdent les limites du droit criminel et ne peuvent être justifiées en vertu du par. 91(27).

(i) Un objectif public légitime

L'appelant et plusieurs intervenants nous ont invités à confirmer la validité des dispositions pour le motif qu'elles avaient trait à la santé qui est l'un des objectifs publics en matière criminelle reconnus dans le *Renvoi sur la margarine*, précité. À cet égard, ils ont cité de nombreuses études exposant les effets nocifs des BPC, qui ont fait l'objet de l'arrêté d'urgence à l'origine du présent litige. Voir, par exemple, Conseil canadien des ministres des ressources et de l'environnement, *La question des BPC* (1986); Santé et Bien-être social Canada, *Examen de la toxicologie et des questions sanitaires relatives aux BPC (1978-1982)* (1985). En toute déférence, la toxicité des BPC, bien que manifestement importante en ce qui concerne l'environnement même, n'est pas directement pertinente relativement au présent pourvoi, étant donné que ce qui est en cause est non seulement l'arrêté d'urgence, mais encore les dispositions habilitantes en vertu desquelles il a été pris. Autrement dit, il ne s'agit pas de savoir si les BPC présentent un danger pour la santé humaine, ce qui semble être clairement le cas, mais plutôt de savoir si la Loi a pour effet d'accorder un pouvoir fédéral de réglementer des substances susceptibles de ne pas présenter un tel danger.

À notre avis, il ne fait aucun doute que tel est l'effet de la Loi. Voici le libellé de l'art. 11:

11. Pour l'application de la présente partie, est toxique toute substance qui pénètre ou peut pénétrer dans l'environnement en une quantité ou une concentration ou dans des conditions de nature à:

a) avoir, immédiatement ou à long terme, un effet nocif sur l'environnement;

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(*b*) constituting or that may constitute a danger to the environment on which human life depends; or

(*c*) constituting or that may constitute a danger in Canada to human life or health.

As noted above, these are not cumulative requirements. It is not necessary that a substance constitute a danger to human life or health for it to be labelled "toxic" and brought under federal control; under s. 11(*a*), it is enough that it may have a harmful effect on the environment. It is not even necessary to show that the aspect of the environment threatened be one upon which human life depends; this is made a separate category under s. 11(*b*), and should not, therefore, be read into s. 11(*a*). A substance which affected groundhogs, for example, but which had no effect on people could be labelled "toxic" under s. 11(*a*) and made subject to wholesale federal regulation.

By defining "toxic" in this way, Parliament has taken explicit steps to ensure that no risk to human life or health, direct or indirect, would have to be proven before regulatory control could be assumed over a given substance. As such, we cannot see how the provisions can be upheld as legislation relating to health. Their scope extends well beyond matters relating to human health into the realm of general ecological protection. Parliament's clear intention was to allow for federal intervention where the environment itself was at risk, whether or not the substances concerned posed a threat to human health and whether or not the aspect of the environment affected was one on which human life depended. Having specifically excluded both direct and indirect danger to human health as preconditions for the application of these provisions, Parliament cannot now say that they were enacted in order to guard against such dangers.

To the extent that La Forest J. suggests that this legislation is supportable as relating to health,

b) mettre en danger l'environnement essentiel pour la vie humaine;

c) constituer un danger au Canada pour la vie ou la santé humaine.

41 Tel que souligné plus haut, ces exigences ne sont pas cumulatives. Il n'est pas nécessaire qu'une substance constitue un danger pour la vie ou la santé humaine pour qu'elle soit qualifiée de «toxique» et assujettie au contrôle fédéral; aux termes de l'al. 11*a*), il suffit qu'elle soit susceptible d'avoir un effet nocif sur l'environnement. Il n'est même pas nécessaire de démontrer que l'aspect de l'environnement menacé est essentiel à la vie humaine; cela fait l'objet d'une catégorie distincte prévue à l'al. 11*b*) et ne doit donc pas être considéré comme faisant partie de l'al. 11*a*). Une substance qui nuirait aux marmottes, par exemple, mais qui n'aurait aucun effet sur les gens pourrait être qualifiée de «toxique» aux termes de l'al. 11*a*) et être assujettie à une réglementation fédérale systématique.

42 En définissant ainsi le mot «toxique», le Parlement a pris des mesures expresses pour s'assurer qu'aucun risque direct ou indirect pour la vie ou la santé humaine ne devrait être établi pour pouvoir réglementer une substance donnée. Pour cette raison, nous ne voyons pas comment les dispositions en cause peuvent être maintenues en tant que mesures législatives concernant la santé. Leur portée dépasse largement les questions de santé humaine et s'étend au domaine de la protection écologique générale. Le Parlement avait manifestement l'intention de permettre au gouvernement fédéral d'intervenir en cas de risque pour l'environnement même, peu importe que les substances concernées constituent ou non une menace pour la santé humaine ou que l'aspect de l'environnement touché soit essentiel ou non à la vie humaine. Après avoir écarté expressément tant le danger direct qu'indirect pour la vie humaine en tant que condition préalable à l'application de ces dispositions, le Parlement ne peut maintenant affirmer qu'elles ont été adoptées afin de parer à de tels dangers.

43 Par conséquent, dans la mesure où le juge La Forest dit que la présente loi peut être justifiée

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therefore, we must respectfully disagree. We agree with him, however, that the protection of the environment is itself a legitimate criminal public purpose, analogous to those cited in the *Margarine Reference*, *supra*. We would not add to his lucid reasoning on this point, save to state explicitly that this purpose does not rely on any of the other traditional purposes of criminal law (health, security, public order, etc.). To the extent that Parliament wishes to deter environmental pollution specifically by punishing it with appropriate penal sanctions, it is free to do so, without having to show that these sanctions are ultimately aimed at achieving one of the "traditional" aims of criminal law. The protection of the environment is itself a legitimate basis for criminal legislation.

44 However, we still do not feel that the impugned provisions qualify as criminal law under s. 91(27). While they have a legitimate criminal purpose, they fail to meet the other half of the *Maragarine Reference* test. The structure of Part II of the Act indicates that they are not intended to prohibit environmental pollution, but simply to regulate it. As we will now explain in further detail, they are not, therefore, criminal law: see *Hauser*, *supra*, at p. 999.

(ii) Prohibitions Backed by Penalties

45 Ascertaining whether a particular statute is prohibitive or regulatory in nature is often more of an art than a science. As Cory J. acknowledged in *Knox Contracting*, *supra*, what constitutes criminal law is often "easier to recognize than define" (p. 347). Some guidelines have, however, emerged from previous jurisprudence.

46 The fact that a statute contains a prohibition and a penalty does not necessarily mean that statute is criminal in nature. Regulatory statutes commonly prohibit violations of their provisions or regulations promulgated under them and provide penal

en tant que loi concernant la santé, nous devons exprimer, en toute déférence, notre désaccord. Nous sommes cependant d'accord avec lui pour dire que la protection de l'environnement est en soi un objectif public légitime en matière criminelle, analogue à ceux mentionnés dans le *Renvoi sur la margarine*, précité. Sans vouloir ajouter quoi que ce soit à son raisonnement limpide sur ce point, nous tenons à préciser que cet objectif ne se fonde sur aucun des autres objectifs traditionnels du droit criminel (santé, sécurité, ordre public, etc.). Dans la mesure où il souhaite dissuader expressément de polluer l'environnement, par l'imposition de peines appropriées, le Parlement est libre de le faire sans avoir à démontrer que ces peines visent, en fin de compte, à atteindre l'un des objectifs «traditionnels» du droit criminel. La protection de l'environnement représente en soi une justification légitime d'une loi criminelle.

Toutefois, nous n'estimons pas que les dispositions contestées peuvent être qualifiées de droit criminel au sens du par. 91(27). Même si elles visent un objectif légitime en matière criminelle, elles ne satisfont pas à l'autre moitié du critère du *Renvoi sur la margarine*. Il ressort de la structure de la partie II de la Loi qu'elles visent non pas à interdire la pollution de l'environnement, mais simplement à la réglementer. Comme nous allons maintenant l'expliquer de manière plus détaillée, elles ne constituent donc pas du droit criminel: voir *Hauser*, précité, à la p. 999.

(ii) Interdictions assorties de peines

Vérifier si une loi particulière est de nature prohibitive ou réglementaire est souvent plus un art qu'une science. Comme le juge Cory l'a reconnu dans l'arrêt *Knox Contracting*, précité, ce qui constitue du droit criminel est souvent «plus facile à reconnaître qu'à définir» (p. 347). Un certain nombre de lignes directrices sont cependant ressorties de la jurisprudence.

La loi qui impose une interdiction et une peine n'est pas nécessairement de nature criminelle. En fait, il arrive souvent que les lois de nature réglementaire interdisent la violation de leurs dispositions ou de leurs règlements d'application et impo-

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sanctions to be applied if violations do, in fact, occur. Any regulatory statute that lacked such prohibitions and penalties would be meaningless. However, as La Forest J. himself recognized in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 508-17, and in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at p. 650, the penalties that are provided in a regulatory context serve a "pragmatic" or "instrumental" purpose and do not transform the legislation into criminal law. (Also see *Wetmore*, *supra*, *Scowby*, *supra*, and *Knox Contracting*, *supra*.) In environmental law, as in competition law or income tax law, compliance cannot always be ensured by the usual regulatory enforcement techniques, such as periodic or unannounced inspections. Hence, in order to ensure that legal standards are being met, a strong deterrent, the threat of penal sanctions, is necessary. La Forest J. relied on this rationale in concluding that the penal sanctions contained in the *Competition Act* (in *Thomson Newspapers*) and the *Income Tax Act* (in *McKinlay Transport*) did not affect the characterization of those statutes as regulatory in nature for purposes of s. 8 of the *Canadian Charter of Rights and Freedoms*.

sent des peines applicables en cas de violation. Une loi de nature réglementaire qui n'imposerait pas de telles interdictions et peines serait dénuée de sens. Cependant, comme le juge La Forest l'a lui-même reconnu dans l'arrêt *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, aux pp. 508 à 517, et dans l'arrêt *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627, à la p. 650, les peines prescrites dans un contexte de réglementation l'ont été pour des raisons «pragmatiques» ou «pratiques» et n'ont pas pour effet de transformer la loi en loi criminelle. (Voir également les arrêts *Wetmore*, *Scowby*, et *Knox Contracting*, précités.) En droit de l'environnement, tout comme en droit de la concurrence ou en droit fiscal, il n'est pas toujours possible d'assurer le respect de la loi au moyen des techniques habituelles d'application des règlements, telles les inspections périodiques ou imprévues, d'où la nécessité de disposer d'un élément dissuasif puissant, soit la menace de sanctions pénales, pour assurer le respect des normes prescrites par la loi. Le juge La Forest s'est fondé sur ce raisonnement pour conclure que les peines prévues dans la *Loi sur la concurrence* (dans *Thomson Newspapers*) et la *Loi de l'impôt sur le revenu* (dans *McKinlay Transport*) n'avaient aucune incidence sur la qualification de ces lois comme étant des lois de nature réglementaire pour les fins de l'art. 8 de la *Charte canadienne des droits et libertés.*

At the same time, however, a criminal law does not have to consist solely of blanket prohibitions. It may, as La Forest J. noted in *RJR-MacDonald*, *supra*, at pp. 263-64, "validly contain exemptions for certain conduct without losing its status as criminal law". See also *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497; *Morgentaler*, *supra*; *R. v. Furtney*, [1991] 3 S.C.R. 89. These exemptions may have the effect of establishing "regulatory" schemes which confer a measure of discretionary authority without changing the character of the law, as was the case in *RJR-MacDonald*.

47 En même temps, une loi en matière criminelle n'a pas à être composée uniquement d'interdictions générales. Elle peut, comme le juge La Forest l'a souligné dans l'arrêt *RJR-MacDonald*, précité, aux pp. 263 et 264, «validement comporter des exemptions relativement à certaines conduites sans pour autant perdre son caractère». Voir également *Lord's Day Alliance of Canada c. Attorney General of British Columbia*, [1959] R.C.S. 497; *Morgentaler*, précité; *R. c. Furtney*, [1991] 3 R.C.S. 89. Il se peut que ces exemptions aient pour effet d'établir des régimes «de réglementation» conférant une certaine mesure de pouvoir discrétionnaire sans pour autant modifier la nature de la loi, comme c'était le cas dans l'arrêt *RJR-MacDonald*.

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48 Determining when a piece of legislation has crossed the line from criminal to regulatory involves, in our view, considering the nature and extent of the regulation it creates, as well as the context within which it purports to apply. A scheme which is fundamentally regulatory, for example, will not be saved by calling it an "exemption". As Professor Hogg suggests, *supra*, at p. 18-26, "the more elaborate [a] regulatory scheme, the more likely it is that the Court will classify the dispensation or exemption as being regulatory rather than criminal". At the same time, the subject matter of the impugned law may indicate the appropriate approach to take in characterizing the law as criminal or regulatory.

Pour déterminer quand une loi passe du domaine criminel au domaine réglementaire, il faut, à notre avis, examiner la nature et la portée de la réglementation qu'elle crée, ainsi que le contexte dans lequel elle est censée s'appliquer. Par exemple, il ne sera pas possible de sauvegarder un régime essentiellement réglementaire en le qualifiant d'«exemption». Comme le professeur Hogg le laisse entendre, *op. cit.*, à la p. 18-26, [TRADUCTION] «plus [un] régime de réglementation est élaboré, plus il est probable que la cour qualifiera la dérogation ou l'exemption de réglementaire au lieu de criminelle». En même temps, il se peut que le sujet sur lequel porte la loi contestée indique la méthode qu'il convient d'adopter pour déterminer s'il s'agit d'une loi de nature criminelle ou réglementaire.

49 Having examined the legislation at issue in this case, we have no doubt that it is essentially regulatory in nature, and therefore outside the scope of s. 91(27). In order to have an "exemption", there must first be a prohibition in the legislation from which that exemption is derived. Thus, the *Tobacco Products Control Act*, S.C. 1988, c. 20, at issue in *RJR-MacDonald*, *supra*, contained broad prohibitions against the advertising and promotion of tobacco products in Canada. Section 4 of that Act provided that "[n]o person shall advertise any tobacco product offered for sale in Canada". It also provided a labelling requirement in the form of a prohibition, stating in s. 9 that it was illegal to sell tobacco products without printed health warnings. Any exemptions from these general prohibitions were just that — exceptions to a general rule.

Après avoir examiné la loi en cause dans le présent pourvoi, nous ne doutons nullement qu'elle est essentiellement de nature réglementaire et qu'elle ne relève donc pas du par. 91(27). Pour qu'il y ait «exemption», il faut d'abord qu'il y ait une interdiction dans la loi dont découle cette exemption. Ainsi, la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20, dont il est question dans l'arrêt *RJR-MacDonald*, précité, imposait des interdictions générales en matière de publicité et de promotion des produits du tabac au Canada. L'article 4 de cette loi prévoyait que «[l]a publicité en faveur des produits du tabac mis en vente au Canada est interdite». Elle prescrivait aussi une exigence en matière d'étiquetage qui revêtait la forme d'une interdiction, en déclarant à l'art. 9 qu'il était interdit de vendre des produits du tabac sur lesquels n'était pas imprimé un message concernant leurs effets sur la santé. Toute exemption relative à ces interdictions générales constituaient précisément des exceptions à une règle générale.

50 Similarly, the *Food and Drugs Act*, R.S.C., 1985, c. F-27, upheld in *Wetmore*, *supra*, contains several prohibitions at the beginning of its Part I. It prohibits, *inter alia*, the advertising of any food, drug, cosmetic or device with respect to a prescribed list of diseases, disorders or abnormal physical states (s. 3); the selling of food or drug that is adulterated or prepared under unsanitary

De même, la *Loi sur les aliments et drogues*, L.R.C. (1985), ch. F-27, dont la validité est confirmée dans *Wetmore*, précité, contient plusieurs interdictions au début de sa partie I. Elle interdit notamment de faire la publicité d'un aliment, d'une drogue, d'un cosmétique ou d'un instrument relativement à une liste établie de maladies, de désordres ou d'état physiques anormaux (art. 3),

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conditions (ss. 4 and 8); the labelling, packaging, selling or advertising of any food, drug or device in a manner that is false, misleading or deceptive (ss. 5(1), 9(1) and 20(1)); the distribution of any drug as a sample (s. 14); and the selling of any cosmetic that may cause injury to the health of the user or was prepared under unsanitary conditions (s. 16). There are also a number of prohibitions with respect to controlled drugs in Part III of the Act and restricted drugs in Part IV.

de vendre un aliment ou une drogue falsifiés ou préparés dans des conditions non hygiéniques (art. 4 et 8), d'étiqueter, d'emballer, de vendre un aliment, une drogue ou un instrument, ou d'en faire la publicité, de manière fausse, trompeuse ou mensongère (par. 5(1), 9(1) et 20(1)), de distribuer une drogue comme échantillon (art. 14), et de vendre un cosmétique susceptible de nuire à la santé de la personne qui en fait usage ou qui a été préparé dans des conditions non hygiéniques (art. 16). On trouve également un certain nombre d'interdictions relatives à des drogues contrôlées dans la partie III de la Loi et à des drogues d'usage restreint dans la partie IV.

In the legislation at issue in this appeal, on the other hand, no such prohibitions appear. Section 34(1) of the *Canadian Environmental Protection Act* reads as follows:

Par contre, la loi faisant l'objet du présent pourvoi ne contient aucune interdiction de cette nature. Voici le libellé du par. 34(1) de la *Loi canadienne sur la protection de l'environnement*: 51

34. (1) Subject to subsection (3), the Governor in Council may, on the recommendation of the Ministers and after the federal-provincial advisory committee is given an opportunity to provide its advice under section 6, make regulations with respect to a substance specified on the List of Toxic Substances in Schedule I, including regulations providing for, or imposing requirements respecting,

34. (1) Sous réserve du paragraphe (3), le gouverneur en conseil peut, sur recommandation des ministres et après avoir donné au comité consultatif fédéro-provincial la possibilité de formuler ses conseils dans le cadre de l'article 6, prendre des règlements concernant une substance inscrite sur la liste de l'annexe I, notamment en ce qui touche:

(*a*) the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source;

a) la quantité ou la concentration dans lesquelles elle peut être rejetée dans l'environnement, seule ou combinée à une autre substance émise par quelque source ou type de sources que ce soit;

(*b*) the places or areas where the substance may be released;

b) les lieux ou zones de rejet;

(*c*) the commercial, manufacturing or processing activity in the course of which the substance may be released;

c) les activités commerciales, de fabrication ou de transformation au cours desquelles le rejet est permis;

(*d*) the manner in which and conditions under which the substance may be released into the environment, either alone or in combination with any other substance;

d) les modalités et conditions de son rejet, seule ou en combinaison avec une autre substance;

(*e*) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;

e) la quantité qui peut être fabriquée, transformée, utilisée, mise en vente ou vendue au Canada;

(*f*) the purposes for which the substance or a product containing the substance may be imported, manufactured, processed, used, offered for sale or sold;

f) les fins pour lesquelles la substance ou un produit qui en contient peut être importé, fabriqué, transformé, utilisé, mis en vente ou vendu;

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(*g*) the manner in which and conditions under which the substance or a product containing the substance may be imported, manufactured, processed or used;

(*h*) the quantities or concentrations in which the substance may be used;

(*i*) the quantities or concentrations of the substance that may be imported;

(*j*) the countries from or to which the substance may be imported or exported;

(*k*) the conditions under which, the manner in which and the purposes for which the substance may be imported or exported;

(*l*) the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for sale, import or export of the substance or a product containing the substance;

(*m*) the quantity or concentration of the substance that may be contained in any product manufactured, imported, exported or offered for sale in Canada;

(*n*) the manner in which and conditions under which and the purposes for which the substance or a product containing the substance may be advertised or offered for sale;

(*o*) the manner in which and conditions under which the substance or a product or material containing the substance may be stored, displayed, handled, transported or offered for transport;

(*p*) the packaging and labelling of the substance or a product or material containing the substance;

(*q*) the manner, conditions, places and method of disposal of the substance or a product or material containing the substance, including standards for the construction, maintenance and inspection of disposal sites;

(*r*) the submission to the Minister, on request or at such times as are prescribed, of information relating to the substance;

(*s*) the maintenance of books and records for the administration of any regulation made under this section;

(*t*) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister;

(*u*) the submission of samples of the substance to the Minister;

g) les modalités et conditions d'importation, de fabrication, de transformation ou d'utilisation de la substance ou d'un produit qui en contient;

h) la quantité ou la concentration dans lesquelles celle-ci peut être utilisée;

i) la quantité ou la concentration dans lesquelles celle-ci peut-être importée;

j) les pays d'exportation ou d'importation;

k) les conditions, modalités et objets de l'importation ou de l'exportation;

l) l'interdiction totale, partielle ou conditionnelle de la fabrication, de l'utilisation, de la transformation, de la vente, de la mise en vente, de l'importation ou de l'exportation de la substance ou d'un produit qui en contient;

m) la quantité ou concentration de celle-ci que peut contenir un produit fabriqué, importé, exporté ou mis en vente au Canada;

n) les modalités, les conditions et l'objet de la publicité et de la mise en vente de la substance ou d'un produit qui en contient;

o) les modalités et les conditions de stockage, de présentation, de transport, de manutention ou d'offre de transport soit de la substance, soit d'un produit ou d'une matière qui en contient;

p) l'emballage et l'étiquetage soit de la substance, soit d'un produit ou d'une matière qui en contient;

q) les modalités, lieux et méthodes d'élimination soit de la substance, soit d'un produit ou d'une matière qui en contient, notamment les normes de construction, d'entretien et d'inspection des sites d'élimination;

r) la transmission au ministre, sur demande ou au moment fixé par règlement, de renseignements concernant la substance;

s) la tenue de livres et de registres pour l'exécution des règlements d'application du présent article;

t) l'échantillonnage, l'analyse, l'essai, la mesure ou la surveillance de la substance et la transmission des résultats au ministre;

u) la transmission d'échantillons de la substance au ministre;

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(*v*) the methods and procedures for conducting sampling, analyses, tests, measurements or monitoring of the substance;

(*w*) circumstances or conditions under which the Minister may, for the proper administration of this Act, modify

(i) any requirement for sampling, analyses, tests, measurements or monitoring, or

(ii) the methods and procedures for conducting any required sampling, analyses, tests, measurements or monitoring; and

(*x*) any other matter necessary to carry out the purposes of this Part.

v) les méthodes et procédures à suivre pour les opérations mentionnées à l'alinéa *t*);

w) les cas ou conditions de modification par le ministre, pour l'exécution de la présente loi, soit des exigences imposées pour les opérations mentionnées à l'alinéa *t*), soit des méthodes et procédures afférentes;

x) toute autre mesure d'application de la présente partie.

This section is not ancillary to existing prohibitions found elsewhere in the Act or to exemptions to such prohibitions. It is not itself prohibitory in nature. In fact, the only time the word "prohibition" appears in s. 34(1) is in s. 34(1)(*l*), which provides that the Governor in Council may, at his or her discretion, prohibit the manufacture, import, use or sale of a given substance. Clearly, this is not analogous to the broad general prohibitions found in the statutes cited above.

52 Ce paragraphe n'est pas accessoire aux interdictions qui se trouvent ailleurs dans la Loi, ni aux exemptions relatives à ces interdictions. Il n'est pas lui-même de nature prohibitive. En fait, le mot «interdiction» n'est employé qu'une seule fois au par. 34(1), soit à l'al. 34(1)*l*), lequel prévoit que le gouverneur en conseil peut, à sa discrétion, interdire la fabrication, l'importation, l'utilisation ou la vente d'une substance particulière. De toute évidence, cela est différent des interdictions générales imposées dans les lois précitées.

The only other mentions of prohibition in relation to the impugned provisions are in ss. 113(*f*) and 113(*i*) of the Act, which provide that failure to comply with a regulation made under ss. 34 or 35 is an offence. The prohibitions, such as they are, are ancillary to the regulatory scheme, not the other way around. This strongly suggests that the focus of the legislation is regulation rather than prohibition.

53 Les seules autres mentions d'une interdiction concernant les dispositions contestées se trouvent aux al. 113*f*) et 113*i*) de la Loi, qui prévoient que l'omission de se conformer à un règlement pris sous le régime de l'art. 34 ou de l'art. 35 constitue une infraction. Les interdictions, telles qu'elles existent, sont accessoires au régime de réglementation, et non l'inverse. Cela laisse fortement entendre que la Loi est axée sur la réglementation plutôt que sur les interdictions.

Moreover, as Professor Hogg notes, *supra*, at p. 18-24:

A criminal law ordinarily consists of a prohibition which is to be self-applied by the persons to whom it is addressed. There is not normally any intervention by an administrative agency or official prior to the application of the law. The law is "administered" by law enforcement officials and courts of criminal jurisdiction only in the sense that they can bring to bear the machinery of punishment after the prohibited conduct has occurred.

54 En outre, comme le professeur Hogg le souligne, *op. cit.*, à la p. 18-24:

[TRADUCTION] Une loi criminelle consiste ordinairement en une interdiction à laquelle se soumettent d'elles-mêmes les personnes qu'elle vise. Normalement, aucun organisme ni fonctionnaire administratif n'intervient avant l'application de la loi. La loi est «appliquée» par les personnes responsables de son application et les cours de juridiction criminelle uniquement en ce sens qu'elles peuvent déclencher le mécanisme de sanction après que la conduite interdite a eu lieu.

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55 In this case, there is no offence until an administrative agency "intervenes". Sections 34 and 35 do not define an offence at all: which, if any, substances will be placed on the List of Toxic Substances, as well as the norms of conduct regarding these substances, are to be defined on an on-going basis by the Ministers of Health and the Environment. It would be an odd crime whose definition was made entirely dependent on the discretion of the Executive. This further suggests that the Act's true nature is regulatory, not criminal, and that the offences created by s. 113 are regulatory offences, not "true crimes": see *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, *per* Cory J. Our colleague, La Forest J., would hold that the scheme of the impugned act is an effective means of avoiding unnecessarily broad prohibitions and carefully targeting specific toxic substances. The regulatory mechanism allows the schemes to be changed flexibly, as the need arises. Of course, simply because a scheme is effective and flexible does not mean it is *intra vires* the federal Parliament.

En l'espèce, il n'y a aucune infraction tant et aussi longtemps qu'un organisme administratif n'«intervient» pas. Les articles 34 et 35 ne définissent pas une infraction: il incombe, de manière continue, aux ministres de la Santé et de l'Environnement de définir les substances qui seront inscrites sur la liste des substances toxiques, de même que les normes de conduite relatives à ces substances. Ce serait un crime singulier dont la définition a été laissée à l'entière discrétion du pouvoir exécutif. Cela laisse aussi entendre que la véritable nature de la Loi est réglementaire et non criminelle et que les infractions créées par l'art. 113 sont de nature réglementaire et non des «crimes proprement dits»: voir *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, le juge Cory. Selon notre collègue le juge La Forest, le régime de la loi contestée est un moyen efficace d'éviter les interdictions inutilement générales et de cibler minutieusement des substances toxiques particulières. Le mécanisme de réglementation permet de modifier les régimes avec souplesse, au besoin. Il va sans dire que le simple fait qu'un régime soit efficace et souple ne signifie pas qu'il relève de la compétence du Parlement fédéral.

56 This is particularly true in light of the striking breadth of the impugned provisions. The 24 listed heads of authority in s. 34 allow for the regulation of every conceivable aspect of toxic substances; in fact, in case anything was left out, s. 34(1)(*x*) provides for regulations concerning "any other matter necessary to carry out the purposes of this Part". It is highly unlikely, in our opinion, that Parliament intended to leave the criminalization of such a sweeping area of behaviour to the discretion of the Ministers of Health and the Environment.

Cela est particulièrement vrai compte tenu de l'ampleur remarquable des dispositions contestées. Les 24 rubriques de compétence énumérées à l'art. 34 permettent la réglementation de tous les aspects imaginables des substances toxiques; en fait, au cas où il y aurait eu oubli, l'al. 34(1)*x*) prévoit la prise de règlements concernant «toute autre mesure d'application de la présente partie». Il est fort improbable, à notre avis, que le Parlement ait eu l'intention de laisser la criminalisation d'un aussi vaste domaine de comportement à la discrétion des ministres de la Santé et de l'Environnement.

57 Moreover, this process is further complicated by the equivalency provisions in s. 34(6) of the Act. Under this provision, the Governor in Council may exempt a province from the application of regulations made under ss. 34 or 35 if that province already has equivalent regulations in force there. This would be a very unusual provision for a criminal law. Provinces do not have the jurisdiction to

De plus, les dispositions équivalentes mentionnées au par. 34(6) de la Loi rendent ce processus d'autant plus complexe. Aux termes de ce paragraphe, le gouverneur en conseil peut exempter une province de l'application des règlements pris en vertu des art. 34 et 35 lorsque des dispositions équivalentes à ces règlements y sont déjà en vigueur. Il s'agirait d'une disposition très inusitée

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enact criminal legislation, nor can the federal government delegate such jurisdiction to them: *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31. Any environmental legislation enacted by the provinces must, therefore, be of a regulatory nature. Deferring to provincial regulatory schemes on the basis that they are "equivalent" to federal regulations made under s. 34(1) creates a strong presumption that the federal regulations are themselves also of a regulatory, not criminal, nature.

pour une loi criminelle. Les provinces n'ont pas compétence pour adopter des lois criminelles et le gouvernement fédéral ne peut pas non plus leur déléguer une telle compétence: *Attorney General of Nova Scotia c. Attorney General of Canada*, [1951] R.C.S. 31. Toute loi en matière d'environnement adoptée par une province doit donc être de nature réglementaire. Le fait de s'en remettre aux régimes de réglementation provinciaux pour le motif qu'ils sont «équivalents» aux règlements fédéraux pris sous le régime du par. 34(1) laisse fortement présumer que les règlements fédéraux eux-mêmes sont aussi de nature réglementaire et non pas criminelle.

The appellant relies on this Court's decision in *RJR-MacDonald*, *supra*, arguing that the statutory regime in this case is analogous to that upheld (on division of powers grounds) in *RJR-MacDonald*. We believe this reliance is, with respect, misplaced. As noted above, the legislation at issue in *RJR-MacDonald* contained broad prohibitions, tempered by certain exemptions. The impugned provisions in this case, on the other hand, involve no such general prohibition. In our view, they can only be characterized as a broad delegation of regulatory authority to the Governor in Council. The aim of these provisions is not to prohibit toxic substances or any aspect of their use, but simply to control the manner in which these substances will be allowed to interact with the environment.

58 L'appelant se fonde sur l'arrêt *RJR-MacDonald*, précité, de notre Cour en soutenant que le régime législatif en l'espèce est analogue à celui qui y a été maintenu (pour des raisons de partage des pouvoirs). Nous estimons, en toute déférence, qu'il est déplacé de s'en remettre ainsi à cet arrêt. Comme nous l'avons vu, la loi en cause dans *RJR-MacDonald* contenait des interdictions générales tempérées par certaines exemptions. Par contre, les dispositions contestées en l'espèce ne comportent aucune interdiction générale de cette nature. À notre avis, elles peuvent seulement être qualifiées de délégation générale de pouvoir réglementaire au gouverneur en conseil. Ces dispositions visent non pas à interdire les substances toxiques ou encore l'un ou l'autre aspect de leur utilisation, mais simplement à contrôler la façon dont elles pourront interagir avec l'environnement.

RJR-MacDonald, may be further distinguished, in our view. The *Tobacco Products Control Act* addressed a narrow field of activity: the advertising and promotion of tobacco products. The impugned provisions here deal with a much broader area of concern: the release of substances into the environment. This Court has unanimously held that the environment is a subject matter of shared jurisdiction, that is, that the Constitution does not assign it exclusively to either the provinces or Parliament: *Oldman River*, *supra*, at p. 63; see also *Crown Zellerbach*, *supra*, at pp. 455-56, *per* La Forest J. A decision by the framers of the Constitution not to give one level of government

59 À notre avis, il est possible d'établir une autre distinction d'avec l'arrêt *RJR-MacDonald*. La *Loi réglementant les produits du tabac* portait sur un champ d'activités restreint: la publicité et la promotion des produits du tabac. Les dispositions contestées en l'espèce traitent d'un sujet de préoccupation beaucoup plus vaste: le rejet de substances dans l'environnement. Notre Cour a conclu, à l'unanimité, que l'environnement est un sujet de compétence partagée, c'est-à-dire que la Constitution ne l'attribue pas exclusivement aux provinces ou au Parlement: *Oldman River*, précité, à la p. 63; voir également *Crown Zellerbach*, précité, aux pp. 455 et 456, le juge La Forest. Une décision des

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exclusive control over a subject matter should, in our opinion, act as a signal that the two levels of government are meant to operate in tandem with regard to that subject matter. One level should not be allowed to take over the field so as to completely dwarf the presence of the other. This does not mean that no regulation will be permissible, but wholesale regulatory authority of the type envisaged by the Act is, in our view, inconsistent with the shared nature of jurisdiction over the environment. As La Forest J. noted in his dissenting reasons in *Crown Zellerbach*, at p. 455, "environmental pollution alone [i.e. as a subject matter of legislative authority] is itself all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable."

rédacteurs de la Constitution de ne pas attribuer à un ordre de gouvernement le contrôle exclusif d'une matière devrait indiquer, à notre avis, que les deux ordres de gouvernement sont appelés à agir de concert à cet égard. On ne devrait pas permettre à un ordre de gouvernement d'investir le domaine de manière à éclipser totalement la présence de l'autre. Cela signifie non pas qu'aucune réglementation ne sera acceptable, mais qu'un pouvoir de réglementation systématique du genre prévu par la Loi est, à notre avis, incompatible avec la nature partagée de la compétence en matière d'environnement. Comme le juge La Forest l'a souligné dans ses motifs de dissidence, dans l'arrêt *Crown Zellerbach*, à la p. 455, «la pollution de l'environnement [c.-à-d. en tant que sujet de compétence législative] se fait elle-même sentir partout. C'est le sous-produit de tout ce que nous faisons. Dans les rapports qu'a l'être humain avec son environnement, les déchets sont une chose inévitable.»

60 We agree completely with this statement. Almost everything we do involves "polluting" the environment in some way. The impugned provisions purport to grant regulatory authority over all aspects of any substance whose release into the environment "ha[s] or . . . may have an immediate or long-term harmful effect on the environment" (s. 11(*a*)). One wonders just what, if any, role will be left for the provinces in dealing with environmental pollution if the federal government is given such total control over the release of these substances. Moreover, the countless spheres of human activity, both collective and individual, which could potentially fall under the ambit of the Act are apparent. Many of them fall within areas of jurisdiction granted to the provinces under s. 92. Granting Parliament the authority to regulate so completely the release of substances into the environment by determining whether or not they are "toxic" would not only inescapably preclude the possibility of shared environmental jurisdiction; it would also infringe severely on other heads of power assigned to the provinces. In this respect, we can do no better than to quote Professor Gibson, who wrote as follows in his article "Constitu-

Nous souscrivons entièrement à cet énoncé. Presque tout ce que nous faisons «pollue» l'environnement d'une façon ou d'une autre. Les dispositions contestées visent à accorder un pouvoir de réglementer tous les aspects d'une substance dont le rejet dans l'environnement «[a], immédiatement ou à long terme, un effet nocif sur l'environnement» (al. 11*a*)). On se demande bien quel rôle, s'il en est, sera laissé aux provinces relativement à la pollution de l'environnement si un contrôle aussi absolu du rejet de ces substances est accordé au gouvernement fédéral. En outre, les innombrables domaines d'activité humaine, aussi bien collective qu'individuelle, susceptibles d'être assujettis à la Loi sont manifestes. Un bon nombre d'entre eux relèvent de champs de compétence conférés aux provinces en vertu de l'art. 92. Le fait d'accorder au Parlement le pouvoir de réglementer de façon aussi complète le rejet de substances dans l'environnement par la détermination de leur nature «toxique» ou non éliminerait inévitablement non seulement la possibilité d'avoir une compétence partagée en matière d'environnement, mais encore empiéterait également de façon considérable sur d'autres chefs de compétence provinciale. À cet égard, nous ne pouvons que citer le professeur Gibson, qui a écrit ce qui suit dans son article

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tional Jurisdiction over Environmental Management in Canada" (1973), 23 *U.T.L.J.* 54, at p. 85:

> [I]t is . . . obvious that 'environmental management' could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal.

For all of the above reasons, we are unable to uphold the impugned provisions of the Act under the federal criminal law power. That being said, we wish to add that none of this should be read as foredooming future attempts by Parliament to create an effective national — or, indeed, international — strategy for the protection of the environment. We agree with La Forest J. that achieving such a strategy is a public purpose of extreme importance and one of the major challenges of our time. There are, in this regard, many measures open to Parliament which will not offend the division of powers set out by the Constitution, notably the creation of environmental crimes. Nothing, in our view, prevents Parliament from outlawing certain kinds of behaviour on the basis that they are harmful to the environment. But such legislation must actually seek to outlaw this behaviour, not merely regulate it.

Other potential avenues include the power to address interprovincial or international environmental concerns under the peace, order and good government power, which is discussed below. Parliament is not without power to act in pursuit of national policies on environmental protection. But it must do so pursuant to the balance of powers assigned by ss. 91 and 92. Environmental protection must be achieved in accordance with the Constitution, not in spite of it. As Professor Bowden concludes in her case comment on *Oldman River*, *supra*, (1992), 56 *Sask. L. Rev.* 209, at pp. 219-20, "it is only through legislative and policy initiatives

intitulé «Constitutional Jurisdiction over Environmental Management in Canada» (1973), 23 *U.T.L.J.* 54, à la p. 85:

> [TRADUCTION] [I]l est [. . .] évident que, la «gestion de l'environnement» ne pourrait jamais être considérée comme une matière constitutionnelle relevant d'un seul ordre de gouvernement en vertu d'une constitution se voulant fédérale, car aucun système dans lequel un gouvernement serait si puissant ne pourrait être fédéral.

61 Pour tous les motifs qui précèdent, nous ne pouvons confirmer la validité des dispositions contestées de la Loi en vertu de la compétence fédérale en matière de droit criminel. Cela dit, nous tenons à ajouter que les présents motifs ne doivent nullement être interprétés comme signifiant que toute tentative future du Parlement de concevoir une stratégie efficace nationale, voire internationale, en matière de protection de l'environnement sera vouée à l'échec. Nous sommes d'accord avec le juge La Forest pour dire que la conception d'une telle stratégie est un objectif public de la plus haute importance et l'un des principaux défis de notre époque. À cet égard, il est loisible au Parlement de prendre de nombreuses mesures qui ne contreviendront pas au partage des compétences énoncé dans la Constitution, notamment la création de crimes contre l'environnement. Rien, à notre avis, n'empêche le Parlement de proscrire certains types de conduite pour le motif qu'ils sont nocifs pour l'environnement. Toutefois, une telle mesure législative doit effectivement viser à proscrire la conduite en cause et non pas simplement à la réglementer.

62 Parmi les autres possibilités qui s'offrent, il y a le pouvoir de s'attaquer aux problèmes d'environnement interprovinciaux ou internationaux en vertu de la compétence en matière de paix, d'ordre et de bon gouvernement, qui est analysée plus loin. Le Parlement n'est pas dépourvu du pouvoir d'agir pour mettre en œuvre des politiques nationales en matière de protection de l'environnement. Cependant, il doit agir conformément au partage des pouvoirs prévu aux art. 91 et 92. La protection de l'environnement doit être réalisée conformément à la Constitution et non malgré celle-ci. Comme le professeur Bowden le conclut dans son commentaire de l'arrêt *Oldman River*, précité, (1992), *Sask. L.*

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at and between both levels of government that satisfactory solutions may be attainable".

63 The impugned provisions are not justified under s. 91(27) of the *Constitution Act, 1867*. We will now consider the appellant's second argument, namely that the provisions may be upheld under the peace, order and good government power.

D. *Peace, Order and Good Government*

64 The appellant argues that ss. 34 and 35 of the Act fall within the residual jurisdiction of Parliament under the peace, order and good government (POGG) power to legislate respecting matters of national concern, as provided for in the introductory paragraph of s. 91 of the *Constitution Act, 1867*. No argument is made with respect to the national emergency branch of POGG, and therefore only the national concern doctrine is at issue.

65 The jurisprudence of this Court with respect to the peace, order and good government provision of the Constitution was thoroughly reviewed by Le Dain J. for the majority in *Crown Zellerbach*, *supra*. Relying on Beetz J.'s comments in *Reference re Anti-Inflation Act*, *supra*, Le Dain J. adopted the following criteria in order to determine whether a matter constitutes a "national concern", at pp. 431-32:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;

2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the

Rev. 209, aux pp. 219 et 220, [TRADUCTION] «ce n'est qu'au moyen d'initiatives législatives et politiques au sein des deux ordres de gouvernement et entre ceux-ci que des solutions satisfaisantes peuvent être trouvées».

Les dispositions contestées ne sont pas justifiées en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*. Nous allons maintenant examiner le deuxième argument de l'appelant, celui voulant qu'il soit possible de confirmer la validité des dispositions en cause en vertu de la compétence en matière de paix, d'ordre et de bon gouvernement.

D. *La paix, l'ordre et le bon gouvernement*

L'appelant soutient que les art. 34 et 35 de la Loi relèvent de la compétence résiduelle que le Parlement possède en matière de paix, d'ordre et de bon gouvernement pour légiférer à l'égard de questions d'intérêt national, prévue au paragraphe introductif de l'art. 91 de la *Loi constitutionnelle de 1867*. Comme aucun argument n'a été avancé au sujet du volet «urgence nationale» de la compétence en matière de paix, d'ordre et de bon gouvernement, seule la théorie de l'intérêt national est en cause.

La jurisprudence de notre Cour en ce qui concerne la disposition constitutionnelle relative à la paix, à l'ordre et au bon gouvernement a été examinée minutieusement par le juge Le Dain, au nom des juges majoritaires, dans l'arrêt *Crown Zellerbach*, précité. Se fondant sur les commentaires du juge Beetz dans le *Renvoi sur la Loi anti-inflation*, précité, le juge Le Dain adopte les critères suivants pour déterminer si une question est d'«intérêt national», aux pp. 431 et 432:

1. La théorie de l'intérêt national est séparée et distincte de la théorie de la situation d'urgence nationale justifiant l'exercice de la compétence en matière de paix, d'ordre et de bon gouvernement, qui peut se distinguer surtout par le fait qu'elle offre un fondement constitutionnel à ce qui est nécessairement une mesure législative provisoire;

2. La théorie de l'intérêt national s'applique autant à de nouvelles matières qui n'existaient pas à l'époque de la Confédération qu'à des matières qui, bien qu'elles fussent à l'origine de nature locale ou privée dans

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absence of national emergency, become matters of national concern;

3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

une province, sont depuis devenues des matières d'intérêt national, sans qu'il y ait situation d'urgence nationale;

3. Pour qu'on puisse dire qu'une matière est d'intérêt national dans un sens ou dans l'autre, elle doit avoir une unicité, une particularité et une indivisibilité qui la distinguent clairement des matières d'intérêt provincial, et un effet sur la compétence provinciale qui soit compatible avec le partage fondamental des pouvoirs législatifs effectué par la Constitution;

4. Pour décider si une matière atteint le degré requis d'unicité, de particularité et d'indivisibilité qui la distingue clairement des matières d'intérêt provincial, il est utile d'examiner quel effet aurait sur les intérêts extra-provinciaux l'omission d'une province de s'occuper efficacement du contrôle ou de la réglementation des aspects intraprovinciaux de cette matière.

Assuming that the protection of the environment and of human life and health against any and all potentially harmful substances could be a "new matter" which would fall under the POGG power, we must then determine whether that matter has the required "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" and whether its "impact on provincial jurisdiction . . . is reconcilable with the fundamental distribution of legislative power under the Constitution". Only if these criteria are satisfied will the matter be one of national concern.

66 Tenant pour acquis que la protection de l'environnement et de la vie et de la santé humaines contre toutes les substances potentiellement nocives pourrait constituer une «nouvelle matière» relevant de la compétence concernant la paix, l'ordre et le bon gouvernement, nous devons déterminer si cette matière a l'«unicité, [la] particularité et [l']indivisibilité [requises] qui la distinguent clairement des matières d'intérêt provincial» et si elle a un «effet sur la compétence provinciale qui soit compatible avec le partage fondamental des pouvoirs législatifs effectué par la Constitution». Ce n'est que si ces critères sont respectés que la matière sera d'intérêt national.

(i) Singleness, Distinctiveness and Indivisibility

(i) Unicité, particularité et indivisibilité

The test for singleness, distinctiveness and indivisibility is a demanding one. Because of the high potential risk to the Constitution's division of powers presented by the broad notion of "national concern", it is crucial that one be able to specify precisely what it is over which the law purports to claim jurisdiction. Otherwise, "national concern" could rapidly expand to absorb all areas of provincial authority. As Le Dain J. noted in *Crown Zellerbach, supra*, at p. 433, once a subject matter is qualified of national concern, "Parliament has an exclusive jurisdiction of a plenary nature to legis-

67 Le critère applicable pour déterminer s'il y a unicité, particularité et indivisibilité est exigeant. Vu le risque élevé que la notion générale de l'«intérêt national» peut présenter pour le partage des compétences prévu par la Constitution, il est essentiel de pouvoir préciser exactement ce que la loi est censée régir. Autrement, l'«intérêt national» pourrait rapidement s'amplifier pour absorber tous les champs de compétence provinciale. Comme le juge Le Dain l'a souligné dans l'arrêt *Crown Zellerbach*, précité, à la p. 433, dès qu'une matière est qualifiée comme étant d'intérêt national, «le Parle-

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late in relation to that matter, including its intra-provincial aspects".

ment jouit d'une compétence exclusive et absolue pour légiférer sur cette matière, y compris sur ses aspects intraprovinciaux».

68 The appellant submits that the object of Part II of the Act is limited in scope in that there is a clear distinction between chemical substances whose pollutant effects are diffuse and persist in the environment and other types of pollution whose effects are temporary and more local in nature. Therefore, being a single, distinct and indivisible form of pollution which can cross provincial boundaries, chemical pollution requires particular national measures for its proper control. However, as we have shown above, Part II of the Act applies to a wide array of substances, not only to chemical polluants. Moreover, the impugned legislation is not limited to substances having interprovincial effects.

L'appelant soutient que l'objectif de la partie II de la Loi a une portée limitée en raison de l'existence d'une distinction nette entre les substances chimiques dont les effets polluants sont diffus et persistent dans l'environnement et les autres types de pollution dont les effets sont temporaires et de nature plus locale. En conséquence, comme elle constitue une forme de pollution unique, particulière et indivisible qui peut franchir les frontières provinciales, la pollution chimique requiert des mesures nationales particulières pour être contrôlée adéquatement. Cependant, comme nous l'avons déjà démontré, la partie II de la Loi s'applique à toute une gamme de substances et non seulement aux polluants chimiques. En outre, la loi contestée ne vise pas que les substances ayant des effets interprovinciaux.

69 The definition of "toxic substances" in s. 11, combined with the definition of "substance" found in s. 3, is an all-encompassing definition with no clear limits. Many human activities could involve the use of materials falling within the meaning of "toxic substances" as defined by the impugned legislation. As noted earlier, the definition of "substance" includes "organic or inorganic matter, whether animate or inanimate". Paragraphs (*a*) through (*g*) of the definition in s. 3(1) do little to narrow this initial broad scope. Paragraph (*g*), which refers to "any animate matter . . . contained in effluents, emissions or wastes that result from any work, undertaking or activity" could, on its plain wording, conceivably include any effluent containing human or animal waste, garbage containing food remnants, or similar items commonly dealt with by municipal waste disposal services.

La définition des «substances toxiques» à l'art. 11, conjuguée à celle du mot «substance» à l'art. 3, est une définition générale sans limites précises. Bien des activités humaines pourraient impliquer l'utilisation de matières visées par la définition de «substances toxiques» contenue dans la loi contestée. Comme nous l'avons vu, le mot «substance» est défini comme incluant «[t]oute matière organique ou inorganique, animée ou inanimée». Les alinéas *a*) à *g*) de la définition de l'art. 3 contribuent peu à restreindre cette large portée initiale. Il est concevable que, vu son libellé, l'al. *g*), qui renvoie aux «matières animées [. . .] qui sont contenu[es] dans les effluents, les émissions ou les déchets attribuables à des travaux, des entreprises ou des activités», porte également sur les effluents contenant des excréments humains ou animaux, des déchets contenant des restes de table ou d'autres objets similaires dont s'occupent communément les services municipaux d'élimination des déchets.

70 Furthermore, by virtue of s. 11(*a*), a "toxic substance" may be any form of distinguishable matter which has or even simply may have "an immediate or long-term harmful effect on the environment". Section 11(*a*) equates "toxic" with "harmful

En outre, aux termes de l'al. 11*a*), une «substance toxique» peut être toute forme de matière distinguable de nature à avoir, «immédiatement ou à long terme, un effet nocif sur l'environnement». L'alinéa 11*a*) assimile «toxique» à «effet nocif». À

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effect". In our opinion, this is a very broad definition of "toxic". While it would be difficult to disagree that "toxic" necessarily implies a "harmful effect", the converse, "that which has a harmful effect is toxic" is more questionable and quite exceeds the plain and ordinary meaning of "toxic". "Toxic" is more narrowly defined in *The Concise Oxford Dictionary* (9th ed. 1995), at p. 1475, as "of or relating to poison (*toxic symptoms*); poisonous (*toxic gas*); caused by poison (*toxic anaemia*)". A more circumscribed definition of "toxic substances" would be required in ss. 11 and 3 of the Act in order to give substance to the appellant's submission that this legislation is aimed at a distinct form of pollution, namely chemical pollution.

notre avis, il s'agit là d'une définition très large du mot «toxique». Même s'il était difficile de ne pas admettre que «toxique» implique nécessairement «effet nocif», l'inverse, c'est-à-dire que «ce qui a un effet nocif est toxique» est plus discutable et excède complètement le sens ordinaire du mot «toxique». Le mot «toxique» reçoit une définition plus stricte dans *Le Nouveau Petit Robert* (1995), à la p. 2282: «**1.** [. . .] Poison. *Toxiques gazeux* ou *volatiles, minéraux, organiques.* **2.** [. . .] Qui agit comme un poison. *Substance toxique* [. . .] *Gaz toxiques.* [. . .] *Supprimer les effets toxiques.* [. . .] *Champignons toxiques* . . .» Il faudrait que les art. 11 et 3 de la Loi donnent une définition plus circonscrite de l'expression «substances toxiques» pour étayer la prétention de l'appelant que cette loi vise une forme précise de pollution, savoir la pollution chimique.

Section 15 does specify some criteria to refine the notion of "toxic substance". However, it does not narrow the broad definition of that notion. Section 15 only offers investigatory guidelines. The Minister of the Environment and the Governor in Council are not legally bound by any of the investigatory reports prepared pursuant to s. 15. The scope of the Minister's power to regulate in ss. 34 and 35 is limited only by the broad definition of "toxic substance" and "environment" in ss. 11 and 3. Moreover, the investigatory process provided for in s. 15 can be totally bypassed with respect to the issuing of an interim order pursuant to s. 35. Under the powers conferred by s. 35(1), the Minister of the Environment may issue an interim order, which has the same regulatory scope and effect as a regulation under s. 34(1) or (2), whenever satisfied that "immediate action is required to deal with a significant danger to the environment or to human life or health" (emphasis added).

71 L'article 15 énonce effectivement certains critères pour raffiner la notion de «substance toxique». Cependant, il ne restreint pas la définition large donnée à cette notion. L'article 15 ne fait qu'offrir des lignes directrices en matière d'enquête. Ni le ministre de l'Environnement ni le gouverneur en conseil ne sont liés légalement par un rapport d'enquête préparé conformément à l'art. 15. L'étendue du pouvoir de réglementer conféré au Ministre par les art. 34 et 35 n'est limitée que par les définitions larges des expressions «substance toxique» et «environnement» que l'on trouve aux art. 11 et 3. En outre, le processus d'enquête prévu à l'art. 15 peut être complètement évité en ce qui concerne la prise d'un arrêté d'urgence conformément à l'art. 35. En vertu des pouvoirs que lui confère le par. 35(1), le ministre de l'Environnement peut prendre un arrêté d'urgence ayant les mêmes portée et effet qu'un règlement d'application du par. 34(1) ou (2) lorsqu'il est convaincu qu'une «intervention immédiate est nécessaire afin de parer à tout danger appréciable soit pour l'environnement, soit pour la vie humaine ou la santé» (je souligne).

In sum, the investigatory guidelines contemplated by s. 15 do not effectively narrow the broad definitions given to "toxic substances" in ss. 11 and 3; that is, they do not guarantee that only the

72 Somme toute, les lignes directrices en matière d'enquête envisagées à l'art. 15 n'ont pas pour effet de limiter les définitions larges données à l'expression «substances toxiques» aux art. 11 et 3,

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most serious, diffuse and persistent toxic substances will be caught by the regulatory power conferred by ss. 34 and 35.

73 Nor are we convinced by the argument of the interveners Pollution Probe et al. that federal practice demonstrates that the impugned legislation is specifically targeted to address only those toxic substances that pose the greatest harm to human health or to the environment. It is true, as the interveners note, that out of the over 21,000 substances on the Domestic Substances List, relatively few, i.e. 44, were placed on the Priority Substances List by the federal government by 1989. Of these 44 substances, just 25 were determined to be toxic, and only a subset of these 25 have been subject to regulations. However, the constitutional validity of a statute cannot depend on the ebb and flow of existing government practice or the manner in which discretionary powers appear thus far to be exercised. It is the boundaries to the exercise of that discretion and the scope of the regulatory power created by the impugned legislation that are at issue here. It is no answer to a charge that a law is unconstitutional to say that it is only used sparingly. If it is unconstitutional, it cannot be used at all.

74 With respect to geographical limits, although the preamble of the Act suggests that its ambit is restricted to those substances that "cannot always be contained within geographic boundaries", nowhere in Part II or the enabling provisions at issue is there any actual limitation based on territorial considerations. The notion of "environment" as defined in s. 3 includes all conceivable environments without regard to provincial boundaries. Thus, Part II applies with equal force to "toxic substances" that are wholly situated within a province or whose effects are localized or entirely intraprovincial and to those which move across interprovincial or international borders.

c'est-à-dire qu'elles ne garantissent pas que seules les substances toxiques les plus dangereuses, diffuses et persistantes seront assujetties au pouvoir de réglementation conféré par les art. 34 et 35.

Nous ne sommes pas non plus convaincus par l'argument des intervenants Pollution Probe et autres qu'il ressort de la pratique fédérale que la loi contestée vise uniquement les substances toxiques qui sont les plus nocives pour la santé humaine ou l'environnement. Il est vrai, comme le font remarquer les intervenants, que des quelque 21 000 substances figurant sur la liste intérieure, relativement peu (c.-à-d. 44) avaient été inscrites sur la liste prioritaire par le gouvernement fédéral en 1989. De ces 44 substances, seulement 25 ont été jugées toxiques et seul un sous-ensemble de ces dernières a fait l'objet d'une réglementation. Cependant, la constitutionnalité d'une loi ne peut dépendre des aléas de la pratique gouvernementale existante ni de la façon dont des pouvoirs discrétionnaires semblent avoir été exercés jusqu'à maintenant. Ce sont les limites de l'exercice de ces pouvoirs discrétionnaires et l'étendue du pouvoir de réglementation créé par la loi contestée qui sont en cause ici. Il ne suffit pas de répondre qu'une loi est appliquée avec modération pour repousser une prétention qu'elle est inconstitutionnelle. Si la loi est inconstitutionnelle, elle ne peut pas du tout s'appliquer.

Quant aux limites géographiques, même si le préambule de la Loi laisse entendre qu'elle ne s'applique qu'aux substances «qu'il n'est pas toujours possible de circonscrire au territoire touché», ni la partie II ni les dispositions habilitantes en cause ne contiennent une véritable restriction fondée sur des considérations territoriales. La notion d'«environnement», définie à l'art. 3, comprend tous les environnements imaginables sans égard aux frontières provinciales. Ainsi, la partie II s'applique aussi bien aux «substances toxiques» qui se trouvent entièrement à l'intérieur d'une province ou dont les effets sont localisés ou se font ressentir exclusivement à l'intérieur de cette province qu'à celles qui franchissent les frontières interprovinciales ou internationales.

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The majority of this Court in *Crown Zellerbach*, *supra*, at pp. 436-37, found marine pollution to constitute a single, distinct, and indivisible subject-matter, on the basis that the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, distinguished between the pollution of salt water and the pollution of fresh water, both types of waters having different compositions and characteristics. In Part II of the *Canadian Environmental Protection Act*, there is no analogous clear distinction between types of toxic substances, either on the basis of degree of persistence and diffusion into the environment and the severity of their harmful effect or on the basis of their extraprovincial aspects. The lack of any distinctions similar to those in the legislation upheld in *Crown Zellerbach* means that the Act has a regulatory scope which can encroach widely upon several provincial heads of power, notably, s. 92(13) "property and civil rights", s. 92(16) "matters of a merely local or private nature", and s. 92(10) "local works and undertakings". In our view, this failure to circumscribe the ambit of the Act demonstrates that the enabling provisions lack the necessary singleness, distinctiveness and indivisibility.

75 Notre Cour à la majorité a conclu, dans l'arrêt *Crown Zellerbach*, précité, aux pp. 436 et 437, que la pollution des mers constituait une matière unique, particulière et indivisible, compte tenu du fait que la *Loi sur l'immersion de déchets en mer*, S.C. 1974-75-76, ch. 55, établissait une distinction entre la pollution des eaux salées et celle des eaux douces, chacun de ces types d'eaux ayant une composition et des caractéristiques lui étant propres. La partie II de la *Loi canadienne sur la protection de l'environnement* n'établit pas de distinction claire semblable entre des types de substances toxiques, que ce soit en fonction de leur degré de persistance et de diffusion dans l'environnement et de la sévérité de leur effet nocif, ou de leurs aspects extraprovinciaux. L'absence de distinctions semblables à celles qu'établissait la loi maintenue dans l'arrêt *Crown Zellerbach* signifie que la Loi a une portée réglementaire susceptible d'empiéter largement sur plusieurs chefs de compétence provinciale, notamment le par. 92(13) «la propriété et les droits civils», le par. 92(16) «les matières d'une nature purement locale ou privée» et le par. 92(10) «les ouvrages et entreprises d'une nature locale». À notre avis, il ressort de cette omission de circonscrire la portée de la Loi que les dispositions habilitantes n'ont pas l'unicité, la particularité et l'indivisibilité requises.

Another criterion that can be used to determine whether the subject matter sought to be regulated can be sufficiently distinguished from matters of provincial interest is to consider whether the failure of one province to enact effective regulation would have adverse effects on interests exterior to the province. This indicator has also been named the "provincial inability" test (see *Crown Zellerbach*, at pp. 432-34). If the impugned provisions of the Act were indeed restricted to chemical substances, like PCBs, whose effects are diffuse, persistent and serious, then a *prima facie* case could be made out as to the grave consequences of any one province failing to regulate effectively their emissions into the environment. However, the s. 11(*a*) threshold of "immediate or long-term harmful effect on the environment" also encompasses substances whose effects may only be temporary or local. Therefore, the notion of "toxic

76 Un autre critère pouvant servir à déterminer si la matière que l'on cherche à réglementer peut être suffisamment distinguée des matières d'intérêt provincial consiste à se demander si l'omission d'une province d'adopter une réglementation efficace aurait des effets préjudiciables sur des intérêts à l'extérieur de celle-ci. Cet indicateur a également été appelé le critère de l'«incapacité provinciale» (voir *Crown Zellerbach*, aux pp. 432 à 434). Si les dispositions contestées de la Loi portaient, en fait, uniquement sur des substances chimiques, tels les BPC, dont les effets sont diffus, persistants et sérieux, les conséquences graves de l'omission d'une province de réglementer efficacement leur rejet dans l'environnement pourraient être établies à première vue. Cependant, le seuil établi à l'al. 11*a*), selon lequel les substances doivent avoir, «immédiatement ou à long terme, un effet nocif sur l'environnement» vise également les subs-

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substances" as defined in the Act is inherently divisible. Those substances whose harmful effects are only temporary and localized would appear to be well within provincial ability to regulate. To the extent that Part II of the Act includes the regulation of "toxic substances" that may only affect the particular province within which they originate, the appellant bears a heavy burden to demonstrate that provinces themselves would be incapable of regulating such toxic emissions. It has not discharged this burden before this Court.

77 The s. 34(6) equivalency provision also implicitly undermines the appellant's submission that the provinces are incapable of regulating toxic substances. If the provinces were unable to regulate, there would be even more reason for the federal government not to agree to withdraw from the field. Section 34(6) demonstrates that the broad subject matter of regulating toxic substances, as defined by the Act, is inherently or potentially divisible

78 These reasons confirm that the subject matter does not fulfill the characteristics of singleness, distinctiveness and indivisibility required to qualify as a national concern matter.

(ii) Impact on Provincial Jurisdiction

79 Having concluded that the requirement of singleness, distinctiveness and indivisibility was not satisfied, it is unnecessary to examine the second criterion of the national concern test. The subject matter at issue does not qualify as a national concern matter and, since it was not suggested that it could be upheld as a matter of national emergency, it is therefore not justified by the peace, order and good government power.

E. *The Trade and Commerce Power*

80 The interveners Pollution Probe et al. submit, in the alternative, that ss. 34 and 35 of the Act as well

tances dont les effets peuvent être seulement temporaires ou locaux. Par conséquent, la notion de «substances toxiques», définie dans la Loi, est divisible en soi. Les substances dont les effets nocifs ne sont que temporaires et localisés sembleraient sans contredit relever de la capacité des provinces en matière de réglementation. Dans la mesure où la partie II de la Loi inclut la réglementation de «substances toxiques» susceptibles de toucher uniquement la province où elles émanent, l'appelant a le lourd fardeau d'établir que les provinces elles-mêmes seraient incapables de réglementer ces émissions toxiques. Il ne s'est pas acquitté de ce fardeau devant notre Cour.

La disposition relative aux dispositions équivalentes que l'on trouve au par. 34(6) mine aussi implicitement la prétention de l'appelant que les provinces sont incapables de réglementer les substances toxiques. Si les provinces étaient incapables de réglementer ces substances, le gouvernement fédéral serait d'autant plus justifié de refuser de se retirer de ce domaine. Le paragraphe 34(6) démontre que le large sujet de la réglementation des substances toxiques, défini dans la Loi, est fondamentalement ou potentiellement divisible.

Les présents motifs confirment que la matière n'a pas l'unicité, la particularité et l'indivisibilité requises pour être qualifiée de question d'intérêt national.

(ii) Effet sur la compétence provinciale

Ayant conclu qu'il n'a pas été satisfait à l'exigence d'unicité, de particularité et d'indivisibilité, il est inutile d'examiner le deuxième volet du critère de l'intérêt national. La matière visée en l'espèce ne peut être qualifiée de question d'intérêt national et, comme on n'a pas laissé entendre qu'il pourrait s'agir d'une question d'urgence nationale, elle n'est donc pas justifiée par la compétence en matière de paix, d'ordre et de bon gouvernement.

E. *La compétence en matière d'échanges et de commerce*

Les intervenants Pollution Probe et autres soutiennent subsidiairement que les art. 34 et 35 de la

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as the Interim Order can be sustained as an exercise of the federal trade and commerce power under s. 91(2) of the *Constitution Act, 1867*. More specifically, they argue that the "general trade and commerce power" recognized in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, can justify the federal regulations, which are aimed at controlling the use and release of toxic substances in the course of commercial activities.

Pollution Probe et al. refer to Laskin C.J.'s comments in *Wetmore*, *supra*, at p. 288, that the part of the *Food and Drugs Act* that regulated the labelling, packaging and manufacture of food and drug products "invites the application of the trade and commerce power". These comments, they argue, should similarly apply to those parts of the Interim Order and s. 34(1) that address the manufacture, sale and commercial use of PCBs and other toxic substances.

We reject these submissions for two main reasons. First, it is clear that the "pith and substance" of the impugned legislation does not concern trade and commerce, even if trade and commerce may be affected by the application of these provisions. The interveners Pollution Probe et al. seem to recognize this insofar as they submit that the trade and commerce power merely provides "supplemental authority" for upholding the Interim Order and the enabling provisions.

Secondly, even if it could be assumed that certain parts of s. 34(1) of the Act were aimed at the regulation of trade and commerce (e.g. those paragraphs dealing with importing and exporting), the remainder of s. 34(1) would, based on the arguments adduced above, be *ultra vires* Parliament and would have to be struck down. Assuming that the "trade and commerce" elements could be saved, therefore, they would have to be "severed"

Loi de même que l'arrêté d'urgence peuvent être maintenus en tant qu'exercice de la compétence fédérale en matière d'échanges et de commerce prévue au par. 91(2) de la *Loi constitutionnelle de 1867*. Plus précisément, ils prétendent que la «compétence générale en matière d'échanges et de commerce» reconnue dans l'arrêt *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641, peut justifier la réglementation fédérale, qui vise à contrôler l'utilisation et le rejet de substances toxiques dans le cadre d'activités commerciales.

81 Les intervenants Pollution Probe et autres renvoient aux commentaires du juge en chef Laskin dans *Wetmore*, précité, à la p. 288, selon lesquels la partie de la *Loi des aliments et drogues* qui réglementait l'étiquetage, l'empaquetage et la fabrication de produits alimentaires et pharmaceutiques «emporte [. . .] l'application de la compétence en matière d'échanges et de commerce». Ces commentaires, prétendent-ils, devraient s'appliquer de la même façon aux parties de l'arrêté d'urgence et du par. 34(1) qui traitent de la fabrication, de la vente et de l'utilisation à des fins commerciales de BPC et d'autres substances toxiques.

82 Nous rejetons ces arguments principalement pour deux raisons. Premièrement, il est clair que le «caractère véritable» de la loi contestée ne concerne pas les échanges et le commerce, même si ceux-ci peuvent être touchés par l'application de ces dispositions. Les intervenants Pollution Probe et autres semblent reconnaître cela dans la mesure où ils soutiennent que la compétence en matière d'échanges et de commerce ne constitue qu'une [TRADUCTION] «raison supplémentaire» de confirmer la validité de l'arrêté d'urgence et des dispositions habilitantes.

83 Deuxièmement, même s'il pouvait être tenu pour acquis que certaines parties du par. 34(1) de la Loi visaient la réglementation des échanges et du commerce (par exemple, les alinéas traitant de l'importation et de l'exportation), le reste du par. 34(1), selon les arguments présentés plus haut, excéderait la compétence du Parlement et devrait être annulé. À supposer que les éléments «échanges et commerce» puissent être sauve-

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from the paragraphs of s. 34(1) that would be struck down. It is not altogether clear that this could be done, particularly since the portion of the statute remaining after severance must be capable of standing independently of the severed portion. In this case, the paragraphs are too "inextricably bound" to be able to survive independently (see Hogg, *supra*, at p. 15-21). For these reasons, we cannot agree with the interveners' submission that the impugned legislation can be justified as an exercise of the federal trade and commerce power.

gardés, ils devraient, par conséquent, être «dissociés» des alinéas du par. 34(1) qui seraient annulés. Il n'est pas absolument certain que cela serait possible, étant donné, en particulier, que la partie restante de la Loi doit pouvoir exister indépendamment de la partie retranchée. En l'espèce, les alinéas sont trop [TRADUCTION] «inextricablement liés» pour pouvoir subsister indépendamment (voir Hogg, *op. cit.*, à la p. 15-21). Pour ces motifs, nous ne pouvons souscrire à l'argument des intervenants que la loi contestée peut se justifier en tant qu'exercice de la compétence fédérale en matière d'échanges et de commerce.

6. Conclusions and Disposition

84 For the above reasons, we find that the impugned provisions are not justified under any of the heads of power granted to Parliament by s. 91. We would therefore declare them *ultra vires* and dismiss the appellant's appeal with costs. We would answer the constitutional question as follows:

Do s. 6(*a*) of the *Chlorobiphenyls Interim Order*, PC 1989-296, and the enabling legislative provisions, ss. 34 and 35 of the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.), fall in whole or in part within the jurisdiction of the Parliament of Canada to make laws for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867* or its criminal law jurisdiction under s. 91(27) of the *Constitution Act, 1867* or otherwise fall within its jurisdiction?

Answer: No.

6. Conclusion et dispositif

Pour les motifs qui précèdent, nous concluons que les dispositions contestées ne sont pas justifiées en vertu de l'un ou l'autre des chefs de compétence attribués au Parlement par l'art. 91. En conséquence, nous sommes d'avis de les déclarer inconstitutionnelles, de rejeter le pourvoi de l'appelant, avec dépens, et de répondre à la question constitutionnelle de la façon suivante:

L'alinéa 6*a*) de l'*Arrêté d'urgence sur les biphényles chlorés*, C.P. 1989-296, ainsi que les dispositions législatives habilitantes, les art. 34 et 35 de la *Loi canadienne sur la protection de l'environnement*, L.R.C. (1985), ch. 16 (4e suppl.), relèvent-ils en tout ou en partie de la compétence du Parlement du Canada de légiférer pour la paix, l'ordre et le bon gouvernement du Canada en vertu de l'art. 91 de la *Loi constitutionnelle de 1867* ou de la compétence en matière criminelle suivant le par. 91(27) de la *Loi constitutionnelle de 1867*, ou autrement?

Réponse: Non.

The judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ. was delivered by

Version française du jugement des juges La Forest, L'Heureux-Dubé, Gonthier, Cory et McLachlin rendu par

85 LA FOREST J. — This Court has in recent years been increasingly called upon to consider the interplay between federal and provincial legislative powers as they relate to environmental protection. Whether viewed positively as strategies for maintaining a clean environment, or negatively as measures to combat the evils of pollution, there can be no doubt that these measures relate to a public purpose of superordinate importance, and one in

LE JUGE LA FOREST — Au cours des dernières années, on a demandé de plus en plus à notre Cour d'examiner l'interaction entre les pouvoirs législatifs du Parlement et ceux des législatures provinciales en ce qui concerne la protection de l'environnement. Qu'elles soient considérées positivement comme des stratégies en vue de maintenir un environnement propre, ou négativement comme des dispositions prises en vue de

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which all levels of government and numerous organs of the international community have become increasingly engaged. In the opening passage of this Court's reasons in what is perhaps the leading case, *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 16-17, the matter is succinctly put this way:

> The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legislative schemes and administrative structures.

The all-important duty of Parliament and the provincial legislatures to make full use of the legislative powers respectively assigned to them in protecting the environment has inevitably placed upon the courts the burden of progressively defining the extent to which these powers may be used to that end. In performing this task, it is incumbent on the courts to secure the basic balance between the two levels of government envisioned by the Constitution. However, in doing so, they must be mindful that the Constitution must be interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated. Given the pervasive and diffuse nature of the environment, this reality poses particular difficulties in this context.

This latest case in which this Court is required to define the nature of legislative powers over the environment is of major significance. The narrow issue raised is the extent to and manner in which the federal Parliament may control the amount of and conditions under which Chlorobiphenyls (PCBs) — substances well known to pose great dangers to humans and the environment generally — may enter into the environment. However, the attack on the federal power to secure this end is not really aimed at the specific provisions respecting

combattre les maux engendrés par la pollution, il ne fait pas de doute que ces mesures visent un objectif public d'une importance supérieure, objectif que tous les niveaux de gouvernement et les nombreux organismes de la communauté internationale ont entrepris de plus en plus de poursuivre. Au tout début des motifs de notre Cour dans ce qui est peut-être l'arrêt de principe, *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, aux pp. 16 et 17, la question est exposée succinctement de la manière suivante:

> La protection de l'environnement est devenue l'un des principaux défis de notre époque. Pour y faire face, les gouvernements et les organismes internationaux ont participé à la création d'un éventail important de régimes législatifs et de structures administratives.

86 Le devoir de la plus haute importance que le Parlement et les législatures provinciales ont d'utiliser pleinement les pouvoirs législatifs qui leur ont été respectivement conférés en matière de protection de l'environnement a inévitablement imposé aux tribunaux l'obligation de définir progressivement la mesure dans laquelle ces pouvoirs peuvent être utilisés à cette fin. Pour s'acquitter de cette tâche, il incombe aux tribunaux d'établir l'équilibre fondamental entre les deux niveaux de gouvernement envisagés par la Constitution. Toutefois, pour ce faire, ils doivent se rappeler que la Constitution doit être interprétée de manière à tenir compte pleinement des nouvelles réalités et de la nature du sujet que l'on veut réglementer. En raison du caractère omniprésent et diffus de l'environnement, cette réalité pose des difficultés particulières dans le présent contexte.

87 La présente affaire, qui est la plus récente dans laquelle on demande à notre Cour de définir la nature des pouvoirs législatifs en matière d'environnement, revêt une importance majeure. Il s'agit strictement de savoir dans quelle mesure et de quelle manière le législateur fédéral peut régir la quantité de biphényles chlorés (BPC) — substances reconnues comme étant très dangereuses pour les humains et l'environnement en général — qui peut pénétrer dans l'environnement, et les conditions dans lesquelles leur rejet peut se faire.

PCBs. Rather, it puts into question the constitutional validity of its enabling statutory provisions. What is really at stake is whether Part II ("Toxic Substances") of the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.), which empowers the federal Ministers of Health and of the Environment to determine what substances are toxic and to prohibit the introduction of such substances into the environment except in accordance with specified terms and conditions, falls within the constitutional power of Parliament.

Cependant, la contestation du pouvoir fédéral de réaliser cette fin ne vise pas vraiment les dispositions particulières concernant les BPC. Elle met plutôt en question la constitutionnalité de ses dispositions législatives habilitantes. Ce qui est vraiment en cause, c'est de savoir si la partie II («Substances toxiques») de la *Loi canadienne sur la protection de l'environnement*, L.R.C. (1985), ch. 16 (4e suppl.), qui habilite les ministres fédéraux de la Santé et de l'Environnement à déterminer quelles substances sont toxiques et à interdire le rejet de ces substances dans l'environnement à moins que certaines conditions particulières soient respectées, relève de la compétence constitutionnelle du Parlement.

Facts

Les faits

88 The case arose in this way. The respondent Hydro-Québec allegedly dumped polychlorinated biphenyls (PCBs) into the St. Maurice River in Quebec in early 1990. On June 5, 1990, it was charged with the following two infractions under s. 6(*a*) of the *Chlorobiphenyls Interim Order*, P.C. 1989-296 (hereafter "Interim Order"), which was adopted and enforced pursuant to ss. 34 and 35 of the *Canadian Environmental Protection Act*:

[TRANSLATION]

[1] From January 1 to January 3, 1990, did unlawfully release more than 1 gram per day of chlorobiphenyls into the environment contrary to s. 6(*a*) of the *Chlorobiphenyls Interim Order*, P.C. 1989-29[6] of February 23, 1989, thereby committing an offence under ss. 113(*i*) and (*o*) of the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.);

[2] On or about January 8, 1990, following the release into the environment, in contravention of s. 6(*a*) of the *Chlorobiphenyls Interim Order*, P.C. 1989-296 of February 23, 1989, of a substance specified in Schedule I to the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.), to wit: chlorobiphenyls . . . did fail to report the matter to an inspector as soon as possible in the circumstances contrary to s. 36(1)(*a*) of the said Act, thereby committing an offence under ss. 113(*h*) and (*o*) of the said Act.

L'affaire a pris naissance de la façon suivante. L'intimée Hydro-Québec aurait déversé des biphényles polychlorés (BPC) dans la rivière St-Maurice au Québec, au début de 1990. Le 5 juin 1990, elle a été accusée d'avoir commis les deux infractions suivantes en vertu de l'al. 6*a*) de *l'Arrêté d'urgence sur les biphényles chlorés*, C.P. 1989-296 (ci-après l'«arrêté d'urgence»), qui a été pris et mis à exécution conformément aux art. 34 et 35 de la *Loi canadienne sur la protection de l'environnement*:

[1] Du 1er janvier au 3 janvier 1990, a illégalement rejeté, dans l'environnement, plus d'un gramme par jour de biphényles chlorés contrairement à l'alinéa 6*a*) de *l'Arrêté d'urgence sur les biphényles chlorés*, C.P. 1989-29[6] du 23 février 1989, commettant ainsi l'infraction prévue aux alinéas 113*i*) et *o*) de la *Loi canadienne sur la protection de l'environnement*, L.R.C. de 198[5], 4e suppl., c. 16;

[2] Le ou vers le 8 janvier 1990, après le rejet dans l'environnement en violation de l'alinéa 6*a*) de *l'Arrêté d'urgence sur les biphényles chlorés*, C.P. 1989-296 du 23 février 1989, d'une substance inscrite à l'annexe I de la *Loi canadienne sur la protection de l'environnement*, L.R.C. de 198[5], 4e suppl., c. 16, à savoir: des biphényles chlorés [. . .] a omis de faire rapport de la situation à l'inspecteur dans les meilleurs délais possible, contrairement à l'alinéa 36(1)*a*) de ladite loi, commettant ainsi l'infraction prévue aux alinéas 113*h*) et *o*) de ladite Loi.

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On July 23, 1990, the respondent pleaded not guilty to both charges before the Court of Québec.

On March 4, 1991, the respondent Hydro-Québec brought a motion before Judge Michel Babin seeking to have ss. 34 and 35 of the Act as well as s. 6(*a*) of the Interim Order itself declared *ultra vires* the Parliament of Canada on the ground that they do not fall within the ambit of any federal head of power set out in s. 91 of the *Constitution Act, 1867*. The Attorney General of Quebec intervened in support of the respondent's position. Judge Babin granted the motion on August 12, 1991 ([1991] R.J.Q. 2736), and an appeal to the Quebec Superior Court was dismissed by Trottier J. on August 6, 1992 ([1992] R.J.Q. 2159). A further appeal to the Court of Appeal of Quebec was dismissed on February 14, 1995: [1995] R.J.Q. 398, 67 Q.A.C. 161, 17 C.E.L.R. (N.S.) 34, [1995] Q.J. No. 143 (QL). Leave to appeal to this Court was granted on October 12, 1995: [1995] 4 S.C.R. vii.

Judicial History

A. *Court of Québec*

The principal submission of the respondent before Judge Babin was that s. 6(*a*) of the Interim Order as well as the enabling provisions of the *Canadian Environmental Protection Act* pursuant to which it was adopted are *ultra vires* Parliament on the ground that they cannot be justified as a matter of "national concern" under the "Peace, Order, and good Government" clause of s. 91 or the criminal law power (s. 91(27)) or under any other federal head of power under s. 91 of the *Constitution Act, 1867*. The appellant argued that the provisions in question could be justified as a matter of national concern as well as under the criminal law power. Judge Babin considered that the main issue in the dispute as regards either head of power was whether Parliament has the power to enact provisions dealing with disposal of toxic substances into the environment when the

Le 23 juillet 1990, l'intimée a plaidé non coupable relativement aux deux accusations devant la Cour du Québec.

89 Le 4 mars 1991, l'intimée Hydro-Québec a déposé une requête devant le juge Michel Babin en vue de faire déclarer que les art. 34 et 35 de la Loi ainsi que l'al. 6*a*) de l'arrêté d'urgence lui-même excèdent la compétence du Parlement du Canada pour le motif qu'ils ne relèvent d'aucun chef de compétence fédérale énoncé à l'art. 91 de la *Loi constitutionnelle de 1867*. Le procureur général du Québec est intervenu à l'appui de la position de l'intimée. Le juge Babin a accueilli la requête le 12 août 1991([1991] R.J.Q. 2736), et le juge Trottier a rejeté, le 6 août 1992, un appel interjeté devant la Cour supérieure du Québec ([1992] R.J.Q. 2159). Un autre appel interjeté devant la Cour d'appel du Québec a été rejeté le 14 février 1995: [1995] R.J.Q. 398, 67 Q.A.C. 161, 17 C.E.L.R. (N.S.) 34, [1995] A.Q. nº 143 (QL). L'autorisation de pourvoi devant notre Cour a été accordée le 12 octobre 1995: [1995] 4 R.C.S. vii.

Historique des procédures judiciaires

A. *Cour du Québec*

90 Devant le juge Babin, l'intimée a principalement soutenu que l'al. 6*a*) de l'arrêté d'urgence ainsi que les dispositions habilitantes de la *Loi canadienne sur la protection de l'environnement*, conformément auxquelles il a été adopté, excèdent la compétence du Parlement pour le motif qu'ils ne peuvent pas être justifiés à titre de question d'«intérêt national» en vertu de la clause de l'art. 91 concernant «la paix, l'ordre et le bon gouvernement», ou de la compétence en matière de droit criminel (par. 91(27)), ou encore en vertu de tout autre chef de compétence fédérale énoncé à l'art. 91 de la *Loi constitutionnelle de 1867*. L'appelant a fait valoir que les dispositions en cause pouvaient être justifiées à titre de question d'intérêt national, ainsi qu'en vertu de la compétence en matière de droit criminel. Le juge Babin a considéré que la principale question en litige concernant l'un ou l'autre chef de compétence était de savoir si le Parlement a le pouvoir d'adopter des dispositions relatives au rejet de substances toxiques dans

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"environment" in question lies exclusively within the borders of a single province.

91 Beginning with the question of whether or not the provisions at issue fall within the "national concern" doctrine under the peace, order and good government clause, Judge Babin applied the criteria enunciated by this Court in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, for determining when a matter may properly be considered as falling within this power. He found that particularly in view of the wide definitions given to the terms "environment" and "toxic" under ss. 3 and 11 of the *Canadian Environmental Protection Act*, the provisions in question were unacceptably broad in that they could not be said to be limited in scope to a subject matter having the "singleness, distinctiveness and indivisibility" required under the *Crown Zellerbach* test. For much the same reasons, he found that to attribute exclusively to Parliament the subject matter at which the provisions are aimed would be to infringe significantly upon various areas of provincial competence and disturb the federal-provincial distribution of powers to an unacceptable degree.

92 Judge Babin also found that the provisions in question did not fall within the ambit of the criminal law power. Specifically, he held that while the provisions at issue are clearly directed at protecting human life and health, they are also directed at protecting the environment in general and that while the former aim constitutes a "criminal public purpose" in the sense set out in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the *Margarine Reference*), at p. 50, the latter does not. Similarly, he found that the mere fact that the Act in question here contains provisions setting out penalties for violations of its terms does not, in and of itself, affect the Act's "regulatory nature". Having found that the provisions at issue did not fall within either the "national concern" doctrine of the peace, order and good government clause or the criminal law power

l'environnement lorsque l'«environnement» en question se trouve exclusivement à l'intérieur d'une seule province.

Commençant par la question de savoir si les dispositions en cause sont visées par la théorie de l'«intérêt national» justifiant l'application de la clause concernant la paix, l'ordre et le bon gouvernement, le juge Babin a appliqué les critères énoncés par notre Cour dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, pour déterminer quand une question peut être considérée à juste titre comme relevant de ce pouvoir. Il a conclu que, compte tenu particulièrement des définitions larges qui ont été données des mots «environnement» et «toxique» aux art. 3 et 11 de la *Loi canadienne sur la protection de l'environnement*, les dispositions en question avaient une portée large inacceptable du fait qu'on ne pouvait pas les considérer comme limitées à un sujet ayant «l'unicité, la particularité et l'indivisibilité» requises en vertu du critère de l'arrêt *Crown Zellerbach*. Pour à peu près les mêmes raisons, il a conclu que l'attribution exclusive au Parlement du sujet visé par les dispositions reviendrait à empiéter sensiblement sur divers domaines de compétence provinciale et à perturber de manière inacceptable le partage des pouvoirs entre le Parlement et les législatures provinciales.

Le juge Babin a également statué que les dispositions en cause ne relevaient pas de la compétence en matière de droit criminel. Il a conclu précisément que, bien que ces dispositions visent clairement à protéger la vie et la santé humaines, elles visent aussi à protéger l'environnement en général, et que, même si le premier objectif constitue un «objectif public du droit criminel» au sens donné à cette expression dans *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1 (le *Renvoi sur la margarine*), à la p. 50, le dernier n'en constitue pas un. De même, il a décidé que le simple fait que la loi en question ici contienne des dispositions énonçant des peines pour sa violation ne modifie pas en soi sa «nature réglementaire». Ayant conclu que les dispositions en cause ne relevaient ni de la théorie de l'«intérêt national» justifiant l'application de la clause concernant la paix,

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(or within any other head of federal competence), Judge Babin held s. 6(*a*) of the Interim Order *ultra vires* Parliament.

B. *Quebec Superior Court*

On the appeal to the Superior Court, Trottier J. began by explaining that, pursuant to this Court's reasons in *Oldman River*, *supra*, the environment *per se* does not constitute a specific domain of legislative competence under ss. 91 and 92 of the *Constitution Act, 1867*. Holding in much the same manner as Judge Babin that the definitions of "toxic" and "environment" are extremely broad, Trottier J. held that the provisions in question could not be upheld as *intra vires* under the national concern doctrine. Similarly, he found the provisions could not be justified under the criminal law power on the basis that their true purpose was not to prohibit activity but to regulate it. Finding no other head of power to be applicable, he dismissed the appeal.

C. *Quebec Court of Appeal*

On the appeal to the Quebec Court of Appeal, Tourigny J.A., writing for the court, began her reasons by holding that even though one of the effects of the Act in question is to protect human life and health, the true "pith and substance" both of s. 6(*a*) of the Interim Order and of the enabling provisions of the Act under which it was adopted is "the protection of the environment". Following this Court's decision in *Oldman River*, Tourigny J.A. recognized that neither Parliament nor the provinces are vested with legislative competence regarding the environment *per se* and that environmental legislation will therefore only fall within the jurisdiction of either level of government if it is ancillary to a head of power listed in ss. 91 or 92 of the *Constitution Act, 1867*.

l'ordre et le bon gouvernement, ni de la compétence en matière de droit criminel (ou de tout autre chef de compétence fédérale), le juge Babin a statué que l'al. 6*a*) de l'arrêté d'urgence excédait la compétence du Parlement.

B. *Cour supérieure du Québec*

93 Lors de l'appel interjeté devant la Cour supérieure, le juge Trottier a commencé par expliquer que, conformément aux motifs de notre Cour dans *Oldman River*, précité, l'environnement ne constitue pas en soi un domaine particulier de compétence législative en vertu des art. 91 et 92 de la *Loi constitutionnelle de 1867*. Concluant, à peu près de la même manière que le juge Babin, que les définitions des mots «toxique» et «environnement» sont extrêmement larges, le juge Trottier a statué qu'il n'était pas possible de confirmer que les dispositions en cause sont constitutionnelles en vertu de la théorie de l'intérêt national. De même, il a conclu que les dispositions ne pouvaient pas être justifiées en vertu de la compétence en matière de droit criminel parce que leur véritable objectif était non pas d'interdire une activité, mais de la réglementer. Estimant qu'aucun autre chef de compétence n'était applicable, il a rejeté l'appel.

C. *Cour d'appel du Québec*

94 Lors de l'appel interjeté devant la Cour d'appel du Québec, le juge Tourigny a, au nom de la cour, commencé ses motifs en disant que, même si l'un des effets de la loi en question est de protéger la vie et la santé humaines, tant l'al. 6*a*) de l'arrêté d'urgence que les dispositions habilitantes de la Loi en vertu desquelles il a été adopté visent, de par leur «caractère véritable», «la protection de l'environnement». Suivant l'arrêt de notre Cour *Oldman River*, le juge Tourigny a reconnu que ni le Parlement ni les provinces ne sont investis du pouvoir de légiférer au sujet de l'environnement lui-même et que les lois en matière d'environnement ne relèveront donc de la compétence de l'un ou l'autre niveau de gouvernement que si elles sont subordonnées à un chef de compétence énuméré à l'art. 91 ou à l'art. 92 de la *Loi constitutionnelle de 1867*.

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95 Applying this principle to the matter at hand, Tourigny J.A. first examined whether the provisions in question can be said to fall within federal competence under the national concern doctrine. In light of this Court's decision in *Crown Zellerbach*, *supra*, she found the provisions could not be *intra vires* on this ground. She then examined the appellant's submission that the provisions could be justified under the "national emergency" doctrine under the peace, order and good government clause. She rejected this argument as well, holding both that there exists no "emergency" justifying the adoption of the provisions, and that, in any case, the provisions are not sufficiently temporary in nature as to satisfy the strict requirements of the national emergency doctrine.

Appliquant ce principe à l'affaire dont il était saisi, le juge Tourigny s'est d'abord demandé s'il était possible de dire que les dispositions en cause relevaient de la compétence fédérale en vertu de la théorie de l'intérêt national. Compte tenu de l'arrêt de notre Cour *Crown Zellerbach*, précité, elle a conclu que ces dispositions ne pouvaient pas être constitutionnelles pour cette raison. Puis, elle a examiné l'argument de l'appelant selon lequel les dispositions pouvaient être fondées en vertu de la théorie de l'«urgence nationale» justifiant l'application de la clause concernant la paix, l'ordre et le bon gouvernement. Elle a aussi rejeté cet argument, concluant qu'il n'y a aucune «urgence» justifiant l'adoption des dispositions et que, de toute façon, celles-ci ne sont pas suffisamment de nature temporaire pour satisfaire aux exigences strictes de la théorie de l'urgence nationale.

96 Finally, Tourigny J.A. analysed the appellant's submission that the impugned provisions fall within Parliament's jurisdiction over criminal law. While she recognized that this power has historically been given a relatively broad reading, she found that these provisions greatly exceed the ambit of what may properly be considered criminal law. She, therefore, held that the provisions in question do not fall within this federal power even though the Act does prohibit certain conduct and provides for the enforcement of such prohibitions through penalties.

Enfin, le juge Tourigny a analysé l'argument de l'appelant selon lequel les dispositions contestées relèvent de la compétence du Parlement en matière de droit criminel. Tout en reconnaissant que ce pouvoir a, dans le passé, reçu une interprétation assez large, elle a conclu que ces dispositions excèdent grandement ce qui peut être considéré à juste titre comme du droit criminel. Elle a donc jugé que les dispositions en cause ne relèvent pas de ce pouvoir fédéral même si la Loi interdit effectivement un certain comportement et prévoit la mise en œuvre de ces interdictions au moyen de peines.

D. *Constitutional Questions*

D. *Question constitutionnelle*

97 On December 21, 1995, Lamer C.J. framed the following constitutional question:

Le 21 décembre 1995, le juge en chef Lamer a formulé la question constitutionnelle suivante:

Do s. 6(*a*) of the *Chlorobiphenyls Interim Order*, P.C. 1989-296, and the enabling legislative provisions, ss. 34 and 35 of the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.), fall in whole or in part within the jurisdiction of the Parliament of Canada to make laws for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867* or its criminal law jurisdiction under s. 91(27) of the *Constitution Act, 1867* or otherwise fall within its jurisdiction?

L'alinéa 6*a*) de l'*Arrêté d'urgence sur les biphényles chlorés*, C.P. 1989-296, ainsi que les dispositions législatives habilitantes, les art. 34 et 35 de la *Loi canadienne sur la protection de l'environnement*, L.R.C. (1985), ch. 16 (4e suppl.), relèvent-ils en tout ou en partie de la compétence du Parlement du Canada de légiférer pour la paix, l'ordre et le bon gouvernement du Canada en vertu de l'art. 91 de la *Loi constitutionnelle de 1867* ou de la compétence en matière criminelle suivant le par. 91(27) de la *Loi constitutionnelle de 1867*, ou autrement?

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As can be seen, the constitutional question first raises the constitutionality of s. 6(*a*) of the Interim Order, which reads as follows:

> 6. The quantity of chlorobiphenyls that may be released into the environment shall not exceed 1 gram per day in respect of any item of equipment or any receptacle or material containing equipment in the course of the operation, servicing, maintenance, decommissioning, transporting or storage of
>
> (*a*) electrical capacitors and electrical transformers and associated electrical equipment manufactured in or imported into Canada before July 1, 1980;

However, it also raises the validity of the enabling provisions of the Act, specifically ss. 34 and 35. While it is possible to challenge the constitutional validity of the Interim Order directly, the real issue, as is evident from the reasons of the courts appealed from, is the validity of the enabling provisions, cited *infra*, and the main thrust of these reasons will be concerned with that issue. It is clear that the Interim Order will be of no force or effect if the enabling provisions pursuant to which it was adopted are themselves found to be *ultra vires.* As stated by Professor Hogg: "The invalidity of a statute which is ultra vires the enacting legislative body will of course destroy any powers which the statute purported to delegate to the government" (P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at p. 14-7); see also D. C. Holland and J. P. McGowan, *Delegated Legislation in Canada* (1989), at pp. 170-71.

Overview of the Legislative Structure of the Canadian Environmental Protection Act

The *Canadian Environmental Protection Act* was adopted by Parliament in 1988 with a view to consolidating and replacing several other laws dealing with different types of environmental protection. Sections 34 and 35 appear in Part II, entitled "Toxic Substances". This Part is, in large measure, an adaptation of the *Environmental*

98 Comme on peut le constater, la question constitutionnelle soulève d'abord la question de la constitutionnalité de l'al. 6*a*) de l'arrêté d'urgence, qui est rédigé ainsi:

> 6. La quantité de biphényles chlorés qui peut être rejetée, dans l'environnement, dans une région du Canada ne peut excéder 1 g par jour pour chaque pièce d'équipement ou contenant ou emballage d'équipement au cours de l'exploitation, de l'entretien, de la maintenance, de la mise hors service, du transport ou de l'entreposage de l'équipement suivant:
>
> *a*) des condensateurs électriques ainsi que des transformateurs électriques et de l'équipement connexe, fabriqués ou importés au Canada avant le 1er juillet 1980;

Cependant, elle soulève également la question de la validité des dispositions habilitantes de la Loi, plus précisément les art. 34 et 35. Bien qu'il soit possible de contester directement la constitutionnalité de l'arrêté d'urgence, la véritable question, qui ressort des motifs des tribunaux dont les décisions ont été portées en appel, concerne la validité des dispositions habilitantes, citées plus loin, et les présents motifs porteront principalement sur cette question. Il est évident que l'arrêté d'urgence sera inopérant si les dispositions habilitantes conformément auxquelles il a été adopté sont elles-mêmes jugées inconstitutionnelles. Comme l'affirme le professeur Hogg: [TRADUCTION] «L'invalidité d'une loi qui excède la compétence du corps législatif qui l'a adoptée annihilera naturellement tout pouvoir que cette loi était censée déléguer au gouvernement» (P. W. Hogg, *Constitutional Law of Canada* (3e éd. 1992 (feuilles mobiles)), vol. 1, à la p. 14-7); voir également D. C. Holland et J. P. McGowan, *Delegated Legislation in Canada* (1989), aux pp. 170 et 171.

Aperçu de la structure de la Loi canadienne sur la protection de l'environnement

99 La *Loi canadienne sur la protection de l'environnement* a été adoptée par le Parlement, en 1988, afin de réunir et de remplacer plusieurs autres lois traitant de différents types de protection de l'environnement. Les articles 34 et 35 figurent à la partie II, intitulée «Substances toxiques». Cette partie est, dans une large mesure, une adaptation de la *Loi sur*

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Contaminants Act, R.S.C., 1985, c. E-12 (which was abrogated when the present Act came into force). It should not be overlooked, however, that other parts of the Act are relevant to toxic substances. The subject of toxic substances is introduced in the preamble, which after declaring that the protection of the environment is essential to the well-being of Canada sets forth the following clauses that are of direct relevance in this case:

les contaminants de l'environnement, L.R.C. (1985), ch. E-12 (qui a été abrogée lorsque la présente loi est entrée en vigueur). Il ne faudrait toutefois pas oublier que d'autres parties de la Loi ont trait aux substances toxiques. La question des substances toxiques est présentée dans le préambule où, après avoir déclaré que la protection de l'environnement est essentielle au bien-être de la population du Canada, on énonce les clauses suivantes qui sont directement applicables en l'espèce:

WHEREAS the presence of toxic substances in the environment is a matter of national concern;

WHEREAS toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;

WHEREAS the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines and codes of practice;

. . .

AND WHEREAS Canada must be able to fulfil its international obligations in respect of the environment;

Attendu:

que la présence de substances toxiques dans l'environnement est une question d'intérêt national;

qu'il n'est pas toujours possible de circonscrire au territoire touché la dispersion de substances toxiques ayant pénétré dans l'environnement;

que le gouvernement fédéral, à titre de chef de file national en la matière, se doit d'établir des objectifs, des directives et des codes de pratiques nationaux en matière de qualité de l'environnement;

. . .

que le Canada se doit d'être en mesure de respecter ses obligations internationales en matière d'environnement,

As well, the first substantive provision of the Act, s. 2, in para. 2(*j*) imposes the following duty on the Canadian government:

De même, l'art. 2, qui est la première disposition de fond de la Loi, impose, à son al. *j*), l'obligation suivante au gouvernement canadien:

2. In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada,

. . .

(*j*) endeavour to act expeditiously to assess whether substances in use in Canada are toxic or capable of becoming toxic.

2. Pour l'exécution de la présente loi, le gouvernement fédéral doit, compte tenu de la Constitution et des lois du Canada:

. . .

j) s'efforcer d'agir avec diligence en vue de déterminer si des substances en usage au Canada sont toxiques ou susceptibles de le devenir.

100 Moreover, Schedule I of the Act under the heading "List of Toxic Substances" originally set forth nine such substances with the type of regulations applicable to them.

En outre, l'annexe I de la Loi énonçait initialement, sous la rubrique intitulée «Liste des substances toxiques», neuf de ces substances en plus du type de règlement qui leur était applicable.

101 Part II of the Act deals first with the identification of other substances that could pose a risk either to the environment or to human life and

La partie II de la Loi traite d'abord de l'identification d'autres substances susceptibles de mettre en danger l'environnement ou la vie et la santé

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health, and then provides a procedure for adding them to the List of Toxic Substances in Schedule I and for imposing by regulations requirements respecting the terms and conditions under which substances so listed may be released into the environment.

Part II begins with s. 11, which reads:

11. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions

(*a*) having or that may have an immediate or long-term harmful effect on the environment;

(*b*) constituting or that may constitute a danger to the environment on which human life depends; or

(*c*) constituting or that may constitute a danger in Canada to human life or health.

Two things should be noted about this provision. First, it is confined in its application to Part II. Secondly, while the provision was in the course of argument described as a "definition", it is by no means a true definition, a matter about which I shall comment more extensively later. Before one can know if a substance can give rise to the real or possible harmful effects or dangers spelled out in paras. (*a*) to (*c*), some assessment or test must be made to determine whether the quantity or concentration or conditions under which a substance enters the environment is sufficient to make it toxic. This is made clear by s. 12(1) which, in providing for the creation of a Priority Substances List, authorizes the Ministers of Health and of the Environment to "specify substances in respect of which the Ministers are satisfied priority should be given in assessing whether they are toxic or capable of becoming toxic" (emphasis added). This expression, I observe, is repeated throughout Part II in the provisions regarding assessments.

The manner in which the Ministers may conduct investigations to determine whether or not a given "substance" is "toxic" is set forth in s. 15. They may examine, *inter alia*, the nature of the sub-

humaines, et elle établit ensuite la procédure à suivre pour les ajouter à la liste des substances toxiques de l'annexe I, et pour imposer, par voie de règlement, les conditions à respecter pour que les substances ainsi énumérées puissent être rejetées dans l'environnement.

La partie II commence par l'art. 11, qui est libellé ainsi: 102

11. Pour l'application de la présente partie, est toxique toute substance qui pénètre ou peut pénétrer dans l'environnement en une quantité ou une concentration ou dans des conditions de nature à:

a) avoir, immédiatement ou à long terme, un effet nocif sur l'environnement;

b) mettre en danger l'environnement essentiel pour la vie humaine;

c) constituer un danger au Canada pour la vie ou la santé humaine.

Il y a lieu de noter deux choses au sujet de cette disposition. Premièrement, son application se limite à la partie II. Deuxièmement, bien qu'elle ait été qualifiée de «définition» au cours des plaidoiries, cette disposition n'est nullement une véritable définition, une question que je commenterai davantage plus loin. Pour savoir si une substance peut avoir les effets nocifs ou présenter les dangers réels ou potentiels, énoncés aux al. *a*) à *c*), il faut effectuer une évaluation ou un test pour déterminer si la quantité ou concentration de la substance rejetée dans l'environnement, ou les conditions dans lesquelles le rejet a eu lieu, sont suffisantes pour qu'elle soit toxique. C'est ce que précise le par. 12(1) qui, en prévoyant l'établissement d'une liste de substances d'intérêt prioritaire, autorise les ministres de la Santé et de l'Environnement à «énum[érer] les substances pour lesquelles ils jugent prioritaire de déterminer si elles sont effectivement ou potentiellement toxiques» (je souligne). Cette expression, ainsi que je l'ai remarqué, revient tout au long de la partie II dans les dispositions concernant les évaluations.

La façon dont les ministres peuvent mener des enquêtes pour déterminer si une «substance» donnée est «toxique» ou non est exposée à l'art. 15. Ils peuvent examiner, notamment, la nature de la sub- 103

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stance in question, its effects on natural biological processes, the extent to which the substance will persist in the environment, methods of controlling it, and methods of reducing the amount used. Section 15 read at the relevant time:

15. For the purpose of assessing whether a substance is toxic or is capable of becoming toxic, or for the purpose of assessing the need for measures to control a substance, either Minister may

(*a*) collect data and conduct investigations respecting

(i) the nature of the substance,

(ii) the presence of the substance in the environment and the effect of its presence on the environment or on human life or health,

(iii) the extent to which the substance can become dispersed and will persist in the environment,

(iv) the ability of the substance to become incorporated or accumulate in biological tissues or to interfere with biological processes,

(v) methods of controlling the presence of the substance in the environment,

(vi) methods for testing the effects of the presence of the substance in the environment,

(vii) development and use of alternatives to the substance,

(viii) quantities, uses and disposal of the substance, and

(ix) methods of reducing the amount of the substance used, produced or released into the environment;

(*b*) correlate and evaluate any data collected pursuant to paragraph (*a*) and publish results of any investigations carried out pursuant to that paragraph; and

(*c*) provide information and consultative services and make recommendations respecting measures to control the presence of the substance in the environment.

Under s. 16, the Minister of the Environment may require that private citizens provide him or her with information about, or samples of, substances they suspect may be toxic, and under s. 18, the Minister can order that persons with information

stance en question, ses effets sur des processus biologiques naturels, la mesure dans laquelle elle persistera dans l'environnement, les méthodes permettant d'en limiter la présence et d'en réduire la quantité utilisée. L'article 15 était ainsi rédigé à l'époque pertinente:

15. En vue de déterminer si une substance est effectivement ou potentiellement toxique ou d'apprécier s'il y a lieu de prendre des mesures pour en contrôler la présence dans l'environnement, l'un ou l'autre ministre peut:

a) recueillir des données sur cette substance et mener des enquêtes sur:

(i) sa nature,

(ii) sa présence dans l'environnement et l'effet qu'elle a sur celui-ci, la vie ou la santé humaine,

(iii) la mesure dans laquelle elle peut se disperser et persister dans l'environnement,

(iv) sa capacité d'infiltration et d'accumulation dans les tissus biologiques ainsi que sa capacité de nuire à des processus biologiques,

(v) les méthodes permettant de limiter sa présence dans l'environnement,

(vi) les méthodes de vérification des effets de sa présence dans l'environnement,

(vii) la mise au point et l'utilisation de substituts,

(viii) ses quantités, ses utilisations et son élimination,

(ix) les méthodes permettant de réduire la quantité utilisée, produite ou rejetée dans l'environnement;

b) corréler et analyser les données recueillies et publier le résultat des enquêtes effectuées;

c) fournir des services d'information et de consultation et faire des recommandations concernant les mesures à prendre pour limiter la présence de cette substance dans l'environnement.

Aux termes de l'art. 16, le ministre de l'Environnement peut exiger des simples citoyens qu'ils lui fournissent des renseignements concernant les substances qu'ils jugent susceptibles d'être toxiques, ou des échantillons de ces substances, et,

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about a substance that may be toxic provide that information.

Sections 12 and 13 of the Act require the Ministers of the Environment and Health to compile a "Priority Substances List" specifying those substances in respect of which priority should be given in determining whether or not they are toxic. Once the Ministers have assessed a priority listed substance, they may decide either to recommend or not to recommend that the substance be added to the List of Toxic Substances in Schedule I. Where the Ministers so recommend, the Governor in Council by virtue of s. 33 may, after a federal-provincial advisory committee (established under s. 6) has been given an opportunity to provide its advice, make an order adding the substance to the List of Toxic Substances. When that is done, the Governor in Council is empowered under s. 34 to make detailed regulations imposing requirements respecting the manner of dealing with any substance listed in Schedule I. Failure to comply with these regulations is punishable by a fine or imprisonment (s. 113(*f*), (*o*) and (*p*)). Since s. 34 (of which s. 34(1) is of prime importance) is under attack in this case, I cite it at length:

34. (1) Subject to subsection (3), the Governor in Council may, on the recommendation of the Ministers and after the federal-provincial advisory committee is given an opportunity to provide its advice under section 6, make regulations with respect to a substance specified on the List of Toxic Substances in Schedule I, including regulations providing for, or imposing requirements respecting,

(*a*) the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source;

(*b*) the places or areas where the substance may be released;

(*c*) the commercial, manufacturing or processing activity in the course of which the substance may be released;

en vertu de l'art. 18, le Ministre peut ordonner que les personnes qui possèdent des renseignements au sujet d'une substance qui peut être toxique fournissent ces renseignements.

104 Les articles 12 et 13 de la Loi exigent que les ministres de l'Environnement et de la Santé établissent une «liste de substances d'intérêt prioritaire» indiquant les substances pour lesquelles il serait prioritaire de déterminer si elles sont toxiques ou non. Une fois que les ministres ont évalué une substance inscrite sur une liste prioritaire, ils peuvent décider de recommander ou non qu'elle soit ajoutée à la liste des substances toxiques de l'annexe I. Lorsque les ministres font une telle recommandation, le gouverneur en conseil peut, en vertu de l'art. 33, après avoir donné à un comité consultatif fédéro-provincial (constitué en vertu de l'art. 6) la possibilité de formuler ses conseils, prendre un décret d'inscription de la substance à la liste des substances toxiques. Cela fait, le gouverneur en conseil est habilité, en vertu de l'art. 34, à prendre des règlements détaillés en ce qui touche la manière de traiter toute substance inscrite sur la liste de l'annexe I. L'omission de se conformer à ces règlements est punissable d'une amende ou d'une peine d'emprisonnement (al. 113*f*), *o*) et *p*)). Comme l'art. 34 (dont le premier paragraphe est de toute première importance) est contesté en l'espèce, je vais le citer au complet:

34. (1) Sous réserve du paragraphe (3), le gouverneur en conseil peut, sur recommandation des ministres et après avoir donné au comité consultatif fédéro-provincial la possibilité de formuler ses conseils dans le cadre de l'article 6, prendre des règlements concernant une substance inscrite sur la liste de l'annexe I, notamment en ce qui touche:

a) la quantité ou la concentration dans lesquelles elle peut être rejetée dans l'environnement, seule ou combinée à une autre substance émise par quelque source ou type de sources que ce soit;

b) les lieux ou zones de rejet;

c) les activités commerciales, de fabrication ou de transformation au cours desquelles le rejet est permis;

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(*d*) the manner in which and conditions under which the substance may be released into the environment, either alone or in combination with any other substance;

d) les modalités et conditions de son rejet, seule ou en combinaison avec une autre substance;

(*e*) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;

e) la quantité qui peut être fabriquée, transformée, utilisée, mise en vente ou vendue au Canada;

(*f*) the purposes for which the substance or a product containing the substance may be imported, manufactured, processed, used, offered for sale or sold;

f) les fins pour lesquelles la substance ou un produit qui en contient peut être importé, fabriqué, transformé, utilisé, mis en vente ou vendu;

(*g*) the manner in which and conditions under which the substance or a product containing the substance may be imported, manufactured, processed or used;

g) les modalités et conditions d'importation, de fabrication, de transformation ou d'utilisation de la substance ou d'un produit qui en contient;

(*h*) the quantities or concentrations in which the substance may be used;

h) la quantité ou la concentration dans lesquelles celle-ci peut être utilisée;

(*i*) the quantities or concentrations of the substance that may be imported;

i) la quantité ou la concentration dans lesquelles celle-ci peut-être importée;

(*j*) the countries from or to which the substance may be imported or exported;

j) les pays d'exportation ou d'importation;

(*k*) the conditions under which, the manner in which and the purposes for which the substance may be imported or exported;

k) les conditions, modalités et objets de l'importation ou de l'exportation;

(*l*) the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for sale, import or export of the substance or a product containing the substance;

l) l'interdiction totale, partielle ou conditionnelle de la fabrication, de l'utilisation, de la transformation, de la vente, de la mise en vente, de l'importation ou de l'exportation de la substance ou d'un produit qui en contient;

(*m*) the quantity or concentration of the substance that may be contained in any product manufactured, imported, exported or offered for sale in Canada;

m) la quantité ou concentration de celle-ci que peut contenir un produit fabriqué, importé, exporté ou mis en vente au Canada;

(*n*) the manner in which and conditions under which and the purposes for which the substance or a product containing the substance may be advertised or offered for sale;

n) les modalités, les conditions et l'objet de la publicité et de la mise en vente de la substance ou d'un produit qui en contient;

(*o*) the manner in which and conditions under which the substance or a product or material containing the substance may be stored, displayed, handled, transported or offered for transport;

o) les modalités et les conditions de stockage, de présentation, de transport, de manutention ou d'offre de transport soit de la substance, soit d'un produit ou d'une matière qui en contient;

(*p*) the packaging and labelling of the substance or a product or material containing the substance;

p) l'emballage et l'étiquetage soit de la substance, soit d'un produit ou d'une matière qui en contient;

(*q*) the manner, conditions, places and method of disposal of the substance or a product or material containing the substance, including standards for the construction, maintenance and inspection of disposal sites;

q) les modalités, lieux et méthodes d'élimination soit de la substance, soit d'un produit ou d'une matière qui en contient, notamment les normes de construction, d'entretien et d'inspection des sites d'élimination;

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(*r*) the submission to the Minister, on request or at such times as are prescribed, of information relating to the substance;

(*s*) the maintenance of books and records for the administration of any regulation made under this section;

(*t*) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister;

(*u*) the submission of samples of the substance to the Minister;

(*v*) the methods and procedures for conducting sampling, analyses, tests, measurements or monitoring of the substance;

(*w*) circumstances or conditions under which the Minister may, for the proper administration of this Act, modify

(i) any requirement for sampling, analyses, tests, measurements or monitoring, or

(ii) the methods and procedures for conducting any required sampling, analyses, tests, measurements or monitoring; and

(*x*) any other matter necessary to carry out the purposes of this Part.

(2) The Governor in Council may, on the recommendation of the Ministers, make regulations providing for the exemption of the following activities from the application of this Part and any regulations made under it, namely,

(*a*) the import, export, manufacture, use, processing, transport, offering for transport, handling, packaging, labelling, advertising, sale, offering for sale, displaying, storing, disposing or releasing into the environment of any substance or a product or material containing any substance; and

(*b*) the release of any substance into the environment, for a period specified in the regulations, from any source or type of source.

(3) The Governor in Council shall not make a regulation under subsection (1) in respect of any substance if, in the opinion of the Governor in Council, the regulation regulates an aspect of the substance that is regulated by or under any other Act of Parliament.

(4) A regulation made under subsection (1) with respect to a substance may amend the List of Toxic Sub-

r) la transmission au ministre, sur demande ou au moment fixé par règlement, de renseignements concernant la substance;

s) la tenue de livres et de registres pour l'exécution des règlements d'application du présent article;

t) l'échantillonnage, l'analyse, l'essai, la mesure ou la surveillance de la substance et la transmission des résultats au ministre;

u) la transmission d'échantillons de la substance au ministre;

v) les méthodes et procédures à suivre pour les opérations mentionnées à l'alinéa *t*);

w) les cas ou conditions de modification par le ministre, pour l'exécution de la présente loi, soit des exigences imposées pour les opérations mentionnées à l'alinéa *t*), soit des méthodes et procédures afférentes;

x) toute autre mesure d'application de la présente partie.

(2) Sur recommandation des ministres, le gouverneur en conseil peut, par règlement, soustraire à l'application de la présente partie et de ses règlements:

a) l'importation, l'exportation, la fabrication, l'utilisation, la transformation, le transport, l'offre de transport, la manutention, l'emballage, l'étiquetage, la publicité, la vente, la mise en vente, la présentation, le stockage, l'élimination ou le rejet dans l'environnement soit d'une substance, soit d'un produit ou d'une matière qui en contient;

b) le rejet dans l'environnement d'une substance provenant d'une source donnée, ou d'un type de sources donné, pendant un certain temps.

(3) Les règlements prévus au paragraphe (1) ne peuvent toutefois être pris que si, selon le gouverneur en conseil, ils ne visent pas un point déjà réglementé sous le régime d'une autre loi fédérale.

(4) Les règlements d'application du paragraphe (1) peuvent modifier la liste de l'annexe I de manière à y

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stances in Schedule I so as to specify the type of regulation that applies with respect to the substance.

(5) Except with respect to Her Majesty in right of Canada, the provisions of a regulation made under subsection (1) do not apply in any province in respect of which there is in force an order, made under subsection (6), declaring that the provisions do not apply.

(6) Where the Minister and the government of a province agree in writing that there are in force by or under the laws of the province

(*a*) provisions that are equivalent to the provisions of a regulation made under subsection (1), and

(*b*) provisions that are similar to sections 108 to 110 for the investigation of alleged offences under provincial environmental legislation,

the Governor in Council may, on the recommendation of the Minister, make an order declaring that the provisions of the regulation do not apply in the province.

(7) The Minister shall make public any agreement referred to in subsection (6).

(8) An agreement referred to in subsection (6) may be terminated by either party giving to the other at least six months notice of termination.

(9) The Governor in Council may, on the recommendation of the Minister, revoke an order made under subsection (6) where the agreement referred to in that subsection is terminated.

(10) The Minister shall include in the annual report required by section 138 a report on the administration of subsections (5) to (9).

préciser le type de règlement qui s'applique à la substance visée.

(5) Sauf à l'égard de Sa Majesté du chef du Canada, les règlements pris aux termes du paragraphe (1) ne s'appliquent pas dans la province visée par un décret pris aux termes du paragraphe (6).

(6) Sur recommandation du ministre, le gouverneur en conseil peut, par décret, déclarer que les règlements pris en application du paragraphe (1) ne s'appliquent pas dans la province lorsque le ministre et le gouvernement provincial sont convenus par écrit que sont en vigueur dans le cadre de la législation provinciale:

a) d'une part, des dispositions équivalentes à ces règlements;

b) d'autre part, des dispositions similaires aux articles 108 à 110 concernant les enquêtes pour infractions aux lois provinciales sur l'environnement.

(7) Le ministre rend public l'accord visé au paragraphe (6).

(8) Une partie à l'accord peut y mettre fin en donnant un préavis de six mois à l'autre partie.

(9) Sur recommandation du ministre, le gouverneur en conseil peut révoquer le décret d'exemption lorsqu'il a été mis fin à l'accord.

(10) Le ministre rend compte, dans le rapport annuel visé à l'article 138, de la mise en œuvre des paragraphes (5) à (9).

105 Section 35 is ancillary to s. 34. It provides that where a substance is not listed in Schedule I (or where it is listed but the Ministers believe it is not adequately regulated) and the Ministers believe that immediate action is required in respect of that substance, the Minister of the Environment may make an "interim order" in respect of the substance and make any provision that may be made in a regulation made under s. 34(1) and (2). Such provisions may include setting limits on the quantity and concentration of emissions of the substance, controlling the areas where the substance may be released, controlling the commercial man-

L'article 35 est accessoire à l'art. 34. Il prévoit que, lorsqu'une substance n'est pas inscrite sur la liste de l'annexe I (ou lorsqu'elle y est inscrite mais que les ministres croient qu'elle n'est pas réglementée comme il convient) et que les ministres croient qu'une intervention immédiate est nécessaire à l'égard de cette substance, le ministre de l'Environnement peut prendre, relativement à la substance en question, un «arrêté d'urgence» pouvant comporter les mêmes dispositions qu'un règlement d'application des par. 34(1) et (2). Ces dispositions peuvent notamment établir des limites relativement à la quantité et à la concentration des

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ufacturing or processing activity in the course of which the substance is released, stipulating the manner and conditions in which the substance may be advertised or offered for sale and regulating the packaging and labelling of the substance or of a material containing the substance. An interim order ceases to have effect within 14 days unless it is approved by the Governor in Council (s. 35(3)), and such approval is not to be given unless, within 24 hours of making the order, the Minister has consulted with the affected provincial governments to determine whether they are prepared to take sufficient action to deal with the significant danger and has also consulted other federal Ministers to determine whether the matter can be dealt with under another Act of Parliament. The interim order ceases to have effect at the latest two years after it is made (s. 35(8)). Section 35 reads:

émissions de la substance, restreindre les secteurs où il peut y avoir rejet de la substance, contrôler les activités commerciales de fabrication ou de transformation au cours desquelles il y a rejet de la substance, prescrire les modalités de la publicité et de la mise en vente de la substance et réglementer l'emballage et l'étiquetage de la substance ou d'un produit qui la contient. L'arrêté d'urgence cesse de s'appliquer dans les 14 jours, à défaut d'approbation par le gouverneur en conseil (par. 35(3)), et une telle approbation ne doit être donnée que si, dans les 24 heures de la prise de l'arrêté, le Ministre a consulté les gouvernements provinciaux concernés afin de déterminer s'ils sont disposés à prendre les moyens nécessaires pour parer au danger appréciable et s'il a également consulté les autres ministres fédéraux afin de déterminer s'il est possible de régler la question en recourant à une autre loi fédérale. L'arrêté d'urgence cesse d'avoir effet, au plus tard, deux ans après qu'il a été pris (par. 35(8)). L'article 35 est rédigé ainsi:

35. (1) Where

(*a*) a substance

(i) is not specified on the List of Toxic Substances in Schedule I and the Ministers believe that it is toxic, or

(ii) is specified on that List and the Ministers believe that it is not adequately regulated, and

(*b*) the Ministers believe that immediate action is required to deal with a significant danger to the environment or to human life or health,

the Minister may make an interim order in respect of the substance and the order may contain any provision that may be contained in a regulation made under subsection 34(1) or (2).

(2) Subject to subsection (3), an interim order has effect

(*a*) from the time it is made; and

(*b*) as if it were a regulation made under section 34.

35. (1) Le ministre peut prendre un arrêté d'urgence pouvant comporter les mêmes dispositions qu'un règlement d'application des paragraphes 34(1) ou (2), lorsque les conditions suivantes sont réunies:

a) la substance n'est pas inscrite sur la liste de l'annexe I et les ministres la croient toxique, ou bien elle y est inscrite et ils estiment qu'elle n'est pas réglementée comme il convient;

b) les ministres croient qu'une intervention immédiate est nécessaire afin de parer à tout danger appréciable soit pour l'environnement, soit pour la vie humaine ou la santé.

(2) Sous réserve du paragraphe (3), l'arrêté prend effet dès sa prise comme s'il s'agissait d'un règlement pris en vertu de l'article 34.

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(3) An interim order ceases to have effect unless it is approved by the Governor in Council within fourteen days after it is made.

(4) The Governor in Council shall not approve an interim order unless

(*a*) the Minister has, within twenty-four hours after making the order, offered to consult the governments of all the affected provinces to determine whether they are prepared to take sufficient action to deal with the significant danger; and

(*b*) the Minister has consulted with other ministers of the Crown in right of Canada to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger.

(5) Where the Governor in Council approves an interim order, the Ministers shall, within ninety days after the approval, recommend to the Governor in Council

(*a*) that a regulation having the same effect as the order be made under section 34; and

(*b*) if the order was made in respect of a substance that was not specified on the List of Toxic Substances in Schedule I, that the substance be added to that List under section 33.

(6) An interim order

(*a*) is exempt from the application of sections 3, 5 and 11 of the *Statutory Instruments Act*; and

(*b*) shall be published in the *Canada Gazette* within twenty-three days after it is approved under subsection (3).

(7) No person shall be convicted of an offence consisting of a contravention of an interim order that, at the time of the alleged contravention, was not published in the *Canada Gazette* in both official languages unless it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the order to the notice of those persons likely to be affected by it.

(8) An interim order ceases to have effect when a regulation referred to in subsection (5) is made or two years after the order was made, whichever is the earlier.

(3) L'arrêté cesse toutefois d'avoir effet à défaut d'approbation par le gouverneur en conseil dans les quatorze jours qui suivent.

(4) Le gouverneur en conseil ne peut approuver l'arrêté d'urgence que si le ministre:

a) d'une part, dans les vingt-quatre heures suivant la prise de l'arrêté, a offert de consulter tous les gouvernements des provinces concernées afin de déterminer s'ils sont disposés à prendre les moyens nécessaires pour parer au danger en question;

b) d'autre part, a consulté les autres ministres fédéraux afin de déterminer si des mesures peuvent être prises sous le régime de toute autre loi fédérale pour parer au danger en question.

(5) Dans les quatre-vingt-dix jours qui suivent l'approbation par le gouverneur en conseil, les ministres recommandent à celui-ci, à la fois:

a) la prise d'un règlement d'application de l'article 34 ayant le même effet que l'arrêté;

b) l'inscription, sous le régime de l'article 33, de la substance visée sur la liste de l'annexe I dans les cas où elle n'y figure pas.

(6) L'arrêté est soustrait à l'application des articles 3, 5 et 11 de la *Loi sur les textes réglementaires* et publié dans la *Gazette du Canada* dans les vingt-trois jours suivant son approbation.

(7) Nul ne peut être condamné pour violation d'un arrêté d'urgence qui, à la date du fait reproché, n'était pas publié dans la *Gazette du Canada* dans les deux langues officielles, sauf s'il est établi qu'à cette date les mesures nécessaires avaient été prises pour porter la teneur de l'arrêté à la connaissance des personnes susceptibles d'être touchées par celui-ci.

(8) L'arrêté cesse d'avoir effet à la prise du règlement visé au paragraphe (5) ou, au plus tard, deux ans après sa prise.

106 It is the interplay between ss. 34 and 35 that gave rise to the Interim Order that ultimately led to

C'est l'interaction des art. 34 et 35 qui est à l'origine de l'arrêté d'urgence ayant abouti au pré-

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this litigation. In 1989, the then Environment Minister, the Honourable Lucien Bouchard, became concerned that regulations governing PCBs made under previous legislation might not continue in force once the previous legislation had been repealed. Exercising his powers under s. 35, he adopted the Interim Order, cited *supra*, providing for the regulation of PCBs in accordance with the provisions of s. 34. The respondent challenges the charges brought against it under the Interim Order by alleging that both the order and ss. 34 and 35 are *ultra vires* Parliament.

But the nub of its case is not fully apparent from a reading of ss. 34 and 35 alone. These provisions must also be read in light of the broad definitions of "environment" and "substance" which read:

3. (1) In this Act,

. . .

"environment" means the components of the Earth and includes

(*a*) air, land and water,

(*b*) all layers of the atmosphere,

(*c*) all organic and inorganic matter and living organisms, and

(*d*) the interacting natural systems that include components referred to in paragraphs (*a*) to (*c*);

. . .

"substance" means any distinguishable kind of organic or inorganic matter, whether animate or inanimate, and includes

(*a*) any matter that is capable of being dispersed in the environment or of being transformed in the environment into matter that is capable of being so dispersed or that is capable of causing such transformations in the environment,

(*b*) any element or free radical,

(*c*) any combination of elements of a particular molecular identity that occurs in nature or as a result of a chemical reaction, and

(*d*) complex combinations of different molecules that originate in nature or are the result of chemical reac-

sent litige. En 1989, le ministre de l'Environnement de l'époque, l'honorable Lucien Bouchard, a commencé à craindre que le règlement régissant les BPC, pris en vertu de l'ancienne loi, ne soit plus en vigueur une fois que l'ancienne loi aurait été abrogée. Exerçant les pouvoirs que lui conférait l'art. 35, il a adopté l'arrêté d'urgence susmentionné qui prévoyait la réglementation des BPC conformément aux dispositions de l'art. 34. L'intimée conteste les accusations portées contre elle en vertu de l'arrêté d'urgence, en alléguant que cet arrêté ainsi que les art. 34 et 35 excèdent la compétence du Parlement.

Mais l'essentiel de son argumentation n'est pas tout à fait évident à la lecture des seuls art. 34 et 35. Il faut également lire ces dispositions à la lumière des définitions générales des mots «environnement» et «substance», qui se lisent ainsi: 107

3. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

«environnement» Ensemble des conditions et des éléments naturels de la terre, notamment:

a) l'air, l'eau et le sol;

b) toutes les couches de l'atmosphère;

c) toutes les matières organiques et inorganiques ainsi que les êtres vivants;

d) les systèmes naturels en interaction qui comprennent les éléments visés aux alinéas *a*) à *c*).

. . .

«substance» Toute matière organique ou inorganique, animée ou inanimée, distinguable. La présente définition vise notamment:

a) les matières susceptibles soit de se disperser dans l'environnement, soit de s'y transformer en matières dispersables, ainsi que les matières susceptibles de provoquer de telles transformations dans l'environnement;

b) les radicaux libres ou les éléments;

c) les combinaisons d'éléments à l'identité moléculaire précise soit naturelles, soit consécutives à une réaction chimique;

d) des combinaisons complexes de molécules différentes, d'origine naturelle ou résultant de réactions

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tions but that could not practicably be formed by simply combining individual constituents,

and, except for the purposes of sections 25 to 32, includes

(*e*) any mixture that is a combination of substances and does not itself produce a substance that is different from the substances that were combined,

(*f*) any manufactured item that is formed into a specific physical shape or design during manufacture and has, for its final use, a function or functions dependent in whole or in part on its shape or design, and

(*g*) any animate matter that is, or any complex mixtures of different molecules that are, contained in effluents, emissions or wastes that result from any work, undertaking or activity;

Above all, the respondent is concerned with the term "toxic" as it is used in s. 11, which, together with the definitions just quoted, it contends, constitute an impermissibly broad interference with provincial legislative powers.

The Issues

108 In this Court, the appellant Attorney General of Canada seeks to support the impugned provisions of the Act on the basis of the national concern doctrine under the peace, order and good government clause of s. 91 or under the criminal law power under s. 91(27) of the *Constitution Act, 1867*. The respondent Hydro-Québec and the *mis en cause* Attorney General of Quebec dispute this. In broad terms, they say that the provisions are so invasive of provincial powers that they cannot be justified either under the national dimensions doctrine or under the criminal law power. The attack on the validity of the provisions under the latter power is also supported, most explicitly by the intervener the Attorney General for Saskatchewan, on the ground that they are, in essence, of a regulatory and not of a prohibitory character. Finally, I repeat that while the Interim Order precipitated the litigation, there is no doubt that the respondent and *mis*

chimiques, mais qui ne pourraient se former dans la pratique par la simple combinaison de leurs composants individuels.

Elle vise aussi, sauf pour l'application des articles 25 à 32:

e) les mélanges combinant des substances et ne produisant pas eux-mêmes une substance différente de celles qui ont été combinées;

f) les articles manufacturés dotés d'une forme ou de caractéristiques matérielles précises pendant leur fabrication et qui ont, pour leur utilisation finale, une ou plusieurs fonctions en dépendant, en tout ou en partie;

g) les matières animées ou les mélanges complexes de molécules différentes qui sont contenus dans les effluents, les émissions ou les déchets attribuables à des travaux, des entreprises ou des activités.

L'intimée s'intéresse surtout au mot «toxique» utilisé à l'art. 11, qui, conjugué aux définitions qui viennent d'être citées, constitue, selon elle, un empiétement grave et inacceptable sur les pouvoirs législatifs des provinces.

Les questions en litige

Devant notre Cour, l'appelant le procureur général du Canada cherche à fonder les dispositions contestées de la Loi sur la théorie de l'intérêt national justifiant l'application de la clause de l'art. 91 concernant la paix, l'ordre et le bon gouvernement, ou sur la compétence en matière de droit criminel conférée au par. 91(27) de la *Loi constitutionnelle de 1867*. L'intimée Hydro-Québec et le mis en cause le procureur général du Québec contestent cela. De façon générale, ils affirment que ces dispositions empiètent tellement sur les pouvoirs des provinces qu'il est impossible de les justifier par la théorie des dimensions nationales ou la compétence en matière de droit criminel. La contestation de la validité des dispositions en vertu de cette dernière compétence est également appuyée fort explicitement par l'intervenant le procureur général de la Saskatchewan, pour le motif qu'elles sont essentiellement de nature réglementaire et non prohibitive. Enfin, je répète que, bien que l'arrêté d'urgence ait précipité le litige, il n'y a pas de doute que l'intimée et le mis en cause ainsi que les intervenants qui les appuient visent

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en cause as well as their supporting interveners are after bigger game — the enabling provisions.

While both the national concern doctrine and the criminal law power received attention in the course of the argument, it is right to say that the principal focus in this Court was on the national concern issue. This may in fact be owing to the fact that this Court's most recent decision dealing extensively with the criminal law power, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, had not been decided when this case came before the courts whose judgments are under review in this case. Whatever the reason, many of the arguments and concerns seemed at times to be addressed at both legislative powers, and the general effect was to colour and I think at times to distort the approach that, in my view, should properly be taken to the criminal law power. Thus I found much of the discussion relating to the pith and substance of the legislation, as well as other matters to which I shall later refer, not altogether apt to a consideration of the criminal law power.

I make these remarks because, in my view, the impugned provisions are valid legislation under the criminal law power — s. 91(27) of the *Constitution Act, 1867*. It thus becomes unnecessary to deal with the national concern doctrine, which inevitably raises profound issues respecting the federal structure of our Constitution which do not arise with anything like the same intensity in relation to the criminal law power.

In analysing the issues as they relate to the criminal law power, I propose to proceed in the following manner. I shall begin with introductory remarks reviewing the manner in which this Court has approached environmental issues arising under the division of powers under the *Constitution Act, 1867*. I shall then turn to a discussion of the federal criminal law power under s. 91(27) of that Act. This will be followed by a closer examination of

une cible plus importante — les dispositions habilitantes.

109 Bien qu'on ait prêté attention à la théorie de l'intérêt national et à la compétence en matière de droit criminel au cours des plaidoiries, on peut affirmer à juste titre que, devant notre Cour, l'accent a été mis principalement sur la question de l'intérêt national. C'est peut-être dû au fait que l'arrêt le plus récent de notre Cour portant largement sur la compétence en matière de droit criminel, *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, n'avait pas été rendu lorsque la présente affaire a été portée devant les tribunaux dont les décisions font l'objet du présent pourvoi. Quelle qu'en soit la raison, bon nombre des arguments et des préoccupations semblaient parfois avoir trait aux deux pouvoirs législatifs, et cela a généralement eu pour effet de fausser et parfois, selon moi, de dénaturer la façon dont, à mon avis, il conviendrait d'aborder la compétence en matière de droit criminel. J'ai donc conclu qu'une bonne partie de l'analyse portant sur le caractère véritable de la loi en cause, ainsi que d'autres questions auxquelles je me reporterai plus tard, n'étaient absolument pas pertinentes pour examiner la compétence en matière de droit criminel.

110 Je formule ces remarques parce que, selon moi, les dispositions contestées sont valides en vertu de la compétence en matière de droit criminel — le par. 91(27) de la *Loi constitutionnelle de 1867*. Il devient ainsi inutile de traiter la théorie de l'intérêt national, qui soulève inévitablement de graves questions concernant la structure fédérale de notre Constitution qui ne se posent pas avec la même intensité au sujet de la compétence en matière de droit criminel.

111 Pour analyser les questions se rapportant à la compétence en matière de droit criminel, je compte procéder de la façon suivante. Je vais d'abord formuler des observations préliminaires sur la façon dont notre Cour a abordé les questions environnementales qui se posent en vertu du partage des pouvoirs prévu dans la *Loi constitutionnelle de 1867*. Je passerai ensuite à l'analyse de la compétence fédérale en matière de droit criminel en vertu

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Part II, Toxic Substances, of the Act. This will open the way to a discussion of whether ss. 34 and 35, as well as the Interim Order, are valid exercises of the criminal law power.

Analysis

Introduction

112 In considering how the question of the constitutional validity of a legislative enactment relating to the environment should be approached, this Court in *Oldman River*, *supra*, made it clear that the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. As it was put there, "the *Constitution Act, 1867* has not assigned the matter of 'environment' *sui generis* to either the provinces or Parliament" (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, prohibit pollution, and the like. In assessing the constitutional validity of a provision relating to the environment, therefore, what must first be done is to look at the catalogue of legislative powers listed in the *Constitution Act, 1867* to see if the provision falls within one or more of the powers assigned to the body (whether Parliament or a provincial legislature) that enacted the legislation (*ibid.* at p. 65). If the provision in essence, in pith and substance, falls within the parameters of any such power, then it is constitutionally valid.

113 Though pith and substance may be described in different ways, the expressions "dominant purpose" or "true character" used in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 481-82, or "the dominant or most important characteristic of the challenged law" used in *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286, and in *Old-*

du par. 91(27) de cette loi. Viendra ensuite un examen plus approfondi de la partie II de la Loi, intitulée «Substances toxiques». Cela nous amènera à nous demander si les art. 34 et 35 ainsi que l'arrêté d'urgence constituent des exercices valides de la compétence en matière de droit criminel.

Analyse

Introduction

En examinant la façon dont devrait être abordée la question de la constitutionnalité d'un texte législatif concernant l'environnement, notre Cour a précisé dans l'arrêt *Oldman River*, précité, que l'environnement n'est pas, comme tel, un domaine de compétence législative en vertu de la *Loi constitutionnelle de 1867*. Comme il y est affirmé, «la *Loi constitutionnelle de 1867* n'a pas conféré le domaine de l'«"environnement"» comme tel aux provinces ou au Parlement» (p. 63). Il s'agit plutôt d'un sujet diffus qui touche plusieurs domaines différents de responsabilité constitutionnelle, dont certains sont fédéraux et d'autres provinciaux (pp. 63 et 64). Le Parlement ou une législature provinciale peut, en alléguant l'économie ou l'objet d'une loi, adopter des dispositions qui réduisent au minimum ou empêchent l'effet préjudiciable que cette loi peut avoir sur l'environnement, interdire la pollution, et ainsi de suite. En conséquence, pour évaluer la constitutionnalité d'une disposition relative à l'environnement, il faut d'abord consulter la liste des pouvoirs législatifs figurant dans la *Loi constitutionnelle de 1867*, pour vérifier si la disposition relève d'un seul ou de plusieurs des pouvoirs attribués au corps législatif (le Parlement ou une législature provinciale) qui a adopté la mesure législative en cause (*ibid.*, à la p. 65). Si, de par son caractère véritable, la disposition relève essentiellement de l'un de ces pouvoirs, elle est alors constitutionnellement valide.

Bien que le caractère véritable puisse être décrit de différentes façons, les expressions «objet principal» ou «idée maîtresse» utilisées dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, aux pp. 481 et 482, ou l'expression «la caractéristique principale ou la plus importante de la loi contestée», utilisée dans les arrêts *Whitbread c. Walley*, [1990] 3

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man River, *supra*, at p. 62, appropriately convey the meaning to be attached to the term. If a provision dealing with the environment is really aimed at promoting the dominant purpose of the statute or at addressing the impact of a statutory scheme, and the scheme itself is valid, then so is the provision.

In examining the validity of legislation in this way, it must be underlined that the nature of the relevant legislative powers must be examined. Different types of legislative powers may support different types of environmental provisions. The manner in which such provisions must be related to a legislative scheme was, by way of example, discussed in *Oldman River* in respect of railways, navigable waters and fisheries. An environmental provision may be validly aimed at curbing environmental damage, but in some cases the environmental damage may be directly related to the power itself. There is a considerable difference between regulating works and activities, like railways, and a resource like fisheries, and consequently the environmental provisions relating to each of these. Environmental provisions must be tied to the appropriate constitutional source.

Some heads of legislation may support a wholly different type of environmental provision than others. Notably under the general power to legislate for the peace, order and good government, Parliament may enact a wide variety of environmental legislation in dealing with an emergency of sufficient magnitude to warrant resort to the power. But the emergency would, of course, have to be established. So too with the "national concern" doctrine, which formed the major focus of the present case. A discrete area of environmental legislative power can fall within that doctrine, provided it meets the criteria first developed in *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373,

R.C.S. 1273, à la p. 1286, et *Oldman River*, précité, à la p. 62, évoquent correctement le sens qu'il faut donner à cette notion. Si une disposition concernant l'environnement vise réellement à promouvoir l'objectif principal de la loi ou à s'attaquer à l'effet d'un régime législatif, et si ce régime est lui-même valide, alors la disposition le sera également.

114 Il faut souligner que, lorsqu'on examine la validité d'une loi de cette façon, il faut également examiner la nature des pouvoirs législatifs pertinents. Différents types de pouvoirs législatifs peuvent justifier différents types de dispositions relatives à l'environnement. La manière dont de telles dispositions doivent se rapporter à un régime législatif a été étudiée, au moyen d'un exemple, dans l'arrêt *Oldman River* relativement aux chemins de fer, aux eaux navigables et aux pêches. Une disposition relative à l'environnement peut validement viser à freiner les dommages causés à l'environnement, mais, dans certains cas, ces dommages peuvent être liés directement au pouvoir lui-même. Il existe une énorme différence entre la réglementation d'ouvrages et d'activités comme les chemins de fer, et celle d'une ressource comme les pêches, et, par conséquent, entre les dispositions relatives à l'environnement qui se rapportent à chacun d'eux. Les dispositions relatives à l'environnement doivent être rattachées à la bonne source constitutionnelle.

115 Certains chefs de compétence législative peuvent justifier un type tout à fait différent de dispositions relatives à l'environnement. En vertu notamment du pouvoir général d'adopter des lois pour la paix, l'ordre et le bon gouvernement, le Parlement peut adopter un large éventail de lois sur l'environnement afin de répondre à une urgence d'une ampleur suffisante pour justifier le recours à ce pouvoir. Mais il faudrait naturellement prouver qu'il y a urgence. Il en est de même en ce qui concerne la théorie de l'«intérêt national», qui constituait le principal point sur lequel on s'est concentré en l'espèce. Un domaine distinct de compétence législative en matière d'environnement peut relever de cette théorie, pourvu qu'il satisfasse aux critères établis dans le *Renvoi sur la Loi anti-*

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and thus set forth in *Crown Zellerbach*, *supra*, at p. 432:

> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

Thus in the latter case, this Court held that marine pollution met those criteria and so fell within the exclusive legislative power of Parliament under the peace, order and good government clause. While the constitutional necessity of characterizing certain activities as beyond the scope of provincial legislation and falling within the national domain was accepted by all the members of the Court, the danger of too readily adopting this course was not lost on the minority. Determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism. In *Crown Zellerbach*, the minority (at p. 453) expressed the view that the subject of environmental protection was all-pervasive, and if accepted as falling within the general legislative domain of Parliament under the national concern doctrine, could radically alter the division of legislative power in Canada.

116 The minority position on this point (which was not addressed by the majority) was subsequently accepted by the whole Court in *Oldman River*, *supra*, at p. 64. The general thrust of that case is that the Constitution should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution. This is hardly consistent with an enthusiastic adoption of the "national dimensions" doctrine. That doctrine can, it is true, be adopted where the criteria set forth in *Crown Zellerbach* are met so that the subject can

inflation, [1976] 2 R.C.S. 373, et ainsi énoncés dans l'arrêt *Crown Zellerbach*, précité, à la p. 432:

> 3. Pour qu'on puisse dire qu'une matière est d'intérêt national dans un sens ou dans l'autre, elle doit avoir une unicité, une particularité et une indivisibilité qui la distinguent clairement des matières d'intérêt provincial, et un effet sur la compétence provinciale qui soit compatible avec le partage fondamental des pouvoirs législatifs effectué par la Constitution;

Dans le dernier cas, notre Cour a donc jugé que la pollution de la mer satisfaisait à ces critères et relevait ainsi de la compétence législative exclusive que le Parlement possède en vertu de la clause concernant la paix, l'ordre et le bon gouvernement. Bien que tous les juges de la Cour aient reconnu la nécessité constitutionnelle de qualifier certaines activités comme excédant la portée de la loi provinciale et relevant du domaine national, le danger d'adopter trop facilement cette ligne de conduite n'a pas échappé aux juges dissidents. Décider qu'un sujet particulier est une question d'intérêt national fait en sorte que cette question relève de la compétence exclusive et prépondérante du Parlement et a manifestement une incidence sur l'équilibre du fédéralisme canadien. Dans l'arrêt *Crown Zellerbach*, les juges dissidents (à la p. 453) ont exprimé l'avis que la protection de l'environnement est une matière qui touche à tout et que, si elle était reconnue comme relevant de la compétence législative générale du Parlement en vertu de la théorie de l'intérêt national, elle pourrait modifier radicalement le partage des compétences législatives au Canada.

La position des juges dissidents sur ce point (qui n'a pas été abordé par les juges formant la majorité) a été ultérieurement acceptée par la Cour au complet dans l'arrêt *Oldman River*, précité, à la p. 64. D'après l'orientation générale de cet arrêt, il faudrait interpréter la Constitution de façon à accorder aux deux niveaux de gouvernement de vastes moyens de protéger l'environnement, tout en maintenant la structure générale de la Constitution. Cela est difficilement compatible avec l'adoption enthousiaste de la théorie des «dimensions nationales». Cette théorie peut, il est vrai, être adoptée lorsqu'il a été satisfait aux critères énoncés dans l'arrêt *Crown Zellerbach*, de sorte

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appropriately be separated from areas of provincial competence.

I have gone on at this length to demonstrate the simple proposition that the validity of a legislative provision (including one relating to environmental protection) must be tested against the specific characteristics of the head of power under which it is proposed to justify it. For each constitutional head of power has its own particular characteristics and raises concerns peculiar to itself in assessing it in the balance of Canadian federalism. This may seem obvious, perhaps even trite, but it is all too easy (see *Fowler v. The Queen*, [1980] 2 S.C.R. 213) to overlook the characteristics of a particular power and overshoot the mark or, again, in assessing the applicability of one head of power to give effect to concerns appropriate to another head of power when this is neither appropriate nor consistent with the law laid down by this Court respecting the ambit and contours of that other power. In the present case, it seems to me, this was the case of certain propositions placed before us regarding the breadth and application of the criminal law power. There was a marked attempt to raise concerns appropriate to the national concern doctrine under the peace, order and good government clause to the criminal law power in a manner that, in my view, is wholly inconsistent with the nature and ambit of that power as set down by this Court from a very early period and continually reiterated since, notably in specific pronouncements in the most recent cases on the subject.

The Criminal Law Power

Section 91(27) of the *Constitution Act, 1867* confers the exclusive power to legislate in relation to criminal law on Parliament. The nature and ambit of this power has recently been the subject of a detailed analytical and historical examination in *RJR-MacDonald*, *supra*, where it was again described (p. 240), as it has for many years, as being "plenary in nature" (emphasis added). I shall

que le sujet en question peut, à juste titre, être dissocié des domaines de compétence provinciale.

117 J'en suis venu jusque-là pour démontrer simplement que la validité d'une disposition législative (y compris une disposition relative à la protection de l'environnement) doit être examinée en fonction des caractéristiques particulières du chef de compétence par lequel on propose de la justifier. En effet, chaque chef de compétence constitutionnelle a ses propres caractéristiques particulières et soulève des questions qui lui sont propres lorsqu'on l'évalue au regard du fédéralisme canadien. Cela peut sembler évident, voire même banal, mais il n'est que trop facile (voir *Fowler c. La Reine*, [1980] 2 R.C.S. 213) d'oublier les caractéristiques d'un pouvoir particulier et de dépasser les bornes ou, encore une fois, en évaluant l'applicabilité d'un chef de compétence, de mettre à exécution des intérêts propres à un autre chef de compétence lorsque ce n'est ni approprié ni conforme au droit énoncé par notre Cour en ce qui concerne l'étendue et les limites de cet autre pouvoir. En l'espèce, me semble-t-il, c'était le cas de certaines propositions qui nous ont été soumises relativement à l'étendue et à l'application de la compétence en matière de droit criminel. On a manifestement tenté de soulever des questions propres à la théorie de l'intérêt national justifiant l'application de la clause concernant la paix, l'ordre et le bon gouvernement à la compétence en matière de droit criminel, et ce, d'une manière qui, à mon avis, est tout à fait incompatible avec la nature et l'étendue de cette compétence qui ont été établies très tôt par notre Cour et qui ont été constamment réitérées depuis, notamment dans des déclarations précises contenues dans la jurisprudence la plus récente en la matière.

La compétence en matière de droit criminel

118 Le paragraphe 91(27) de la *Loi constitutionnelle de 1867* confère au Parlement le pouvoir exclusif d'adopter des lois en matière de droit criminel. La nature et l'étendue de ce pouvoir ont récemment fait l'objet d'une analyse historique approfondie dans l'arrêt *RJR-MacDonald*, précité, où ce pouvoir a de nouveau été décrit (p. 240), comme c'était le cas depuis de nombreuses années, comme

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not attempt to repeat the analysis so recently set forth at length by this Court, or attempt to refer extensively to all of the many authorities there cited, but will confine myself to underlining the findings in that case that are most salient to the issues raised here. I add that Professor Leclair in an excellent article, "Aperçu des virtualités de la compétence fédérale en droit criminel dans le contexte de la protection de l'environnement" (1996), 27 *R.G.D.* 137, has very recently analysed all the relevant cases and has come to the same conclusion about the general scope of the criminal law power and its application to the environment, and in particular the Act here in question.

étant «de nature plénière» (je souligne). Je ne tenterai ni de reprendre l'analyse détaillée si récente de notre Cour ni de mentionner à fond toute la doctrine et toute la jurisprudence qui y ont été citées, mais je me contenterai plutôt de souligner les conclusions de cet arrêt qui sont les plus marquantes en ce qui concerne les questions soulevées en l'espèce. J'ajoute que, dans un excellent article intitulé «Aperçu des virtualités de la compétence fédérale en droit criminel dans le contexte de la protection de l'environnement» (1996), 27 *R.G.D.* 137, le professeur Leclair analysait très récemment toute la jurisprudence pertinente et qu'il en est venu à la même conclusion au sujet de la portée générale de la compétence en matière de droit criminel et de son application à l'environnement, et, en particulier, de la loi dont il est question en l'espèce.

119 What appears from the analysis in *RJR-MacDonald* is that as early as 1903, the Privy Council, in *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524, at pp. 528-29, had made it clear that the power conferred on Parliament by s. 91(27) is "the criminal law in its widest sense" (emphasis added). Consistently with this approach, the Privy Council in *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310 (hereafter *PATA*), at p. 324, defined the criminal law power as including any prohibited act with penal consequences. As it put it, at p. 324: "The criminal quality of an act cannot be discerned . . . by reference to any standard but one: Is the act prohibited with penal consequences?" This approach has been consistently followed ever since and, as *RJR-MacDonald* relates, it has been applied by the courts in a wide variety of settings. Accordingly, it is entirely within the discretion of Parliament to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard, to adopt the terminology of Rand J. in the *Margarine Reference*, *supra*, at p. 49, cited *infra*.

Ce qui ressort de l'analyse effectuée dans l'arrêt *RJR-MacDonald* est que, dès 1903, dans l'arrêt *Attorney-General for Ontario c. Hamilton Street Railway Co.*, [1903] A.C. 524, aux pp. 528 et 529, le Conseil privé avait précisé que le pouvoir conféré au Parlement par le par. 91(27) a trait au [TRADUCTION] «droit criminel dans son sens le plus large» (je souligne). Conformément à cette interprétation, le Conseil privé a, dans l'arrêt *Proprietary Articles Trade Association c. Attorney-General for Canada*, [1931] A.C. 310 (ci-après *PATA*), à la p. 324, défini la compétence en matière de droit criminel comme comprenant tout acte interdit assorti de conséquences pénales. Comme il l'affirme, à la p. 324: [TRADUCTION] «La qualité criminelle d'un acte ne peut se discerner [. . .] qu'en se référant à une norme unique: l'acte est-il interdit et assorti de conséquences pénales?» Cette interprétation a été constamment suivie depuis et, comme on le rapporte dans l'arrêt *RJR-MacDonald*, elle a été appliquée par les tribunaux dans toute une gamme de contextes. Par conséquent, il relève entièrement du pouvoir discrétionnaire du Parlement de décider quel mal il désire supprimer au moyen d'une interdiction pénale et quel intérêt menacé il souhaite ainsi sauvegarder, pour reprendre les termes du juge Rand dans le *Renvoi sur la margarine*, précité, à la p. 49, cité plus loin.

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Contrary to the respondent's submission, under s. 91(27) of the *Constitution Act, 1867*, it is also within the discretion of Parliament to determine the extent of blameworthiness that it wishes to attach to a criminal prohibition. So it may determine the nature of the mental element pertaining to different crimes, such as a defence of due diligence like that which appears in s. 125(1) of the Act in issue. This flows from the fact that Parliament has been accorded plenary power to make criminal law in the widest sense. This power is, of course, subject to the "fundamental justice" requirements of s. 7 of the *Canadian Charter of Rights and Freedoms*, which may dictate a higher level of *mens rea* for serious or "true" crimes; cf. *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, and *R. v. Rube*, [1992] 3 S.C.R. 159, but that is not an issue here.

120 Contrairement à l'argument de l'intimée, aux termes du par. 91(27) de la *Loi constitutionnelle de 1867*, il relève également du pouvoir discrétionnaire du Parlement de déterminer le degré de culpabilité qu'il souhaite attacher à une interdiction criminelle. Il peut ainsi déterminer la nature de l'élément moral relatif à divers crimes, telle que la défense de diligence raisonnable comme celle qui figure au par. 125(1) de la loi en cause. Cela découle du fait que le Parlement a été investi du plein pouvoir d'adopter des règles de droit criminel au sens le plus large du terme. Ce pouvoir est assujetti, naturellement, aux exigences de la «justice fondamentale» prescrites à l'art. 7 de la *Charte canadienne des droits et libertés*, qui peuvent dicter un degré plus élevé de *mens rea* dans le cas des crimes graves ou «proprement dits»; voir *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, et *R. c. Rube*, [1992] 3 R.C.S. 159, mais cette question ne se pose pas en l'espèce.

The *Charter* apart, only one qualification has been attached to Parliament's plenary power over criminal law. The power cannot be employed colourably. Like other legislative powers, it cannot, as Estey J. put it in *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at p. 237, "permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence". To determine whether such an attempt is being made, it is, of course, appropriate to enquire into Parliament's purpose in enacting the legislation. As Estey J. noted in *Scowby*, at p. 237, since the *Margarine Reference*, it has been "accepted that some legitimate public purpose must underlie the prohibition". Estey J. then cited Rand J.'s words in the *Margarine Reference* (at p. 49) as follows:

121 La *Charte* mise à part, le plein pouvoir du Parlement en matière de droit criminel a été assorti d'une seule réserve. Ce pouvoir ne peut pas être utilisé de façon déguisée. Comme d'autres pouvoirs législatifs, il ne peut pas, comme le dit le juge Estey dans l'arrêt *Scowby c. Glendinning*, [1986] 2 R.C.S. 226, à la p. 237, «permettr[e] au Parlement, simplement en légiférant de la manière appropriée, d'empiéter spécieusement sur des domaines de compétence législative provinciale exclusive». Pour déterminer si on est en présence d'une telle tentative, il convient, naturellement, d'examiner l'objectif que poursuivait le Parlement en adoptant la loi en cause. Comme le juge Estey le fait remarquer dans l'arrêt *Scowby*, à la p. 237, depuis le *Renvoi sur la margarine*, on a «accepté que l'interdiction doit se fonder sur un objectif public légitime». Le juge Estey cite ensuite les propos du juge Rand dans le *Renvoi sur la margarine* (à la p. 49):

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legisla-

[TRADUCTION] Le crime est l'acte que la loi interdit et auquel elle attache une peine; les interdictions portant sur quelque chose, l'on peut toujours trouver à leur base une situation contre laquelle le législateur veut, dans l'intérêt public, lutter. La situation que le législateur a voulu faire cesser ou les intérêts qu'il a voulu sauvegar-

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ture has had in mind to suppress the evil or to safeguard the interest threatened.

der peuvent être autant du domaine social que du domaine économique ou politique; et la législature avait à l'esprit de supprimer le mal ou de sauvegarder les intérêts menacés.

I simply add that the analysis in *Scowby* and the *Margarine Reference* was most recently applied by this Court in *RJR-MacDonald*, *supra*, at pp. 240-41.

J'ajoute simplement que l'analyse effectuée dans *Scowby* et le *Renvoi sur la margarine* a été appliquée tout récemment par notre Cour dans l'arrêt *RJR-MacDonald*, précité, aux pp. 240 et 241.

122 In the *Margarine Reference*, *supra*, at p. 50, Rand J. helpfully set forth the more usual purposes of a criminal prohibition in the following passage:

Dans le *Renvoi sur la margarine*, précité, à la p. 50, le juge Rand expose de façon utile les objectifs les plus courants d'une interdiction criminelle, dans le passage suivant:

> Is the prohibition . . . enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law. . . . [Emphasis added.]

> [TRADUCTION] La prohibition est-elle [. . .] adoptée en vue d'un objectif public qui peut la faire considérer comme relative au droit criminel? La paix publique, l'ordre, la sécurité, la santé, la moralité: ce sont là des buts habituels, bien que non exclusifs, que poursuit ce droit . . . [Je souligne.]

See also *Morgentaler*, *supra*, at p. 489; *RJR-MacDonald*, at p. 241. As the final clause in the passage just cited indicates, the listed purposes by no means exhaust the purposes that may legitimately support valid criminal legislation. Not only is this clear from this passage, but subsequent to the *Margarine Reference*, it is obvious from Rand J.'s remarks in *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497, at pp. 508-9, that he was in no way departing from Lord Atkin's statement in the *PATA* case, *supra* (he cited the relevant passage with approval). His concern in the *Margarine Reference*, as he indicates in the *Lord's Day* case (at p. 509), was that "in a federal system distinctions must be made arising from the true object, purpose, nature or character of each particular enactment". In short, in a case like the present, all one is concerned with is colourability. Otherwise, one would, in effect, be reviving the discarded notion that there is a "domain" of criminal law, something Rand J., like Lord Atkin before him, was not prepared to do. All of this is, of course, consistent with the view, most recently reiterated in *RJR-MacDonald*, at pp. 259-61, that criminal law is not frozen in time.

Voir aussi *Morgentaler*, précité, à la p. 489; *RJR-MacDonald*, à la p. 241. Comme l'indique la dernière phrase du passage que je viens de citer, il ne s'agit nullement d'une liste exhaustive des objectifs sur lesquels une loi criminelle valide peut se fonder légitimement. Non seulement cela ressort-il clairement de ce passage, mais, à la suite du *Renvoi sur la margarine*, il appert des remarques du juge Rand dans l'arrêt *Lord's Day Alliance of Canada c. Attorney General of British Columbia*, [1959] R.C.S. 497, aux pp. 508 et 509, qu'il ne s'écartait nullement de l'énoncé de lord Atkin dans l'arrêt *PATA*, précité (il a cité le passage pertinent en l'approuvant). Ce qui l'intéressait dans le *Renvoi sur la margarine*, comme il l'indique dans l'arrêt *Lord's Day* (à la p. 509), c'était que [TRADUCTION] «dans un régime fédéral, il convient de faire des distinctions selon l'objet, le but, la nature ou le caractère de chaque texte législatif». Bref, dans un cas comme en l'espèce, tout ce qui nous intéresse, c'est la question de la législation déguisée. Sinon, on ferait, en réalité, revivre l'idée abandonnée qu'il existe un «domaine» de droit criminel, quelque chose que le juge Rand, à l'instar de lord Atkin avant lui, n'était pas disposé à faire. Il va sans dire que tout cela est compatible avec le point de vue réitéré tout récemment dans l'arrêt *RJR-MacDonald*, aux pp. 259 à 261, que le droit criminel n'est pas figé dans le temps.

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During the argument in the present case, however, one sensed, at times, a tendency, even by the appellant and the supporting interveners, to seek justification solely for the purpose of the protection of health specifically identified by Rand J. Now I have no doubt that that purpose obviously will support a considerable measure of environmental legislation, as perhaps also the ground of security. But I entertain no doubt that the protection of a clean environment is a public purpose within Rand J.'s formulation in the *Margarine Reference*, cited *supra*, sufficient to support a criminal prohibition. It is surely an "interest threatened" which Parliament can legitimately "safeguard", or to put it another way, pollution is an "evil" that Parliament can legitimately seek to suppress. Indeed, as I indicated at the outset of these reasons, it is a public purpose of superordinate importance; it constitutes one of the major challenges of our time. It would be surprising indeed if Parliament could not exercise its plenary power over criminal law to protect this interest and to suppress the evils associated with it by appropriate penal prohibitions.

This approach is entirely consistent with the recent pronouncement of this Court in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, where Gonthier J., speaking for the majority, had this to say, at para. 55:

> It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment. . . . Everyone is aware that individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, *Crimes Against the Environment*, *supra*, which concluded at p. 8 that:
>
> > . . . a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the *right to a safe environment*.
> >
> > To some extent, this right and value appears to be new and emerging, but in part because it is an exten-

123 Toutefois, durant les plaidoiries en l'espèce, on a parfois senti une tendance, même chez l'appelant et les intervenants qui l'appuyaient, à chercher seulement à justifier de l'objectif de protection de la santé décrit expressément par le juge Rand. Maintenant je n'ai aucun doute que cet objectif servira manifestement de fondement à un grand nombre de mesures législatives relatives à l'environnement, comme peut-être également le motif de sécurité. Mais je ne doute nullement que la protection d'un environnement propre est un objectif public, au sens de ce qu'a exprimé le juge Rand dans le *Renvoi sur la margarine*, précité, qui est suffisant pour justifier une interdiction criminelle. C'est sûrement un [TRADUCTION] «intérêt menacé» que le Parlement peut légitimement «sauvegarder» ou, en d'autres mots, la pollution est un «mal» que le Parlement peut légitimement chercher à supprimer. En fait, comme je l'ai indiqué au début des présents motifs, c'est un objectif public d'une importance supérieure; il constitue l'un des principaux défis de notre époque. Il serait, en effet, surprenant que le Parlement ne puisse pas exercer son plein pouvoir en matière de droit criminel pour protéger cet intérêt et supprimer les maux qui lui sont associés au moyen d'interdictions pénales appropriées.

124 Ce point de vue est en totale harmonie avec l'arrêt récent de notre Cour *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, où le juge Gonthier affirme au nom des juges majoritaires, au par. 55:

> Il est clair qu'au cours des deux dernières décennies, les citoyens se sont fortement sensibilisés à l'importance d'assurer la protection de l'environnement et au fait que des conséquences pénales peuvent découler d'une conduite qui nuit à l'environnement. [. . .] Nous savons tous que, individuellement et collectivement, nous sommes responsables de la préservation de l'environnement naturel. J'abonde dans le sens de la Commission de réforme du droit du Canada qui, dans son document *Les crimes contre l'environnement*, *op. cit.*, a conclu, à la p. 10:
>
> > . . . certains faits de pollution représentent effectivement la violation d'une valeur fondamentale et largement reconnue, valeur que nous appellerons le *droit à un environnement sûr*.
> >
> > Cette valeur paraît relativement nouvelle, encore que dans la mesure où elle s'inscrit dans le prolonge-

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sion of existing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as *quality of life*, and *stewardship* of the natural environment. At the same time, traditional values as well have simply expanded and evolved to include the environment now as an area and interest of direct and primary concern. Among these values fundamental to the purposes and protections of criminal law are the *sanctity of life*, the *inviolability and integrity of persons*, and the *protection of human life and health*. It is increasingly understood that certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health.

ment d'un ensemble traditionnel et bien établi de droits et de valeurs déjà protégés par le droit pénal, son existence et ses modalités soient facilement perceptibles. Parmi les nouvelles composantes de cette valeur fondamentale, on peut sans doute compter la *qualité de la vie* et la *responsabilité* de l'être humain envers l'environnement naturel. D'autre part, les valeurs plus traditionnelles ont simplement évolué et pris une certaine ampleur pour embrasser l'environnement à titre de sujet d'intérêt et de préoccupation en soi. Font partie des valeurs fondamentales qui sous-tendent les objets et les mécanismes de protection du droit pénal, *le caractère sacré de la vie*, *l'inviolabilité et l'intégrité de la personne* et la *protection de la vie et de la santé humaines*. L'on s'entend de plus en plus pour dire que la pollution de l'environnement, sous certaines formes et à certains degrés, peut, directement ou indirectement, à court ou à long terme, être gravement dommageable ou dangereuse pour la vie et la santé humaines.

Not only has environmental protection emerged as a fundamental value in Canadian society, but this has also been recognized in legislative provisions such as s. 13(1)(*a*) EPA. [Italics in original; underlining added.]

Non seulement la protection de l'environnement est-elle devenue une valeur fondamentale au sein de la société canadienne, mais ce fait est maintenant reconnu dans des dispositions législatives telles que l'al. 13(1)*a*) LPE. [En italique dans l'original; je souligne.]

125 It is worthy of note that following Working Paper 44 (1985), from which Gonthier J. cites, the Law Reform Commission of Canada in a subsequent report to Parliament (*Recodifying Criminal Law*, Report 31 (1987)), noted its view of the desirability of using the criminal law to underline the value of respect for the environment itself. It stated, at p. 93:

Il est à noter que, à la suite du document de travail 44 (1985), dont le juge Gonthier cite un passage, la Commission de réforme du droit du Canada a, dans un rapport ultérieur au Parlement (*Pour une nouvelle codification du droit pénal*, rapport 31 (1987)), fait part de son opinion qu'il était souhaitable de mettre en relief par le droit criminel l'importance du respect de l'environnement lui-même. Elle affirme, aux pp. 105 et 106:

. . . in Working Paper 44 we proposed a new and distinct crime against the environment on the ground that certain behaviour so threatens fundamental values as to warrant criminal sanctions. That crime was to consist of conduct damaging the environment and thereby seriously harming or endangering human life or health.

Dans le document de travail nº 44 [. . .], nous proposions [. . .] l'instauration d'un nouveau crime portant spécifiquement sur les atteintes à l'environnement parce que certains actes menacent à ce point les valeurs fondamentales qu'ils justifient le recours au droit pénal. Plus précisément, le crime était défini comme une conduite dommageable pour l'environnement et, de ce fait, gravement dommageable ou dangereuse pour la vie ou la santé humaines.

Since then, however, we revised our opinion. First, we concluded that since environmental damage harming or endangering life and safety is covered by crimes of negligence against the person and by the newly proposed crime of endangering (clause 10(1)), there was no need for an environmental crime like that proposed.

Nous avons toutefois changé d'avis depuis. En premier lieu, nous en sommes venus à la conclusion qu'il était inutile de créer une infraction contre l'environnement telle que nous l'avions proposée parce que le dommage écologique gravement dommageable ou dangereux pour la vie et la sécurité est réprimé par les crimes

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Second, our consultations on Working Paper 44 together with a series of environmental disasters since its publication convinced the majority of the Commissioners of the need to use criminal law to underline the value of respect for the environment itself and stigmatize behaviour causing disastrous damage with long-term loss of natural resources. [Emphasis added.]

de négligence contre la personne et par le nouveau crime de mise en danger (paragraphe 10(1)). En second lieu, les consultations tenues au sujet du document de travail nº 44 et la série de catastrophes écologiques qui ont eu lieu dans les années qui ont suivi la publication du document ont convaincu la majorité des commissaires de la nécessité de mettre en relief par le droit pénal l'importance du respect de l'environnement lui-même et de stigmatiser les conduites qui provoquent des dommages écologiques d'ampleur catastrophique amenant à long terme une perte des ressources naturelles. [Je souligne.]

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This is, of course, in line with the thinking of various international organisms. The World Commission on Environment and Development (the Brundtland Commission) in its report *Our Common Future* (1987) (see at pp. 219-20, and pp. 224-25) long ago recommended the adoption of appropriate legislation to protect the environment against toxic and chemical substances, including the creation of national standards that could be supplemented by local legislation. At p. 211, it stated:

126 Naturellement, cela est conforme à la pensée de divers organismes internationaux. Dans son rapport intitulé *Notre avenir à tous* (1988) (voir aux pp. 261 et 262 et aux pp. 267 et 268), la Commission mondiale sur l'environnement et le développement (la commission Brundtland) a recommandé, depuis longtemps, l'adoption de lois appropriées pour protéger l'environnement contre les substances toxiques et chimiques, y compris l'établissement de normes nationales qui pourraient être complétées par des mesures législatives locales. Aux pages 251 et 252, elle affirme:

It is becoming increasingly clear that the sources and causes of pollution are far more diffuse, complex, and interrelated — and the effects of pollution more widespread, cumulative, and chronic — than hitherto believed. Pollution problems that were once local are now regional or even global in scale. Contamination of soils, ground-water, and people by agrochemicals is widening and chemical pollution has spread to every corner of the planet. The incidence of major accidents involving toxic chemicals has grown. Discoveries of hazardous waste disposal sites — at Love Canal in the United States, for example, and at Lekkerkek in the Netherlands, Vac in Hungary, and Georgswerder in the Federal Republic of Germany — have drawn attention to another serious problem.

Il devient de plus en plus évident que les sources et causes de pollution sont beaucoup plus diffuses, complexes et reliées — et les effets de la pollution plus répandus, plus cumulatifs et plus chroniques — qu'on ne le croyait précédemment. Les problèmes de pollution qui avaient naguère un caractère local se posent maintenant à l'échelle régionale, voire même mondiale. La contamination des sols, des eaux souterraines et des êtres humains par des produits agrochimiques, s'élargit et la pollution chimique s'est étendue aux quatre coins de la planète. Les incidences de grands accidents impliquant des produits chimiques toxiques se sont aggravées. Les découvertes de décharges de déchets dangereux — à Love Canal aux États-Unis, par exemple, ainsi qu'à Lekkerkek aux Pays-Bas, à Vac en Hongrie et à Georgswerder en République fédérale d'Allemagne — a appelé l'attention sur un autre grave problème.

In the light of this and the growth trends projected through the next century, it is evident that measures to reduce, control, and prevent industrial pollution will need to be greatly strengthened. If they are not, pollution damage to human health could become intolerable

Compte tenu de ce qui précède et des projections estimées de la croissance pour le siècle prochain, il est manifeste qu'il faudra renforcer considérablement les mesures visant à réduire, à maîtriser et à prévenir la pollution industrielle. Autrement les dommages causés à la

in certain cities and threats to property and ecosystems will continue to grow.

Later, at pp. 219-20, it added:

In dealing with industrial pollution and resource degradation, it is essential that industry, government, and the public have clear benchmarks. Where the workforce and financial resources permit, national governments should establish clear environmental goals and enforce environmental laws, regulations, incentives, and standards on industrial enterprises. In formulating such policies, they should give priority to public health problems associated with industrial pollution and hazardous wastes. And they must improve their environmental statistics and data base relating to industrial activities.

The regulations and standards should govern such matters as air and water pollution, waste management, occupational health and safety of workers, energy and resource efficiency of products or processes, and the manufacture, marketing, use, transport, and disposal of toxic substances. This should normally be done at the national level, with local governments being empowered to exceed, but not to lower, national norms. [Emphasis added.]

See also United Nations Environment Programme, *Global Environmental Issues* (1982), at pp. 55-60.

127 What the foregoing underlines is what I referred to at the outset, that the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels. And, as is stated in the preamble to the Act under review, "Canada must be able to fulfil its international obligations in respect of the environment". I am confident that Canada can fulfil its international obligations, in so far as the toxic substances sought to be prohibited from entering into the environment under the Act are concerned, by use of the criminal law power. The purpose of the criminal law is to underline and protect our fundamental values. While many environmental issues could be criminally sanctioned in

santé par la pollution pourraient devenir intolérables dans certaines villes et les menaces aux biens et aux écosystèmes continueraient de s'amplifier.

Plus loin, aux pp. 261 et 262, elle ajoute:

Pour faire face à la pollution industrielle et à la dégradation des ressources, il est essentiel que l'industrie, les gouvernements et l'opinion publique disposent de critères bien définis. Lorsque les ressources humaines et financières le permettent, les gouvernements nationaux devraient définir clairement les objectifs en matière d'environnement et obliger les entreprises industrielles à mettre en application les lois, les règlements, les mesures incitatives et les normes dans ce domaine. En élaborant ces politiques, ils devraient donner la priorité aux problèmes d'ordre sanitaire liés à la pollution industrielle et aux déchets dangereux. Et ils devraient améliorer, du point de vue de l'environnement, leurs statistiques et leurs fonds de données se rapportant à des activités industrielles.

Les règlements et les normes devraient régir des aspects tels que la pollution de l'air et de l'eau, la gestion des déchets, l'hygiène industrielle et la sécurité des travailleurs, l'efficacité des produits ou des processus du point de vue de la consommation d'énergie et de ressources, ainsi que la fabrication, la commercialisation, l'utilisation, le transport et l'élimination des substances toxiques. Cela devrait normalement se faire à l'échelon national, les autorités locales étant habilitées à renforcer, mais non pas à libéraliser, les normes nationales. [Je souligne.]

Voir également le Programme des Nations Unies sur l'environnement, intitulé *Global Environmental Issues* (1982), aux pp. 55 à 60.

Les passages précédents viennent souligner ce que j'ai mentionné au début, c'est-à-dire que la protection de l'environnement est un défi majeur de notre époque. C'est un problème international qui exige une action des gouvernements de tous les niveaux. Et, comme il est déclaré dans le préambule de la Loi visée par le présent examen, «le Canada se doit d'être en mesure de respecter ses obligations internationales en matière d'environnement». Je suis persuadé que le Canada peut, en recourant à la compétence en matière de droit criminel, respecter ses obligations internationales en ce qui concerne les substances toxiques dont la Loi cherche à interdire le rejet dans l'environnement. Le droit criminel a pour objectif de mettre en relief

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terms of protection of human life or health, I cannot accept that the criminal law is limited to that because "certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health", as the paper approvingly cited by Gonthier J. in *Ontario v. Canadian Pacific*, *supra*, observes. But the stage at which this may be discovered is not easy to discern, and I agree with that paper that the stewardship of the environment is a fundamental value of our society and that Parliament may use its criminal law power to underline that value. The criminal law must be able to keep pace with and protect our emerging values.

et de protéger nos valeurs fondamentales. Bien que des sanctions pénales puissent être attachées à beaucoup de questions relatives à l'environnement en ce qui concerne la protection de la vie ou de la santé humaine, je ne puis accepter que le droit criminel se limite à cela parce que «la pollution de l'environnement, sous certaines formes et à certains degrés, peut, directement ou indirectement, à court ou à long terme, être gravement dommageable ou dangereuse pour la vie et la santé humaines», comme on le fait remarquer dans le document que le juge Gonthier cite et approuve dans l'arrêt *Ontario c. Canadien Pacifique*, précité. Mais le stade auquel cela peut être découvert n'est pas facile à identifier, et je suis d'accord avec le document pour dire que la responsabilité de l'être humain envers l'environnement est une valeur fondamentale de notre société, et que le Parlement peut recourir à sa compétence en matière de droit criminel pour mettre cette valeur en relief. Le droit criminel doit pouvoir s'adapter à nos nouvelles valeurs et les protéger.

In saying that Parliament may use its criminal law power in the interest of protecting the environment or preventing pollution, there again appears to have been confusion during the argument between the approach to the national concern doctrine and the criminal law power. The national concern doctrine operates by assigning full power to regulate an area to Parliament. Criminal law does not work that way. Rather it seeks by discrete prohibitions to prevent evils falling within a broad purpose, such as, for example, the protection of health. In the criminal law area, reference to such broad policy objectives is simply a means of ensuring that the prohibition is legitimately aimed at some public evil Parliament wishes to suppress and so is not a colourable attempt to deal with a matter falling exclusively within an area of provincial legislative jurisdiction.

128 Lorsqu'on a dit que le Parlement peut recourir à sa compétence en matière de droit criminel dans le but de protéger l'environnement ou de prévenir la pollution, il semble de nouveau y avoir eu de la confusion, durant les plaidoiries, entre la façon d'aborder la théorie de l'intérêt national et la compétence en matière de droit criminel. La théorie de l'intérêt national a pour effet d'attribuer au Parlement le plein pouvoir de réglementer un domaine. Le droit criminel ne fonctionne pas ainsi. Il cherche plutôt, au moyen d'interdictions distinctes, à prévenir des maux relevant d'un objectif général, comme, par exemple, la protection de la santé. Dans le domaine du droit criminel, le renvoi à des objectifs de principe généraux n'est qu'un moyen d'assurer que l'interdiction vise légitimement un certain mal public que le Parlement veut supprimer et ne constitue pas une tentative déguisée de traiter une matière relevant exclusivement d'un domaine de compétence législative provinciale.

The legitimate use of the criminal law I have just described in no way constitutes an encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit.

129 Le recours légitime au droit criminel, que je viens de décrire, ne constitue nullement un empiétement sur la compétence législative provinciale, bien qu'il puisse toucher à des matières qui en

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This is made clear from the following passage from *Standard Sausage Co. v. Lee*, [1933] 4 D.L.R. 501 (B.C.C.A.), at pp. 506-7, cited with approval in *RJR-MacDonald*, *supra*, pp. 254-55:

> . . . if the Federal Parliament, to protect the public health against actual or threatened danger, places restrictions on, and limits the number of preservatives that may be used, it may do so under s. 91(27) of the B.N.A. Act. This is not in essence an interference with property and civil rights. That may follow as an incident but the real purpose (not colourable and not merely to aid what in substance is an encroachment) is to prevent actual, or threatened injury or the likelihood of injury of the most serious kind to all inhabitants of the Dominion.
>
> . . .
>
> The primary object of this legislation is the public safety — protecting it from threatened injury. If that is its main purpose — and not a mere pretence for the invasion of civil rights — it is none the less valid. . . .

I shall have more to say about this later.

130 I conclude that Parliament may validly enact prohibitions under its criminal law power against specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances. I quite understand that a particular prohibition could be so broad or all-encompassing as to be found to be, in pith and substance, really aimed at regulating an area falling within the provincial domain and not exclusively at protecting the environment. A sweeping prohibition like this (and this would be equally true of one aimed generally at the protection of health) would, in any case, probably be unworkable. But the attack here ultimately is that the impugned provisions grant such a broad discretion to the Governor in Council as to permit orders that go beyond federal power. I can imagine very nice issues being raised concerning this matter under certain types of legislation, though in such a case one would tend to interpret the legislation narrowly if only to keep it within constitutional bounds. But one need not go so far here. For, it

relèvent. Cela ressort clairement du passage suivant de l'arrêt *Standard Sausage Co. c. Lee*, [1933] 4 D.L.R. 501 (C.A.C.-B.), aux pp. 506 et 507, cité et approuvé dans *RJR-MacDonald*, précité, aux pp. 254 et 255:

> [TRADUCTION] . . . si le Parlement fédéral, pour protéger la santé publique contre un danger réel ou appréhendé, apporte des restrictions aux agents de conservation qui peuvent être utilisés et en limite le nombre, il peut le faire en vertu du par. 91(27) de l'A.A.N.B. Ce n'est pas par essence une intrusion dans la propriété et les droits civils. Cela peut en découler accessoirement mais le vrai but (qui n'est pas déguisé, ni seulement un appui à ce qui est en substance un empiétement) est de prévenir un dommage réel ou appréhendé ou la probabilité d'un dommage de la plus grande gravité pour tous les habitants du Dominion.
>
> . . .
>
> L'objet premier de cette loi est la sécurité du public, en protégeant celui-ci contre un dommage appréhendé. Si c'est là son but principal — et non un simple prétexte pour s'ingérer dans le domaine des droits civils — sa validité n'est pas amoindrie . . .

J'aurai quelque chose à ajouter à ce sujet plus loin.

Je conclus que le Parlement peut, en vertu de sa compétence en matière de droit criminel, édicter validement des interdictions relatives à des actes précis en vue de prévenir la pollution ou, autrement dit, le rejet de certaines substances toxiques dans l'environnement. Je comprends très bien qu'une interdiction particulière pourrait être générale ou globale au point d'être considérée, de par son caractère véritable, comme visant réellement à réglementer un domaine relevant des provinces et non pas exclusivement à protéger l'environnement. Une interdiction absolue comme celle-là (et ce serait également le cas de toute interdiction visant généralement à protéger la santé) serait de toute façon probablement impossible à appliquer. Mais, en l'espèce, on s'attaque en fin de compte au fait que les dispositions contestées accordent au gouverneur en conseil un pouvoir discrétionnaire si vaste qu'il permet de rendre des ordonnances qui excèdent la compétence fédérale. J'imagine que certains types de mesures législatives peuvent soulever de très belles questions à ce sujet, même si,

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seems to me, as we shall see, when one carefully peruses the legislation, it becomes clear enough that Parliament has stayed well within its power.

dans un tel cas, on avait tendance à interpréter strictement le texte législatif en cause ne serait-ce que pour le garder dans les limites fixées par la Constitution. Mais il n'est pas nécessaire d'aller aussi loin en l'espèce, car, me semble-t-il, comme nous le verrons, lorsqu'on lit attentivement la Loi, il devient assez évident que le Parlement a bel et bien agi conformément à sa compétence.

Though I shall deal with this issue in more detail once I come to consider the legislation, it is well at this point to recall that the use of the federal criminal law power in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action. The situation is really no different from the situation regarding the protection of health where Parliament has for long exercised extensive control over such matters as food and drugs by prohibitions grounded in the criminal law power. This has not prevented the provinces from extensively regulating and prohibiting many activities relating to health. The two levels of government frequently work together to meet common concerns. The cooperative measures relating to the use of tobacco are fully related in *RJR-MacDonald*, *supra*. Nor, though it arises under a different technical basis, is the situation, in substance, different as regards federal prohibitions against polluting water for the purposes of protecting the fisheries. Here again there is a wide measure of cooperation between the federal and provincial authorities to effect common or complementary ends. It is also the case in many other areas. The fear that the legislation impugned here would distort the federal-provincial balance seems to me to be overstated.

131 Même si je traiterai cette question plus en détail une fois que j'en serai venu à examiner la Loi, il convient à ce moment-ci de se rappeler que le recours à la compétence fédérale en matière de droit criminel n'empêche nullement les provinces d'exercer les vastes pouvoirs que leur confère l'art. 92 pour réglementer et limiter la pollution de l'environnement de façon indépendante ou pour compléter les mesures fédérales. La situation ne diffère vraiment pas de celle qui a trait à la protection de la santé, dans laquelle le Parlement exerce depuis longtemps un vaste contrôle sur des matières comme les aliments et drogues au moyen d'interdictions fondées sur la compétence en matière de droit criminel. Cela n'a pas empêché les provinces de réglementer et d'interdire largement beaucoup d'activités relatives à la santé. Les deux niveaux de gouvernement travaillent souvent ensemble pour satisfaire des intérêts communs. Les mesures de coopération concernant l'usage du tabac sont relatées intégralement dans *RJR-MacDonald*, précité. Bien qu'elle ait un fondement technique différent, la situation n'est pas non plus différente, pour l'essentiel, dans le cas des interdictions fédérales de pollution de l'eau qui visent à protéger les pêches. Ici encore, il y a une vaste mesure de coopération entre les autorités fédérales et provinciales pour réaliser des fins communes ou complémentaires. C'est également le cas dans de nombreux autres domaines. La crainte que la loi contestée en l'espèce perturbe l'équilibre fédéral-provincial me semble exagérée.

One last matter requires comment. The specific provision impugned in this case, the Interim Order, would seem to me to be justified as a criminal prohibition for the protection of human life and health alone (a purpose upheld most recently in *RJR-MacDonald*). That would also at first sight appear

132 Un dernier point nécessite des remarques. La mesure même qui est contestée en l'espèce, l'arrêté d'urgence, me semblerait justifiée en tant qu'interdiction criminelle visant à protéger la vie et la santé humaines seulement (un objectif dont la validité a été confirmée tout récemment dans *RJR-*

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to be true of many of the prohibited uses of the substances in the List of Toxic Substances in Schedule I. So if the protection of the environment does not amount to a valid public purpose to justify criminal sanctions, it would be simply a question of severing those portions of s. 11 of the Act that deal solely with the environment to ensure the validity of the Interim Order and the rest of the enabling provisions. After all, the protection of the environment, as we earlier saw, is closely integrated, directly or indirectly, with the protection of health. But for my part, I find this exercise wholly unnecessary. The protection of the environment, through prohibitions against toxic substances, seems to me to constitute a wholly legitimate public objective in the exercise of the criminal law power. Humanity's interest in the environment surely extends beyond its own life and health.

MacDonald). De prime abord, cela paraîtrait également être le cas d'un bon nombre des usages interdits des substances inscrites sur la liste des substances toxiques de l'annexe I. Donc, si la protection de l'environnement n'équivaut pas à un objectif public valide pour justifier des sanctions criminelles, il s'agirait simplement de dissocier du reste des dispositions habilitantes les parties de l'art. 11 de la Loi qui traitent seulement de l'environnement, afin de garantir la validité de l'arrêté d'urgence. Après tout, la protection de l'environnement, comme nous l'avons déjà vu, est étroitement assimilée, directement ou indirectement, à la protection de la santé. Mais, quant à moi, je juge cet exercice tout à fait inutile. La protection de l'environnement, au moyen d'interdictions concernant les substances toxiques, me semble constituer un objectif public tout à fait légitime dans l'exercice de la compétence en matière de droit criminel. L'intérêt qu'ont les êtres humains dans l'environnement va sûrement au-delà de leurs propres vie et santé.

The Provisions Respecting Toxic Substances

Les dispositions concernant les substances toxiques

133 The respondent, the *mis en cause* and their supporting interveners primarily attack ss. 34 and 35 of the Act as constituting an infringement on provincial regulatory powers conferred by the Constitution. This they do by submitting that the power to regulate a substance is so broad as to encroach upon provincial legislative jurisdiction. That is because of what they call the broad "definition" given to toxic substances under s. 11, and particularly para. (*a*), thereof which, it will be remembered, provides that:

L'intimée, le mis en cause et les intervenants qui les appuient contestent principalement les art. 34 et 35 de la Loi, en faisant valoir qu'ils constituent un empiétement sur les pouvoirs de réglementation conférés aux provinces par la Constitution. Ce faisant, ils soutiennent que le pouvoir de réglementer une substance est vaste au point d'empiéter sur la compétence législative des provinces. Il en est ainsi en raison de ce qu'ils appellent la «définition» large que l'on donne des substances toxiques à l'art. 11 et tout particulièrement à son al. *a*), qui, rappelons-le, prévoit que:

11. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions

(*a*) having or that may have an immediate or long-term harmful effect on the environment;

11. Pour l'application de la présente partie, est toxique toute substance qui pénètre ou peut pénétrer dans l'environnement en une quantité ou une concentration ou dans des conditions de nature à:

a) avoir, immédiatement ou à long terme, un effet nocif sur l'environnement;

This, along with the expansive definitions of "substance" and "environment" in s. 3(1), makes it possible, they say, in effect to regulate any substance

Cette définition, conjuguée aux définitions larges des termes «substance» et «environnement» au par. 3(1), permet en fait, disent-ils, de réglementer

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that can in any way prove harmful to the environment.

I cannot agree with this submission. As I see it, the argument focusses too narrowly on a specific provision of the Act and for that matter only on certain aspects of it, and then applies that provision in a manner that I do not think is warranted by a consideration of the provisions of the Act as a whole and in light of its background and purpose. I shall deal with the latter first. Before doing so, however, I shall comment briefly on the concern expressed about the breadth of the phraseology of the Act. As Gonthier J. observed in *Ontario v. Canadian Pacific*, *supra*, this broad wording is unavoidable in environmental protection legislation because of the breadth and complexity of the subject and has to be kept in mind in interpreting the relevant legislation. At para. 43, he stated:

> What is clear from this brief review of Canadian pollution prohibitions is that our legislators have preferred to take a broad and general approach, and have avoided an exhaustive codification of every circumstance in which pollution is prohibited. Such an approach is hardly surprising in the field of environmental protection, given that the nature of the environment (its complexity, and the wide range of activities which might cause harm to it) is not conducive to precise codification. Environmental protection legislation has, as a result, been framed in a manner capable of responding to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation.

In light of this, he went on to hold that environmental protection legislation should not be approached with the same rigour as statutes dealing with less complex issues in applying the doctrine of vagueness developed under s. 7 of the *Charter*. The effect of requiring greater precision would be to frustrate the legislature in its attempt to protect the public against the dangers flowing from pollution. He thus summarized his view, at para. 58:

> In the environmental context, each one of us is vulnerable to the health and property damage caused by pollution. Where the legislature provides protection

toute substance qui peut de quelque façon s'avérer nocive pour l'environnement.

Je ne suis pas d'accord avec cet argument. À mon sens, il porte trop strictement sur une disposition précise de la Loi et, à ce sujet, uniquement sur certains de ses aspects, et applique ensuite cette disposition d'une manière qui, selon moi, n'est pas justifiée selon un examen des dispositions de la Loi dans son ensemble et compte tenu de l'historique et de l'objet de cette loi. Je vais d'abord traiter le dernier point. Avant de ce faire, cependant, je commenterai brièvement la crainte exprimée au sujet du caractère général du libellé de la Loi. Comme le juge Gonthier l'a fait observer dans l'arrêt *Ontario c. Canadien Pacifique*, précité, cette formulation large est inévitable dans une loi sur la protection de l'environnement en raison de l'ampleur et de la complexité du sujet, et il faut en tenir compte en interprétant les dispositions législatives pertinentes. Voici qu'il disait, au par. 43: 134

> Il ressort clairement de cette brève revue des interdictions relatives à la pollution au Canada que nos législateurs ont préféré adopter une démarche générale, évitant ainsi une codification exhaustive de chaque situation entraînant l'interdiction de polluer. Une telle démarche dans le domaine de la protection de l'environnement ne surprend pas, étant donné que la nature de l'environnement (sa complexité et la vaste gamme des activités qui peuvent en causer la dégradation) ne se prête pas à une codification précise. Les lois sur la protection de l'environnement ont donc été rédigées d'une façon qui permette de répondre à une vaste gamme d'atteintes environnementales, y compris celles qui n'ont peut-être même pas été envisagées par leurs rédacteurs.

Compte tenu de cela, il a conclu qu'il n'y a pas lieu d'aborder les lois sur la protection de l'environnement avec la même rigueur que celles qui traitent de questions moins complexes, en appliquant la théorie de l'imprécision établie en vertu de l'art. 7 de la *Charte*. Exiger une plus grande précision aurait pour effet de faire échouer la législature dans sa tentative de protéger le public contre les dangers découlant de la pollution. Il résume ainsi son point de vue, au par. 58:

> Dans le contexte environnemental, chacun d'entre nous est menacé par la dégradation de la santé et des biens que cause la pollution. Lorsque le législateur pré-

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through regulatory statutes such as the EPA, it is appropriate for courts to take a more deferential approach to the *Charter* review of the offences contained in such statutes.

On this basis, Gonthier J. then turned to an examination of terms similar to those in the Act under review. He was there dealing with a provincial regulatory statute, but the same underlying need to protect the vulnerable and the public generally is inherent in criminal offences of the type in question here. This was recognized by Cory J. in *Wholesale Travel Group Inc.*, *supra*. That case concerned offences under the *Competition Act* (formerly the *Combines Investigation Act*), long held to be constitutionally supportable under Parliament's criminal law power. Cory J. carefully distinguished between the type of offences there in question, which he described as regulatory offences, and "true crimes" such as murder. In a passage, at p. 233, relied upon by Gonthier J. (at para. 57), he had this to say:

The realities and complexities of a modern industrial society coupled with the very real need to protect all of society and particularly its vulnerable members, emphasize the critical importance of regulatory offences in Canada today. Our country simply could not function without extensive regulatory legislation. The protection provided by such measures constitutes a second justification for the differential treatment, for *Charter* purposes, of regulatory and criminal offences.

135 I turn then to the background and purpose of the provisions under review. Part II does not deal with the protection of the environment generally. It deals simply with the control of toxic substances that may be released into the environment under certain restricted circumstances, and does so through a series of prohibitions to which penal sanctions are attached. It replaces the *Environmental Contaminants Act*, first enacted in 1975 (S.C. 1974-75-76, c. 72), which was intended to control substances entering or capable of entering into the environment in a quantity or concentration suffi-

voit des mesures de protection au moyen de lois de nature réglementaire comme la LPE, il convient que les tribunaux fassent preuve d'une plus grande retenue quand ils examinent les infractions prévues dans ces lois au regard de la *Charte*.

À partir de là, le juge Gonthier est passé à l'examen de termes semblables à ceux utilisés dans la loi en cause dans la présente affaire. Il était alors saisi d'une loi provinciale de nature réglementaire, mais la même nécessité sous-jacente de protéger les personnes vulnérables et le public en général est inhérente aux infractions criminelles du genre en question ici. Le juge Cory a reconnu cela dans l'arrêt *Wholesale Travel Group Inc.*, précité. Cette affaire concernait des infractions à la *Loi sur la concurrence* (auparavant *Loi relative aux enquêtes sur les coalitions*) jugée depuis longtemps constitutionnellement justifiable en vertu de la compétence du Parlement en matière de droit criminel. Le juge Cory a soigneusement établi une distinction entre le genre d'infractions dont il était question dans cette affaire, qu'il a qualifiées d'infractions réglementaires, et des «crimes proprement dits» comme le meurtre. Dans un passage, à la p. 233, sur lequel s'est fondé le juge Gonthier (au par. 57), il affirme ceci:

Les réalités et les complexités d'une société industrielle moderne associées au besoin réel de protéger tous les membres de la société et, en particulier, ceux qui sont vulnérables font ressortir l'importance cruciale des infractions réglementaires au Canada aujourd'hui. Notre pays ne pourrait tout simplement pas fonctionner sans réglementation très étendue. La protection fournie par de telles mesures est une seconde justification du traitement différent des infractions réglementaires et des infractions criminelles aux fins de la *Charte*.

Je passe maintenant à l'historique et à l'objet des dispositions visées par le présent examen. La partie II ne traite pas de la protection de l'environnement en général. Elle traite simplement du contrôle de substances toxiques qui peuvent être rejetées dans l'environnement dans certaines circonstances limitées, et elle le fait au moyen d'une série d'interdictions assorties de sanctions pénales. Elle remplace la *Loi sur les contaminants de l'environnement* adoptée en 1975 (S.C. 1974-75-76, ch. 72), qui visait à contrôler les substances pénétrant ou risquant de pénétrer dans l'environne-

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cient to constitute a danger to health or the environment; see s. 4. The continuity of policy is evident from the fact that the toxic substances controlled under the earlier legislation including PCBs were automatically included as Schedule I of the present legislation, entitled "List of Toxic Substances".

The underlying purpose for the enactment of the present Act, so far as toxic substances are concerned, is evident from a series of reports of studies made in the mid-1980s; see Environment Canada, *From Cradle to Grave: A Management Approach to Chemicals* (1986); Environment Canada and Health and Welfare Canada, *Final Report of the Environmental Contaminants Act Amendments Consultative Committee* (1986). What these reveal is that the earlier Act was clearly deficient in identifying substances that could be toxic and that what was really needed was a regime whereby the government could assess material that could be harmful to health and the environment before the substance was already in use.

This comes out more clearly in a document published by Environment Canada in 1987 which outlines the reasons why a new Act dealing with the environment was necessary; see Environment Canada, *The Right to a Healthy Environment: An Overview of the Proposed Environmental Protection Act.* The publication made clear that existing measures had not been adequate and that because of the negligent use of chemical products, the following had resulted: "Chemical residues are everywhere: in our homes, offices and factories; in cities, on farms, in wilderness areas far removed from the sources of contamination" (p. 1). It continued (at p. 1):

> The fact that most human beings have detectable levels of synthetic chemicals in their bodies is evidence of our collective carelessness in using them. In his *Report Card* on the environment in 1986, Environment Minister Tom McMillan gave Canada an "F" for its ability to handle toxic substances.

ment en une quantité ou concentration suffisante pour mettre en danger la santé ou l'environnement; voir l'art. 4. La continuité de la politique ressort clairement du fait que les substances toxiques contrôlées en vertu de la loi antérieure, qui comprenaient les BPC, ont été incluses automatiquement à l'annexe I de la loi actuelle, intitulée «Liste des substances toxiques».

136 L'objet sous-jacent de la loi actuelle, en ce qui concerne les substances toxiques, ressort clairement d'une série de rapports émanant d'études effectuées au milieu des années 80; voir Environnement Canada, *L'intégral système de gestion des produits chimiques* (1986); Environnement Canada et Santé et Bien-être social Canada, *Rapport final du Comité consultatif sur les modifications à la Loi sur les contaminants de l'environnement* (1986). Ces rapports révèlent que la loi antérieure ne suffisait manifestement pas à identifier les substances susceptibles d'être toxiques et qu'il fallait vraiment établir un régime permettant au gouvernement d'évaluer les matières qui pourraient être nocives pour la santé et l'environnement avant qu'elles soient utilisées.

137 Cela ressort plus clairement d'un document publié par Environnement Canada en 1987, qui expose les raisons pour lesquelles une nouvelle loi sur l'environnement était requise; voir Environnement Canada, *Le droit à un environnement sain: Aperçu du projet de loi sur la protection de l'environnement*. La publication précisait que les mesures existantes n'avaient pas été adéquates et que l'utilisation négligente de produits chimiques avait engendré la situation suivante: «Les résidus de produits chimiques sont partout: dans nos maisons, dans nos bureaux et dans nos usines, dans les villes et sur les fermes, dans les régions sauvages très éloignées des sources de contamination» (p. 1). On ajoutait (à la p. 1):

> Le fait qu'on puisse déceler, chez la plupart des humains, la présence de produits chimiques synthétiques constitue une preuve évidente de l'insouciance avec laquelle nous utilisons ces produits. Dans le *Bulletin d'évaluation* sur l'état de l'environnement en 1986, le ministre de l'Environnement, Tom McMillan, accordait au Canada la note (F) pour la compétence dont nous faisons preuve dans la gestion des substances toxiques.

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138 There was no intention that the Act should bar the use, importation or manufacture of all chemical products, but rather that it should affect only those substances that are dangerous to the environment, and then only if they are not regulated by law. The report recognized that "[a] great deal of our industrial strength and economic progress is based upon the use of chemicals" (p. 2), and that only a fraction of these were "believed to be hazardous but few have been assessed to make sure" (p. 2).

La Loi visait non pas à interdire l'utilisation, l'importation ou la fabrication de tous les produits chimiques, mais plutôt à ne toucher que les substances qui sont dangereuses pour l'environnement, et seulement si elles ne sont pas réglementées par la loi. Le rapport reconnaissait qu'«[u]ne large part de notre puissance industrielle et de notre croissance économique est fondée sur l'utilisation de substances chimiques» (p. 2) et que seulement une fraction d'entre elles étaient «considérées comme dangereuses, mais très peu de celles-ci ont fait l'objet de tests permettant de s'en assurer» (p. 2).

139 The manner of assessment traditionally employed — related as it was to the concern for "pollution that could be seen, touched, smelled or tasted" and "cleaning up a mess after it occurred" (p. 3) — was no longer adequate. As the report put it (at p. 3):

> Toxic chemical contamination cannot be handled in this way. Ordinary sense perception cannot identify chemical contamination because it is usually invisible until the damage, sometimes irreparable damage, has been done. Since chemical pollution exists at the molecular level, it cannot usually be treated, contained or recovered from the environment. And since its effects are pervasive and long term, rather than local or immediate, quick-fix measures are not practical. [Emphasis added.]

La méthode d'évaluation traditionnelle — axée sur la crainte de «pollution apparente, de celle que l'on peut voir à l'œil nu, toucher, sentir, goûter», et sur le «nettoyage des dégâts, après coup» (pp. 3 et 4) — ne convenait plus. Comme l'explique le rapport (à la p. 4):

> La lutte contre la contamination par les substances toxiques ne peut se faire de cette manière. La perception habituelle par les sens ne permet pas de constater cette contamination parce qu'elle reste invisible jusqu'au moment où les dommages, quelquefois irréversibles, sont un fait accompli. Vu que la pollution chimique existe à l'état moléculaire, il n'est pas possible de la traiter dans l'environnement, de la circonscrire ou de l'éliminer. Et vu également que ses effets sont diffus et durables, plutôt que circonscrits et immédiats, des mesures ponctuelles sont impraticables. [Je souligne.]

140 Not surprisingly, the report emphasized the need to improve the procedures for assessing whether chemical substances were hazardous; see e.g. pp. 10-11. The Act would operate through the listing of chemicals, including "a schedule of dangerous chemicals which are subject to regulation under the [Act]" (p. 15).

Comme on pouvait s'y attendre, le rapport insistait sur la nécessité d'améliorer les procédures servant à établir si les substances chimiques étaient dangereuses; voir, par exemple, aux pp. 10 et 11. La Loi dresserait une liste de produits chimiques, dont «une liste des substances chimiques dangereuses visées par les règlements de la [Loi]» (p. 18).

141 The impugned Act appears to me to respond closely to these objectives. The subject of toxic substances is dealt with principally in Part II of the Act. It begins, we saw, with s. 11, which has been described as a "definition" in argument. While the provision has some properties of a definition, to speak of it in this way is misleading and does not do full justice to its purpose and function. It should be observed that it does not purport to define a

La loi contestée me semble satisfaire exactement à ces objectifs. Le sujet des substances toxiques est traité principalement à la partie II de la Loi. Elle commence, nous l'avons vu, par l'art. 11 qui a été qualifié de «définition» pendant les plaidoiries. Bien que cette disposition présente certaines caractéristiques d'une définition, la qualifier ainsi est trompeur et ne rend pas pleinement justice à son objet et à sa fonction. Il y a lieu de souligner

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"toxic substance" in the manner in which s. 3 defines various concepts, e.g. "air contaminant", "air pollution", etc. which describes with finality what the defined concept means. Rather, it sets forth that a substance can only be toxic, for the purposes of Part II, if it is entering or may enter the environment in a quantity or concentration or under conditions that result in the detrimental effects on the environment, human life and human health described in paras. (*a*) to (*c*). In other words, one cannot look at a phrase like "having or that may have an immediate or long-term harmful effect on the environment" in a manner divorced from the term "toxic" (i.e. "poisonous"; see the *Oxford English Dictionary* (2nd ed. 1989)). As well, the provision underlines that toxic as used in the Act includes substances that are not *per se*, toxic, but that may, when released into the environment in a certain quantity, concentration or condition, become toxic. Lead, for example, which appears in Schedule I, entitled "List of Toxic Substances", is not *per se* toxic but it can be so when it enters the environment in the course of its use. (This approach is strongly fortified by the nature of Schedule I, which I shall examine later.) The phrase, in other words, describes the nature of toxicity in respect of which substances are to be tested or assessed.

qu'elle n'a pas pour objet de définir une «substance toxique» de la façon dont l'art. 3 définit diverses notions, notamment «polluant atmosphérique» ou «polluant», «pollution atmosphérique», etc., article qui décrit de façon péremptoire le sens de la notion définie. Elle prévoit plutôt qu'une substance ne peut être toxique, pour l'application de la partie II, que si elle pénètre ou peut pénétrer dans l'environnement en une quantité ou une concentration ou dans des conditions qui ont un effet nocif sur l'environnement ainsi que sur la vie et la santé humaines, tel que prévu aux al. *a*) à *c*). Autrement dit, on ne peut pas considérer un passage comme «avoir, immédiatement ou à long terme, un effet nocif sur l'environnement» séparément du terme «toxique» (c.-à-d. «délétère»; voir *Le Nouveau Petit Robert* (1995)). De plus, la disposition souligne que le mot «toxique» utilisé dans la Loi comprend des substances qui ne sont pas toxiques en soi, mais qui peuvent le devenir lorsqu'elles sont rejetées dans l'environnement en une certaine quantité ou concentration ou dans certaines circonstances. Le plomb, par exemple, qui figure à l'annexe I, intitulée «Liste des substances toxiques» n'est pas toxique en soi, mais il peut le devenir lorsqu'il pénètre dans l'environnement au cours de son utilisation. (Ce point de vue est grandement renforcé par la nature de l'annexe I, que j'examinerai plus loin.) En d'autres termes, le passage en question décrit la nature de la toxicité en fonction de laquelle les substances doivent être analysées ou évaluées.

I add that the determination of whether the various components of s. 11 are satisfied in respect of particular substances is by no means an easy task. Whether substances enter or may enter the environment in a quantity, concentration or conditions sufficient to have the effects set forth in that provision are not matters that are generally known. Rather these are matters that must be ascertained by assessments or tests set forth in s. 15, and in accordance with a procedure that requires consultation with the provinces, the informed community and the general public with a view to determining whether certain substances "are toxic or capable of becoming toxic", to use the expression employed in the provisions of Part II dealing with testing,

142 J'ajoute qu'il n'est nullement facile de déterminer si les divers éléments de l'art. 11 sont respectés relativement à certaines substances. La question de savoir si des substances pénètrent ou peuvent pénétrer dans l'environnement en une quantité ou concentration ou dans des conditions suffisantes pour produire les effets mentionnés à cet article n'est pas un fait notoire. Ce sont plutôt des questions qui doivent être vérifiées au moyen des évaluations ou des tests mentionnés à l'art. 15 et conformément à une procédure qui requiert des consultations avec les provinces, les citoyens avertis et le public en général afin de déterminer si certaines substances «sont effectivement ou potentiellement toxiques», pour reprendre l'expression

beginning with the Ministers' weeding out most substances by establishing a priority list of substances to be tested. I note here that a similar expression is used in s. 2(*j*), which falls outside Part II, where in describing the administrative duties of the Government under the Act, it is provided that it shall, consistently with the Constitution, act expeditiously in assessing "whether substances in use in Canada are toxic or capable of becoming toxic". It is also evident from the portion of the preamble of the Act earlier cited that the toxic substances intended to be dealt with by the Act are toxic substances in their normal sense that may result in polluting the environment in a significant degree. In light of this, it is difficult to believe "toxic" is not given its ordinary meaning in the Act, and that s. 11 is, therefore, simply a drafting tool for the demarcation of those aspects of toxicity that are to be considered in the tests required in the sections that follow.

143 What the assessments described in Part II are aimed at is the selection of new items to add to the List of Toxic Substances set forth in Schedule I. Thus s. 11 is the first of a series of provisions respecting testing or assessment for toxicity. The first step in the process of assessment is s. 12, which requires the Ministers to compile a Priority Substances List in respect of substances to which the Ministers are satisfied priority should be given in assessing whether they are toxic or capable of becoming toxic; this list and any amendments to it are published in the *Canada Gazette*, and the provinces and other interested parties are informed (s. 12(2) and (3)). The process of testing is a detailed one and includes informing the provinces and other interested groups and the public at all stages; see, for example, s. 13. In performing their duties, the Ministers are given broad powers to collect data, conduct investigations and correlate and evaluate any data so obtained (see, for example, s. 15). The testing process culminates in a decision of the Ministers to recommend or not to recommend that a substance be added to the List of Toxic Substances in Schedule I of the Act, and, if a

utilisée dans les dispositions de la partie II traitant de la vérification, à commencer par l'élimination par les ministres de la plupart des substances au moyen d'une liste des substances d'intérêt prioritaire à vérifier. Je souligne ici qu'une expression similaire est utilisée à l'al. 2*j*), qui est en dehors de la partie II, où, en décrivant les tâches administratives que la Loi confie au gouvernement, il est prévu que, conformément à la Constitution, ce dernier doit agir avec diligence pour évaluer «si des substances en usage au Canada sont toxiques ou susceptibles de le devenir». Il ressort aussi de la partie du préambule de la Loi, citée plus haut, que les substances toxiques destinées à être visées par la Loi sont les substances toxiques au sens ordinaire qui peuvent polluer sensiblement l'environnement. Compte tenu de cela, il est difficile de croire qu'on ne donne pas au mot «toxique» son sens ordinaire dans la Loi et que l'art. 11 n'est donc qu'un moyen rédactionnel de délimiter les aspects de la toxicité qu'il faut prendre en considération dans les vérifications requises dans les articles suivants.

Les évaluations décrites dans la partie II visent la sélection de nouvelles matières à ajouter à la liste des substances toxiques de l'annexe I. Ainsi, l'art. 11 est la première d'une série de dispositions concernant la vérification ou l'évaluation de la toxicité. La première étape du processus d'évaluation est l'art. 12, qui exige des ministres qu'ils établissent une liste de substances d'intérêt prioritaire énumérant les substances pour lesquelles ils jugent prioritaire de déterminer si elles sont effectivement ou potentiellement toxiques; cette liste et ses modifications sont publiées dans la *Gazette du Canada*, et les provinces ainsi que les autres parties intéressées en sont informées (par. 12(2) et (3)). Le processus de vérification est un processus détaillé qui consiste notamment à informer les provinces de même que les autres groupes intéressés et le public à toutes les étapes; voir, par exemple, l'art. 13. Dans l'exercice de leurs fonctions, les ministres sont investis de vastes pouvoirs de recueillir des données, de mener des enquêtes et de corréler et analyser les données ainsi obtenues (voir, par exemple, l'art. 15). Le processus de vérification aboutit à une décision des ministres de recomman-

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recommendation is made, what regulations should be made in respect of the substance under s. 34.

der ou non l'ajout d'une substance à la liste des substances toxiques de l'annexe I de la Loi et, en cas de recommandation, à une décision de leur part quant au règlement qui devrait être pris en vertu de l'art. 34 relativement à la substance en cause.

The recommendation of the Ministers marks the end of the testing phase and the beginning of a new phase in the process, i.e. the regulatory phase. From this point, as the terminology of the Act makes clear, Part II is concerned with substances in the List of Toxic Substances in Schedule I only. This begins with s. 33, under which the Governor in Council may, if satisfied that a substance is toxic, on the recommendation of the Ministers, make an order adding it to the List of Toxic Substances in Schedule I. It is important to underline that what Part II of the Act provides for is a procedure to control toxic substances generally by subjecting the many chemical substances in use in Canada to testing. That is in furtherance of the duty imposed on the Government, by s. 2(*j*), to make such assessments consistently with the Constitution. If any such substance is found to be toxic, it may be added to the List of Toxic Substances in Schedule I of the Act. Since that list (like s. 2(*j*)) is outside Part II, one must assume "toxic" here refers to toxic in a real sense, which as I stated earlier buttresses the argument that the description given in s. 11 does the same, since one would think the substances authorized to be added to a statute by the Governor in Council would be of the same general character. I add that Driedger's statement that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" bears repetition here; see E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

144 La recommandation des ministres marque la fin de la phase de vérification et le début d'une nouvelle phase du processus, c.-à-d. la phase de réglementation. Dès lors, comme il ressort nettement de la terminologie de la Loi, la partie II ne porte que sur les substances inscrites sur la liste des substances toxiques de l'annexe I. Cela commence par l'art. 33, en vertu duquel le gouverneur en conseil peut, s'il est convaincu qu'une substance est toxique, sur recommandation des ministres, prendre un arrêté ajoutant une substance à la liste des substances toxiques de l'annexe I. Il est important de souligner que ce que prescrit la partie II de la Loi, c'est une procédure de contrôle des substances toxiques en général au moyen de la vérification des nombreuses substances chimiques en usage au Canada. Il est conforme à l'obligation imposée au gouvernement, par l'al. 2*j*), de faire ces évaluations en accord avec la Constitution. Si une telle substance est jugée toxique, elle peut être ajoutée à la liste des substances toxiques de l'annexe I de la Loi. Vu que cette liste (comme l'al. 2*j*) est en dehors de la partie II, il faut présumer que le mot «toxique» signifie ici toxique au sens réel, ce qui, ainsi que je l'ai affirmé antérieurement, vient étayer l'argument selon lequel la description figurant à l'art. 11 fait la même chose, puisqu'on penserait que les substances que le gouverneur en conseil permettrait d'ajouter à une loi auraient le même caractère général. J'ajoute ici qu'il convient de répéter l'assertion de Driedger selon laquelle [TRADUCTION] «il faut interpréter les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur»; voir E. A. Driedger, *Construction of Statutes* (2e éd. 1983), à la p. 87.

More needs to be said about this. When one examines the original Schedule, as it appeared in the statute, it is evident that it comprises a very restricted number of substances, nine, and it is also

145 Il est nécessaire d'en dire plus sur ce point. Lorsqu'on examine l'annexe initiale, telle qu'elle apparaissait dans la Loi, il est évident qu'elle comprend un nombre très limité de substances, soit

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apparent that they set forth asbestos, lead and mercury, substances that even to the uninitiated are well known to be toxic in certain circumstances when they enter into the environment. As well, as I noted earlier, the items in the statute were taken from previous legislation, notably the *Environmental Contaminants Act*, under which they were selected because the Ministers believed "on reasonable grounds" that they "constitute or will constitute a significant danger to human health or the environment" (s. 7(2)). I have earlier referred more generally to the continuation of policy when the new legislation was enacted, and noted that the change particularly aimed at by the new legislation was the strengthening of the method of controlling toxic substances by improving the means for identifying them. For all these reasons, I conclude that when the Governor in Council makes an order adding to the List of Toxic Substances in Schedule I, it involves a determination that the substances added are of a kind akin to those already listed in Schedule I.

146 In summary, as I see it, the broad purpose and effect of Part II is to provide a procedure for assessing whether out of the many substances that may conceivably fall within the ambit of s. 11, some should be added to the List of Toxic Substances in Schedule I and, when an order to this effect is made, whether to prohibit the use of the substance so added in the manner provided in the regulations made under s. 34(1) subject to a penalty. These listed substances, toxic in the ordinary sense, are those whose use in a manner contrary to the regulations the Act ultimately prohibits. This is a limited prohibition applicable to a restricted number of substances. The prohibition is enforced by a penal sanction and is undergirded by a valid criminal objective, and so is valid criminal legislation.

147 This, in my mind, is consistent with the terms of the statute, its purpose, and indeed common sense. It is precisely what one would expect of an environmental statute — a procedure to weed out from

neuf, et il appert également qu'elle inclut l'amiante, le plomb et le mercure, des substances dont, même le profane, reconnaît la toxicité dans certaines circonstances lorsqu'elles pénètrent dans l'environnement. De même, comme je l'ai déjà noté, les substances énumérées dans la Loi sont tirées de la législation antérieure, notamment la *Loi sur les contaminants de l'environnement*, en vertu de laquelle elles ont été sélectionnées parce que les ministres avaient des «motifs raisonnables» de croire qu'elles «constituent un risque important pour la santé ou l'environnement» (par. 7(2)). Je me suis déjà reporté plus généralement à la continuation d'une politique lorsque la nouvelle loi a été adoptée et j'ai fait remarquer que le changement visé particulièrement par cette nouvelle loi était le renforcement de la méthode de contrôle des substances toxiques par l'amélioration des moyens de les identifier. Pour toutes ces raisons, je conclus que, lorsque le gouverneur en conseil prend un arrêté qui ajoute une substance à la liste des substances toxiques de l'annexe I, cela implique une décision que la substance ajoutée s'apparente à celles qui figurent déjà sur la liste de l'annexe I.

En résumé, j'estime que la partie II a généralement pour objet et pour effet de prescrire une procédure permettant d'évaluer si, parmi les nombreuses substances qui peuvent, en théorie, être visées par l'art. 11, certaines devraient être ajoutées à la liste des substances de l'annexe I, et de déterminer, lorsqu'on prend un arrêté en ce sens, s'il y a lieu d'interdire, sous peine de sanction, l'utilisation de la substance ainsi ajoutée de la manière prévue dans le règlement pris en vertu du par. 34(1). Ces substances inscrites sur la liste, toxiques au sens ordinaire du terme, sont celles que la Loi interdit, en fin de compte, d'utiliser d'une manière contraire au règlement. C'est une interdiction limitée qui s'applique à un nombre limité de substances. L'interdiction est assortie d'une peine en cas de non-respect et s'appuie sur un objectif pénal valide et est donc une mesure législative pénale valide.

À mon sens, cela est conforme aux termes de la Loi, à son objet et, en fait, au bon sens. C'est précisément ce qu'on attendrait d'une loi sur l'environnement — une procédure permettant d'élimi-

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the vast number of substances potentially harmful to the environment or human life those only that pose significant risks of that type of harm. Specific targeting of toxic substances based on individual assessment avoids resort to unnecessarily broad prohibitions and their impact on the exercise of provincial powers. Having regard to the particular nature and requirements of effective environmental protection legislation, I do not share my colleagues' concern that the prohibition originates in a regulation, the breach of which gives rise to criminal sanction. The careful targeting of toxic substances is borne out by practice. Counsel for the interveners, Pollution Probe et al., informed us that of the over 21,000 registered substances in commercial use in Canada (see *Domestic Substances List*, SI/91-148, *Canada Gazette, Part I Supp.*; *Domestic Substances List*, SOR/94-311, am. SOR/95-517), only 44 have been placed on the *Priority Substances List* and scientifically assessed under the Act (*Priority Substances List, Canada Gazette, Part I* (Feb. 11, 1989), p. 543). Of these, only 25 were found to be toxic within the meaning of s. 11 (*It's About Our Health!: Towards Pollution Prevention*, Report of the House of Commons Standing Committee on Environment and Sustainable Development, at pp. 63-64), and of these only a few have been the subject of a regulation under s. 34; see *Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations*, SOR/92-267; *Pulp and Paper Mill Defoamer and Wood Chip Regulations*, SOR/92-268.

ner, parmi le très grand nombre de substances potentiellement nocives pour l'environnement ou la vie humaine, celles qui posent des risques importants de ce genre. Le ciblage précis de substances toxiques fondé sur une évaluation individuelle évite de recourir à des interdictions inutilement larges et à leur incidence sur l'exercice de pouvoirs provinciaux. Compte tenu de la nature et des exigences particulières d'une loi efficace en matière de protection de l'environnement, je ne partage pas la crainte de mes collègues que l'interdiction prenne naissance dans un règlement dont la violation donne lieu à une sanction criminelle. Le ciblage minutieux de substances toxiques est justifié par la pratique. Les avocats des intervenants Pollution Probe et autres nous ont informés que, sur plus de 21 000 substances enregistrées et utilisées de façon commerciale au Canada (voir *Liste intérieure des substances*, TR/91-148, *Gazette du Canada, partie I suppl.*; *Liste intérieure des substances*, DORS/94-311, mod. DORS/95-517), seulement 44 ont été inscrites sur la *Liste des substances d'intérêt prioritaire* et évaluées scientifiquement en vertu de la Loi (*Liste des substances d'intérêt prioritaire, Gazette du Canada, partie I* (11 février 1989), p. 543). De ce nombre, seulement 25 ont été jugées toxiques au sens de l'art. 11 (*Notre santé en dépend!: Vers la prévention de la pollution*, Rapport du Comité permanent de l'environnement et du développement durable, aux pp. 70 et 71), et parmi celles-ci, seules quelques-unes ont fait l'objet d'un règlement pris en vertu de l'art. 34; voir le *Règlement sur les dioxines et les furannes chlorés dans les effluents des fabriques de pâtes et papiers*, DORS/92-267; le *Règlement sur les additifs antimousse et les copeaux de bois utilisés dans les fabriques de pâtes et papiers*, DORS/92-268.

I should perhaps note here that it is wholly appropriate to have recourse to extrinsic material of the kind just referred to as well as of the type already referred to in considering the constitutional validity of legislation, especially when one is dealing with colourability, as is the case here. I refer to *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, where McIntyre J.,

148 Je devrais peut-être souligner ici qu'il convient parfaitement d'avoir recours à des documents extrinsèques du genre de ceux que je viens de mentionner et de ceux que j'ai déjà mentionné en examinant la constitutionnalité de la Loi, notamment quand il est question de législation déguisée, comme c'est le cas en l'espèce. Je me reporte au *Renvoi relatif à la Upper Churchill Water Rights*

referring to earlier authorities, had this to say, at p. 318:

> I agree with the Court of Appeal in the present case that extrinsic evidence is admissible to show the background against which the legislation was enacted. I also agree that such evidence is not receivable as an aid to construction of the statute. However, I am also of the view that in constitutional cases, particularly where there are allegations of colourability, extrinsic evidence may be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well. This was also the view of Dickson J. in the *Reference re Residential Tenancies Act, 1979*, *supra*, at p. 721. . . . [Emphasis in third sentence added.]

149 I turn now to a more detailed examination of the provisions of the Act impugned in the present case, i.e. ss. 34 and 35. I mentioned earlier that the testing phase provided for under Part II ends with s. 32. Up to that point, Part II deals with the testing of substances that may be toxic when released into the environment as described in s. 11. The remainder of Part II, beginning with s. 33, however, is no longer addressed at substances that may be toxic in that broad sense. Rather it is more narrowly addressed at substances specifically listed in the List of Toxic Substances in Schedule I of the Act. In particular, s. 34 authorizes the Governor in Council to make regulations setting forth the restrictions imposed on those using or dealing with such substances. Failure to comply with any such restriction constitutes an offence and is punishable on summary conviction by a fine not exceeding three hundred thousand dollars or a term of imprisonment not exceeding six months, or both; or, on indictment, by a fine not exceeding one million dollars or a term of imprisonment not exceeding three years, or both (s. 113(*f*), (*o*) and (*p*)).

150 Without attempting to regurgitate the whole of s. 34, I shall simply give some flavour of the nature of the prohibitions created by the regulations made thereunder. Generally, s. 34 includes regulations providing for or imposing require-

Reversion Act, [1984] 1 R.C.S. 297, dans lequel le juge McIntyre affirme ceci, au sujet de la jurisprudence antérieure, à la p. 318:

> Je suis d'accord avec la Cour d'appel qu'en l'espèce les éléments de preuve extrinsèques sont recevables pour montrer le contexte dans lequel la législation a été adoptée. Je suis également d'accord que ces éléments de preuve ne sont pas recevables pour aider à interpréter la Loi. Je suis toutefois d'avis que dans les affaires constitutionnelles, notamment lorsqu'il y a allégation de législation déguisée, on peut tenir compte d'éléments de preuve extrinsèques pour vérifier non seulement l'application et l'effet de la loi contestée, mais aussi son objet véritable. C'est également l'avis exprimé par le juge Dickson dans le renvoi *Re Loi de 1979 sur la location résidentielle*, précité, à la p. 721 . . . [Je souligne dans la troisième phrase.]

Je passe maintenant à un examen plus détaillé des dispositions de la loi contestée en l'espèce, c.-à-d. les art. 34 et 35. J'ai mentionné précédemment que la phase de vérification prévue à la partie II se termine à l'art. 32. Jusqu'à ce point, la partie II traite de la vérification de substances qui peuvent être toxiques lorsqu'elles sont rejetées dans l'environnement, tel que décrit à l'art. 11. Cependant, le reste de la partie II, à commencer par l'art. 33, ne vise plus les substances qui peuvent être toxiques dans ce sens large du terme. Il vise plus strictement les substances inscrites précisément sur la liste des substances toxiques de l'annexe I de la Loi. En particulier, l'art. 34 autorise le gouverneur en conseil à prendre des règlements énonçant les restrictions imposées à ceux qui utilisent ou traitent de telles substances. Le défaut de se conformer à l'une de ces restrictions constitue une infraction et est punissable, par procédure sommaire, d'une amende maximale de 300 000 $ et d'un emprisonnement maximal de six mois, ou de l'une de ces peines, ou, par mise en accusation, d'une amende maximale d'un million de dollars et d'un emprisonnement maximal de trois ans, ou de l'une de ces peines (al. 113*f*), *o*) et *p*)).

Sans tenter de reprendre l'art. 34 au complet, je vais simplement donner un aperçu de la nature des interdictions créées par ses règlements d'application. En général, l'art. 34 comprend des règlements prescrivant ou imposant des exigences concernant

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ments respecting the quantity or concentration of a substance listed in Schedule I that may be released into the environment either alone or in combination with others from any source, the places where such substances may be released, the manufacturing or processing activities in the course of which the substance may be released, the manner and conditions of release, and so on. In short, s. 34 precisely defines situations where the use of a substance in the List of Toxic Substances in Schedule I is prohibited, and these prohibitions are made subject to penal consequences. This is similar to the techniques Parliament has employed in providing for and imposing highly detailed requirements and standards in relation to food and drugs, which control their import, sale, manufacturing, labelling, packaging, processing and storing (see *Food and Drugs Act*, R.S.C., 1985, c. F-27). These techniques have, in a number of cases including several in this Court, been upheld as valid criminal law; see *Standard Sausage*, *supra*, esp. at pp. 506-7; *R. v. Wetmore*, [1983] 2 S.C.R. 284, at p. 289; *RJR-MacDonald*, *supra*. Other statutes providing for extensive control of hazardous products that are justifiable in whole or in part under the criminal law power include the *Hazardous Products Act*, R.S.C., 1985, c. H-3 (see *R. v. Cosman's Furniture (1972) Ltd.* (1976), 32 C.C.C. (2d) 345 (Man. C.A.)), and the *Explosives Act*, R.S.C., 1985, c. E-17.

la quantité ou la concentration d'une substance inscrite sur la liste de l'annexe I, qui peut être rejetée dans l'environnement seule ou avec d'autres substances provenant de quelque source que ce soit, les endroits où ces substances peuvent être rejetées, les activités de fabrication ou de traitement au cours desquelles la substance peut être rejetée, la manière et les conditions du rejet, et ainsi de suite. Bref, l'art. 34 définit précisément des situations où l'utilisation d'une substance inscrite sur la liste des substances toxiques de l'annexe I est interdite et où ces interdictions sont assorties de conséquences pénales. Cela ressemble aux techniques que le Parlement a utilisées pour prescrire et imposer des exigences et des normes fort détaillées en matière d'aliments et drogues, qui servent à en contrôler l'importation, la vente, la fabrication, l'étiquetage, l'emballage, le traitement et l'entreposage (voir la *Loi sur les aliments et drogues*, L.R.C. (1985), ch. F-27). Dans un certain nombre d'affaires dont plusieurs instruites par notre Cour, ces techniques ont été maintenues comme constituant du droit criminel valide; voir *Standard Sausage*, précité, particulièrement aux pp. 506 et 507; *R. c. Wetmore*, [1983] 2 R.C.S. 284, à la p. 289; *RJR-MacDonald*, précité. Parmi d'autres lois prévoyant le contrôle général de produits dangereux, qui peuvent se justifier en totalité ou en partie en vertu de la compétence en matière de droit criminel, il y a la *Loi sur les produits dangereux*, L.R.C. (1985), ch. H-3 (voir *R. c. Cosman's Furniture (1972) Ltd.* (1976), 32 C.C.C. (2d) 345 (C.A. Man.)), et la *Loi sur les explosifs*, L.R.C. (1985), ch. E-17.

What Parliament is doing in s. 34 is making provision for carefully tailoring the prohibited action to specified substances used or dealt with in specific circumstances. This type of tailoring is obviously necessary in defining the scope of a criminal prohibition, and is, of course, within Parliament's power. As Laskin C.J. noted in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 627: "I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is". More recently, Stevenson J. in *R. v. Furtney*, [1991] 3 S.C.R. 89, at pp. 106-7, speak-

151 Ce que fait le Parlement à l'art. 34, c'est créer une disposition qui permette de bien adapter l'action interdite aux substances mentionnées qui sont utilisées ou traitées dans certaines circonstances. Ce genre d'adaptation est manifestement requis pour définir l'étendue d'une interdiction criminelle et relève, naturellement, de la compétence du Parlement. Comme le juge en chef Laskin l'a fait observer dans l'arrêt *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, à la p. 627: «Je n'ai pas besoin de citer de précédents pour affirmer que le Parlement peut déterminer ce qui n'est pas criminel aussi bien que ce qui l'est». Plus récemment, le juge Stevenson, dans l'arrêt *R. c. Furtney*, [1991] 3

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ing of decriminalization of lotteries in certain circumstances, had this to say:

> It constitutes a definition of the crime, defining the reach of the offence, a constitutionally permissive exercise of the criminal law power, reducing the area subject to criminal law prohibition where certain conditions exist. I cannot characterize it as an invasion of provincial powers any more than the appellants were themselves able to do.

152 As Stevenson J. notes, this kind of legislation does not constitute an invasion of provincial regulatory power; see also *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368 (P.C.), at pp. 375-6; *Boggs v. The Queen*, [1981] 1 S.C.R. 49, at pp. 60-61. This is true as well in the case of detailed legislation such as that in question here, as can be seen from the statement of Macdonald J.A. in *Standard Sausage*, cited *supra*, at pp. 506-7 (affirmed in *Wetmore*, *supra*, and specifically relied on in *RJR-MacDonald*, *supra*). This is based on even more fundamental principles. As noted earlier, we are dealing with prohibitions accompanied by penal sanctions, so that we are really not concerned with whether these may incidentally affect property and civil rights but whether the prohibitions are directed at a public evil. The matter was thus put in *RJR-MacDonald*, at pp. 241-42:

> These prohibitions are accompanied by penal sanctions under s. 18 of the Act, which, as Lord Atkin noted in *PATA*, *supra*, at p. 324, creates at least a *prima facie* indication that the Act is criminal law. However, the crucial further question is whether the Act also has an underlying criminal public purpose in the sense described by Rand J. in the *Margarine Reference*, *supra*. The question, as Rand J. framed it, is whether the prohibition with penal consequences is directed at an "evil" or injurious effect upon the public.

153 In truth, there is a broad area of concurrency between federal and provincial powers in areas subjected to criminal prohibitions, and the courts

R.C.S. 89, aux pp. 106 et 107, a dit, au sujet de la décriminalisation des loteries dans certaines circonstances:

> Elle constitue une définition de l'acte criminel, qui fixe la portée de l'infraction, un exercice constitutionnellement acceptable du pouvoir en matière de droit criminel, qui réduit le champ de l'interdiction du droit criminel lorsqu'il existe certaines conditions. Je ne puis qualifier cela d'empiétement sur les pouvoirs des provinces, pas plus que les appelants n'ont eux-mêmes été en mesure de le faire.

Comme le juge Stevenson le souligne, ce genre de mesure législative ne constitue pas un empiétement sur le pouvoir de réglementation des provinces; voir également les arrêts *Attorney-General for British Columbia c. Attorney-General for Canada*, [1937] A.C. 368 (C.P.), aux pp. 375 et 376; *Boggs c. La Reine*, [1981] 1 R.C.S. 49, aux pp. 60 et 61. C'est aussi vrai dans le cas d'une loi détaillée comme celle dont il est question en l'espèce, comme permet de le constater l'énoncé du juge Macdonald dans l'arrêt *Standard Sausage*, précité, aux pp. 506 et 507 (confirmé dans *Wetmore*, précité, et invoqué expressément dans *RJR-MacDonald*, précité). Cela repose sur des principes encore plus fondamentaux. Comme nous l'avons vu, il est question ici d'interdictions assorties de sanctions pénales, de sorte que ce qui nous intéresse vraiment est de savoir non pas si elles peuvent influer incidemment sur la propriété et les droits civils, mais si elles visent à remédier à un mal public. La question est exposée ainsi dans l'arrêt *RJR-MacDonald*, aux pp. 241 et 242:

> Ces interdictions sont assorties de sanctions pénales en vertu de l'art. 18 de la Loi, lesquelles, comme le précise lord Atkin dans l'arrêt *PATA*, précité, à la p. 324, créent une indication du moins à première vue que la loi est de droit criminel. Cependant, l'autre question importante est de savoir si la Loi a également un objectif public sous-jacent du droit criminel au sens où le décrit le juge Rand dans le *Renvoi sur la margarine*, précité. Comme le précise le juge Rand, la question est de savoir si l'interdiction assortie de sanctions pénales est dirigée contre un «mal» ou un effet nuisible pour le public.

À vrai dire, c'est un vaste champ de concurrence entre les pouvoirs du gouvernement fédéral et ceux des provinces dans des domaines assujettis à des

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have been alert to the need to permit adequate breathing room for the exercise of jurisdiction by both levels of government. Dickson J. put it this way in *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 134:

> The interface between criminal law and provincial legislation which might be seen as impunging upon the federal jurisdiction in the field of criminal law has not been closely drawn. As Professor Hogg notes in Chapter 16 of his work, *Constitutional Law of Canada*, the dominant tendency of the case law has been to uphold provincial penal legislation; recent cases have been generous to provincial power, and "The result is that over much of the field which may loosely be thought of as criminal law legislative power is concurrent" (at p. 292).

This type of approach is essential in dealing with amorphous subjects like health and the environment. In my reasons for the minority in *Crown Zellerbach*, *supra*, (addressing an issue which the majority did not discuss), I had this to say about the matter as it relates to environmental pollution (at p. 455):

> . . . environmental pollution . . . is . . . all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable. The problem is thus not new, although it is only recently that the vast amount of waste products emitted into the atmosphere or dumped in water has begun to exceed the ability of the atmosphere and water to absorb and assimilate it on a global scale. There is thus cause for concern and governments at every level have begun to deal with the many activities giving rise to problems of pollution. In Canada, both federal and provincial levels of government have extensive powers to deal with these matters. Both have enacted comprehensive and specific schemes for the control of pollution and the protection of the environment. Some environmental pollution problems are of more direct concern to the federal government, some to the provincial government. But a vast number are interrelated, and all levels of government actively co-operate to deal with problems of mutual concern; for

interdictions criminelles, et les tribunaux ont été conscients de la nécessité de réserver un espace adéquat pour que les deux niveaux de gouvernement puissent exercer leur compétence. Le juge Dickson s'exprime ainsi dans l'arrêt *Schneider c. La Reine*, [1982] 2 R.C.S. 112, à la p. 134:

> La ligne de démarcation entre le droit criminel et les lois provinciales qui pourraient être considérées comme des empiétements sur la compétence fédérale en matière de droit criminel n'a pas été tracée avec précision. Le professeur Hogg souligne, au chapitre 16 de son ouvrage intitulé *Constitutional Law of Canada*, que la jurisprudence a tendance à confirmer les lois provinciales de nature pénale; les arrêts récents sont favorables au pouvoir des provinces et [TRADUCTION] «Il s'ensuit qu'une bonne partie du domaine qu'on pourrait plus ou moins considérer comme relevant de la compétence législative en matière de droit criminel est de compétence concurrente» (à la p. 292).

Ce genre d'approche est essentiel pour traiter de sujets vagues comme la santé et l'environnement. Dans les motifs de dissidence que j'ai rédigés dans l'arrêt *Crown Zellerbach*, précité, (abordant une question que la Cour à la majorité n'avait pas analysée), voici ce que j'ai dit à ce sujet dans le contexte de la pollution de l'environnement (à la p. 455):

> . . . la pollution de l'environnement se fait [. . .] sentir partout. C'est le sous-produit de tout ce que nous faisons. Dans les rapports qu'a l'être humain avec son environnement, les déchets sont une chose inévitable. Le problème n'est donc pas nouveau, bien que ce ne soit que récemment que la vaste quantité de résidus déversés dans l'atmosphère ou dans l'eau ait commencé à excéder la capacité de l'atmosphère et de l'eau de les absorber et de les assimiler, à l'échelle planétaire. Il y a donc là un sujet de préoccupation et les gouvernements de tous paliers ont commencé à s'intéresser aux nombreuses activités qui causent la pollution. Au Canada, tant le gouvernement fédéral que ceux des provinces jouissent de pouvoirs étendus pour traiter ces problèmes. Les deux paliers de gouvernement ont adopté des programmes globaux et spécifiques de contrôle de la pollution et de protection de l'environnement. Certains problèmes de pollution de l'environnement intéressent plus directement le gouvernement fédéral, d'autres le gouvernement provincial. Mais beaucoup sont intimement liés et tous les paliers de gouvernement coopèrent activement pour régler ces problèmes d'intérêt mutuel; pour un exemple de cela, voir l'étude sur les Grands Lacs

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an example of this, see the Great Lakes study in I.J.C. Report, op. cit.

I observe that in enacting the legislation in issue here, Parliament was alive to the need for cooperation and coordination between the federal and provincial authorities. This is evident throughout the Act. In particular, under s. 34(2), (5) and (6), Parliament has made it clear that the provisions of this Part are not to apply where a matter is otherwise regulated under other equivalent federal or provincial legislation.

154 In *Crown Zellerbach*, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power. Great sensitivity is required in this area since, as Professor Lederman has rightly observed, environmental pollution "is no limited subject or theme, [it] is a sweeping subject or theme virtually all-pervasive in its legislative implications"; see W. R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597, at p. 610.

155 Turning then to s. 35, I mentioned that it is ancillary to s. 34. It deals with emergency situations. The provision, it seems to me, indicates even more clearly a criminal purpose, and throws further light on the intention of s. 34 and of the Act generally. It can only be brought into play when the Ministers believe a substance is not specified in the List in Schedule I or is listed but is not subjected to control under s. 34. In such a case, they may make an interim order in respect of the sub-

dans le rapport de la Commission mixte internationale, *op. cit.*

Je remarque que, en adoptant la loi en question dans la présente affaire, le Parlement était conscient du besoin de coopération et de coordination entre les autorités fédérales et provinciales. Cela est manifeste partout dans la Loi. Plus particulièrement, aux par. 34(2), (5) et (6), le Parlement a précisé que les dispositions de cette partie ne doivent pas s'appliquer lorsqu'une matière est, par ailleurs, réglementée en vertu d'une autre loi fédérale ou provinciale équivalente.

Dans l'arrêt *Crown Zellerbach*, j'ai exprimé des craintes au sujet de la possibilité d'accorder exclusivement au Parlement la compétence législative en matière de pollution de l'environnement. Je serais tout aussi craintif si on donnait une interprétation de la Constitution qui accorderait effectivement aux provinces, en vertu de pouvoirs généraux comme ceux relatifs à la propriété et aux droits civils, un contrôle sur l'environnement d'une manière qui empêcherait le Parlement d'exercer le leadership que la communauté internationale attend de lui et son rôle de protecteur des valeurs fondamentales des Canadiens en ce qui concerne l'environnement, au moyen de sa compétence en matière de droit criminel. Il faut faire preuve d'une grande perspicacité dans ce domaine car, comme le professeur Lederman l'a fait observer à juste titre, la pollution de l'environnement [TRADUCTION] «n'est pas un sujet limité, c'est un vaste sujet dont l'incidence législative se fait sentir presque partout»; voir W. R. Lederman, «Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation» (1975), 53 *R. du B. can.* 597, à la p. 610.

Quant à l'art. 35, j'ai mentionné qu'il est accessoire à l'art. 34. Il traite de situations d'urgence. La disposition, me semble-t-il, indique encore plus clairement l'existence d'un objectif de droit criminel et renseigne davantage sur le but de l'art. 34 et de la Loi en général. Il ne peut entrer en jeu que lorsque les ministres croient qu'une substance n'est pas inscrite sur la liste de l'annexe I ou y est inscrite sans toutefois être assujettie au contrôle fondé sur l'art. 34. En pareil cas, ils peuvent pren-

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stance if they believe "immediate action is required to deal with a significant danger to the environment or to human life or health".

dre un arrêté d'urgence relativement à la substance en cause s'ils croient qu'une «intervention immédiate est nécessaire afin de parer à tout danger appréciable soit pour l'environnement, soit pour la vie humaine ou la santé».

In sum, then, I am of the view that Part II of the Act, properly construed, simply provides a means to assess substances with a view to determining whether the substances are sufficiently toxic to be added to Schedule I of the Act (which contains a list of dangerous substances carried over from pre-existing legislation), and provides by regulations under s. 34 the terms and conditions under which they can be used, with provisions under s. 35 for by-passing the ordinary provisions for testing and regulation under Part II in cases where immediate action is required. I have reached this position independently of the legal presumption that a legislature intends to confine itself to matters within its competence; see *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198, at p. 255; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at p. 688. However, it follows that the position I have taken would by virtue of the presumption displace a possible reading of the Act that would render it unconstitutional.

156 Somme toute, je suis donc d'avis que la partie II de la Loi, interprétée correctement, fournit simplement un moyen d'évaluer des substances en vue de déterminer si elles sont suffisamment toxiques pour être ajoutées à l'annexe I de la Loi (qui contient une liste de substances dangereuses provenant d'un texte législatif antérieur), qu'elle prescrit, par règlement pris en vertu de l'art. 34, les conditions auxquelles elles peuvent être utilisées et qu'elle comporte, à l'art. 35, des dispositions permettant de contourner les dispositions ordinaires de la partie II, relatives à la vérification et à la réglementation, dans les cas où une intervention immédiate est requise. J'ai adopté ce point de vue indépendamment de la présomption légale qu'un législateur entend se limiter aux matières relevant de sa compétence; voir *Reference re Farm Products Marketing Act*, [1957] R.C.S. 198, à la p. 255; *Nova Scotia Board of Censors c. McNeil*, [1978] 2 R.C.S. 662, à la p. 688. Cependant, il s'ensuit que le point de vue que j'ai adopté supplanterait, en vertu de cette présomption, une interprétation éventuelle de la Loi qui la rendrait inconstitutionnelle.

Since I have found the empowering provisions, ss. 34 and 35, to be *intra vires*, the only attack that could be brought against any action taken under them would be that such action went beyond the authority granted by those provisions; in the present case, for example, such an attack might consist in the allegation that PCBs did not pose "a significant danger to the environment or to human life or health" justifying the making of the Interim Order. This would seem to me to be a tall order. The fact that PCBs are highly toxic substances should require no demonstration. This has become well known to the general public and is supported by an impressive array of scientific studies at both the national and international levels. I list here merely a sample of those cited to us: World Health Organization, U.N. Environment Programme and

157 Comme j'ai conclu que les dispositions habilitantes, les art. 34 et 35, sont constitutionnelles, la seule contestation dont pourrait faire l'objet toute action intentée en vertu de celles-ci consisterait à affirmer que cette action a excédé le pouvoir accordé par ces dispositions; dans la présente affaire, par exemple, elle pourrait consister à alléguer que les BPC ne posaient pas un «danger appréciable soit pour l'environnement, soit pour la vie humaine ou la santé» qui justifiait la prise d'un arrêté d'urgence. Ce serait, me semble-t-il, demander un peu trop. Il ne devrait pas être nécessaire de démontrer que les BPC sont des substances très toxiques. Ce fait est bien connu du grand public et est étayé par un nombre impressionnant d'études scientifiques tant au niveau national qu'au niveau international. J'énumère ici simplement des

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International Labour Organization (joint report), *Polychlorinated Biphenyls (PCBs) and Polychlorinated Terphenyls (PCTs) Health and Safety Guide* (1992); S. Dobson and G. J. van Esch, *Polychlorinated Biphenyls and Terphenyls* (2nd ed. 1993), Environmental Health Criteria 140, World Health Organization; R. J. Norstrom (Environment Canada) and D. C. G. Muir (Department of Fisheries and Oceans), "Chlorinated Hydrocarbon Contaminants in Arctic Marine Mammals", *The Science of the Total Environment* 154 (1994) 107-28; U.N. Environment Programme, *Global Environmental Issues*, *supra*; Environment Canada, Department of Fisheries and Oceans, Health and Welfare Canada, *Toxic Chemicals in the Great Lakes and Associated Effects* (1991); J. L. and S. W. Jacobson, "A 4-Year Followup Study of Children Born to Consumers of Lake Michigan Fish", *Journal of Great Lakes Research*, 19(4) (1993): 776-83; M. Gilbertson et al., "Great Lakes Embryo Mortality, Edema, and Deformities Syndrome (GLEMEDS) in Colonial Fish-eating Birds: Similarity to Chick-Edema Disease", *Journal of Toxicology and Environmental Health*, 33 (1991): 455-520; Canadian Council of Resource and Environment Ministers, *The PCB Story* (1986); Environment Canada and Health and Welfare Canada, *Background to the Regulation of Polychlorinated Biphenyls (PCB) in Canada: A report of the Task Force on PCB, April 1 1976 to the Environmental Contaminants Committee of Environment Canada and Health and Welfare Canada*; Health and Welfare Canada, *A Review of the Toxicology and Human Health Aspects of PCBs (1978-1982)* (1985); OECD, *Protection of the Environment by Control of Polychlorinated Biphenyls* (1973).

158 From what appears in these studies, one can conclude that PCBs are not only highly toxic but long lasting and very slow to break down in water, air or soil. They do dissolve readily in fat tissues and other organic compounds, however, with the

exemples d'études qui nous ont été cités: Organisation mondiale de la Santé, Programme des Nations Unies pour l'environnement et Organisation internationale du travail (rapport conjoint), *Polychlorinated Biphenyls (PCBs) and Polychlorinated Terphenyls (PCTs) Health and Safety Guide* (1992); S. Dobson et G. J. van Esch, *Polychlorinated Biphenyls and Terphenyls* (2e éd. 1993), Critères d'hygiène de l'environnement 140, Organisation mondiale de la Santé; R. J. Norstrom (Environnement Canada) et D. C. G. Muir (Ministère des Pêches et des Océans), «Chlorinated Hydrocarbon Contaminants in Arctic Marine Mammals», *The Science of the Total Environment* 154 (1994) 107 à 128; Programme des Nations Unies pour l'environnement, *Global Environmental Issues*, *op. cit.*; Environnement Canada, Ministère des Pêches et des Océans, Santé et Bien-être social Canada, *Les produits chimiques toxiques dans les Grands Lacs et leurs effets connexes* (1991); J. L. et S. W. Jacobson, «A 4-year Followup Study of Children Born to Consumers of Lake Michigan Fish», *Journal of Great Lakes Research*, 19(4) (1993): 776 à 783; M. Gilbertson et autres, «Great Lakes Embryo Mortality, Edema, and Deformities Syndrome (GLEMEDS) in Colonial Fish-eating Birds: Similarity to Chick-Edema Disease», *Journal of Toxicology and Environmental Health*, 33 (1991): 455 à 520; Conseil canadien des ministres des ressources et de l'environnement, *La question des BPC* (1986); Environnement Canada et Santé et Bien-être social Canada, *Background to the Regulation of Polychlorinated Biphenyls (PCB) in Canada: A report of the Task Force on PCB, April 1 1976 to the Environmental Contaminants Committee of Environment Canada and Health and Welfare Canada*; Santé et Bien-être social Canada, *Examen de la toxicologie et des questions sanitaires relatives aux BPC (1978-1982)* (1985); OCDE, *Protection of the Environment by Control of Polychlorinated Biphenyls* (1973).

Selon ce qui ressort de ces études, on peut conclure que les BPC sont non seulement très toxiques, mais encore qu'ils durent longtemps et se décomposent très lentement dans l'eau, l'air ou le sol. Toutefois, ils se dissolvent facilement dans les

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result that they move up the food chain through birds and other animals and eventually to humans. They pose significant risks of serious harm to both animals and humans. As well they are extremely mobile. They evaporate from soil and water and are transported great distances through the atmosphere. High levels of PCBs have been found in a variety of arctic animals living thousands of kilometres from any major source of PCBs. The extent of the dangers they pose is reflected in the fact that they were the first substance sought to be controlled in Canada under the *Environmental Contaminants Act*, the predecessor of the present legislation. They were also the first substance regulated in the United States under the *Toxic Substances Control Act*, 15 U.S.C. § 2605(c). And because of the trans-boundary nature of the threat, they were the first substances targeted for joint action by Canada, the United States and Mexico through the Commission for Environmental Cooperation established under the North American Free Trade Agreement; see C.E.C. Council of Ministers, Resolution # 95-5 "Sound Management of Chemicals", Oct. 1995; C.E.C. Secretariat Bulletin, vol. 2, No. 3, Winter/Spring 1996.

tissus adipeux et autres composés organiques, de sorte qu'ils remontent la chaîne alimentaire grâce aux oiseaux et aux autres animaux pour éventuellement atteindre les êtres humains. Ils posent des risques importants de préjudice grave pour les animaux et les humains. De même, ils sont extrêmement mobiles. Ils s'évaporent du sol et de l'eau et franchissent de grandes distances dans l'atmosphère. On a trouvé des concentrations élevées de BPC chez divers animaux de l'Arctique qui vivent à des milliers de kilomètres de toute source majeure de BPC. L'ampleur des dangers qu'ils posent est illustrée par le fait qu'ils constituent la première substance qu'on a cherché à contrôler au Canada en vertu de la *Loi sur les contaminants de l'environnement*, qui a précédé la loi actuelle. Ils ont aussi été la première substance à être réglementée aux États-Unis en vertu de la *Toxic Substances Control Act*, 15 U.S.C. § 2605c). Et en raison de la nature transfrontalière de la menace, ce sont les premières substances ciblées par une action conjointe du Canada, des États-Unis et du Mexique par l'intermédiaire de la Commission de coopération environnementale établie en vertu de l'Accord de libre-échange nord-américain; voir Conseil des ministres de la C.C.E., résolution # 95-5 «Sound Management of Chemicals», oct. 1995; Bulletin du Secrétariat de la C.C.E., vol. 2, nº 3, hiver-printemps 1996.

I should say that the respondent and *mis en cause* do not contest the toxicity of PCBs but simply argue that their control should not fall exclusively within federal competence. They also note that there is one study (G. J. Farquhar and J. Sykes, *PCB Behavior in Soils* (1978), at pp. 7, 8, 22, 23, 26, 33 and 34) that indicates that PCBs are absorbed, remain stable and are not mobile. I have already discussed the issue of concurrency. So far as mobility is concerned, whatever weight may be attached to the report in relation to the national concern issue, it has no relevance in considering federal jurisdiction under the criminal law power.

159 Je tiens à préciser que l'intimée et le mis en cause ne contestent pas la toxicité des BPC, mais soutiennent simplement que leur contrôle ne devrait pas relever exclusivement de la compétence fédérale. Ils soulignent aussi qu'il existe une étude (G. J. Farquhar et J. Sykes, *PCB Behavior in Soils* (1978), aux pp. 7, 8, 22, 23, 26, 33 et 34) qui indique que les BPC sont absorbés, demeurent stables et ne sont pas mobiles. J'ai déjà analysé la question de la concurrence. Quant à la mobilité, quel que soit le poids qu'on puisse attacher au rapport relativement à la question de l'intérêt national, il n'a rien à voir avec l'examen de la compétence fédérale en vertu du pouvoir en matière de droit criminel.

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160 I conclude, therefore, that the Interim Order is also valid under s. 91(27) of the *Constitution Act, 1867*.

Disposition

161 I would allow the appeal with costs, set aside the judgment of the Court of Appeal of Quebec and order that the matter be returned to the Court of summary convictions to be dealt with in accordance with the Act. I would answer the constitutional question as follows:

Q. Do s. 6(*a*) of the *Chlorobiphenyls Interim Order*, P.C. 1989-296, and the enabling legislative provisions, ss. 34 and 35 of the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.), fall in whole or in part within the jurisdiction of the Parliament of Canada to make laws for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867* or its criminal law jurisdiction under s. 91(27) of the *Constitution Act, 1867* or otherwise fall within its jurisdiction?

A. Yes. They fall wholly within Parliament's power to enact laws under s. 91(27) of the *Constitution Act, 1867*. It is not necessary to consider the first issue.

Appeal allowed with costs, LAMER C.J. *and* SOPINKA, IACOBUCCI *and* MAJOR JJ. *dissenting.*

Solicitor for the appellant: George Thomson, Montreal.

Solicitors for the respondent: Ogilvy Renault, Montreal.

Solicitor for the mis en cause: Alain Gingras, Sainte-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.

Solicitors for the intervener IPSCO Inc.: MacPherson Leslie & Tyerman, Regina.

Je conclus donc que l'arrêté d'urgence est également valide en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*.

Dispositif

Je suis d'avis d'accueillir le pourvoi avec dépens, d'infirmer l'arrêt de la Cour d'appel du Québec et d'ordonner que l'affaire soit renvoyée au tribunal des poursuites sommaires pour qu'elle soit instruite conformément à la Loi. Je suis d'avis de répondre à la question constitutionnelle de la façon suivante:

Q. L'alinéa 6*a*) de l'*Arrêté d'urgence sur les biphényles chlorés*, C.P. 1989-296, ainsi que les dispositions législatives habilitantes, les art. 34 et 35 de la *Loi canadienne sur la protection de l'environnement*, L.R.C. (1985), ch. 16 (4e suppl.), relèvent-ils en tout ou en partie de la compétence du Parlement du Canada de légiférer pour la paix, l'ordre et le bon gouvernement du Canada en vertu de l'art. 91 de la *Loi constitutionnelle de 1867* ou de la compétence en matière criminelle suivant le par. 91(27) de la *Loi constitutionnelle de 1867*, ou autrement?

R. Oui. Ils relèvent entièrement du pouvoir du Parlement de légiférer en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*. Il n'est pas nécessaire d'examiner la première partie de la question.

Pourvoi accueilli avec dépens, le juge en chef LAMER *et les juges* SOPINKA, IACOBUCCI *et* MAJOR *sont dissidents.*

Procureur de l'appelant: George Thomson, Montréal.

Procureurs de l'intimée: Ogilvy Renault, Montréal.

Procureur du mis en cause: Alain Gingras, Sainte-Foy.

Procureur de l'intervenant le procureur général de la Saskatchewan: W. Brent Cotter, Regina.

Procureurs de l'intervenante IPSCO Inc.: MacPherson Leslie & Tyerman, Regina.

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Solicitors for the intervener the Société pour vaincre la pollution inc.: Astell & Monette, Montreal.

Solicitors for the interveners Pollution Probe, Great Lakes United (Canada), Canadian Environmental Law Association and Sierra Legal Defence Fund: Stewart A. G. Elgie and Paul R. Muldoon, Toronto.

Procureurs de l'intervenante la Société pour vaincre la pollution inc.: Astell & Monette, Montréal.

Procureurs des intervenants Pollution Probe, Great Lakes United (Canada), Association canadienne du droit de l'environnement et Sierra Legal Defence Fund: Stewart A. G. Elgie et Paul R. Muldoon, Toronto.

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TAB 26

Her Majesty The Queen in right of Alberta, as represented by the Minister of Public Works, Supply and Services *Appellant*

and

The Minister of Transport and the Minister of Fisheries and Oceans *Appellants*

v.

Friends of the Oldman River Society *Respondent*

and

The Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General of Newfoundland, the Minister of Justice of the Northwest Territories, the National Indian Brotherhood/Assembly of First Nations, the Dene Nation and the Metis Association of the Northwest Territories, the Native Council of Canada (Alberta), the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada), the Friends of the Earth and the Alberta Wilderness Association *Interveners*

Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Travaux publics, des Approvisionnements et des Services *Appelante*

et

Le ministre des Transports et le ministre des Pêches et des Océans *Appelants*

c.

Friends of the Oldman River Society *Intimée*

et

Le procureur général du Québec, le procureur général du Nouveau-Brunswick, le procureur général du Manitoba, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan, le procureur général de Terre-Neuve, le ministre de la Justice des Territoires du Nord-Ouest, la Fraternité des Indiens du Canada/l'Assemblée des Premières Nations, la Nation dénée et l'Association des Métis des Territoires du Nord-Ouest, le Conseil national des autochtones du Canada (Alberta), le Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, le Sierra Club of Western Canada, Survie culturelle (Canada), les Amis de la Terre et l'Alberta Wilderness Association *Intervenants*

INDEXED AS: FRIENDS OF THE OLDMAN RIVER SOCIETY *v.* CANADA (MINISTER OF TRANSPORT)

File No.: 21890.

1991: February 19, 20; 1992: January 23.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

RÉPERTORIÉ: FRIENDS OF THE OLDMAN RIVER SOCIETY *c.* CANADA (MINISTRE DES TRANSPORTS)

N° du greffe: 21890.

1991: 19, 20 février; 1992: 23 janvier.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson et Iacobucci.

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ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Distribution of legislative powers — Environment — Environmental assessment — Whether federal environmental guidelines order intra vires Parliament — Constitution Act, 1867, ss. 91, 92 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law — Environmental assessment — Statutory validity of federal environmental guidelines order — Whether guidelines order authorized by s. 6 of Department of the Environment Act — Whether guidelines order inconsistent with Navigable Waters Protection Act — Department of the Environment Act, R.S.C., 1985, c. E-10, s. 6 — Navigable Waters Protection Act, R.S.C., 1985, c. N-22, ss. 5, 6 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law — Environmental assessment — Applicability of federal environmental guidelines order — Alberta building dam on Oldman River — Dam affecting areas of federal responsibility such as navigable waters and fisheries — Whether guidelines order applicable only to new federal projects — Whether Minister of Transport and Minister of Fisheries and Oceans must comply with guidelines order — Department of the Environment Act, R.S.C., 1985, c. E-10, ss. 4(1)(a), 5(a)(ii), 6 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467, ss. 2 "proposal", "initiating department", 6 — Navigable Waters Protection Act, R.S.C., 1985, c. N-22, s. 5 — Fisheries Act, R.S.C., 1985, c. F-14, ss. 35, 37.

Crown — Immunity — Provinces — Whether Crown in right of province bound by provisions of Navigable Waters Protection Act, R.S.C., 1985, c. N-22 — Interpretation Act, R.S.C., 1985, c. I-21, s. 17.

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EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Répartition des pouvoirs législatifs — Environnement — Évaluation environnementale — Les lignes directrices fédérales en matière d'environnement sont-elles intra vires du Parlement? — Loi constitutionnelle de 1867, art. 91, 92 — Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467.

Droit de l'environnement — Évaluation environnementale — Validité législative du décret fédéral sur les lignes directrices en matière d'environnement — Le décret sur les lignes directrices est-il autorisé par l'art. 6 de la Loi sur le ministère de l'Environnement? — Le décret sur les lignes directrices est-il incompatible avec la Loi sur la protection des eaux navigables? — Loi sur le ministère de l'Environnement, L.R.C. (1985), ch. E-10, art. 6 — Loi sur la protection des eaux navigables, L.R.C. (1985), ch. N-22, art. 5, 6 — Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467.

Droit de l'environnement — Évaluation environnementale — Applicabilité du décret fédéral sur les lignes directrices en matière d'environnement — Construction d'un barrage par l'Alberta sur la rivière Oldman — Barrage touchant des domaines de compétence fédérale comme les eaux navigables et les pêches — Le décret sur les lignes directrices s'applique-t-il seulement aux nouveaux projets fédéraux? — Le ministre des Transports et le ministre des Pêches et des Océans sont-ils tenus de se conformer au décret sur les lignes directrices? — Loi sur le ministère de l'Environnement, L.R.C. (1985), ch. E-10, art. 4(1)a), 5a)(ii), 6 — Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467, art. 2 «proposition», «ministère responsable», 6 — Loi sur la protection des eaux navigables, L.R.C. (1985), ch. N-22, art. 5 — Loi sur les pêches, L.R.C. (1985), ch. F-14, art. 35, 37.

Couronne — Immunité — Provinces — La Couronne du chef de la province est-elle liée par les dispositions de la Loi sur la protection des eaux navigables, L.R.C. (1985), ch. N-22? — Loi d'interprétation, L.R.C. (1985), ch. I-21, art. 17.

Droit administratif — Contrôle judiciaire — Redressements — Pouvoir discrétionnaire — Construction d'un barrage par l'Alberta sur la rivière Oldman — Barrage touchant des domaines de compétence fédérale comme les eaux navigables et les pêches — Groupe environnemental, par demande de bref de certiorari et de bref de mandamus à la Cour fédérale, cherche à for-

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guidelines order — Applications dismissed on grounds of unreasonable delay and futility — Whether Court of Appeal erred in interfering with motions judge's discretion not to grant remedy sought.

cer le ministre des Transports et le ministre des Pêches et des Océans à se conformer au décret fédéral sur les lignes directrices en matière d'environnement — Demandes rejetées en raison du retard déraisonnable et de la futilité de la procédure — La Cour d'appel a-t-elle commis une erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder la réparation demandée?

The respondent Society, an Alberta environmental group, brought applications for *certiorari* and mandamus in the Federal Court seeking to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal *Environmental Assessment and Review Process Guidelines Order*, in respect of a dam constructed on the Oldman River by the province of Alberta — a project which affects several federal interests, in particular navigable waters, fisheries, Indians and Indian lands. The Guidelines Order was established under s. 6 of the federal *Department of the Environment Act* and requires all federal departments and agencies that have a decision-making authority for any proposal (i.e., any initiative, undertaking or activity) that may have an environmental effect on an area of federal responsibility to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects. The province had itself conducted extensive environmental studies over the years which took into account public views, including the views of Indian bands and environmental groups, and, in September 1987, had obtained from the Minister of Transport an approval for the work under s. 5 of the *Navigable Waters Protection Act*. This section provides that no work is to be built in navigable waters without the prior approval of the Minister. In assessing Alberta's application, the Minister considered only the project's effect on navigation and no assessment under the Guidelines Order was made. Respondent's attempts to stop the project in the Alberta courts failed and both the federal Ministers of the Environment and of Fisheries and Oceans declined requests to subject the project to the Guidelines Order. The contract for the construction of the dam was awarded in 1988 and the project was 40 percent complete when the respondent commenced its action in the Federal Court in April 1989. The Trial Division dismissed the applications. On appeal, the Court of Appeal reversed the judgment, quashed the approval under s. 5 of the *Navigable Waters Protection Act*, and ordered the Ministers of Transport and of Fisheries and Oceans to comply with the Guidelines Order. This appeal raises the constitutional and statutory validity of the Guidelines Order as well as its nature and applicability. It also raises the

L'intimée, la Friends of the Oldman River Society (la «Société»), un groupe environnemental de l'Alberta, par demande de bref de *certiorari* et de bref de *mandamus* présentée à la Cour fédérale, cherche à forcer deux ministères fédéraux, le ministère des Transports et le ministère des Pêches et des Océans, à procéder à une évaluation environnementale conformément au *Décret fédéral sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement*, relativement à un barrage construit sur la rivière Oldman par la province d'Alberta—un projet qui touche plusieurs sphères de compétence fédérale, notamment les eaux navigables, les pêcheries, les Indiens et les terres indiennes. Le Décret sur les lignes directrices a été pris en vertu de l'art. 6 de la *Loi sur le ministère de l'Environnement* et exige de tous les ministères et organismes fédéraux qui exercent un pouvoir de décision à l'égard d'une proposition (c'est-à-dire une entreprise ou activité) susceptible d'entraîner des répercussions environnementales sur une question de compétence fédérale, qu'ils procèdent à un examen initial de cette proposition afin de déterminer si elle peut éventuellement comporter des effets défavorables sur l'environnement. La province a elle-même procédé au cours des années à d'importantes études environnementales qui ont donné lieu à des consultations publiques, notamment auprès des bandes indiennes et des groupes environnementaux, et, en septembre 1987, avait obtenu du ministre des Transports une approbation de l'ouvrage en vertu de l'art. 5 de la *Loi sur la protection des eaux navigables*. Cette disposition prévoit qu'il est interdit de construire un ouvrage dans les eaux navigables à moins qu'il n'ait préalablement été approuvé par le ministre. Dans l'évaluation de la demande de l'Alberta, le ministre n'a examiné que l'incidence du projet sur la navigation et aucune évaluation n'a été faite en vertu du Décret sur les lignes directrices. Les tentatives de l'intimée devant les tribunaux de l'Alberta pour faire arrêter le projet ont échoué et les ministres fédéraux de l'Environnement et des Pêches et des Océans ont refusé d'assujettir le projet à l'évaluation en vertu du Décret sur les lignes directrices. Le contrat de construction du barrage a été octroyé en 1988 et les travaux étaient achevés à 40 pour 100 lorsque la présente action a été intentée

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question whether the motions judge properly exercised his discretion in deciding not to grant the remedy sought on grounds of unreasonable delay and futility.

Held (Stevenson J. dissenting): The appeal should be dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order.

Statutory Validity of the Guidelines Order

The Guidelines Order was validly enacted pursuant to s. 6 of the *Department of the Environment Act*, and is mandatory in nature. When one reads s. 6 as a whole, rather than focusing on the word "guidelines" in isolation, it is clear that Parliament has elected to adopt a regulatory scheme that is "law", and amenable to enforcement through prerogative relief. The "guidelines" are not merely authorized by statute but must be formally enacted by "order" with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority.

The Guidelines Order, which requires the decision maker to take socio-economic considerations into account in the environmental impact assessment, does not go beyond what is authorized by the *Department of the Environment Act*. The concept of "environmental quality" in s. 6 of the Act is not confined to the biophysical environment alone. The environment is a diffuse subject matter and, subject to the constitutional imperatives, the potential consequences for a community's livelihood, health and other social matters from environ-

devant la Cour fédérale en avril 1989. La Section de première instance a rejeté les demandes. La Cour d'appel a infirmé le jugement, annulé l'approbation accordée en vertu de l'art. 5 de la *Loi sur la protection des eaux navigables* et ordonné aux ministres des Transports et des Pêches et des Océans de se conformer au Décret sur les lignes directrices. Le présent pourvoi soulève la validité constitutionnelle et législative du Décret sur les lignes directrices et porte sur la nature et l'applicabilité de celui-ci. Il soulève aussi la question de savoir si le juge des requêtes a bien exercé son pouvoir discrétionnaire dans sa décision de ne pas accorder le redressement demandé en raison du retard déraisonnable et de la futilité de la procédure.

Arrêt (le juge Stevenson est dissident): Le pourvoi est rejeté, sauf qu'il ne sera pas délivré de bref de la nature d'un *mandamus* ordonnant au ministre des Pêches et des Océans de se conformer au Décret sur les lignes directrices.

La validité législative du Décret sur les lignes directrices

Le Décret sur les lignes directrices a été validement adopté conformément à l'art. 6 de la *Loi sur le ministère de l'Environnement* et il est de nature impérative. Lorsqu'on examine l'art. 6 dans son ensemble, plutôt que seulement le terme «directives» en vase clos, on se rend compte que le législateur fédéral a opté pour l'adoption d'un mécanisme de réglementation auquel on est soumis «légalement» et dont on peut obtenir l'exécution par bref de prérogative. Les «directives» ne sont pas simplement autorisées par une loi, mais elles doivent être officiellement adoptées par «arrêté», sur approbation du gouverneur en conseil. Ce processus contraste vivement avec le processus habituel d'établissement de directives de politique interne ministérielle destinées à exercer un contrôle sur les fonctionnaires relevant de l'autorité du ministre.

Le Décret sur les lignes directrices, qui exige du décideur qu'il tienne compte de facteurs socio-économiques dans l'évaluation des répercussions environnementales, ne va pas au-delà de ce qui est autorisé par la *Loi sur le ministère de l'Environnement*. Le concept de la «qualité de l'environnement» prévu à l'art. 6 de la Loi ne se limite pas à l'environnement biophysique seulement. L'environnement est un sujet diffus et, sous réserve des impératifs constitutionnels, les conséquences éventuelles d'un changement environnemental sur le gagne-pain, la santé et les autres préoccupations sociales d'une collectivité font partie intégrante de la prise de décisions

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mental change, are integral to decision making on matters affecting environmental quality.

The Guidelines Order is consistent with the *Navigable Waters Protection Act*. There is nothing in the Act which explicitly or implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act. The Minister's duty under the Order is supplemental to his responsibility under the *Navigable Waters Protection Act*, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the Order. There is also no conflict between the requirement for an initial assessment "as early in the planning process as possible and before irrevocable decisions are taken" in s. 3 of the Guidelines Order, and the remedial power under s. 6(4) of the Act to grant approval after the commencement of construction. That power is an exception to the general rule in s. 5 of the Act requiring approval prior to construction, and in exercising his discretion to grant approval after commencement, the Minister is not precluded from applying the Order.

Applicability of the Guidelines Order

The scope of the Guidelines Order is not restricted to "new federal projects, programs and activities"; the Order is not engaged every time a project may have an environmental effect on an area of federal jurisdiction. However, there must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility". The proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under s. 91 of the *Constitution Act, 1867*, must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. "Responsibility" within the definition of "proposal" means a legal duty or obligation and should not be read as connoting matters falling generally within federal jurisdiction. Once such a duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the "decision making authority" for the proposal and

concernant des questions ayant une incidence sur la qualité de l'environnement.

Le Décret sur les lignes directrices est compatible avec la *Loi sur la protection des eaux navigables*. La Loi n'a pas pour effet d'empêcher explicitement ou implicitement le ministre des Transports de tenir compte de facteurs autres que ceux touchant la navigation dans l'exercice de son pouvoir d'approbation en vertu de l'art. 5 de la Loi. La fonction confiée au ministre en vertu du Décret vient s'ajouter à la responsabilité qu'il a en vertu de la *Loi sur la protection des eaux navigables*, et il ne peut invoquer une interprétation trop étroite des pouvoirs qui lui sont conférés par des lois pour éviter de se conformer au Décret. Il n'existe pas non plus de conflit entre, d'une part, le fait d'exiger, à l'art. 3 du Décret sur les lignes directrices, qu'un examen soit effectué «le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables» et, d'autre part, le pouvoir de redressement, prévu au par. 6(4) de la Loi, permettant au ministre d'accorder une approbation après le début des travaux. Ce pouvoir constitue une exception à la règle générale énoncée à l'art. 5 de la Loi selon laquelle il faut obtenir une approbation avant le début de la construction et, dans l'exercice de son pouvoir discrétionnaire d'accorder une approbation après le début des travaux, rien n'empêche le ministre d'appliquer le Décret.

L'applicabilité du Décret sur les lignes directrices

L'application du Décret sur les lignes directrices n'est pas restreinte aux «nouveaux projets, programmes et activités fédéraux»; le Décret ne reçoit pas application chaque fois qu'un projet peut comporter des répercussions environnementales sur un domaine de compétence fédérale. Il doit toutefois s'agir tout d'abord d'une «proposition» qui vise une «entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décisions». L'interprétation qu'il faut donner à l'expression «participe à la prise de décisions» est que le gouvernement fédéral, se trouvant dans un domaine relevant de sa compétence en vertu de l'art. 91 de la *Loi constitutionnelle de 1867*, doit avoir une obligation positive de réglementation en vertu d'une loi fédérale relativement à l'entreprise ou à l'activité proposée. L'expression «participe à la prise de décisions» dans la définition du terme «proposition» signifie une obligation légale et ne devrait pas être interprétée comme ayant trait à des questions relevant généralement de la compétence fédérale. Si cette obligation existe, il s'agit alors de déterminer qui est le «ministère responsable» en la matière, puisque c'est ce ministère qui exerce le «pouvoir de

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thus responsible for initiating the process under the Guidelines Order.

The Oldman River Dam project falls within the ambit of the Guidelines Order. The project qualifies as a proposal for which the Minister of Transport alone is the "initiating department" under s. 2 of the Order. The *Navigable Waters Protection Act*, in particular s. 5, places an affirmative regulatory duty on the Minister of Transport. Under that Act there is a legislatively entrenched regulatory scheme in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water.

The Guidelines Order does not apply to the Minister of Fisheries and Oceans, however, because there is no equivalent regulatory scheme under the *Fisheries Act* which is applicable to this project. The discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a "decision making responsibility" within the meaning of the Order. The Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has only been given a limited *ad hoc* legislative power which does not constitute an affirmative regulatory duty.

The scope of assessment under the Guidelines Order is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Under the Order, the initiating department which has been given authority to embark on an assessment must consider the environmental effect on all areas of federal jurisdiction. The Minister of Transport, in his capacity of decision maker under the *Navigable Waters Protection Act*, must thus consider the environmental impact of the dam on such areas of federal jurisdiction as navigable waters, fisheries, Indians and Indian lands.

Crown Immunity

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Crown in right of Alberta is bound by the *Navigable Waters Protection Act* by necessary implication. The proprietary right the province may have in the bed of the Oldman River is subject to the public right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament. Alberta requires statutory

décision» à l'égard de la proposition et qui doit donc entamer le processus d'évaluation visé par le Décret sur les lignes directrices.

Le projet de barrage sur la rivière Oldman est visé par le Décret sur les lignes directrices. Il peut être qualifié de proposition dont le ministre des Transports seul est le «ministère responsable» en vertu de l'art. 2 du Décret. La *Loi sur la protection des eaux navigables*, notamment son art. 5, impose une obligation positive de réglementation au ministre des Transports. Cette loi a mis en place un mécanisme de réglementation qui prévoit qu'il est nécessaire d'obtenir l'approbation du ministre avant qu'un ouvrage qui gêne sérieusement la navigation puisse être placé dans des eaux navigables ou sur, sous, au-dessus ou à travers de telles eaux.

Cependant, le Décret sur les lignes directrices ne s'applique pas au ministre des Pêches et des Océans, puisque la *Loi sur les pêches* ne renferme pas de disposition de réglementation équivalente qui serait applicable au projet. Le fait que le ministre possède le pouvoir discrétionnaire de demander des renseignements visant à l'aider dans l'exercice d'une fonction législative ne signifie pas qu'il «participe à la prise de décisions» au sens du Décret. Le ministre des Pêches et des Océans a, en vertu de l'art. 37 de la *Loi sur les pêches*, un pouvoir législatif spécial limité qui ne constitue pas une obligation positive de réglementation.

L'étendue de l'évaluation en vertu du Décret sur les lignes directrices n'est pas limitée au domaine particulier de compétence à l'égard duquel le gouvernement du Canada participe à la prise de décisions au sens du terme «proposition». En vertu du Décret, le ministère responsable qui a reçu le pouvoir de procéder à l'évaluation doit tenir compte des répercussions environnementales dans tous les domaines de compétence fédérale. Le ministre des Transports, à titre de décideur en vertu de la *Loi sur la protection des eaux navigables*, doit examiner les incidences environnementales du barrage sur les domaines de compétence fédérale, comme les eaux navigables, les pêcheries, les Indiens et les terres indiennes.

L'immunité de la Couronne

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci: La Couronne du chef de l'Alberta est par déduction nécessaire liée par la *Loi sur la protection des eaux navigables*. Le droit de propriété que la province peut détenir sur le lit de la rivière Oldman est assujetti au droit public de navigation, sur lequel le Parlement exerce une compétence législative exclusive. L'Alberta

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authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the *Navigable Waters Protection Act* is the means by which it must be obtained. The Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval. The purpose of the Act would be wholly frustrated if the province was not bound by the Act. The provinces are among the bodies that are likely to engage in projects that may interfere with navigation. Were the Crown in right of a province permitted to undermine the integrity of the essential navigational networks in Canadian waters, the legislative purpose of the *Navigable Waters Protection Act* would effectively be emasculated.

Per Stevenson J. (dissenting): The province of Alberta is not bound by the *Navigable Waters Protection Act*. The Crown is not bound by legislation unless it is mentioned or referred to in the legislation. Here, there are no words in the Act "expressly binding" the Crown and no clear intention to bind "is manifest from the very terms of the statute". As well, the failure to include the Crown would not wholly frustrate the purpose of the Act or produce an absurdity. There are many non-governmental agencies whose activities are subject to the Act and there is thus no emasculation of the Act. If the Crown interferes with a public right of navigation, that wrong is remediable by action. There is no significant benefit in approval under the Act. Tort actions may still lie.

Constitutional Validity of the Guidelines Order

The "environment" is not an independent matter of legislation under the *Constitution Act, 1867*. Understood in its generic sense, it encompasses the physical, economic and social environment and touches upon several of the heads of power assigned to the respective levels of government. While both levels may act in relation to the environment, the exercise of legislative power affecting environmental concerns must be linked to an appropriate head of power. Local projects will generally fall within provincial responsibility, but federal participation will be required if, as in this case, the project impinges on an area of federal jurisdiction.

The Guidelines Order is *intra vires* Parliament. The Order does not attempt to regulate the environmental effects of matters within the control of the province but

doit obtenir l'autorisation législative du Parlement pour construire un ouvrage qui entraverait sérieusement la navigation dans la rivière Oldman; la *Loi sur la protection des eaux navigables* est le mécanisme qu'elle doit utiliser à cette fin. La Couronne du chef de l'Alberta est liée par la Loi, car il s'agit là du seul moyen pratique d'obtenir l'approbation requise. Par ailleurs, si la province n'était pas liée par la Loi, celle-ci serait privée de toute efficacité. Les provinces font partie des organismes susceptibles de participer à des projets qui peuvent obstruer la navigation. Si la Couronne du chef d'une province était habilitée à saper l'intégrité des réseaux essentiels de navigation dans les eaux canadiennes, l'objet de la *Loi sur la protection des eaux navigables* serait, en fait, annihilé.

Le juge Stevenson (dissident): La province d'Alberta n'est pas liée par la *Loi sur la protection des eaux navigables*. Nul texte législatif ne lie la Couronne, sauf dans la mesure qui y est mentionnée ou prévue. En l'espèce, la Loi ne renferme pas de termes qui «lient expressément» la Couronne et il n'existe pas d'intention claire de la lier qui «ressort du texte même de la loi». En outre, le fait que la Couronne ne soit pas liée ne priverait pas la Loi de toute efficacité ni ne donnerait lieu à une absurdité. Il existe de nombreux organismes non gouvernementaux dont les activités sont régies par la Loi et l'objet de la Loi n'est donc pas annihilé. Si la Couronne porte atteinte à un droit public de navigation, il est possible de la poursuivre en justice. Il n'y a pas d'avantage important lié à l'approbation en vertu de la Loi. Il peut toujours y avoir ouverture à responsabilité civile.

La validité constitutionnelle du Décret sur les lignes directrices

L'«environnement» n'est pas un domaine distinct de compétence législative en vertu de la *Loi constitutionnelle de 1867*. Dans son sens générique, il englobe l'environnement physique, économique et social touchant plusieurs domaines de compétence attribués aux deux paliers de gouvernement. Bien que les deux paliers puissent œuvrer dans le domaine de l'environnement, l'exercice d'une compétence législative, dans la mesure où elle se rapporte à l'environnement, doit se rattacher au domaine de compétence approprié. Les projets de nature locale relèvent généralement de la compétence provinciale, mais ils peuvent exiger la participation du fédéral dans le cas où ils empiètent sur un domaine de compétence fédérale comme en l'espèce.

Le Décret sur les lignes directrices est *intra vires* du Parlement. Il ne tente pas de réglementer les répercussions environnementales de matières qui relèvent de la

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merely makes environmental impact assessment an essential component of federal decision making. The Order is in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. In essence, the Order has two fundamental aspects. First, there is the substance of the Order dealing with environmental impact assessment to facilitate decision making under the federal head of power through which a proposal is regulated. This aspect of the Order can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in s. 91 of the *Constitution Act, 1867*. The second aspect of the Order is its procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker (the "initiating department"). This facet of the Order has as its object the regulation of the institutions and agencies of the Government of Canada as to the manner in which they perform their administrative functions and duties. This is unquestionably *intra vires* Parliament. It may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, be justifiable under the residuary power in s. 91.

The Guidelines Order cannot be used as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power. The "initiating department" is only given a mandate to examine matters directly related to the areas of federal responsibility potentially affected. Any intrusion under the Order into provincial matters is merely incidental to the pith and substance of the legislation.

Discretion

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Federal Court of Appeal did not err in interfering with the motions judge's discretion not to grant the remedies sought on the grounds of unreasonable delay and futility. Respondent made a sustained effort, through legal proceedings in the Alberta courts and through correspondence with federal departments, to challenge the legality of the process followed by the province to build the dam and the acquiescence of the appellant Ministers, and there is no evidence that Alberta has suffered any prejudice from any delay in taking the present action. Despite ongoing legal proceedings, the construction of the dam continued. The province was not prepared to

compétence de la province, mais fait simplement de l'évaluation des incidences environnementales un élément essentiel de la prise de décisions fédérales. De par son caractère véritable, le Décret n'est rien de plus qu'un instrument qui régit la façon dont les institutions fédérales doivent gérer leurs diverses fonctions. Essentiellement, le Décret comporte deux aspects fondamentaux. Il y a tout d'abord l'aspect de fond qui porte sur l'évaluation des incidences environnementales, dont l'objet est de faciliter la prise de décisions dans le domaine de compétence fédérale qui régit une proposition. Cet aspect du Décret peut être maintenu au motif qu'il s'agit d'un texte législatif se rapportant aux matières pertinentes énumérées à l'art. 91 de la *Loi constitutionnelle de 1867*. Le deuxième aspect est l'élément procédural ou organisationnel coordonnant le processus d'évaluation, qui peut dans un cas donné toucher plusieurs domaines de compétence fédérale, relevant d'un décideur désigné (le «ministère responsable»). Cette facette vise à réglementer la façon dont les institutions et organismes du gouvernement du Canada exercent leurs fonctions et responsabilités administratives. Cela est indiscutablement *intra vires* du Parlement. Cet aspect peut être considéré comme un pouvoir accessoire de la compétence législative en cause, ou de toute façon, être justifié en vertu du pouvoir résiduel prévu à l'art. 91.

Le Décret sur les lignes directrices ne peut être utilisé comme moyen déguisé d'envahir des champs de compétence provinciale qui ne se rapportent pas aux domaines de compétence fédérale concernés. Le «ministère responsable» n'a que le mandat d'examiner les questions se rapportant directement aux domaines de compétence fédérale concernés. Toute ingérence dans la sphère de compétence provinciale est simplement accessoire au caractère véritable du texte législatif.

Le pouvoir discrétionnaire

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci: La Cour d'appel fédérale n'a pas commis d'erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder la réparation sollicitée en raison du retard déraisonnable et de la futilité de la procédure. L'intimée s'est efforcée d'une façon soutenue de contester, dans le cadre des poursuites judiciaires devant les tribunaux de l'Alberta et dans les lettres envoyées aux ministères fédéraux, d'une part, la légalité des mesures prises par l'Alberta relativement à la construction du barrage, et d'autre part, l'acquiescement des ministres appelants; il n'existe pas de preuve que l'Alberta a subi

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accede to an environmental impact assessment under the Order until it had exhausted all legal avenues. The motions judge did not weigh these considerations adequately, giving the Court of Appeal no choice but to intervene. Futility was also not a proper ground to refuse a remedy in the present circumstances. Prerogative relief should only be refused on that ground in those few instances where the issuance of a prerogative writ would be effectively nugatory. It is not obvious in this case that the implementation of the Order even at this late stage will not have some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction.

Per Stevenson J. (dissenting): The Federal Court of Appeal erred in interfering with the motions judge's discretion to refuse the prerogative remedy. The court was clearly wrong in overruling his conclusion on the question of delay. The common law has always imposed a duty on an applicant to act promptly in seeking prerogative relief. Given the enormity of the project and the interests at stake, it was unreasonable for the respondent Society to wait 14 months before challenging the Minister of Transport's approval. It is impossible to conclude that Alberta was not prejudiced by the delay. The legal proceedings in the Alberta courts brought by the respondent and others need not have been taken into account by the motions judge. These proceedings were separate and distinct from the relief sought in this case and were irrelevant to the issues at hand. The present action centres on the constitutionality and applicability of the Guidelines Order. It raises new and different issues. In determining whether he should exercise his discretion against the respondent, the motions judge was obliged to look only at those factors which he considered were directly connected to the application before him. Interference with his exercise of discretion is not warranted unless it can be said with certainty that he was wrong in doing what he did. The test has not been met in this case.

Costs

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: 603

un préjudice quelconque en raison d'un retard à intenter la présente action. Malgré les contestations judiciaires en cours, la construction du barrage s'est poursuivie. La province n'était pas disposée à consentir à une évaluation des incidences environnementales en vertu du Décret avant l'épuisement de tous les recours légaux. Le juge des requêtes n'a pas suffisamment accordé d'importance à ces considérations, ne laissant à la Cour d'appel d'autre choix que d'intervenir. Le motif de la futilité de la procédure ne pouvait justifier un refus dans les circonstances. On ne devrait refuser la délivrance d'un bref de prérogative pour ce motif que dans les rares cas où sa délivrance serait vraiment inefficace. En l'espèce, il n'est pas évident que l'application du Décret, même à cette étape tardive, n'aura pas un certain effet sur les mesures susceptibles d'être prises pour atténuer toute incidence environnementale néfaste que pourrait avoir le barrage sur un domaine de compétence fédérale.

Le juge Stevenson (dissident): La Cour d'appel fédérale a commis une erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder une réparation par voie de bref de prérogative. La cour a clairement commis une erreur en rejetant sa conclusion relativement à la question du retard. La common law a toujours exigé du requérant qu'il agisse avec diligence lorsqu'il sollicite un bref de prérogative. Compte tenu de l'envergure du projet et des intérêts en jeu, il n'était pas raisonnable que la Société intimée attende 14 mois avant de contester l'approbation du ministre des Transports. Il est impossible de conclure que l'Alberta n'a pas subi un préjudice en raison du retard. Le juge des requêtes n'avait pas à tenir compte des procédures judiciaires que l'intimée et d'autres parties avaient entamées devant les tribunaux de l'Alberta. Ces procédures constituaient des recours distincts et différents du redressement sollicité en l'espèce et n'étaient pas pertinentes quant aux questions en litige. La présente action porte sur la constitutionnalité et l'applicabilité du Décret sur les lignes directrices. Il soulève des questions nouvelles et différentes. Pour déterminer s'il devait exercer son pouvoir discrétionnaire contre l'intimée, le juge des requêtes devait examiner seulement les facteurs qui, selon lui, se rattachaient directement à la demande dont il était saisi. On n'est pas justifié de modifier la décision qu'il a prise dans l'exercice de son pouvoir discrétionnaire, sauf si l'on peut affirmer avec certitude qu'il a eu tort de procéder ainsi. L'on n'a pas répondu au critère en l'espèce.

Les dépens

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin

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It is a proper case for awarding costs on a solicitor-client basis to the respondent, given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did not earlier seek leave to appeal to this Court.

Per Stevenson J. (dissenting): The appellants should not be called upon to pay costs on a solicitor and client basis. There is no justification in departing from our own general rule that a successful party should recover costs on the usual party and party basis. Public interest groups must be prepared to abide by the same principles as apply to other litigants and be prepared to accept some responsibility for the costs.

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et Iacobucci: Il s'agit d'un cas où il est approprié d'accorder les dépens comme entre procureur et client à la Société intimée, compte tenu de la situation de cette dernière et du fait que les ministères fédéraux ont été joints comme appelants même s'ils n'avaient pas auparavant présenté une demande d'autorisation de pourvoi à notre Cour.

Le juge Stevenson (dissident): Les appelants ne devraient pas être contraints de payer les dépens comme entre procureur et client. Il n'y a pas de raison de déroger à notre règle générale que la partie qui a gain de cause a droit aux dépens sur la base des frais entre parties. Les groupes d'intérêt public doivent être disposés à se plier aux mêmes principes que les autres plaideurs et accepter une certaine responsabilité quant aux dépens.

Jurisprudence

Citée par le juge La Forest

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[1980] 2 S.C.R. 292; *Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia* (1976), 136 C.L.R. 1; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182; *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338; *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868; *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713; *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Friends of the Oldman River Society v. Alberta (Minister of the Environment)* (1987), 85 A.R. 321; *Friends of Oldman River Society v. Alberta (Minister of the Environment)* (1988), 89 A.R. 339; *Friends of the Old Man River Society v. Energy Resources Conservation Board (Alta.)* (1988), 89 A.R. 280; *Champion v. City of Vancouver*, [1918] 1 W.W.R. 216; *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459.

By Stevenson J. (dissenting)

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APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 18, 68 D.L.R. (4th) 375, [1991] 1 W.W.R. 352, 108 N.R. 241, 76 Alta. L.R. (2d) 289, 5 C.E.L.R. (N.S.) 1, reversing a judgment of the Trial Division, [1990] 1 F.C. 248, [1990] 2 W.W.R. 150, 30 F.T.R. 108, 70 Alta. L.R. (2d) 289, 4 C.E.L.R. (N.S.) 137. Appeal dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the federal environmental guidelines order. Stevenson J. is dissenting.

D. R. Thomas, Q.C., T. W. Wakeling and *G. D. Chipeur*, for the appellant Her Majesty the Queen in right of Alberta.

E. R. Sojonky, Q.C., B. J. Saunders and *J. de Pencier*, for the appellants the Minister of Transport and the Minister of Fisheries and Oceans.

B. A. Crane, Q.C., for the respondent.

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POURVOI contre un arrêt de la Cour d'appel fédérale, [1990] 2 C.F. 18, 68 D.L.R. (4th) 375, [1991] 1 W.W.R. 352, 108 N.R. 241, 76 Alta. L.R. (2d) 289, 5 C.E.L.R. (N.S.) 1, qui a infirmé un jugement de la Section de première instance, [1990] 1 C.F. 248, [1990] 2 W.W.R. 150, 30 F.T.R. 108, 70 Alta. L.R. (2d) 289, 4 C.E.L.R. (N.S.) 137. Pourvoi rejeté, sauf qu'il ne sera pas délivré de bref de la nature d'un *mandamus* ordonnant au ministre des Pêches et des Océans de se conformer aux lignes directrices fédérales en matière d'environnement. Le juge Stevenson est dissident.

D. R. Thomas, c.r., T. W. Wakeling et *G. D. Chipeur*, pour l'appelante Sa Majesté la Reine du chef de l'Alberta.

E. R. Sojonky, c.r., B. J. Saunders et *J. de Pencier*, pour les appelants le ministre des Transports et le ministre des Pêches et des Océans.

607 *B. A. Crane, c.r.*, pour l'intimée.

1992 CanLII 110 (SCC)

J.-K. Samson and *A. Gingras*, for the intervener the Attorney General of Quebec.

P. H. Blanchet, for the intervener the Attorney General for New Brunswick.

G. E. Hannon, for the intervener the Attorney General of Manitoba.

G. H. Copley, for the intervener the Attorney General of British Columbia.

R. G. Richards, for the intervener the Attorney General for Saskatchewan.

B. G. Welsh, for the intervener the Attorney General of Newfoundland.

R. A. Kasting and *J. Donihee*, for the intervener the Minister of Justice of the Northwest Territories.

P. W. Hutchins, *D. H. Soroka* and *F. S. Gertler*, for the intervener the National Indian Brotherhood/Assembly of First Nations.

J. J. Gill, for the interveners the Dene Nation and the Metis Association of the Northwest Territories, and the Native Council of Canada (Alberta).

G. J. McDade and *J. B. Hanebury*, for the interveners the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada), and the Friends of the Earth.

M. W. Mason, for the intervener the Alberta Wilderness Association.

The judgment of Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. was delivered by

LA FOREST J.—The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legis-

J.-K. Samson et *A. Gingras*, pour l'intervenant le procureur général du Québec.

P. H. Blanchet, pour l'intervenant le procureur général du Nouveau-Brunswick.

G. E. Hannon, pour l'intervenant le procureur général du Manitoba.

G. H. Copley, pour l'intervenant le procureur général de la Colombie-Britannique.

R. G. Richards, pour l'intervenant le procureur général de la Saskatchewan.

B. G. Welsh, pour l'intervenant le procureur général de Terre-Neuve.

R. A. Kasting et *J. Donihee*, pour l'intervenant le ministre de la Justice des Territoires du Nord-Ouest.

P. W. Hutchins, *D. H. Soroka* et *F. S. Gertler*, pour l'intervenante la Fraternité des Indiens du Canada/l'Assemblée des Premières Nations.

J. J. Gill, pour les intervenants la Nation dénée et l'Association des Métis des Territoires du Nord-Ouest, et le Conseil national des autochtones du Canada (Alberta).

G. J. McDade et *J. B. Hanebury*, pour les intervenants le Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, le Sierra Club of Western Canada, Survie culturelle (Canada), et les Amis de la Terre.

M. W. Mason, pour l'intervenante l'Alberta Wilderness Association.

Version française du jugement du juge en chef Lamer et des juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci rendu par

LE JUGE LA FOREST—La protection de l'environnement est devenue l'un des principaux défis de notre époque. Pour y faire face, les gouvernements et les organismes internationaux ont participé à la création d'un éventail important de

1992 CanLII 110 (SCC)

TAB 27

Federal Court  Cour fédérale

Date: 20180129

Dockets: T-1892-14
T-756-14
T-2101-14
T-2137-14
T-2222-14
T-144-16

Citation: 2018 FC 94

2018 FC 94 (CanLII)

Ottawa, Ontario, January 29, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JEAN GUÉRIN
JARROD SHOOK
JAMES DRUCE
JOHN ALKERTON
MICHAEL FLANNIGAN
CHRISTOPHER ROCHELEAU
JOHANNE BARITEAU
GAÉTAN ST-GERMAIN
JEFF EWERT

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

health care is not provided appropriately in some instances. But the case before this Court does not reveal any such failure, and it is far from clear how the rates of pay decreased by the October 2013 amendments could affect health care delivery. No systemic failure has been proven. At best, the record shows that one of the applicants complained of having to purchase certain painkillers even though some are prescribed to him, of having to cover the cost of a mouth guard suggested by the institutional dentist but deemed non-essential, and that his losing weight (3.3 kg) resulted in him needing to purchase new clothing outside the replacement periods. Lastly, I note exhibit Z-1, filed with consent, entitled "National Essential Health Services Framework". This document, produced by CSC in July 2015, provides a long list of which healthcare services, medical equipment and supplies, and dental service standards are approved or not.

2018 FC 94 (CanLII)

IV. Analysis

[33] Two comments must be made before we examine the applicants' legal arguments.

[34] First, this Court is not sitting to consider the wisdom of the policy decisions made by the government. Case in point, the system implemented by the government at the time in 1981 seems more generous to inmates in penitentiaries. It also follows a different philosophy. As it explicitly states, the document "Inmate Pay System" submitted as evidence, while not forgetting those in education and vocational programs, aims to "provide inmates with pay according to their job. Under this plan those inmates who participate in assigned employment including education and training, agriculture, institutional services, industrial production, and other recognized employment assignments, will receive a rate of pay designed to recognize their contribution".

The plan was to compile a list of all jobs and their descriptions and to assign pay rates to each one. The evidence does not indicate the extent to which this policy was implemented in the years that followed. However, what we do know is that Parliament adopted subsection 78(1) of the *Corrections and Conditional Release Act* in 1992 (SC 1992, c 20), establishing a correspondence between payment and participation in CSC programs and social reintegration programs. It was not a question of compensation for work performed, as was the case in 1981. This subsection still reads the same today:

Payments to offenders	**Rétribution**
78 (1) For the purpose of	**78 (1)** Le commissaire peut autoriser la rétribution des délinquants, aux taux approuvés par le Conseil du Trésor, afin d'encourager leur participation aux programmes offerts par le Service ou de leur procurer une aide financière pour favoriser leur réinsertion sociale.
(a) encouraging offenders to participate in programs provided by the Service, or	
(b) providing financial assistance to offenders to facilitate their reintegration into the community,	
the Commissioner may authorize payments to offenders at rates approved by the Treasury Board.	

This is a policy decision, meaning this Court can intervene only if it violates the Constitution. We seem to have moved from payment for work performed to payment for participation in

2018 FC 94 (CanLII)

programs promoting social reintegration; this is Parliament's decision and is not in dispute before this Court.

[35] Second, the Court is required to consider the parties' legal arguments based on the evidence in the record. It is possible that, in a particular case, the government is not fulfilling its duties under the Act. As the Attorney General concedes, the ad-hoc decision is reviewable (for example, *Charbonneau v Canada (Attorney General),* 2013 FC 687). In this case, the applicants, collectively, are challenging a lot more. The remedies sought are not so much the result of the application of certain measures in a given case under specific circumstances as they are a direct attack on the system put in place in 2013.

[36] Thus, the applicants are not arguing the unconstitutionality of section 78 in its current form, in place since 1995. Subsection 78(1) has already been reproduced, and was enacted in 1992. Originally, subsection 78(2) already allowed for deductions from payments. In 1992, it read as follows:

(2) Payments provided for pursuant to subsection (1) may be subject to deductions in accordance with any regulations made under paragraph 96(*z*.2) and any Commissioner's Directives.	**(2)** La rétribution autorisée peut faire l'objet de retenues en conformité avec les règlements d'application de l'alinéa 96*z*.2) ou les directives du commissaire.

The wording of subsection 78(2) was amended in 1995 (S.C. c. 42, s. 20) to prescribe the purposes for which deductions may be made and the maximum amount that may be deducted. Where payment is made—which suggests, of course, that Parliament is considering the possibility that no payment has been made—the Act has provided for more than 20 years that

2018 FC 94 (CanLII)

TAB 28

Her Majesty The Queen in Right of Canada *Appellant/Respondent on cross-appeal*

v.

Imperial Tobacco Canada Limited *Respondent/Appellant on cross-appeal*

and

Attorney General of Ontario and Attorney General of British Columbia *Interveners*

- and -

Attorney General of Canada *Appellant/ Respondent on cross-appeal*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. and Philip Morris International Inc. *Respondents/Appellants on cross-appeal*

and

Attorney General of Ontario, Attorney General of British Columbia and Her Majesty The Queen in Right of the Province of New Brunswick *Interveners*

Sa Majesté la Reine du chef du Canada *Appelante/intimée au pourvoi incident*

c.

Imperial Tobacco Canada Limitée *Intimée/appelante au pourvoi incident*

et

Procureur général de l'Ontario et procureur général de la Colombie-Britannique *Intervenants*

- et -

Procureur général du Canada *Appelant/ intimé au pourvoi incident*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique *Intimée*

et

Imperial Tobacco Canada Limitée, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. et Philip Morris International Inc. *Intimées/appelantes au pourvoi incident*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique et Sa Majesté la Reine du chef de la province du Nouveau-Brunswick *Intervenants*

INDEXED AS: R. *v.* IMPERIAL TOBACCO CANADA LTD.

2011 SCC 42

File Nos.: 33559, 33563.

2011: February 24; 2011: July 29.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Third-party claims — Motion to strike — Tobacco manufacturers being sued by provincial government to recover health care costs of tobacco-related illnesses, and by consumers of "light" or "mild" cigarettes for damages and punitive damages — Tobacco companies issuing third-party notices to federal government claiming contribution and indemnity — Whether plain and obvious that third-party claims disclose no reasonable cause of action.

Torts — Negligent misrepresentation — Failure to warn — Negligent design — Duty of care — Proximity — Tobacco manufacturers being sued by provincial government and consumers and issuing third-party notices to federal government claiming contribution and indemnity — Federal government claiming representations constituted government policy immune from judicial review — Whether facts as pleaded establish prima facie duty of care — If so, whether conflicting policy considerations negate such duty.

Torts — Provincial statutory scheme establishing rights of action against tobacco manufacturers and suppliers — Whether federal government liable as a "manufacturer" under the Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, or a "supplier" under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, and the Trade Practice Act, R.S.B.C. 1996, c. 457.

The appeal concerns two cases before the courts in British Columbia. In the *Costs Recovery* case, the

RÉPERTORIÉ : R. *c.* IMPERIAL TOBACCO CANADA LTÉE

2011 CSC 42

N[os] du greffe : 33559, 33563.

2011 : 24 février; 2011 : 29 juillet.

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

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Mise en cause — Requête en radiation — Fabricants de tabac poursuivis par le gouvernement d'une province qui cherche à recouvrer les sommes consacrées au traitement des maladies liées au tabagisme, et par des consommateurs de cigarettes dites « légères » ou « douces » qui demandent des dommages-intérêts et des dommages-intérêts punitifs — Compagnies de tabac mettant en cause le gouvernement fédéral pour lui réclamer une contribution et une indemnisation — Est-il évident et manifeste que les avis de mise en cause ne révèlent aucune cause d'action raisonnable?

Responsabilité délictuelle — Déclaration inexacte faite par négligence — Défaut de mise en garde — Conception négligente — Obligation de diligence — Lien de proximité — Poursuites engagées par le gouvernement d'une province et des consommateurs contre des fabricants de tabac qui ont mis en cause le gouvernement fédéral pour lui réclamer une contribution et une indemnisation — Gouvernement fédéral prétendant que les déclarations relevaient de la politique générale du gouvernement et étaient de ce fait soustraites au contrôle judiciaire — Les faits allégués établissent-ils l'existence d'une obligation de diligence prima facie? — Dans l'affirmative, des considérations de politique générale opposées écartent-elles cette obligation?

Responsabilité délictuelle — Régime législatif provincial conférant un droit d'action contre les fabricants et les fournisseurs de tabac — Le gouvernement fédéral a-t-il engagé sa responsabilité à titre de « fabricant » au sens de la Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, ch. 30, ou de « fournisseur » au sens de la Business Practices and Consumer Protection Act, S.B.C. 2004, ch. 2, et de la Trade Practice Act, R.S.B.C. 1996, ch. 457?

Le pourvoi porte sur deux actions intentées devant les tribunaux de la Colombie-Britannique. Dans l'*Affaire du*

Government of British Columbia is seeking to recover, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act* ("*CRA*"), the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of tobacco companies, including Imperial. British Columbia alleges that by 1950, the tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product. In the *Knight* case, a class action was brought against Imperial alone on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost of the cigarettes and punitive damages. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes.

In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design and failure to warn, as well as at equity. They also allege that Canada would itself be liable as a "manufacturer" under the *CRA* or a "supplier" under the *Business Practices and Consumer Protection Act* and the *Trade Practice Act*, and that they are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*. Canada brought motions to strike the third-party notices, arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claim. The court unanimously struck the remainder of the tobacco companies' claims.

recouvrement des coûts, le gouvernement de la Colombie-Britannique cherche, aux termes de la *Tobacco Damages and Health Care Costs Recovery Act* (« *CRA* »), à recouvrer d'un groupe de compagnies de tabac, dont Imperial, les sommes consacrées au traitement médical de personnes souffrant de maladies liées au tabagisme. Selon la Colombie-Britannique, dès 1950, les compagnies de tabac savaient ou auraient dû savoir que les cigarettes étaient néfastes pour la santé et ont fait défaut de mettre le public en garde adéquatement contre les risques associés à l'usage de leur produit. Dans l'affaire *Knight*, un recours collectif a été intenté contre Imperial seulement, pour demander, au nom des membres qui ont acheté des cigarettes dites « légères » ou « douces », le remboursement du coût des cigarettes ainsi que le versement de dommages-intérêts punitifs. Selon eux, la teneur en goudron et en nicotine indiquée sur les paquets de cigarettes fabriquées par Imperial ne correspondait pas aux émissions toxiques réelles pour les fumeurs. Ils font valoir que la fumée dégagée par les cigarettes légères était tout aussi néfaste que celle dégagée par les cigarettes régulières.

Dans les deux affaires, les compagnies de tabac ont mis en cause le gouvernement du Canada, prétendant que, si elles étaient tenues responsables envers les demandeurs, elles avaient le droit d'être indemnisées par le Canada pour déclarations inexactes faites par négligence, conception négligente et défaut de mise en garde; ainsi qu'en vertu de l'equity. Elles font également valoir que le Canada aurait engagé sa propre responsabilité à titre de « fabricant » au sens de la *CRA* ou à titre de « fournisseur » au sens de la *Business Practices and Consumer Protection Act* et de la *Trade Practice Act*, et qu'elles sont en droit d'obtenir du Canada une contribution et une indemnisation en vertu de la *Negligence Act*. Le Canada a présenté des requêtes en radiation des avis de mise en cause, faisant valoir qu'il était évident et manifeste que ces avis ne révélaient aucune cause d'action raisonnable. Dans les deux affaires, les juges siégeant en cabinet ont ordonné la radiation de tous les avis de mise en cause. La Cour d'appel de la Colombie-Britannique a accueilli en partie les appels interjetés par les compagnies de tabac. Les juges majoritaires ont conclu à l'opportunité d'instruire, dans l'*Affaire du recouvrement des coûts* et dans l'affaire *Knight*, les demandes relatives aux déclarations inexactes faites par négligence en violation d'une prétendue obligation de diligence du Canada envers les compagnies de tabac. Dans l'affaire *Knight*, les juges majoritaires ont conclu en outre à l'opportunité d'instruire la demande relative aux déclarations inexactes faites par négligence fondée sur une prétendue obligation de diligence du Canada envers les consommateurs, ainsi que la demande relative à la conception négligente. La cour a radié à l'unanimité les autres demandes présentées par les compagnies de tabac.

Held: The appeals should be allowed and the claims should be struck out. The tobacco companies' cross-appeals should be dismissed.

On a motion to strike, a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. The approach must be generous, and err on the side of permitting a novel but arguable claim to proceed to trial. However, the judge cannot consider what evidence adduced in the future might or might not show. Here, it is plain and obvious that none of the tobacco companies' claims against Canada have a reasonable chance of success.

Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case

In the *Costs Recovery* case, the private law claims against Canada for contribution and indemnity based on alleged breaches of a duty of care to smokers must be struck. A third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff, in this case, British Columbia. Here, even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia.

The Claims for Negligent Misrepresentation

There are two relationships at issue in these claims: one between Canada and consumers and one between Canada and tobacco companies. In the *Knight* case, Imperial alleges that Canada negligently represented the health attributes of low-tar cigarettes to consumers. In both the *Knight* case and the *Costs Recovery* case, the tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies.

The facts as pleaded do not bring Canada's relationship with consumers and the tobacco companies within a settled category of negligent misrepresentation. Accordingly, to determine whether the alleged causes of action have a reasonable prospect of success, the general requirements for liability in tort must be met. At

Arrêt : Les pourvois sont accueillis et les demandes sont radiées. Les pourvois incidents interjetés par les compagnies de tabac sont rejetés.

Dans le cas d'une requête en radiation, une demande ne sera radiée que s'il est évident et manifeste, dans l'hypothèse où les faits allégués seraient avérés, que la déclaration ne révèle aucune cause d'action raisonnable. L'approche doit être généreuse et permettre, dans la mesure du possible, l'instruction de toute demande inédite, mais soutenable. Cependant, le juge ne peut pas anticiper ce que la preuve qui sera produite permettra d'établir. En l'espèce, il est évident et manifeste qu'aucune des allégations des compagnies de tabac visant le Canada n'a une possibilité raisonnable d'être accueillie.

Les prétendues obligations de diligence du Canada envers les fumeurs dans l'Affaire du recouvrement des coûts

Dans l'*Affaire du recouvrement des coûts*, les demandes de contribution et d'indemnisation de droit privé dirigées contre le Canada et fondées sur des manquements allégués à une obligation de diligence envers les fumeurs doivent être radiées. Un tiers ne peut être tenu de verser une contribution en vertu de la *Negligence Act* que s'il est directement responsable envers le demandeur, en l'occurrence la Colombie-Britannique. En l'espèce, même si le Canada a manqué à ses obligations envers les fumeurs, ce manquement n'aurait aucune incidence sur la question de savoir s'il est responsable envers la Colombie-Britannique.

Les allégations de déclarations inexactes faites par négligence

Les allégations en l'espèce mettent en cause deux liens : celui entre le Canada et les consommateurs, et celui entre le Canada et les compagnies de tabac. Dans l'affaire *Knight*, Imperial prétend que le Canada a fait preuve de négligence en déclarant faussement aux fumeurs que la cigarette à teneur réduite en goudron serait moins nocive pour la santé. Dans l'affaire *Knight* et l'*Affaire du recouvrement des coûts*, les compagnies de tabac prétendent que le Canada leur a fait des déclarations inexactes par négligence.

Les faits allégués ne font pas entrer la relation du Canada avec les consommateurs et les compagnies de tabac dans une catégorie définie en matière de déclarations inexactes faites par négligence. Par conséquent, afin de déterminer si les causes d'action alléguées ont une possibilité raisonnable d'être accueillies, il faut que

the first stage, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. In a claim of negligent misrepresentation, both of these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties. A special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case. If proximity is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized.

Here, on the facts as pleaded, Canada did not owe a *prima facie* duty of care to consumers. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes. However, the relevant statutes establish only general duties to the public, and no private law duties to consumers. In light of the lack of proximity, this claim in the *Knight* case should be struck at the first stage of the analysis.

As for the tobacco companies, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of establishing a special relationship of proximity giving rise to a *prima facie* duty of care. The allegations are that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials, going far beyond the sort of statements made by Canada to the public at large. Furthermore, Canada's regulatory powers over the manufacturers coupled with its specific advice and its commercial involvement could be seen as supporting a conclusion that Canada ought reasonably to have foreseen that the tobacco companies would rely on the representations and that such reliance would be reasonable in the pleaded circumstance.

les exigences générales en matière de responsabilité délictuelle soient remplies. À la première étape, il faut se demander si les faits révèlent l'existence d'un lien de proximité dans le cadre duquel l'omission de faire preuve de diligence raisonnable peut, de façon prévisible, causer une perte ou un préjudice au plaignant. Dans le cadre d'une action pour déclaration inexacte faite par négligence, ces deux conditions pour qu'il existe une obligation de diligence *prima facie* sont remplies lorsqu'un « lien spécial » unit les parties. L'existence d'un lien spécial est établie lorsque : (1) le défendeur doit raisonnablement prévoir que le demandeur se fiera à sa déclaration; et que (2) la confiance que le demandeur accorde à la déclaration serait raisonnable dans les circonstances. Si l'existence d'un lien de proximité est établie, il y a obligation de diligence *prima facie* et l'analyse passe à l'étape suivante dans laquelle on se demande si des considérations de politique empêcheraient de reconnaître cette obligation de diligence *prima facie*.

Compte tenu des faits allégués, le Canada n'avait pas d'obligation de ce genre envers les consommateurs. Le lien entre eux se limitait aux déclarations du Canada adressées au grand public selon lesquelles les cigarettes à faible teneur en goudron sont moins dangereuses pour la santé. Le Canada n'entretenait pas de rapports spéciaux avec les membres du groupe. Par conséquent, le constat qu'il s'agit d'un lien suffisamment étroit doit découler des lois applicables. Les lois pertinentes n'établissent toutefois que des obligations générales envers le public, et aucune obligation de nature privée envers les consommateurs. Vu l'absence de lien de proximité, il convient de radier cette allégation dans l'affaire *Knight* à la première étape de l'analyse.

En ce qui concerne les compagnies de tabac, les faits allégués révèlent que le Canada et les compagnies de tabac entretiennent depuis longtemps des rapports qui peuvent constituer un lien spécial imposant une obligation de diligence *prima facie*. On allègue que le Canada a joué un rôle de conseiller auprès d'un nombre déterminé de fabricants et a entretenu des rapports commerciaux avec les sociétés en cause compte tenu, en partie, des avis fournis à ces dernières par des fonctionnaires, avis qui vont bien au-delà des déclarations faites par le Canada au grand public. De plus, les pouvoirs de réglementation du Canada envers les fabricants, conjugués aux avis précis qu'il a donnés et à sa participation à des activités commerciales, pourraient être considérés comme étayant la conclusion que le Canada aurait raisonnablement dû prévoir que les compagnies de tabac se fieraient aux déclarations et que cette confiance serait raisonnable dans les circonstances alléguées.

Canada's alleged negligent misrepresentations do not give rise to tort liability, however, because of conflicting policy considerations. The alleged representations constitute protected expressions of government policy. Core government policy decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. The representations in this case were part and parcel of a government policy, adopted at the highest level in the Canadian government and developed out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease, to encourage people who continued to smoke to switch to low-tar cigarettes.

Les déclarations inexactes que le Canada aurait faites par négligence n'engagent toutefois pas sa responsabilité délictuelle parce que des considérations de politique générale s'y opposent. Les déclarations qui auraient été faites sont des expressions protégées de politique générale du gouvernement. Les décisions de politique générale fondamentale du gouvernement qui sont soustraites aux poursuites sont les décisions qui se rapportent à une ligne de conduite et reposent sur des considérations d'intérêt public, tels des facteurs économiques, sociaux ou politiques, pourvu qu'elles ne soient ni irrationnelles ni prises de mauvaise foi. Les déclarations en cause faisaient partie intégrante d'une politique générale adoptée par les plus hautes instances du gouvernement canadien et élaborée par souci pour la santé des Canadiens et des Canadiennes et en raison des coûts individuels et institutionnels associés aux maladies causées par le tabac, afin d'inciter les personnes qui continuaient de fumer à opter pour des cigarettes à faible teneur en goudron.

The claims for negligent misrepresentation should also fail because they would expose Canada to indeterminate liability. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers. While the quantum of damages owed by Canada to the companies in both cases would depend on the number of smokers and the number of cigarettes sold, Canada had no control over the number of people who smoked light cigarettes.

Les allégations de déclarations inexactes faites par négligence doivent aussi être rejetées parce qu'elles exposeraient le Canada à une responsabilité indéterminée. Reconnaître une obligation de diligence à l'égard des déclarations faites aux compagnies de tabac reviendrait en fait à reconnaître une obligation envers les consommateurs. Le montant des dommages-intérêts dus par le Canada aux compagnies de tabac dans les deux cas dépendrait du nombre de fumeurs et du nombre de cigarettes vendues, alors que le Canada n'exerçait aucun contrôle sur le nombre de fumeurs de cigarettes légères.

The Claims for Failure to Warn

The tobacco companies make two allegations for failure to warn: (1) that Canada directed the tobacco companies not to provide warnings on cigarette packages about the health hazards of cigarettes and (2) that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco it designed and licensed. These two claims should be struck. The crux of the first claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn. The same is true of the second claim. While the tort of failure to warn requires evidence of a positive duty towards the plaintiff, nothing in the third-party notices suggests that Canada was under such a positive duty here. A plea of negligence, without more, will not suffice to raise a duty to warn. In any event,

Les allégations de défaut de mise en garde

Les compagnies de tabac formulent deux allégations de défaut de mise en garde : (1) le Canada a interdit aux compagnies de tabac d'apposer sur les paquets de cigarettes des mises en garde à l'égard des dangers que présentent les cigarettes pour la santé et (2) le Canada n'a pas avisé les compagnies de tabac des dangers que présentent les souches de tabac conçues par le Canada et pour lesquelles il a octroyé des licences. Il faut radier ces allégations. L'élément crucial de la première allégation est essentiellement le même que celui des allégations de déclarations inexactes faites par négligence, et il y a lieu de la rejeter pour les mêmes considérations de politique générale. Les recommandations du ministre de la Santé sur les mises en garde faisaient partie intégrante de la politique générale du gouvernement visant à inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. En tant que telles, elles ne peuvent fonder une action pour défaut de mise en garde. Cela vaut aussi pour la deuxième allégation. Bien que le délit

such a claim would fail for the policy reasons applicable to the negligent misrepresentation claim.

The Claims for Negligent Design

The tobacco companies have brought two types of negligent design claims against Canada. They submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. In the *Knight* case, Imperial submits that Canada breached its duty of care to consumers of light and mild cigarettes. The two negligent design claims establish a *prima facie* duty of care. With respect to Canada's design of low-tar tobacco strains, the proximity alleged with the tobacco companies is not based on a statutory duty, but on commercial interactions between Canada and the tobacco companies. In the *Knight* case also, it is at least arguable that Canada was acting in a commercial capacity towards the consumers of light and mild cigarettes when it designed its strains of tobacco. However, the decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy and based on social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. These claims should accordingly be struck.

Liability as a "Manufacturer" and a "Supplier"

The tobacco companies' contribution claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* should be struck. It is plain and obvious that the federal government does not qualify as a manufacturer of tobacco under that Act. When the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act,

de défaut de mise en garde requière la preuve d'une obligation positive envers le demandeur, les avis de mise en cause ne donnent aucunement matière à croire que le Canada avait une telle obligation en l'espèce. Une allégation de négligence, sans plus, est insuffisante pour imposer une obligation de mise en garde. Quoi qu'il en soit, une allégation de ce genre serait rejetée pour les considérations de politique générale qui s'appliquent aux allégations de déclarations inexactes faites par négligence.

La conception négligente

Les compagnies de tabac ont soulevé à l'encontre du Canada deux types d'allégations de conception négligente. Elles affirment que le Canada a manqué à son obligation de diligence envers elles en concevant de manière négligente ses souches de tabac à faible teneur en goudron. Dans l'affaire *Knight*, Imperial fait valoir que le Canada a manqué à son obligation de diligence envers les consommateurs de cigarettes légères et douces. Ces deux allégations de conception négligente établissent l'existence d'une obligation de diligence *prima facie*. Pour ce qui est des souches de tabac à faible teneur en goudron conçues par le Canada, le prétendu lien de proximité avec les compagnies de tabac se fonde non pas sur une obligation prévue par la loi, mais sur les rapports entre le Canada et les compagnies de tabac. Dans l'affaire *Knight* également, il est au moins possible de soutenir que le Canada agissait comme une entreprise commerciale envers les consommateurs de cigarettes légères et douces lorsqu'il a conçu ses souches de tabac. Cependant, la décision de concevoir des souches de tabac à faible teneur en goudron parce qu'on croit que les cigarettes fabriquées avec ce tabac seraient moins nuisibles pour la santé constitue une ligne de conduite fondée sur la politique générale du Canada en matière de santé et repose sur des facteurs sociaux et économiques. Cette décision de politique générale fondamentale du gouvernement ne saurait fonder une poursuite pour conception négligente. Il faut donc rejeter ces allégations.

Responsabilité d'un « fabricant » et d'un « fournisseur »

Dans l'*Affaire du recouvrement des coûts*, la demande de contribution des compagnies de tabac visant à faire reconnaître au Canada la qualité de « fabricant » au sens de la *CRA* doit être radiée. Il est manifeste et évident que le gouvernement fédéral n'est pas un fabricant de produits du tabac au sens de cette loi. Lorsqu'on interprète la loi dans son contexte eu égard à l'ensemble de ses dispositions, il appert que la législature de la Colombie-Britannique ne voulait pas imposer au Canada la responsabilité d'un fabricant. C'est ce que

and the broader context of the relationship between the province and the federal government. Holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco-related wrongs from taxpayers to the tobacco industry. Similarly, the tobacco companies cannot rely on the recently adopted *Health Care Costs Recovery Act* in an action for contribution under the *CRA*. Finally, Canada could not be liable for contribution under the *Negligence Act* or at common law since it is not directly liable to British Columbia.

Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *Trade Practice Act* and the *Business Practices and Consumer Protection Act* which replaced it should also be struck. Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in those statutes. Those phrases must be understood as limited to activities undertaken for a commercial purpose. Here, it is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier and is not liable under those statutes.

Claims for Equitable Indemnity and Procedural Considerations

The tobacco companies' claims of equitable indemnity should be struck. Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

Finally, the claims for declaratory relief should be struck. The tobacco companies' ability to mount defences would not be severely prejudiced if Canada was no longer a third party in the litigation.

confirment le texte de la loi, l'intention qu'avait le législateur au moment de l'adopter et le contexte plus général des rapports entre la province et le gouvernement fédéral. Tenir le Canada responsable en application de la *CRA* contrecarrerait l'intention de la législature de faire passer des contribuables à l'industrie du tabac la responsabilité des coûts des soins de santé résultant d'une faute du fabricant. Dans le même ordre d'idées, les compagnies de tabac ne peuvent s'appuyer sur la *Health Care Costs Recovery Act*, récemment édictée, dans le cadre d'une action intentée pour obtenir une contribution en vertu de la *CRA*. Enfin, le Canada ne peut être tenu à une contribution au titre de la *Negligence Act* ou en common law parce qu'il n'est pas directement responsable envers la Colombie-Britannique.

Dans l'affaire *Knight*, la demande d'Imperial de reconnaître au Canada la qualité de « fournisseur » au sens de la *Trade Practice Act* et de la loi qui l'a remplacée, la *Business Practices and Consumer Protection Act*, doit aussi être radiée. Le but recherché par le Canada lorsqu'il a développé et promu le tabac, comme l'indique l'avis de mise en cause, tend à indiquer que le Canada n'agissait pas « dans le cours de ses affaires », dans le sens où cette expression est employée dans ces lois. Cette expression doit être interprétée comme visant seulement les activités exercées à une fin commerciale. Il ressort de façon évidente et manifeste des faits allégués que le Canada a promu la consommation de cigarettes à faible teneur en goudron non pas à une fin commerciale, mais à une fin liée à la santé. Le Canada n'est donc pas un fournisseur et sa responsabilité n'est pas engagée en application de ces lois.

Demandes d'indemnité fondées sur l'equity et considérations d'ordre procédural

Les demandes des compagnies de tabac relatives à l'indemnisation en equity doivent être radiées. La doctrine de l'indemnité fondée sur l'equity est une doctrine restreinte qui ne s'applique que dans les cas où le mandant s'engage expressément ou implicitement à indemniser son mandataire pour avoir agi conformément à ses directives. Lorsque le Canada a donné à l'industrie du tabac des directives sur la manière dont elle devrait se comporter, il le faisait à titre d'autorité de réglementation du gouvernement qui se souciait de la santé des Canadiens et des Canadiennes. Dans ces circonstances, il est déraisonnable de déduire que le Canada avait promis implicitement d'indemniser l'industrie pour avoir donné suite à sa demande.

Enfin, il convient de radier les demandes de jugement déclaratoire. La capacité des compagnies de tabac de se défendre ne serait pas gravement compromise si la mise en cause du Canada en l'espèce prenait fin.

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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Hall, Saunders, Lowry, Tysoe et Smith), 2009 BCCA 540, 98 B.C.L.R. (4th) 201, 313 D.L.R. (4th) 651, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100, [2009] B.C.J. No. 2444 (QL), 2009 CarswellBC 3307, qui a infirmé en partie une décision de la juge Wedge qui a ordonné la radiation des

2008 BCSC 419, 82 B.C.L.R. (4th) 362, 292 D.L.R. (4th) 353, [2008] 12 W.W.R. 241, [2008] B.C.J. No. 609 (QL), 2008 CarswellBC 687 (*sub nom. British Columbia v. Imperial Tobacco Canada Ltd.*). Appeal allowed and cross-appeal dismissed.

John S. Tyhurst, *Paul Vickery* and *Travis Henderson*, for the appellant/respondent on cross-appeal Her Majesty the Queen in Right of Canada (33559).

Paul Vickery, *John S. Tyhurst* and *Travis Henderson*, for the appellant/respondent on cross-appeal the Attorney General of Canada (33563).

Deborah Glendining and *Nada Khirdaji*, for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33559).

Ryan D. W. Dalziel and *Daniel A. Webster*, *Q.C.*, for the respondent Her Majesty the Queen in Right of British Columbia (33563).

John J. L. Hunter, *Q.C.*, and *Brent B. Olthuis*, for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33563).

Written submissions only by *Kenneth N. Affleck*, *Q.C.*, for the respondents/appellants on cross-appeal Rothmans, Benson & Hedges Inc. and Rothmans Inc. (33563).

Written submissions only by *Jeffrey J. Kay*, *Q.C.*, for the respondents/appellants on cross-appeal JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc. (33563).

Written submissions only by *Craig P. Dennis* and *Michael D. Shirreff*, for the respondents/appellants on cross-appeal B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited (33563).

Written submissions only by *Christopher M. Rusnak*, for the respondent/appellant on cross-appeal Carreras Rothmans Limited (33563).

Written submissions only by *D. Ross Clark*, for the respondent/appellant on cross-appeal Philip Morris U.S.A. Inc. (33563).

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John S. Tyhurst, *Paul Vickery* et *Travis Henderson*, pour l'appelante/intimée au pourvoi incident Sa Majesté la Reine du chef du Canada (33559).

Paul Vickery, *John S. Tyhurst* et *Travis Henderson*, pour l'appelant/intimé au pourvoi incident le procureur général du Canada (33563).

Deborah Glendining et *Nada Khirdaji*, pour l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée (33559).

Ryan D. W. Dalziel et *Daniel A. Webster*, *c.r.*, pour l'intimée Sa Majesté la Reine du chef de la Colombie-Britannique (33563).

John J. L. Hunter, *c.r.*, et *Brent B. Olthuis*, pour l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée (33563).

Argumentation écrite seulement par *Kenneth N. Affleck*, *c.r.*, pour les intimées/appelantes au pourvoi incident Rothmans, Benson & Hedges Inc. et Rothmans Inc. (33563).

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Argumentation écrite seulement par *Craig P. Dennis* et *Michael D. Shirreff*, pour les intimées/appelantes au pourvoi incident B.A.T. Industries p.l.c. et British American Tobacco (Investments) Limited (33563).

Argumentation écrite seulement par *Christopher M. Rusnak*, pour l'intimée/appelante au pourvoi incident Carreras Rothmans Limited (33563).

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Simon V. Potter, *Michael A. Feder* and *Angela M. Juba*, for the respondent/appellant on cross-appeal Philip Morris International Inc. (33563).

Malliha Wilson and *Lynne McArdle*, for the intervener the Attorney General of Ontario (33559-33563).

Jeffrey S. Leon, *Robyn M. Ryan Bell* and *Michael A. Eizenga*, for the intervener Her Majesty the Queen in Right of the Province of New Brunswick (33563).

Nancy Brown, for the intervener the Attorney General of British Columbia (33559-33563).

The judgment of the Court was delivered by

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Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

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I. Introduction

[1] Imperial Tobacco Canada Ltd. ("Imperial") is a defendant in two cases before the courts in British Columbia, *British Columbia v. Imperial Tobacco Canada Ltd.*, Docket: S010421, and *Knight v. Imperial Tobacco Canada Ltd.*, Docket: L031300. In the first case, the Government of British Columbia is seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies, including Imperial ("*Costs Recovery* case"). The second case is a class action brought against Imperial alone by Mr. Knight on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost

I. Introduction

[1] Imperial Tobacco Canada Limitée (« Imperial ») est défenderesse dans deux actions intentées devant les tribunaux de la Colombie-Britannique, soit *British Columbia c. Imperial Tobacco Canada Ltd.*, dossier : S010421, et *Knight c. Imperial Tobacco Canada Ltd.*, dossier : L031300. Dans la première, le gouvernement de la Colombie-Britannique cherche à recouvrer d'un groupe de 14 compagnies de tabac, dont Imperial, les sommes consacrées au traitement médical de personnes souffrant de maladies liées au tabagisme (l'« *Affaire du recouvrement des coûts* »). Dans la deuxième action, un recours collectif intenté contre Imperial uniquement, M. Knight, au nom

of the cigarettes and punitive damages ("*Knight* case").

[2] In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn, as well as at equity. They also allege that Canada would itself be liable under the statutory schemes at issue in the two cases. In the *Costs Recovery* case, it is alleged that Canada would be liable under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*CRA*"), as a "manufacturer". In the *Knight* case, it is alleged that Canada would be liable as a "supplier" under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), and its predecessor, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*").

[3] In both cases, Canada brought motions to strike the third party notices under r. 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5), arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority of 3-2 held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claims in the *Knight* case. The court unanimously

des autres membres qui ont acheté des cigarettes dites « légères » ou « douces », demande le remboursement du coût des cigarettes ainsi que le versement de dommages-intérêts punitifs (l'« *Affaire Knight* »).

[2] Dans les deux affaires, les compagnies de tabac ont mis en cause le gouvernement du Canada, prétendant que si elles sont tenues responsables envers les demandeurs, elles ont le droit d'être indemnisées par le Canada pour déclarations inexactes faites par négligence, pour conception négligente et défaut de mise en garde; elles fondent aussi leur demande sur l'equity. Elles font également valoir que le Canada aurait engagé sa propre responsabilité au titre des régimes législatifs invoqués dans ces deux affaires. Dans l'*Affaire du recouvrement des coûts*, elles invoquent sa responsabilité, à titre de [TRADUCTION] « fabricant », aux termes de la *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, ch. 30 (« *CRA* »). Dans l'*Affaire Knight*, c'est à titre de [TRADUCTION] « fournisseur » que le Canada serait responsable, aux termes de la *Business Practices and Consumer Protection Act*, S.B.C. 2004, ch. 2 (« *BPCPA* ») et de la loi qui l'a précédée, la *Trade Practice Act*, R.S.B.C. 1996, ch. 457 (« *TPA* »).

[3] Dans les deux affaires, le Canada a présenté des requêtes en radiation des avis de mise en cause en vertu du par. 19(24) des *Supreme Court Rules*, B.C. Reg. 221/90 (remplacé par la règle 9-5 des *Supreme Court Civil Rules*, B.C. Reg. 168/2009), faisant valoir qu'il était évident et manifeste que ces avis ne révélaient aucune cause d'action raisonnable. Les juges siégeant en cabinet, faisant droit aux requêtes du Canada dans les deux actions, ont ordonné la radiation de tous les avis de mise en cause. La Cour d'appel de la Colombie-Britannique a accueilli en partie les appels interjetés par les compagnies de tabac. À trois voix contre deux, les juges majoritaires ont conclu à l'opportunité d'instruire, dans l'*Affaire du recouvrement des coûts* et dans l'*Affaire Knight*, les demandes relatives aux déclarations inexactes faites par négligence en violation d'une prétendue obligation de diligence du Canada envers les compagnies de tabac. Dans l'*Affaire Knight*, les juges majoritaires ont conclu en

evidence should be resolved in favour of proceeding to trial. The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.

[71] Before we can answer this question, we must consider a third preliminary issue: what constitutes a policy decision immune from review by the courts?

(iii) What Constitutes a Policy Decision Immune From Judicial Review?

[72] The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.

[73] The jurisprudence reveals two approaches to the problem, one emphasizing discretion, the other, policy, each with variations. The first approach focuses on the discretionary nature of the impugned conduct. The "discretionary decision" approach was first adopted in *Home Office v. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). This approach holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.

ne devraient pas empêcher la tenue d'un procès. La question dont nous sommes saisis est donc de savoir s'il ressort clairement des faits tenus pour avérés qu'une obligation de faire diligence afin d'éviter les déclarations inexactes faites par négligence serait écartée parce que la conduite à l'origine de la déclaration inexacte alléguée relève d'une politique générale du gouvernement et n'est donc pas susceptible d'engager la responsabilité délictuelle de son auteur.

[71] Pour être en mesure de répondre à cette question, nous devons examiner une troisième question préliminaire : en quoi consiste une décision de politique générale soustraite au contrôle judiciaire?

(iii) Les décisions de politique générale soustraites au contrôle judiciaire

[72] La question de savoir en quoi consiste une décision de politique générale qui écarte généralement toute responsabilité pour négligence est une question épineuse qui a fait couler beaucoup d'encre. Les tribunaux de common law de partout dans le monde s'entendent généralement pour dire que les décisions de politique générale des gouvernements ne sont pas justiciables et ne peuvent engager la responsabilité délictuelle de ces derniers. On s'entend aussi généralement pour dire que la responsabilité délictuelle de l'État peut être engagée lorsque ses mandataires exercent de façon négligente des fonctions prescrites. La difficulté tient à l'élaboration d'un critère qui permette de distinguer ces situations.

[73] La jurisprudence révèle l'existence de deux méthodes d'analyse utilisées pour résoudre cette difficulté, l'une étant axée sur la notion de pouvoir discrétionnaire, et l'autre sur la notion de politique générale, et chacune a ses propres variantes. La première méthode met l'accent sur la nature discrétionnaire de la conduite reprochée. La méthode fondée sur la [TRADUCTION] « décision discrétionnaire » a été retenue pour la première fois dans *Home Office c. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). Selon cette méthode, les autorités publiques doivent être exonérées de toute responsabilité lorsqu'elles agissent dans l'exercice de leur pouvoir discrétionnaire, à moins que la décision attaquée ne soit irrationnelle.

[74] The second approach emphasizes the "policy" nature of protected state conduct. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. These are sometimes called "true" or "core" policy decisions. They are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith. A variant of this is the policy/operational test, in which "true" policy decisions are distinguished from "operational" decisions, which seek to implement or carry out settled policy. To date, the policy/operational approach is the dominant approach in Canada: *Just*; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.

[74] La seconde méthode insiste sur la qualité de « politique générale » de la conduite de l'État bénéficiant d'une protection. On considère que les décisions de politique générale forment un sous-groupe de décisions discrétionnaires, qui font habituellement intervenir des considérations d'ordre social, économique et politique. Elles sont parfois qualifiées de « véritables » décisions de politique générale ou décisions de politique générale « fondamentale ». Les décisions de politique générale sont soustraites au contrôle judiciaire et ne peuvent engager la responsabilité délictuelle de l'État, sauf si elles sont irrationnelles ou ont été prises de mauvaise foi. Une variante de cette méthode est le critère politique générale-opérations, lequel fait la distinction entre les « véritables » décisions de politique générale et les décisions « opérationnelles », qui visent la mise en œuvre ou l'application d'une politique générale établie. De nos jours, c'est le critère politique générale-opérations qui prévaut au Canada : *Just*; *Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie)*, [1994] 1 R.C.S. 420; *Swinamer c. Nouvelle-Écosse (Procureur général)*, [1994] 1 R.C.S. 445; *Lewis (Tutrice à l'instance de) c. Colombie-Britannique*, [1997] 3 R.C.S. 1145.

[75] To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably. Thus Lord Wilberforce in *Anns* defined policy as a synonym for discretion (p. 754).

[75] Pour compliquer les choses, les notions de pouvoir discrétionnaire et de politique générale se chevauchent et sont parfois employées de manière interchangeable. Ainsi, dans *Anns*, lord Wilberforce a décrit la notion de politique générale comme étant synonyme de pouvoir discrétionnaire (p. 754).

[76] There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions": *Just*, at p. 1239. The challenge,

[76] On admet généralement que le droit de la négligence doit prendre en compte le rôle unique des organismes gouvernementaux : *Just*. D'une part, il importe que les organismes publics soient responsables en général de leur négligence compte tenu du grand rôle qu'ils jouent dans tous les aspects de la vie en société. Soustraire les gouvernements à toute responsabilité pour leurs actes entraînerait des conséquences inacceptables. Par contre, « la Couronne n'est pas une personne et elle doit pouvoir être libre de gouverner et de prendre de véritables décisions de politique sans encourir pour autant une

to repeat, is to fashion a just and workable legal test.

[77] The main difficulty with the "discretion" approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as to some extent discretionary. For this reason, this approach has sometimes been refined or replaced by tests that narrow the scope of the discretion that confers immunity.

[78] The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.

[79] The elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts. I begin with the House of Lords. The House initially adopted the view that all discretionary decisions of government are immune, unless they are irrational: *Dorset Yacht*. It then moved on to a two-stage test that asked first whether the decision was discretionary and, if so, rational; and asked second whether it was a core policy decision,

responsabilité civile délictuelle » : *Just*, p. 1239. La difficulté, encore une fois, consiste à formuler un critère juridique équitable et utile.

[77] La principale difficulté que pose la méthode d'analyse fondée sur la notion de « décision discrétionnaire » réside dans la possibilité qu'elle applique à la conduite des acteurs gouvernementaux une exemption trop générale. Bien des décisions peuvent être qualifiées de discrétionnaires dans une certaine mesure. Cette méthode d'analyse a donc parfois été peaufinée ou remplacée par des critères restreignant le pouvoir discrétionnaire qui dégage son titulaire de toute responsabilité.

[78] La principale difficulté que pose le critère politique générale-opérations tient au fait qu'il est notoirement difficile pour les tribunaux de décider si une décision gouvernementale donnée relève d'une politique générale ou des opérations. Même des fonctionnaires aux échelons inférieurs peuvent jouir d'un certain pouvoir discrétionnaire pour ce qui est d'établir le montant des fonds disponibles ou de décider quelle tâche parmi d'autres revêt le plus d'importance à un moment donné. La décision d'un travailleur social quant au moment de rendre visite à une famille perturbée, ou celle d'un conducteur de chasse-neige quant au moment d'épandre du sable sur une route glacée, sont-elles des décisions de politique générale ou des décisions opérationnelles? On peut soutenir que les deux réponses sont bonnes, selon les circonstances. Bien qu'elle illustre un facteur clé en raison duquel certains actes du gouvernement doivent généralement être à l'abri de toute responsabilité, la distinction politique générale-opérations ne constitue pas un critère juridique très utile.

[79] L'historique du traitement de la question par différents tribunaux illustre la difficulté que présente l'élaboration d'un critère utile pour décrire les décisions de politique générale soustraites au contrôle judiciaire. Commençons par la Chambre des lords, qui estimait au départ que toutes les décisions discrétionnaires du gouvernement qui ne sont pas irrationnelles sont soustraites au contrôle judiciaire : *Dorset Yacht*. Elle a ensuite appliqué un critère à deux volets, en se demandant en

in which case it was entirely exempt from judicial scrutiny: *X v. Bedfordshire County Council*, [1995] 3 All E.R. 353. Within a year of adopting this two-stage test, the House abandoned it with a ringing declamation of the policy/operational distinction as unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence: *Stovin v. Wise*, [1996] A.C. 923 (H.L.), *per* Lord Hoffmann. In its most recent foray into the subject, the House of Lords affirmed that both the policy/operational distinction and the discretionary decision approach are valuable tools for discerning which government decisions attract tort liability, but held that the final test is a "justiciability" test: *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550. The ultimate question on this test is whether the court is institutionally capable of deciding on the question, or "whether the court should accept that it has no role to play" (p. 571). Thus at the end of the long judicial voyage the traveller arrives at a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts.

[80] Australian judges in successive cases have divided between a discretionary/irrationality model and a "true policy" model. In *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (H.C.), two of the justices (Gibbs C.J. and Wilson J.) adopted the *Dorset Yacht* rule that all discretionary decisions are immune, provided they are rational (p. 442). They endorsed the policy/operational distinction as a logical test for discerning which decisions should be protected, and adopted Lord Wilberforce's definition of policy as a synonym for discretion. Mason J., by contrast, held that only core policy decisions, which he viewed as a narrower subset of discretionary decisions, were protected (p. 500). Deane J. agreed with Mason J.

premier lieu si la décision était discrétionnaire et, dans l'affirmative, si elle était rationnelle; elle s'est demandé en second lieu s'il s'agissait d'une décision de politique fondamentale, et donc entièrement soustraite à l'examen judiciaire : *X c. Bedfordshire County Council*, [1995] 3 All E.R. 353. Moins d'un an après avoir retenu ce critère à deux volets, la Chambre des lords l'a laissé tomber en déclamant de manière retentissante que le critère politique générale-opérations était inapplicable dans les cas difficiles, ce dont témoignerait la jurisprudence canadienne : *Stovin c. Wise*, [1996] A.C. 923 (H.L.), lord Hoffmann. Lors de sa dernière incursion dans ce domaine, la Chambre des lords a mentionné que tant le critère politique générale-opérations que l'analyse fondée sur la notion de décision discrétionnaire sont utiles pour déterminer les décisions du gouvernement qui engagent la responsabilité délictuelle de celui-ci, mais elle a jugé que le critère final en est un de « justiciabilité » : *Barrett c. Enfield London Borough Council*, [2001] 2 A.C. 550. Selon ce critère, il s'agit de savoir, en définitive, si le tribunal est habile, sur le plan institutionnel, à trancher la question ou [TRADUCTION] « si le tribunal doit reconnaître qu'il n'a pas à intervenir » (p. 571). Ainsi, à la fin de ce long périple jurisprudentiel, on se retrouve avec un critère qui ne fait que reformuler la question. Quand le tribunal doit-il juger qu'une décision gouvernementale ne donne pas prise à la responsabilité pour négligence? Quand le tribunal conclut que l'affaire est du ressort du gouvernement et non des tribunaux.

[80] Des juges australiens s'étant prononcés dans des décisions successives sont partagés entre le modèle décision discrétionnaire-décision irrationnelle et celui de la « véritable décision de politique générale ». Dans *Sutherland Shire Council c. Heyman* (1985), 157 C.L.R. 424 (H.C.), deux des juges (le juge en chef Gibbs et le juge Wilson) ont adopté la règle établie dans l'arrêt *Dorset Yacht*, selon laquelle toutes les décisions discrétionnaires échappent au contrôle judiciaire, pourvu qu'elles soient rationnelles (p. 442). Ils ont souscrit à la thèse que la distinction entre la politique générale et les opérations était un critère logique pour déterminer quelles décisions ne donnent pas prise à la responsabilité, et ils ont fait leur la description de lord

for somewhat different reasons. Brennan J. did not comment on which test should be adopted, leaving the test an open question. The Australian High Court again divided in *Pyrenees Shire Council v. Day*, [1998] HCA 3, 192 C.L.R. 330, with three justices holding that a discretionary government action will only attract liability if it is irrational and two justices endorsing different versions of the policy/operational distinction.

Wilberforce voulant que la politique générale soit synonyme de pouvoir discrétionnaire. Pour sa part, le juge Mason a affirmé que l'État bénéficiait de la protection uniquement à l'égard des décisions de politique générale fondamentale, qu'il considérait comme un sous-groupe plus restreint de décisions discrétionnaires (p. 500). Le juge Deane a souscrit à l'opinion du juge Mason, mais pour des raisons quelque peu différentes. Quant au juge Brennan, il n'a pas dit quel critère devrait être retenu, laissant cette question en suspens. La Haute Cour d'Australie était encore une fois divisée dans *Pyrenees Shire Council c. Day*, [1998] HCA 3, 192 C.L.R. 330, où trois juges ont conclu qu'une mesure gouvernementale discrétionnaire n'engage la responsabilité de l'État que si elle est irrationnelle, et deux juges ont retenu des versions différentes du critère politique générale-opérations.

[81] In the United States, the liability of the federal government is governed by the *Federal Tort Claims Act* of 1946, 28 U.S.C. ("*FTCA*"), which waived sovereign immunity for torts, but created an exemption for discretionary decisions. Section 2680(a) excludes liability in tort for

[81] Aux États-Unis, la responsabilité du gouvernement fédéral est régie par la *Federal Tort Claims Act* de 1946, 28 U.S.C. (« *FTCA* »), qui écarte l'immunité absolue à l'égard de la responsabilité délictuelle, mais crée une exemption en faveur des décisions discrétionnaires. L'alinéa 2680a) écarte la responsabilité du gouvernement à l'égard de

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

> [TRADUCTION] [t]oute poursuite fondée sur l'acte ou l'omission d'un fonctionnaire dans l'exécution diligente d'une loi ou d'un règlement, que ces derniers soient ou non valides, ou fondée sur l'exercice ou le défaut d'exercice d'une fonction ou d'un pouvoir discrétionnaire de la part d'un organisme fédéral ou d'un fonctionnaire, qu'il y ait eu ou non exercice abusif de ce pouvoir discrétionnaire.

Significantly, s. 2680(h) of the *FTCA* exempts the federal government from any claim of misrepresentation, either intentional or negligent: *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), at p. 430; *United States v. Neustadt*, 366 U.S. 696 (1961).

Fait important, l'al. 2680h) de la *FTCA* soustrait le gouvernement fédéral à toute poursuite pour déclaration inexacte, faite délibérément ou par négligence : *Office of Personnel Management c. Richmond*, 496 U.S. 414 (1990), p. 430; *United States c. Neustadt*, 366 U.S. 696 (1961).

[82] Without detailing the complex history of the American jurisprudence on the issue, it suffices to say that the cases have narrowed the concept of discretion in the *FTCA* by reference to the concept of policy. Some cases develop this analysis by distinguishing between policy and operational decisions:

[82] Sans entrer dans les détails de l'historique complexe de la jurisprudence américaine en la matière, il suffit de dire que les tribunaux ont restreint le concept de pouvoir discrétionnaire énoncé dans la *FTCA* en invoquant la notion de politique générale. Dans certaines décisions, ils développent

e.g., *Dalehite v. United States*, 346 U.S. 15 (1953). The Supreme Court of the United States has since distanced itself from the approach of defining a true policy decision negatively as "not operational", in favour of an approach that asks whether the impugned state conduct was based on public policy considerations. In *United States v. Gaubert*, 499 U.S. 315 (1991), White J. faulted the Court of Appeals for relying on "a nonexistent dichotomy between discretionary functions and operational activities" (p. 326). He held that the "discretionary function exception" of the *FTCA* "protects only governmental actions and decisions based on considerations of public policy" (at p. 323, citing *Berkovitz v. United States*, 486 U.S. 531 (1988), at p. 537 (emphasis added)), such as those involving social, economic and political considerations: see also *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

[83] In *Gaubert*, only Scalia J. found lingering appeal in defining policy decisions as "not operational", but only in the narrow sense that people at the operational level will seldom make policy decisions. He stated that "there is something to the planning vs. operational dichotomy — though . . . not precisely what the Court of Appeals believed" (p. 335). That "something" is that "[o]rdinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions". For Scalia J., a government decision is a protected policy decision if it "ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations".

cette analyse en distinguant les décisions de politique générale des décisions opérationnelles : p. ex. *Dalehite c. United States*, 346 U.S. 15 (1953). La Cour suprême des États-Unis s'est depuis distanciée de l'approche qui consiste à décrire de façon négative une véritable décision de politique générale comme une décision [TRADUCTION] « n'étant pas de nature opérationnelle » et favorise une approche visant à déterminer si la conduite contestée de l'État reposait sur des considérations d'intérêt public. Dans *United States c. Gaubert*, 499 U.S. 315 (1991), le juge White a reproché à la Court of Appeals de se fonder sur une [TRADUCTION] « dichotomie inexistante entre les fonctions discrétionnaires et les activités opérationnelles » (p. 326). Selon lui, l'« exception relative aux fonctions discrétionnaires » prévue par la *FTCA* « ne vise que les mesures et les décisions du gouvernement qui reposent sur des considérations d'intérêt public » (p. 323, citant *Berkovitz c. United States*, 486 U.S. 531 (1988), p. 537 (je souligne)), comme celles faisant intervenir des considérations sociales, économiques ou politiques; voir aussi *United States c. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

[83] Dans *Gaubert*, seul le juge Scalia trouvait encore attrayante l'idée de définir les décisions de politique générale comme des décisions [TRADUCTION] « n'étant pas de nature opérationnelle », mais seulement au sens strict selon lequel les employés au niveau opérationnel prennent rarement des décisions de politique générale. Selon lui, [TRADUCTION] « un facteur intervient dans la dichotomie entre la planification et les opérations [. . .] mais ce n'est pas tout à fait ce que les cours d'appel avaient en tête » (p. 335). Ce « facteur », c'est que, « [h]abituellement, un employé au niveau opérationnel n'a pas à prendre des décisions de politique générale, même si ses actes peuvent être étroitement liés à des considérations de cette nature ». D'après le juge Scalia, une décision du gouvernement constitue une décision de politique générale bénéficiant de protection si elle « doit tenir compte de considérations sociales, économiques ou politiques et si elle est prise par un fonctionnaire dont l'une des responsabilités officielles consiste à évaluer ces considérations ».

[84] A review of the jurisprudence provokes the following observations. The first is that a test based simply on the exercise of government discretion is generally now viewed as too broad. Discretion can imbue even routine tasks, like driving a government vehicle. To protect all government acts that involve discretion unless they are irrational simply casts the net of immunity too broadly.

[84] Les observations suivantes s'imposent comme suite à l'analyse de la jurisprudence. Premièrement, un critère fondé uniquement sur l'exercice du pouvoir discrétionnaire du gouvernement est maintenant perçu par la plupart des tribunaux comme étant trop général. Même les tâches courantes, comme la conduite d'un véhicule du gouvernement, peuvent requérir l'exercice d'un certain pouvoir discrétionnaire. Soustraire à l'examen judiciaire tous les actes de l'administration publique qui font intervenir un pouvoir discrétionnaire, pourvu qu'ils ne soient pas irrationnels, a pour effet de donner une portée trop large à l'immunité.

[85] The second observation is that there is considerable support in all jurisdictions reviewed for the view that "true" or "core" policy decisions should be protected from negligence liability. The current Canadian approach holds that only "true" policy decisions should be so protected, as opposed to operational decisions: *Just*. The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight. Even the most recent "justiciability" test in the U.K. looks to this concept for support in defining what should be viewed as justiciable.

[85] Deuxièmement, un grand nombre de tribunaux dans tous les ressorts visés par l'analyse s'entendent pour dire que l'État devrait être soustrait à toute responsabilité pour négligence dans les cas de « véritables » décisions de politique générale ou de décisions de politique générale « fondamentale ». Selon le point de vue qui prévaut au Canada, seules les « véritables » décisions de politique générale (par opposition aux décisions opérationnelles) ne devraient pas donner prise à cette responsabilité : *Just*. La difficulté liée à la détermination des décisions de cette nature ne change rien au fait que les tribunaux s'en remettent encore à ces indications essentielles. Même le critère de « justiciabilité » établi tout récemment au Royaume-Uni s'inspire de ce concept pour déterminer ce qui doit être perçu comme étant justiciable.

[86] A third observation is that defining a core policy decision negatively as a decision that is not an "operational" decision may not always be helpful as a stand-alone test. It posits a stark dichotomy between two water-tight compartments — policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other.

[86] Troisièmement, le fait de définir négativement une décision de politique générale fondamentale comme une décision n'étant pas de nature « opérationnelle » ne constitue peut-être pas un critère distinct utile dans tous les cas. Ce critère suppose une nette dichotomie entre deux compartiments étanches : les décisions de politique générale et les décisions opérationnelles. Dans les faits, il est possible que les décisions n'appartiennent pas clairement à l'une ou l'autre de ces catégories.

[87] Instead of defining protected policy decisions negatively, as "not operational", the majority in *Gaubert* defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and

[87] Au lieu de définir négativement les décisions de politique générale à l'abri de l'examen judiciaire comme des décisions [TRADUCTION] « n'étant pas de nature opérationnelle », les juges majoritaires dans *Gaubert* les décrivent positivement comme

political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

étant des décisions et des mesures discrétionnaires d'ordre législatif ou administratif qui se fondent sur des considérations sociales, économiques ou politiques. Les décisions de politique générale sont habituellement prises par le législateur ou un fonctionnaire tenu officiellement d'évaluer et de mettre en balance des considérations d'intérêt public. La décision est réfléchie et traduit une « politique générale » dans le sens d'une règle ou orientation générale appliquée dans une situation précise. La politique désigne une « ligne de conduite adoptée par un organisme [. . .] public » : *Multidictionnaire de la langue française*, p. 1261. Les juges saisis d'une pareille ligne de conduite adoptée par un organisme public estiment généralement qu'il s'agit d'une décision de politique générale. Il appartient véritablement au gouvernement, et non aux tribunaux, de mettre en balance des considérations sociales, économiques et politiques pour en arriver à une ligne de conduite. C'est pourquoi les décisions et les actes reposant sur ces considérations ne sauraient fonder une action en responsabilité délictuelle.

[88] Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

[88] Utilisée dans ce sens, la notion de politique générale diffère de la notion de pouvoir discrétionnaire. Un tel pouvoir dépend de la question de savoir si un acteur donné a la faculté de choisir d'agir d'une façon ou d'une autre. Les politiques générales forment un sous-ensemble restreint de décisions discrétionnaires, et n'englobent que les décisions fondées sur des considérations d'intérêt public, comme des considérations d'ordre économique, social ou politique. Toutes les décisions de politique générale sont discrétionnaires, en ce sens qu'une politique différente aurait pu être retenue. Toutefois, les décisions discrétionnaires du gouvernement ne sont pas toutes des décisions de politique générale.

[89] While the main focus on the *Gaubert* approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a "course" or "principle" of action with respect to a particular problem facing the government? Without suggesting that

[89] Bien que l'approche préconisée dans *Gaubert* mette l'accent sur la nature de la décision, le rôle du décideur peut se révéler utile. Ce dernier était-il chargé d'étudier les facteurs sociaux, économiques ou politiques et d'élaborer une « ligne de conduite » à l'égard d'un problème auquel fait face le gouvernement? Sans prétendre qu'il est possible de répondre à la question en invoquant

the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices.

[90] I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

[91] Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

simplement le niveau hiérarchique du décideur, on peut s'inspirer de l'observation faite par le juge Scalia dans *Gaubert* selon laquelle les employés au niveau opérationnel ne participent habituellement pas à la prise de décisions de politique générale.

[90] Je conclus que les décisions de « politique générale fondamentale » du gouvernement à l'égard desquelles ce dernier est soustrait aux poursuites se rapportent à une ligne de conduite et reposent sur des considérations d'intérêt public, tels des facteurs économiques, sociaux ou politiques, pourvu qu'elles ne soient ni irrationnelles ni prises de mauvaise foi. Cette approche concorde avec le message essentiel de la jurisprudence canadienne à cet égard, bien qu'elle fasse ressortir des caractéristiques positives des décisions de politique générale, au lieu de se fonder exclusivement sur le fait qu'elles ne sont pas de « nature opérationnelle ». Elle est aussi étayée par les réflexions faites dans la nouvelle jurisprudence canadienne et étrangère. Cela dit, elle n'est pas censée constituer un critère décisif. On peut s'attendre à ce que surviennent de temps à autre des situations délicates où il n'est pas facile de décider si le degré de « politique générale » en cause suffit à mettre une décision à l'abri de toute responsabilité pour négligence. Il serait illusoire de vouloir établir un critère absolu qui donnerait rapidement et infailliblement une réponse à l'égard de toute décision parmi la gamme infinie de celles que peuvent prendre les acteurs gouvernementaux. On pourra néanmoins facilement cerner la plupart des décisions gouvernementales qui représentent une ligne de conduite fondée sur une mise en balance de considérations économiques, sociales et politiques.

[91] L'application de l'approche exposée ci-dessus aux requêtes en radiation nous permet de conclure que, dans les cas où il est « évident et manifeste » qu'une décision contestée du gouvernement constitue une décision de politique générale, l'allégation peut à juste titre être radiée au motif qu'elle ne saurait fonder une action en responsabilité délictuelle. S'il n'est pas évident et manifeste qu'il s'agit d'une décision de politique générale, il faut permettre l'instruction de l'affaire.

(iv) Conclusion on the Policy Argument

[92] As discussed, the question is whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government. If so, the representations cannot ground an action in tort.

[93] The third-party notices plead that Canada made statements to the public (and to the tobacco companies) warning about the hazards of smoking, and asserting that low-tar cigarettes are less harmful than regular cigarettes; that the representations that low-tar cigarettes are less harmful to health were false; and that insofar as consumption caused extra harm to consumers for which the tobacco companies are held liable, Canada is required to indemnify the tobacco companies and/or contribute to their losses.

[94] The third-party notices implicitly accept that in making the alleged representations, Health Canada was acting out of concern for the health of Canadians, pursuant to its policy of encouraging smokers to switch to low-tar cigarettes. They assert, in effect, that Health Canada had a policy to warn the public about the hazardous effects of smoking, and to encourage healthier smoking habits among Canadians. The third-party claims rest on the allegation that Health Canada accepted that some smokers would continue to smoke despite the adverse health effects, and decided that these smokers should be encouraged to smoke lower-tar cigarettes.

[95] In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government

(iv) Conclusion sur l'argument relatif à la politique générale

[92] Comme je l'ai indiqué, il s'agit de savoir si les déclarations qu'aurait faites le Canada aux compagnies de tabac, selon lesquelles les cigarettes à faible teneur en goudron sont moins nuisibles pour la santé, sont des questions de politique générale, en ce sens qu'elles constituent une ligne de conduite du gouvernement. Dans l'affirmative, ces déclarations ne peuvent fonder une action en responsabilité délictuelle.

[93] On soutient dans les avis de mise en cause que le Canada a mis en garde la population (et les compagnies de tabac) contre les dangers de l'usage du tabac et a affirmé que les cigarettes à faible teneur en goudron sont moins nocives que les cigarettes ordinaires. On soutient aussi que ces déclarations étaient fausses et que, dans la mesure où l'usage du tabac a causé aux consommateurs un préjudice additionnel dont sont tenues responsables les compagnies de tabac, le Canada doit indemniser celles-ci ou éponger une partie de leurs pertes.

[94] Les avis de mise en cause concèdent implicitement que Santé Canada a fait les déclarations qu'on lui attribue par souci pour la santé des Canadiens et Canadiennes, conformément à sa politique d'inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. Ils mentionnent en fait que Santé Canada avait pour politique de mettre en garde la population contre les effets nocifs de l'usage du tabac, et d'encourager les Canadiens et Canadiennes à fumer plus sainement. Les demandes de mise en cause reposent sur l'allégation que Santé Canada s'est résigné à ce que certaines personnes continuent de fumer malgré les effets nuisibles de cette habitude sur leur santé, et a décidé qu'il convenait de les inciter à fumer des cigarettes à faible teneur en goudron.

[95] En bref, les déclarations sur lesquelles s'appuient les demandes de mise en cause faisaient partie intégrante d'une politique générale du gouvernement visant à inciter les personnes qui continuaient de fumer à opter pour des cigarettes à faible teneur en goudron. Il s'agissait d'une « véritable »

adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

[96] Having concluded that the claims for negligent misrepresentation are not actionable because the alleged representations were matters of government policy, it is not necessary to canvas the other stage-two policy grounds that Canada raised against the third-party claims relating to negligent misrepresentation. However, since the argument about indeterminate liability was fully argued, I will briefly discuss it. In my view, it confirms that no liability in tort should be recognized for Canada's alleged misrepresentations.

(b) *Indeterminate Liability*

[97] Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.

[98] The tobacco companies respond that Canada faces extensive, but not indeterminate liability.

politique générale ou d'une politique générale « fondamentale » au sens d'une ligne de conduite adoptée par le gouvernement. La ligne de conduite gouvernementale alléguée a été adoptée par les plus hautes instances du gouvernement canadien et mettait en jeu des considérations sociales et économiques. Selon les actes de procédure, le Canada a élaboré cette politique par souci pour la santé des Canadiens et Canadiennes et en raison des coûts individuels et institutionnels associés aux maladies causées par le tabac. Il m'apparaît évident et manifeste que les déclarations alléguées relevaient de la politique générale du gouvernement, de sorte que les allégations de déclarations inexactes faites par négligence qu'ont formulées les compagnies de tabac à l'encontre du Canada doivent être radiées.

[96] Vu ma conclusion que les allégations de déclarations inexactes faites par négligence ne peuvent fonder une action parce que les déclarations alléguées relevaient de la politique générale du gouvernement, point n'est besoin de passer en revue les autres motifs de politique générale — liés à la deuxième étape de l'analyse — qu'a invoqués le Canada à l'encontre des demandes de mise en cause pour déclarations inexactes faites par négligence. Mais, comme l'argument relatif à la responsabilité indéterminée a été débattu à fond, je vais l'analyser brièvement. À mon avis, cet argument confirme que la responsabilité délictuelle du Canada ne doit pas être reconnue à l'égard des déclarations inexactes qu'il aurait faites.

b) *Responsabilité indéterminée*

[97] Le Canada soutient que, si l'on accepte les allégations des défenderesses en matière de déclaration inexacte faite par négligence, cela entraînerait une responsabilité indéterminée de sa part, et qu'il faut donc les rejeter. Le Canada affirme que le nombre de cigarettes vendues était indépendant de sa volonté. En outre, dans les cas de perte financière, les tribunaux ne doivent conclure à la responsabilité du mis en cause que lorsque celui-ci est à même d'en contrôler la portée.

[98] Les compagnies de tabac répondent que la responsabilité à laquelle s'expose le Canada est

TAB 29

COURT OF APPEAL FOR ONTARIO

CITATION: Tanudjaja v. Canada (Attorney General), 2014 ONCA 852
DATE: 20141201
DOCKET: C57714

2014 ONCA 852 (CanLII)

Feldman, Strathy and Pardu JJ.A.

BETWEEN

Jennifer Tanudjaja, Janice Arsenault, Ansat Mahmood, Brian DuBourdieu, Centre for Equality Rights in Accommodation

Appellants

and

The Attorney General of Canada and the Attorney General of Ontario

Respondents

Tracy Heffernan, Fay Faraday and Peter Rosenthal, for the appellants

Janet E. Minor and Shannon Chace, for the respondent the Attorney General of Ontario

Michael H. Morris and Gail Sinclair, for the respondent the Attorney General of Canada

Anthony D. Griffin, for the intervener the Ontario Human Rights Commission

Avvy Go and Mary Eberts, for the intervener the Colour of Poverty/Colour of Change Network

Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights

Marie Chen and Jackie Esmonde, for the intervener the coalition of the Income Security and Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance

Vasuda Sinha, Rahool Agarwal and Lauren Posloski, for the intervener the Women's Legal Education and Action Fund

Molly Reynolds and Ryan Lax, for the intervener the coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights

Laurie Letheren and Renée Lang, for the intervener the coalition of ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario

Martha Jackman and Benjamin Ries, for the intervener the coalition of the Charter Committee on Poverty, Pivot Legal Society and Justice for Girls

2014 ONCA 852 (CanLII)

Heard: May 26, 27 and 29, 2014

On appeal from the judgment of Justice Thomas R. Lederer of the Superior Court of Justice dated September 6, 2013, with reasons reported at 2013 ONSC 5410, 116 O.R. (3d) 574.

Pardu J.A.:

[1] The appellants ask this Court to overturn a decision of a motion judge dismissing their application for relief pursuant to the *Charter of Rights and Freedoms*. The motion judge concluded it was plain and obvious the application did not disclose a viable cause of action and the application had no reasonable prospect of success. The motion judge also found the appellant's claim was not justiciable.

Committee on Social Assistance (the Income Security Coalition); (6) the Colour of Poverty/Colour of Change Network (COPC); (7) the Ontario Human Rights Commission (OHRC); and (8) the Women's Legal Education Action Fund Inc. (LEAF). Each filed a factum and made brief oral submissions, generally in support of the appellants.

2014 ONCA 852 (CanLII)

Analysis

[19] I would uphold the motion judge's conclusion that this application is not justiciable. In essence, the application asserts that Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing.

[20] As indicated in *Canada (Auditor-General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 at 90-91, "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity."

[21] Having analysed the jurisprudence relating to justiciability in Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012), the author identified several relevant factors, at p. 162:

> Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution

> through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.
>
> …
>
> [T]he political nature of a matter raises two related dilemmas for courts. The first is the dilemma of institutional capacity. Courts are designed to make pronouncements of law. Arguably, they accomplish this goal more effectively and efficiently than any other institution could. Where the heart of a dispute is political rather than legal, however, courts may have no particular advantage over other institutions in their expertise, and may well be less effective and efficient than other branches of government in resolving such controversies, as the judiciary is neither representative of the political spectrum, nor democratically accountable.

[22] A challenge to a particular law or particular application of such a law is an archetypal feature of *Charter* challenges under s. 7 and s. 15. As observed in *Re Canada Assistance Plan,* [1991] 2 S.C.R. 525, at p. 545:

> In considering its appropriate role the Court must determine whether the question is purely political in nature, and should therefore be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.

[23] The Supreme Court discussed the difference between a political issue and a legal issue in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 2 S.C.R. 134, and *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791. In both cases, the Attorneys General argued

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that the subject matter of the *Charter* challenge was immune from scrutiny, and the Supreme Court disagreed. Both cases are distinguishable.

[24] In *Canada (Attorney General) v. PHS Community Services Society*, the Court observed, at para. 105:

> The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated *into law or state action,* those *laws and actions* are subject to scrutiny under the *Charter*: *Chaoulli*, at para. 89, per Deschamps J., at para. 107, per McLachlin C.J. and Major J., and at para. 183, per Binnie and LeBel JJ.; *Rodriguez,* at pp. 589-90, per Sopinka J. The issue before the Court at this point is not whether harm or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*. [Emphasis added]

[25] In *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35, [2005] 1 S.C.R. 791, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. At para. 107, McLachlin C.J. and Major J. said:

> While the decision about the type of health care system Quebec should adopt falls to the legislature of the province, the resulting legislation, like *all laws*, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. [Emphasis added]

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[26] Binnie and LeBel JJ. (dissenting on the merits in *Chaoulli*) also rejected the argument of the Attorneys General of Canada and Quebec that the claims advanced by the appellant were inherently political and therefore not properly justiciable by the courts. They pointed, at para. 183, to s. 52 of the *Constitution Act, 1982,* which "affirms the constitutional power and *obligation* of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution" (emphasis in original).

[27] In this case, unlike in *PHS Community Services* (where a specific state action was challenged) and *Chaoulli* (where a specific law was challenged) there is no sufficient legal component to engage the decision-making capacity of the courts.

[28] In *Chaoulli*, the Supreme Court found that the legislative prohibition against private insurance contained in the *Hospital Insurance Act,* R.S.Q. c. A-29, engaged the appellants' rights to security of the person and was arbitrary in that no link was established to tie the need for the prohibition to the goal of maintaining quality public health care. That kind of analysis, a comparison between the legislative means and purpose, is impossible in this case.

[29] This is not to say that constitutional violations caused by a network of government programs can never be addressed, particularly when the issue may otherwise be evasive of review.

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[30] There are several aspects of this application, however, that make it unsuitable for *Charter* scrutiny. Here the appellants assert that s. 7 confers a general freestanding right to adequate housing. This is a doubtful proposition in light of *Chaoulli*, where McLachlin C.J. and Major J. made the following unequivocal statement, at para. 104:

> The *Charter* does not confer a freestanding right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*.

[31] Further, as this Court noted in *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561, leave to appeal denied, [2006] S.C.C.A. No. 441, at para. 225:

> [I]n *Gosselin, supra*, the Supreme Court of Canada rejected an argument that s. 7 of the *Charter* requires the provision of a minimum level of social assistance adequate to meet basic needs.

[32] Moreover, the diffuse and broad nature of the claims here does not permit an analysis under s. 1 of the *Charter*. As indicated in *R. v. Oakes*, [1986] 1 S.C.R. 103, in the event of a violation of a right guaranteed by the *Charter*, the legislation will nonetheless be sustained if the objective of the legislation is pressing and substantial, the rights violation is rationally connected to the purpose of the legislation, the violation minimally impairs the guaranteed right, and the impact of the infringement of the right does not outweigh the value of the legislative object. Here, in the absence of any impugned law there is no basis to make that comparison.

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[33] Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.

[34] Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity. All agree that housing policy is enormously complex. It is influenced by matters as diverse as zoning bylaws, interest rates, procedures governing landlord and tenant matters, income tax treatment of rental housing, not to mention the involvement of the private sector and the state of the economy generally. Nor can housing policy be treated monolithically. The needs of aboriginal communities, northern regions, and urban centres are all different, across the country.

[35] I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that

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legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, *Chaoulli*, at para. 107. Again, the issue is one of institutional competence. The question is whether there is a sufficient legal component to anchor the analysis.

[36] The application here is demonstrably unsuitable for adjudication, and the motion judge was correct to dismiss it on the basis that it was not justiciable.

[37] Given that this application was properly dismissed on the ground that it did not raise justiciable issues, it is not necessary to explore the limits, in a justiciable context, of the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin v. Quebec*, 2002 SCC 84, [2002] 4 S.C.R. 429. Nor is it necessary to determine whether homelessness can be an analogous ground of discrimination under s. 15 of the *Charter* in some contexts.

[38] The appellants also argue that the motion judge ought to have refused to hear the respondents' motions to dismiss because the governments did not move to dismiss the application until two years after the application was issued on May 26, 2010, and after the appellants had compiled a voluminous record which was served on the respondents on November 22, 2012. Six months later the respondents advised the appellants that they had reviewed the record, sought instructions, and consulted each other and would respond with motions to strike.

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TAB 30

Federal Court Cour fédérale

Date: 20201027

Docket: T-1750-19

Citation: 2020 FC 1008

2020 FC 1008 (CanLII)

Ottawa, Ontario, October 27, 2020

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CECILIA LA ROSE, BY HER GUARDIAN AD LITEM ANDREA LUCIUK, SIERRA RAINE ROBINSON, BY HER GUARDIAN AD LITEM KIM ROBINSON, SOPHIA SIDAROUS, IRA JAMES REINHART-SMITH, BY HIS GUARDIAN AD LITEM LINDSEY ANN REINHART, MONTAY JESSE BEAUBIEN-DAY, BY HIS GUARDIAN AD LITEM SARAH DAWN BEAUBIEN, SADIE AVA VIPOND, BY HER GUARDIAN AD LITEM JOSEPH CONRAD VIPOND, HAANA EDENSHAW, BY HER GUARDIAN AD LITEM JAALEN EDENSHAW, LUCAS BLAKE PRUD'HOMME, BY HIS GUARDIAN AD LITEM HUGO PRUD'HOMME, ZOE GRAMES-WEBB, BY HER GUARDIAN AD LITEM ANNABEL WEBB, LAUREN WRIGHT, BY HER GUARDIAN AD LITEM HEATHER WRIGHT, SÁJ MILAN GRAY STARCEVICH, BY HER GUARDIAN AD LITEM SHAWNA LYNN GRAY, MIKAEEL MAHMOOD, BY HIS GUARDIAN AD LITEM ASIYA ATCHA, ALBERT JERÔME LALONDE, BY HIS GUARDIAN AD LITEM PHILIPPE LALONDE, MADELINE LAURENDEAU, BY HER GUARDIAN AD LITEM HEATHER DAWN PLETT AND DANIEL MASUZUMI

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND THE ATTORNEY GENERAL OF CANADA

Defendants

[Emphasis added]

(c) Policy and Political Questions

[33] Policy and political questions are not a bar to judicial involvement, however, "[s]ome questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and other branches of government" (*Hupacasath* at para 62). Questions in the realm of policy and political issues must be demonstrably unsuitable for adjudication (Sossin at 162):

> Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.

[34] To engage the Court's adjudicative functions, the question must be one that can be resolved by the application of law.

[35] It is within the Court's role to consider the constitutionality of government action and the accountability of the executive in light of the supremacy of the Constitution, including the *Charter*. *Charter* cases have been considered justiciable, regardless of the nature of government action, be it an exercise of Crown prerogative or otherwise (*Hupacasath* at paras 61, 70).

[36] Several cases discuss the crystallization of a policy or political issue into a justiciable one, as it relates to a Court's role in upholding constitutional supremacy. The Supreme Court in

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[41] My finding on justiciability is supported both by the undue breadth and diffuse nature of the Impugned Conduct and the inappropriate remedies sought by the Plaintiffs.

(a) Breadth of the Impugned Conduct

[42] As described above, the Impugned Conduct refers broadly to categories of the Defendants' actions and inactions, including Canada's participation in various industries and its causation of, contribution to and allowance of GHG emissions incompatible with a Stable Climate System. These categories are somewhat sub-categorized throughout the Statement of Claim, through descriptions of a broad range of activities, as identified above.

[43] The diffuse nature of the Impugned Conduct, as described by the Plaintiffs, has effectively put the entirety of Canada's policy response to climate change in issue. The Plaintiffs adamantly disagree with this characterization. In their Written Representations, they attempt to clarify their claim, suggesting that they are asking this Court to review the cumulative effects of GHG emissions, not each and every law or state action that underpins these emissions. I find this position to be problematic, as the purpose of *Charter* review is to ensure the constitutionality of laws and state action. The Plaintiffs' position undermines this function of *Charter* review, if assessments of *Charter* infringement cannot be connected to specific laws or state action.

[44] Moreover, the diffuse nature of the claim that targets all conduct leading to GHG emissions cannot be characterized in a way other than to suggest the Plaintiffs' are seeking judicial involvement in Canada's overall policy response to climate change. There is little difference between the choices the Defendants make in relation to addressing climate change and other policy choices the Courts have consistently recognized as falling more appropriately within

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the sphere of the other branches of government. These include choices in relation to the type of healthcare system (*Chaoulli* at para 107), approaches to illegal drug use and addiction (*PHS* at para 105), limits on how and where prostitution may be conducted (*Canada (Attorney Genera) v Bedford*, 2013 SCC 72 at para 5), addressing physician-assisted death (*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 98) and the prioritization of homeless and inadequate housing (*Tanudjaja* at para 33). These are all important societal issues, the decisions in relation to which fall more appropriately on the legislative and executive branches of government. They attract a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people about how these issues should be addressed (*PHS* at para 105).

[45] However, when policy choices are translated into law or state action, that resulting law or state action must not infringe the constitutional rights of the Plaintiffs. As such, it is the specific law or state action – or possibly a network thereof – that is subject to *Charter* review and that forms the basis upon which the rest of the *Charter* analysis can occur. “A challenge to a particular law or particular application of such law is an archetypal feature of *Charter* challenges under s. 7 and s. 15” (*Tanudjaja* at para 22).

[46] The Plaintiffs do not plead definable law or state action in issue, or for that matter a network in respect thereof. I agree with the statement made by the Ontario Court of Appeal in *Tanudjaja*, that it is not the case that a Court could never consider the constitutionality of a network of programs. In fact, Courts have already considered the constitutionality of a network of laws in some cases. For example, in *Bedford*, the Supreme Court considered three impugned provisions that prevented prostitutes from implementing certain safety measures (*Bedford*, above

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TAB 31

COAL CONSERVATION ACT

CHAPTER C-14

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1(1) In this Act,

(a) "agent" means a person appointed by the owner of a mine site, mine or coal processing plant, to act as a representative of the owner;

(b) "Board" means the Energy Resources Conservation Board;

(c) "certificate of competency" means a certificate granted under the *Coal Mines Regulation Act* or the *Coal Mines Safety Act* and entitling the holder to perform the duties of the occupation or office in respect of which the certificate is granted;

(d) "coal", in addition to its ordinary meaning, includes manufactured chars, cokes and any manufactured solid coal product used or useful as a reductant or energy source or for conversion into a reductant or energy source;

(e) "coal processing plant" means an installation for upgrading the quality of coal or for producing a marketable solid fuel, and includes any coal storage facility directly associated with it;

(f) "exploratory program" means a geological or geophysical study, investigation, reconnaissance or survey undertaken to establish the geological or physical settings of coal in a given area, or to ascertain the nature, quality or extent of coal occurrences in a given area;

(g) "manager" means the chief officer having control and daily supervision of a mine or mine site;

(h) "mine" means a working, other than a drill hole made while exploring for coal, from which coal is or could be extracted, whether commercially or otherwise;

(i) "mine site" means a location at which a facility for extracting coal by underground, strip or open pit operations exists or is to be developed, and includes

under subsection (3) subject to any terms and conditions he considers necessary or desirable.

1973 c65 s21,1975(2) c45 s5,1977 c79 s1

Compliance with other Acts

22 The performance of an operation in accordance with a permit or licence under this Part does not relieve a person from the requirements or liabilities arising under any other Act or otherwise.

1973 c65 s22

PART 5

OPERATION AND ABANDONMENT OF COAL PROCESSING PLANTS

Coal processing plants

23(1) No person shall

(a) construct or begin operations at a new coal processing plant,

(b) resume operations at a previously shut-in or abandoned coal processing plant,

(c) resume normal operation at an extensively rebuilt, modified or re-equipped coal processing plant, or

(d) operate facilities directly connected with a coal processing plant,

without applying for, and obtaining, an approval from the Board.

(2) An application under subsection (1) shall include

(a) a map or plan showing the exact location of the coal processing plant and all connected facilities in relation to

(i) the mine or mines from which the plant draws coal,

(ii) all nearby bodies of water, and

(iii) inhabited buildings and other private or public works,

(b) an outline of what steps are proposed for controlling pollution from the coal processing plant and its connected facilities, and

(c) any further information the Board requires.

1973 c65 s23

Authorizations and approvals required

24(1) Before the Board issues an approval pursuant to this Part, it shall refer the application to the Minister of the Environment for his approval of the application as it affects matters of the environment.

(2) The Minister of the Environment may give his approval with or without conditions, but when conditions are imposed, the Board shall, if it grants an approval, make its approval subject to the same

conditions imposed by the Minister of the Environment when he gave his approval.

(3) No approval relating to a coal processing plant capable of treating more than 45 000 tonnes of coal per year by normal continuous working shall be issued by the Board pursuant to this Part unless the Lieutenant Governor in Council has first authorized the issue of the approval.

(4) The Lieutenant Governor in Council may make his authorization under subsection (3) subject to any terms and conditions he considers necessary or desirable.

1973 c65 s24,1977 c79 s1

Order to shut down plant

25 If at any time after the issue of an approval under section 23, it appears to the Board that operations at a coal processing plant or facilities connected with the plant fail to comply with the conditions of the approval, the Board may order the plant or affected parts of it to be shut down until it is satisfied that the conditions will be complied with.

1973 c65 s24

Change in ownership

26(1) When a change in ownership of a coal processing plant occurs, the former owner and the new owner shall

(a) immediately notify the Board in writing and furnish any particulars respecting the change the Board requests, and

(b) apply to the Board for an amendment of the approval or for a new approval to reflect the change of ownership.

(2) If a coal processing plant has been materially altered, expanded or re-equipped, the holder of the approval shall apply to the Board for an amendment of the approval before resuming operations.

1973 c65 s26

Shut-down or suspension of operations

27(1) When it is intended to shut down permanently a coal processing plant or a major facility directly connected with it, or when normal operations are to be suspended for more than 3 months, the holder of the approval shall advise the Board of the planned shut-down or suspension and obtain its consent.

(2) The shut-down or suspension shall comply with any conditions the Board sets out in its consent.

(3) If, in connection with a shut-down or suspension under subsection (1), the holder of the approval fails to comply with the conditions prescribed in the Board's approval or consent, the Board may

(a) direct other qualified personnel to do whatever is necessary to remedy the failure, and

(b) charge all attendant costs to the holder of the approval.

1973 c65 s27

TAB 32

Cardinal River Coals Ltd.
TransAlta Utilities Corporation
Cheviot Coal Project

June 1997

ALBERTA ENERGY AND UTILITIES BOARD
Decision 97-08: Cardinal River Coals Ltd. TransAlta Utilities Corporation Cheviot Coal Project

Published by
Alberta Energy and Utilities Board
640 – 5 Avenue SW
Calgary, Alberta
T2P 3G4

Telephone: (403) 297-8311
Fax: (403) 297-7040

Web site: www.eub.gov.ab.ca

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1.2.1 Coal Development Policy for Alberta (1976)

The Coal Development Policy for Alberta is designed to bring about and maintain the maximum benefits of the province's coal resources for the people of Alberta. A fundamental principle of the Coal Development Policy is that no development will be permitted unless the Alberta Government is satisfied that it may proceed without irreparable harm to the environment and with satisfactory reclamation of any disturbed land.

The Coal Development Policy provides a classification of provincial lands into four categories based on: their relative environmental sensitivity; the range of alternate land uses; the potential coal resources; and the extent of existing development of townsites and transportation facilities.

The Coal Development Policy also provides for a four-step screening and approval process for coal mines which includes:

(1) preliminary disclosure to government,

(2) disclosure by the applicant to the public,

(3) consideration of a formal application through a public hearing, and

(4) a final decision by the government.

CRC submitted a preliminary disclosure, as required by the Coal Development Policy, to the Government of Alberta and in December 1985 received approval in principle to proceed to the next stage of the approval process.

1.2.2 Alberta Environmental Protection

The Cheviot Coal Project includes both a surface mine producing a projected 3.2 million tonnes of coal per year and a coal processing plant. As a result, it is a mandatory project as set out under the Environmental Assessment Regulations of the AEPEA and so requires the preparation of an EIA.

A draft Terms of Reference for the EIA was developed jointly between both the federal and provincial governments and CRC. These were made available to the public for review in October 1994. After receipt of comments, the Terms of Reference were finalized and published by the Alberta Director of Environmental Assessment on 23 January 1995. The EIA was submitted by CRC in March 1996 to the EUB as one component of its application. Following the review of the EIA, AEP's Director of Environmental Assessment advised the EUB on 18 September 1996 that the EIA now addressed the requirements set out in Section 47 of the AEPEA and in the final Terms of Reference. The Director also advised the EUB that the EIA report was complete pursuant to Section 51 of the AEPEA.

6 LAND USE EFFECTS

The proposed Cheviot Coal Project is located on lands owned by the Province of Alberta (i.e. Crown lands) and is subject to government land use policies. A number of other uses are currently made of these and nearby lands, including: provincial natural areas, recreational uses, commercial developments, and federal national parks. (A number of communities are also located near to the Cheviot Coal Project. The expected environmental effects of the Cheviot Coal Project on them are discussed in Section 7 of the report.)

6.1 Land Use Policies

6.1.1 Views of the Applicant

In their application, CRC acknowledged that several provincial zoning policies cover the proposed development areas of the Cheviot mine, including the Coal Development Policy for Alberta, the Eastern Slopes Policy, and the Coal Branch Sub-Regional Integrated Resource Plan.
CRC also noted that the proposed Cheviot Coal Project area is located entirely within the Municipal District (M.D.) of Yellowhead No. 94. The applicant indicated that, should the project be approved by the provincial and federal governments, local development approvals would also be required and would be subject to the development policies of the M.D.

Coal Development Policy

CRC noted that the 1976 Alberta Coal Development Policy identifed a variety of categories which set out the extent to which exploration and development of coal resources may be considered in Alberta. The categories are based on factors such as potential coal resources, infrastructure requirements, alternate land uses, environmental sensitivity, and reclamation capability.

At the hearing, CRC advised the Panel that all lands within the mine permit area were classified under the Coal Conservation Act as Category 4 lands; that is, lands:

> *"in which surface or underground mining or in-situ operations may be considered subject to proper assurances respecting protection of the environment and reclamation of disturbed lands".*

CRC stated that the Coal Development Policy zoning for the proposed Cheviot area recognizes the previous mining activity in the area, as well as the high potential for the area to still contain significant coal resources, the proximity of infrastructure, the presence of successful coal operations, and reclamation achievements in the immediate area. In CRC's view, these all confirm the capability of the area to accommodate future coal mining.

Coal Branch Sub-Regional Integrated Resource Plan

CRC stated that the 1995 Coal Branch Sub-Regional Integrated Resource Plan outlined the government's most recent general resource management policy for public lands and resources within the Coal Branch planning area. CRC stated that the Integrated Resource Plan identified eight Resource Management Areas (RMAs) within the Coal Branch Region and that the Cheviot project area is within the Mountain Park–Folding Mountain RMA. CRC observed that the Integrated Resource Plan (page 66) stated that:

> *"The management intent for the Mountain Park–Folding Mountain RMA is to recognize a varied range of provincially significant resources such as coal, wildlife, extensive recreation, tourism and historical resources. A limited range of other multiple use activities will also be provided, while recognizing the importance of watershed protection."*

CRC indicated that four land use zones and their associated objectives have been established for the immediate area within and around the Cheviot Coal Project. These are:

- *Zone 1 - Prime Protection: "To preserve environmentally sensitive terrain and valuable ecological and aesthetic resources."*

- *Zone 2 - Critical Wildlife: "To protect specific fish and wildlife populations by protecting aquatic and terrestrial habitat crucial to the maintenance of those populations."*

- *Zone 4 - General Recreation: "To retain a variety of natural environments within which a wide range of outdoor recreation opportunities may be provided."*

- *Zone 5 - Multiple Use: "To provide for the management and development of the full range of available resources, while meeting long-term objectives for watershed management and environmental protection."*

Of these, CRC noted that only Zones 2, 4, and 5 are found within the lands to be disturbed by the Cheviot Coal Project. CRC stated that while Zone 1 (Prime Protection) lands border part of the Cheviot Coal Project area, they do not occur within it and that the breakdown of the land use zones within the project is: 83 per cent Critical Wildlife; 8 per cent General Recreation; and 9 per cent Multiple Use.

Coal Branch Access Management Plan

CRC indicated that the Coal Branch Access Management Plan, which was developed in 1995, also had a bearing on the Cheviot Coal Project. CRC stated that the Access Management Plan was intended to manage motorized and non-motorized recreational use on existing access routes on public land. The Plan was created in order to provide opportunities for compatible motorized and

non–motorized recreational use, while meeting the fish and wildlife objectives and maintaining the integrity of the natural environment as outlined in the Integrated Resource Plan. Within the Mountain Park–Folding Mountain RMA, the planning area considered by the Access Management Plan included all Zone 1, 2, and 4 areas. To date, the plan has only been implemented on a voluntary basis, with a public review proposed for the latter half of 1997.

CRC stated that the proposed mine and coal preparation plant operations would disturb portions of designated motorized access corridors from the project area to Drummond/Prospect Ridge and to Cadomin Ridge/Cadomin Mountain. CRC stated that it was prepared to work with provincial land managers and affected stakeholders to review access alternatives and, where appropriate, develop trails outside the disturbance area, and thereby provide linkages to the existing trail system. In addition, CRC stated that it would prepare annual access plans within the project area that would be available for review by interested recreation user groups. As a result, CRC believed that the proposed Cheviot Coal Project would have an insignificant impact on the Coal Branch Access Management Plan.

Special Places 2000

In their application, CRC noted that Special Places 2000 is a 1995 government policy committed to the identification and protection of a network of natural landscapes that represent the environmental diversity of the province's six natural regions and 20 sub–regions. CRC noted at the hearing that the Alberta Minister of Environment had advised the Special Places Coordinating Committee that the Cardinal Divide Natural Area is an effective and adequate commitment to the protected areas program for this portion of the Rocky Mountains. CRC stated that, in its view, approval of the Cheviot Coal Project would have no impact on the Special Places 2000 program.

CRC stated that, while it was aware that there are other land use policies which may have some degree of relevance to the Cheviot Coal Project, it was their belief that the policies noted above were the overriding authority for the area. Furthermore, CRC stated that whatever land use limitations may have previously applied to the Cheviot Coal Project under the 1984 Eastern Slopes Policy, those had now been superseded by the more recent Integrated Resource Plan.

CRC stated that it recognized that zoning policies carry restrictions and/or guidelines for industrial development within the areas of their coverage and hence must be assessed for potential conflicts or development conditions. CRC stated that it had incorporated what it interpreted as being the required components of the aforementioned policies into its EIA.

6.1.2 Views of the Interveners

The AWA Coalition stated that they believed the applicant had not given an appropriate amount of consideration to all of the relevant policies that apply to the proposed Cheviot project area. The AWA Coalition also felt that, due to the possibility of impacts extending beyond the proposed project boundary, the policies which apply to lands adjacent to the proposed project area should also have been considered.

required or if access management can continue on a voluntary basis. Given this, AEP requested that the Panel leave the issue of access to the provincial process.

6.1.3 Views of the Panel

As noted earlier in this report, the Panel does believe that the consistency of a project with government policy does provide one of many tests of the public acceptability of a project. In the case where there are inconsistencies between the policies themselves, the Panel believes that it is reasonable, unless it can be demonstrated otherwise, to consider either the most recent and/or the most site specific as paramount. In the case of the Cheviot Coal Project, the Coal Branch Sub-Regional Integrated Resource Plan is clearly both the most recent and site specific. That plan also clearly anticipates potential coal mining in the area, to the extent that it sets out specific criteria for an applicant to meet in its environmental planning. The Panel agrees with the position taken by AEP that the Cheviot Coal Project is conceptually consistent with the Integrated Resource Plan for the region. The Panel also finds that the Cheviot Coal Project is consistent with the Alberta Coal Development Policy. Nor is the Panel convinced that further consideration of the area under the Special Places 2000 program is likely.

With regard to access management, this issue has been addressed to some degree previously (Section 4.4) and will be addressed again in Section 6.4. However, the Panel notes that AEP did not raise concerns with CRC's proposals to ensure that Cheviot Coal Project activities were consistent with the Coal Branch Access Management Plan, and accepts that these issues can be addressed during the mine development process.

6.2 Natural Areas

6.2.1 Views of the Applicant

In their application, CRC indicated that two sites near the proposed mine permit area have been designated as Natural Areas, and that two other sites have been nominated as Candidate Natural Areas. The designated Natural Areas were the Cardinal Divide Natural Area south and west of the proposed mine and the Muskiki Lake Natural Area several kilometres to the east. The two candidate sites identified by CRC were the Cadomin Caves Candidate Natural Area located south of Cadomin, and the Grave Flats Candidate Natural Area located 5 km east of the project area. In its application, CRC only addressed possible environmental effects of the Cheviot Coal Project on the Cardinal Divide Natural Area and the Cadomin Caves Candidate Natural Area, as these were the closest to the proposed developments.

Existing Conditions

CRC indicated that the Cardinal Divide Natural Area was established under the Alberta Special Places 2000 legislation in 1995. Bordering part of both the western and southern boundaries of the proposed Cheviot mine project area, it covers approximately 6500 ha and lies between the proposed mine and Jasper National Park to the west and the Cardinal River to the south (Figure 6). CRC also noted that

TAB 33

Court of Queen's Bench of Alberta

Citation: Calgary (City) v. Alberta (Municipal Government Board), 2010 ABQB 719

2010 ABQB 719 (CanLII)

Date: 20101119
Docket: 0801 13148
Registry: Calgary

Between:

The City of Calgary

Applicant

- and -

The Municipal Government Board and BTC Properties II Ltd. also known as "BTC PROPERTIES II LTD."

Respondents

Reasons for Judgment
of the
Honourable Madam Justice B. E. Romaine

---

[1] The City of Calgary applies for judicial review of Municipal Government Board Order 057/08 (the Impugned Order). The issue is whether BTC Properties II Ltd. was properly assessed for business tax on parking facilities located in each of three office buildings owned by it. This largely depends upon whether BTC or the tenants renting the parking operated a business in the parking facilities.

I. BACKGROUND

[2] Prior to 2003, it was not the City's practice to assess business tax on parking space or facilities associated with office buildings and rented to the tenants of those buildings. This changed as a result of the MGB's decision in *Tonko Development Corporation v. Calgary (City)*, MGB 078/03 in which various parking operators, both property owners and third parties

operating under leases or other agreements with the owners, challenged 2002 business tax assessments relating to numerous parking facilities operated by them. One basis for the challenge was that the assessments were inequitable. The MGB found that the parking operators were assessable but agreed that the assessments were inequitable and reduced each to $1.00. The MGB found a systemic inequity resulting from the fact that the owners/landlords of parking facilities in office buildings were competing businesses but were not being assessed. As a result, the City began assessing both parking operators and owners/landlords of office building parking facilities for 2003 business tax.

[3] BTC and numerous other parking operators and owners/landlords appealed the 2003 assessments, and like assessments for the 2004, 2005 and 2006 taxation years, to the Calgary Assessment Review Board (ARB).

[4] On further appeal to the MGB, BTC's 2004 assessments on the subject parking facilities were affirmed. BTC's grounds for appeal of the 2004 assessments were the same as its grounds for appeal of the 2005 and 2006 assessments, the appeals under review in the present case. The 2004 assessments were affirmed on the basis that there was insufficient evidence to decide the matter: *Altus Group Calgary v. Calgary (City)*, MGB 016/06. In the Impugned Order, the MGB granted BTC's 2005 and 2006 appeals. The MGB distinguished its decision affirming the 2004 assessments on the basis, in this case, BTC had brought forth considerable evidence, in the form of the leases governing the subject parking facilities, to support its appeals: Impugned Order p. 13.

[5] This judicial review relates to BTC's appeal to the MGB of its 2005 and 2006 business tax assessments on the subject parking facilities. The facilities are underground parkades located in each of three multi-storey, multi-tenanted office buildings in the Calgary core and beltline areas. The buildings are owned by BTC and are referred to respectively as the IBM Building, the Energy Plaza Building and the BP Centre Building. The parking facilities in each of the buildings were rented at all material times exclusively to the business tenants of the buildings.

[6] BTC, as well as numerous other owners/landlords and parking operators of parking facilities, appealed their 2005 assessments to the ARB. BTC's Issue Statement raised the following grounds of appeal:

> Issue - Assessment incorrectly determined. Support - Bylaw 8M2005 does not identify parking as an assessable use, the bylaw is applied inconsistently within the same property. Current application of the NARV assigns a Business Asmt. and tax to vacant space...
> Issue - Incorrect Person Assessed. Support - The owner of the premises has been levied the assessment and tax instead of the occupant and the associated business...
> Issue - The NARV is unsupported by evidence and market fact. Support - No evidence is provided by the assessment office to substantiate how the NARV is achieved...
> Issue - Some assessed occupancies are tax exempt....

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[7] BTC's appeal was heard in conjunction with appeals on approximately 40 other properties. On August 24, 2005, the ARB affirmed the 2005 assessments. Each of the ARB decisions relating to each of the three parking facilities is one page in length and states the following under the section entitled "Decision with Reasons":

> ...It is the Board's decision that in most instances it is the owners or landlord and not the tenant who is the properly assessed person. The owner has care and control of the parking spaces and receives the revenue. Although the development permit requires that parking be provided, it does not indicate who shall manage the parking spaces. With regards to the allegation that many similar parking facilities have not been assessed, the Board finds there is inconclusive evidence to support this position...

[8] BTC, and numerous other owners/landlords and operators of parking facilities, also appealed their 2006 assessments to the ARB. BTC's Issue Statement raised the following grounds of appeal: (1) the NARV for the facilities may be incorrect for a number of reasons; and (2) the City erred in assessing and levying a business tax in respect of the parking facilities for the subjects as: (i) Bylaw 9M2006 does not contemplate a business tax assessment of the subjects; (ii) City applied the bylaw in a manner that was incorrect and contrary to its purpose and intent in respect of the assessed person. BTC's appeal to the ARB was heard in conjunction with approximately 47other appeals. The ARB affirmed the 2006 assessments. No formal decision was rendered other than a one page form letter mailed May 24, 2006 indicating that the assessment was confirmed.

[9] BTC and other parking operators and owners/landlords appealed both the 2005 and 2006 ARB decisions to the MGB. The 2005 Applications for Assessment Appeal state the grounds for appeal as follows: (1) the assessment is incorrectly determined and NARV is unsupported by evidence and market fact; (2) "incorrect assessed person"; and (3) "the owner of the property should not be the assessed person under bylaw 8M2005". The 2006 Application for Assessment Appeal reasons for appeal were as follows: (1) Bylaw 9m2006 does not specifically address assessment of parking facilities; Bylaw is applied inconsistently and contrary to intent and purpose; (2) incorrect stall counts are assessed; (3) NARV may not represent actual rents (net) the subject achieves; (4) comparison analysis identifies potential inequity in treatment of similar situations.

[10] The MGB hearing took place over four days, on January 14, 16, 17 and 18, 2008. Prior to the hearing, all property owners except BTC withdrew their 2005 and 2006 appeals. At the hearing, the MGB received and reviewed the ARB Record, heard evidence from BTC's two witnesses and the City's witness, examined building leases provided by BTC, and heard extensive argument from both the City and BTC. On May 26, 2008, the MGB rendered the Impugned Order allowing the appeals and setting the assessments to nil. It stated in its reasons that while BTC was not the proper assessed person, the tenants of the buildings may be.

[11] On January 19, 2009, the MGB denied the City's request to reconsider the Impugned Order: see *Calgary (City) v. BTC Properties II Ltd.*, MGB 006/09.

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II. LEGISLATION

A. MUNICIPAL GOVERNMENT ACT

[12] The imposition of business tax is authorized under the *Municipal Government Act*, R.S.A. 2000, c. M-26 (MGA), Part 10, Division 3.

[13] Business tax must be imposed under a business tax bylaw. Section 371 of the MGA gives the City power to pass a business tax bylaw. Section 372 of the MGA gives the City power to impose a business tax bylaw on all businesses operating in the municipality unless the business was exempt from tax. Section 373 of the MGA requires the person operating the business to pay the business tax.

[14] Section 374 of the MGA specifies the contents of the bylaw. The business tax bylaw is to contain assessments of businesses to be prepared and recorded on a business assessment roll: s. 374(1). The bylaw is to specify one or more methods to be used to prepare business tax assessments. One method, the method chosen by the City in the present case, is on "a percentage of the net annual rental value of the premises" (the "NARV method"): s. 374(1)(b)(i.1). The bylaw is also to specify the basis upon which a business tax may be imposed by prescribing, for the NARV method, "the percentage of the net annual rental value": s. 374(1)(c)(i.1).

[15] "Business" is defined under s. 1(1)(a) of the MGA as follows:

> (i) a commercial, merchandising or industrial activity or undertaking;
> (ii) a profession, trade, occupation, calling or employment, or
> (iii) an activity providing goods or services,
> whether or not for profit and however organized or formed, including a co-operative or association of persons;

[16] ARB functions and decisions are dealt with in Part 11 of the MGA. Section 460 specifies the types of complaints that can be made to the ARB and includes complaints about matters shown on an assessment or tax notice including a description of a property or business (s. 460 (5)(a)); the name and mailing address of an assessed person or taxpayer (s. 460(5)(b)); an assessment (s. 460(5)(c)); and whether the property is assessable (s.460(5)(i)).

[17] Part 11, s. 467 of the MGA deals with decisions of the ARB:

> 467 (1) An assessment review board may make any of the following decisions:
> ...
> (b) make a change with respect to any matter referred to in section 460(5);

(c) decide that no change to an assessment roll or tax roll is required.

(2) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration assessments of similar property or businesses in the same municipality.

[18] Part 12, s. 499(1) of the MGA deals with appeals to the MGB:

499 (1) On concluding a hearing the Board may make any of the following decisions:
...
(d) make any decision that the assessment review board could have made, if the hearing relates to the decision of an assessment review board;

(2) The Board must not alter

(a) any assessment that is fair and equitable, taking into consideration assessments of similar property in the same municipality, and...

[19] In proceedings before the MGB, the MGB is not bound by the rules of evidence and may hear new evidence: s 496 (1).

B. CALGARY BUSINESS TAX BYLAWS 8M2005 AND 9M2006

[20] The City passed the business tax bylaws in question, Bylaws 8M2005 and 9M2006 (the Bylaws). They are identical. There is no dispute that the Bylaws complied with the foregoing provisions of the MGA.

[21] NARV is defined under s. 3(e) of each Bylaw as "the typical market annual rental value of the Premises exclusive of operating costs, but inclusive of the costs of leasehold improvements".

[22] Section 4(2) of each Bylaw states that the business assessments are based on 100 percent of the NARV of the premises.

[23] The definition of "business" in s. 3 (c) of the Bylaws is the same as the definition of "business" in s. 1(1)(a) of the MGA.

[24] The term "premises" is not defined in the MGA but is defined in s. 1(g) of the Bylaws as follows:

1(g) "Premises" means any space occupied or used for the purpose of or in connection with a Business, and without limiting the generality of the foregoing includes:

(i) land and buildings or part of buildings on such land; and

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(ii) any store, office, warehouse, factory, facility, hotel, motel, enclosure, yard or other space.

[25] Section 18(1) of each Bylaw states that if a business would not have been subject to the imposition of business tax under the *Municipal Taxation Act*, R.S.A. 1980, c. M-31 (MTA), it continues to be non-taxable.

III. ISSUES

1. What is the appropriate standard of review?

2. Applying the appropriate standard of review, did the MGB err in its findings?

IV. DISCUSSION AND ANALYSIS

A. STANDARD OF REVIEW

1. Position of parties

[26] The City's approach appears to be that where a party alleges that an administrative decision maker's reasons are not only unreasonable or incorrect, but also inadequate, a double-barrelled approach to the standard of review analysis may be employed. It challenges the MGB's decision based on procedural unfairness, applying a correctness standard of review, and on a reasonableness/correctness standard of review applying the analysis in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[27] The City argues that the appropriate standard of review is correctness based on three alleged errors made by the MGB. First, it argues that the MGB's decision is procedurally unfair because its reasons are so deficient as to constitute an error of law. Second, it argues that it was procedurally unfair for the MGB to decide that the tenants had exclusive use of the parking premises and imply that they were liable for the business tax when the tenants were not represented at the MGB hearing. Third, it argues that the MGB's decision exempted BTC from the payment of business tax and that decisions regarding exemption from tax are outside the MGB's jurisdiction. In the alternative, the City argues that if a judicial review analysis under *Dunsmuir* is conducted, applying either a correctness or reasonableness standard, the MGB's reasons and decision should be quashed and the matter returned to a different hearing panel of the MGB for rehearing. It argues that if a correctness standard is applied, the reasons and decision of the MGB are not correct. It argues that if a reasonableness standard is applied, the reasons and decision of the MGB are not reasonable because the reasons are not transparent or intelligible and do not provide appropriate justification for the MGB's conclusions.

[28] The MGB made submissions to the Court confined to explaining the Record, addressing the standard and scope of judicial review, and explaining the MGB's practices and policies

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within its statutory mandate relative to the matters in issue. It took no position on the correctness, reasonableness or fairness of its decision.

[29] The MGB resists the application of a parallel judicial review analysis. It submits that the requirement to give reasons should not be so expanded that it "eats up" the judicial review analysis of the substantive reasons required under *Dunsmuir*. It argues that a parallel review goes directly against the Supreme Court of Canada's intention in *Dunsmuir* to simplify the judicial review analysis. It submits that the standard to be applied depends, in part, on the characterization of the issues before the MGB, which it characterizes as issues of fact and mixed law and fact attracting a reasonableness standard of review. It submits that the issue before the MGB was whether BTC was assessable for business tax on the parking facilities. This required the MGB to interpret the MGB and the Bylaws and make findings of fact and law related to whether parking facilities are assessable, whether BTC was operating a business in the City of Calgary, and whether it was operating its business in the parking facilities.

[30] The MGB challenges the characterization of its decision to reduce the business tax assessment to nil as a jurisdictional issue. It argues that the MGA specifically gives the MGB the authority to deal with assessment appeals. It submits that the issue before the MGB was not whether it had jurisdiction to exempt BTC from tax or to hear an appeal which could result in an exemption. The issue was whether BTC was assessable under the MGB, which is wholly within its jurisdiction to decide. It also submits that it did not decide, in the tenants' absence, that the tenants were assessable for business tax on the parking facilities. It left that issue open.

[31] BTC submits that the standard of review is reasonableness. It characterizes the issue as one of mixed law and fact. It submits that the MGB embarked on a fact finding mission and then applied those facts to the legislative scheme and the Bylaws. It considered the evidence and business tax assessment policy and equity. It submits that this was a classic case of applying the facts and findings to the law.

2. Law re standard of review for procedural fairness issues

[32] Generally, the standard of review for issues of procedural fairness and the legal obligation to give reasons is correctness: *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670, 98 O.R. (3d) 210, leave to appeal to the SCC dismissed [2009] S.C.C.A. No. 461; *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2008 ABQB 595, 450 A.R. 1 at para. 56. In *Clifford*, the Court held at paras. 22 - 23 that if there is a legal obligation to give reasons, there can be no deference granted to a tribunal's decision to not give reasons.

a. Doctrine of legitimate expectations

[33] The Supreme Court of Canada expanded the duty of procedural fairness in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39. Reasons are required from tribunals such as the MGB where the decision has an important

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significance for the individual or if there is a statutory right of appeal. In doing so, the Supreme Court of Canada commented on the doctrine of legitimate expectations, at para. 26:

> [...] the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights [citations omitted]. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: [citations omitted]. Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded [citations omitted]. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain....
> [Emphasis added]

[34] The doctrine of legitimate expectations provides that a certain process will be followed rather than assuring a particular result. Further, in certain cases, more extensive procedural rights are afforded, however, the doctrine of legitimate expectations does not produce or deal with substantive rights. Put another way, a decision maker's discretion to reach a certain result is unfettered by the doctrine of legitimate expectations. Examples of procedural rights arising from this doctrine include the right to make representations and the right to be consulted: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 at para. 78. The City cites *Edison v. Canada*, 2001 FCT 734, 208 F.T.R. 58 at para. 23 which confirms that legitimate expectations arise "where an individual relies on procedural norms established by past practice or published guidelines...".

[35] *Baker* expanded a tribunal's duty to give reasons but also confined the application of the doctrine of legitimate expectations to procedural rights. The City cannot use this doctrine to argue for a different determination outside of the procedural domain.

b. Difference between adequacy of reasons and the substantive decision made

[36] The difference between challenging the procedural fairness of a decision based on the inadequacy of reasons under *Baker* and challenging the substantive decision applying the *Dunsmuir* standard of review analysis has recently been analysed by the Ontario and the Newfoundland and Labrador Courts of Appeal.

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[37] In its 2009 decision in *Clifford*, the Ontario Court of Appeal found that where a lack of procedural fairness based on the inadequacy of reasons is alleged, two separate analyses must be conducted for judicial review purposes. The initial threshold review requires an analysis of whether the administrative body has satisfied its procedural fairness obligation to give reasons. The second review requires an analysis of whether the administrative body's substantive reasons and decision are reasonable or correct applying the *Dunsmuir* analysis. The Court stated at paras. 31 - 32:

> In addition, in my view, it is important to differentiate the task of assessing the adequacy of reasons given by an administrative tribunal from the task of assessing the substantive decision made. A challenge on judicial review to the sufficiency of reasons is a challenge to an aspect of the procedure used by the tribunal. The court must assess the reasons from a functional perspective to see if the basis for the decision is intelligible.
>
> This is to be distinguished from a challenge on judicial review to the outcome reached by the tribunal. That may require the court to examine not only the decision but the reasoning offered in support of it from a substantive perspective. Depending on the applicable standard of review, the court must determine whether the outcome and the reasoning supporting it are reasonable or correct. That is a very different task from assessing the sufficiency of the reasons in a functional sense.

[38] Jeffrey J. recently adopted and applied the foregoing passage from *Clifford* in *Calgary (City) v. Calgary Firefighters Assn.*, 2010 ABQB 226, [2010] A.J. No. 367 at para. 28.

[39] The majority of the Newfoundland and Labrador Court of Appeal subsequently took a different approach in *Newfoundland and Labrador (Treasury Board) v. Newfoundland and Labrador Nurses' Union*, 2010 NLCA 13, 294 Nfld. & P.E.I.R. 161, leave to appeal to the SCC granted [2010] S.C.C.A. No. 137. The majority decision frames the issue as whether the trial division judge erred in concluding that the arbitrator's decision was unreasonable because the decision-making process lacked justification, transparency and intelligibility. This is the test for reasonableness developed in *Dunsmuir*. The Court split on the issue of whether it must conduct both a procedural fairness analysis as to the adequacy of the reasons and a separate *Dunsmuir* analysis as to the reasonableness or correctness of the substantive reasons. Welsh J., for the majority, preferred a simplified approach, stating at para. 12:

> Finally, a comment may be of assistance regarding the interplay between adequacy of reasons in the context of procedural fairness and the first prong of the *Dunsmuir* analysis, this is, the aspect of reasonableness directed to the process of articulating the reasons, requiring justification transparency and intelligibility in the decision-making process. Clearly, the *Dunsmuir* analysis requires a consideration of the reasons provided by the

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> tribunal. A failure to give reasons, or inadequate reasons, would be decisive in the reasonableness assessment. A complete lack of or inadequate reasons could not be said to provide the justification, transparency and intelligibility in the decision-making process required to satisfy reasonableness under the *Dunsmuir* analysis. Unless legislation eliminates the necessity for reasons, reasonableness is the standard required to be met by a tribunal. Since reasons, including adequacy thereof, constitute a component of reasonableness, a separate examination of procedural fairness is an unnecessary and unhelpful complication.
> [Emphasis added]

[40] Cameron J., in dissent, appeared to prefer the two-step approach applied in *Clifford*, stating at para. 38:

> The distinction between the first part of a *Dunsmuir* review for reasonableness of a decision of an arbitrator (a substantive review) and a review of adequacy of reasons in response to a claim based on procedural fairness turns on the purpose of the review. The two procedures often use the same vocabulary: words such as "transparency" and "intelligibility" appear in the discussions of both. The difference is that a substantive review is concerned with the reasonableness of the decision and, to that end, it looks at the reasons articulated. A procedural fairness review examines the fairness of the process. It is directed to the ability to discern the reasons without reference to the question of whether the decision falls within the range of acceptable outcomes. In my opinion, where procedural fairness requires reasons be provided, *Dunsmuir* has not changed how a reviewing court would approach the task of reviewing adequacy of reasons. Issues of procedural fairness do not involve any deferential standard of review [citations omitted]...

[41] Thus, the approach to judicial review of this type of issue is different. The majority of the Newfoundland and Labrador Court of Appeal took a more simplified approach than the two-pronged approach adopted by the Ontario Court of Appeal. It found, in effect, that *Baker* is subsumed in *Dunsmuir*. There is no need to assess every decision firstly on whether the reasons are adequate applying a correctness standard and secondly on whether the reasons are reasonable or correct applying the *Dunsmuir* analysis. Welsh J. notes that if there is a total lack of reasons or inadequate reasons, justification, transparency and intelligibility cannot exist within the decision-making process.

[42] In my view, the requirement in *Baker* to give reasons does not occupy precisely the same ground as the Supreme Court of Canada's framework for analysing the sufficiency of reasons in *Dunsmuir*. However, there is some crossover since both involve an evaluation of the justification, transparency and intelligibility of the reasons. As the issue is not settled in Alberta, I will conduct two separate reviews, although I agree with the view of the majority of the

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Newfoundland and Labrador Court of Appeal which is consistent with the *Dunsmuir* goal of clarity and simplicity.

[43] It is noteworthy that the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at paras. 55-56 had the following to say on the topic of the reasonableness standard of review:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam* at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation, even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> ...At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result...

[44] This description of reasonableness can be taken as a description of the process for determining whether the reasons given by the tribunal are sufficient, whether the basis for the decision is intelligible and thus whether the process was fair, the first step in the two-step analysis adopted in *Clifford*. To isolate the first step and characterize it as being subject to some standard of "correctness" rather than "reasonableness" is to bring "correctness" in through the back door in an analysis that does not require such a standard, as reasons that do not meet such a test would surely, as Welsh J. has put it in Law Society of New Brunswick, be unreasonable.

3. Law re standard of review for substantive issues

a. General principles

[45] The Supreme Court reconsidered the analytical process employed by a court to ascertain the appropriate standard of review in the judicial review of administrative tribunal decisions in *Dunsmuir*. Where a standard of review analysis is required, a two-step process is now to be applied: *Dunsmuir* at paras. 62 and 64.

[46] First, the court determines whether the standard has been settled by the jurisprudence. Judicial precedent must have "determined in a satisfactory manner" the degree of deference to be accorded to "a particular category of question". It is not necessary to perform a fresh standard of review analysis in every case if the standard has already been set for the type of question in issue: *Dunsmuir* at paras. 57, 62.

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[47] Second, if the standard of review has not been satisfactorily determined, the court must perform a contextual standard of review analysis to determine whether the administrative decision maker should be given deference and a reasonableness standard applied. This involves the consideration of the following four factors: (1) presence of a privative clause; (2) purpose of the administrative decision maker as determined by its enabling legislation; (3) nature of the question(s) at issue; (4) expertise of the administrative decision maker: *Dunsmuir* at paras. 53 - 57 and para. 64.

[48] An exhaustive review of these factors is not required in every case and no one factor is determinative. The applicable factors must be weighed together to determine the proper level of deference required and thereby the appropriate standard of review: *Dunsmuir* at para. 56. Where the reviewing court determines that little or no deference is called for, a correctness standard of review is applied. Where the reviewing court determines that considerable deference is called for, a reasonableness standard of review is applied.

[49] In *Dunsmuir*, the Supreme Court of Canada gave guidelines as to the types of issues that normally attract a reasonableness standard of review and those that attract a correctness standard of review: at paras. 53 - 54:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically *(Mossop* at pp. 599-600; *Dr. 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.
>
> 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: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, 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.*, 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*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[50] A correctness standard necessarily applies where the nature of the issue before the tribunal is one of constitutional interpretation involving “true questions of jurisdiction” that arise where the tribunal must “explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter”: *Dunsmuir* at para. 59; where the issue is a general

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question of law of "central importance to the legal system as a whole and outside the adjudicator's specialized areas of expertise": *Dunsmuir* at paras. 55 and 60; and, where the issue involves the jurisdictional lines between two or more competing specialized tribunals: *Dunsmuir* at para. 61. It is noteworthy that the issue of adequacy of reasons does not fit well into any of these categories.

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[51] The expertise of a tribunal is determined relative to the expertise of the court. Determining expertise requires the court to identify the nature of the issue before the tribunal, characterize the expertise of the tribunal relative to the nature of the issue, consider the court's own expertise relative to the nature of the issue, and determine whether the tribunal has relatively more expertise than the court with respect to the issue. The reviewing court determines the expertise of the tribunal by considering both the general expertise of the tribunal as well as its expertise regarding the issue under appeal or judicial review. Greater deference is indicated if the tribunal is more expert than the court and the issue under appeal or judicial review falls within the tribunal's greater expertise: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226.

[52] The Supreme Court of Canada explained the reasonableness standard in *Dunsmuir* at para. 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.

b. Existing Case Law

[53] The existing case law indicates that a reasonableness standard of review should be applied to the MGB's decision in this case.

[54] One of the issues before the MGB was whether the parking facilities were occupied or used for the purpose of or in connection with BTC's business. Where the issue before the MGB was whether various properties used to provide food and beverage services were "...used in connection with educational purposes and held by . . . the board of governors" of a university under s. 362(1)(d)(i) of the MGA, the Alberta Court of Appeal applied a reasonableness standard of review: *University of Alberta v. Edmonton (City)*, 2005 ABCA 147, 363 A.R. 378. The Court

ruled that the nature of the problem was one of mixed fact and law, and that a moderate level of deference was called for.

[55] In *Calgary (City) v. Municipal Government Board (Alta.)*, 2008 ABCA 187, 432 A.R. 202 (*Hudson's Bay* decision), the MGB interpreted s. 460(3) of the MGA, specifically whether a party was "an assessed person" that could make a complaint as to "any assessed property or tax", even though it did not own the property assessed. The Alberta Court of Appeal ruled that the nature of the issue involved the interpretation of the MGA and was subject to a reasonableness standard of review.

c. Standard of Review Analysis

[56] In the event that a standard of review analysis is required, it also leads to the application of a reasonableness standard of review.

[57] Section 506 of the MGA states that there is no appeal from a decision of the MGB and has been characterized as a weak privative clause attracting a moderate degree of deference: *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.*, 2002 ABCA 199, 312 A.R. 40 at para. 3, leave to appeal to S.C.C. refused, [2002] S.C.C.A. 440.

[58] The purpose of the MGB is to supervise the assessment of real property for municipal taxation purposes with the objective of ensuring that all property in the Province subject to municipal taxation is fairly and equitably assessed. Where the MGB applies its expertise to assess the economic and operational realities which, in turn, impact upon its interpretation of the MGA, a reasonableness standard is applied. The assessment of economic and operational realities is a factual assessment which the MGB is uniquely equipped to make: *Telus*.

[59] The nature of the question before the MGB involved the interpretation of the MGA and the Bylaws and fact finding with regard to that interpretation. This can be characterized as an issue of mixed law and fact; however, the issues before the MGB were primarily factual. It was required to determine whether BTC occupied or used the subject parking facilities for its business. This required the MGB to examine the provisions of the leases applicable to the buildings and the facts regarding the occupation and use of the parking facilities. A reasonableness standard of review is indicated.

[60] The expertise of the MGB relative to the courts on issues of property valuation and assessment also indicates that deference be given to the MGB. In *Telus*, the Court ruled that the MGB "may have developed, through experience, a level of expertise in the area of property assessment...". The Court also considered the chambers judge's comment that the MGB had been given "an important expert role to play in determining whether it would be fair and equitable in light of the taxation of other linear property to include feature software in the definition of 'telecommunications system'". In assessing the relative expertise of the MGB and the reviewing court, the Court of Appeal ruled that the MGB was "uniquely equipped to assess the factual context and its expertise in that regard" was owed greater deference. As a result, the Court of

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Appeal ruled that, as the nature of the issue before the MGB was one of mixed law and fact, the standard of review was patent unreasonableness: *Telus* at paras. 33 - 34.

[61] Alberta courts have found that the MGB has "a particular expertise in appreciating the impact of various possible interpretations of the statutory provisions on its ability to fulfill its mandate to administer the appeal process relating to the taxation of property fairly and equitably": *Calgary (City of) v. Northland Property Ltd.*, 2003 ABQB 668, [2003] A.J. No. 970 at para. 13.

d. Conclusion

[62] Balancing the foregoing factors to be considered in a standard of review analysis, I find that a reasonableness standard of review is applicable. In this case, the MGB interpreted the provisions of the MGA and the Bylaws, made findings of fact, and applied the facts and its findings to the law. I do not agree with the City's argument that the MGB's decision to reduce the tax assessment to nil has the effect of granting a tax exemption to BTC and that this is a matter outside the MGB's jurisdiction. The issue was whether the City had properly assessed BTC for business tax under the MGA and the Bylaws. This was an issue which was clearly within the jurisdiction of the MGB.

B. APPLICATION OF STANDARD OF REVIEW

1. Application of standard of review to substantive issues

[63] A court conducting a review for reasonableness inquires into the qualities that make the decision reasonable. An administrative body's decision will be reasonable if two conditions are satisfied. First, justification, transparency and intelligibility must exist in the decision making process. Second, the decision must fall within a range of possible, acceptable outcomes which are defensible given the law and the facts: *Dunsmuir*. If the process employed by the administrative body and the outcome "fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.": *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

[64] The law applicable to the MGB's Impugned Order is the MGA and the Bylaws and the case law interpreting it. Further, although this Court is not bound by decisions of the MGB, it is informed by them.

[65] Business tax is assessable against those who operate a "business" in "premises" in the City of Calgary. To determine whether BTC was assessable for business tax on the subject parking facilities, the MGB was required to consider whether the subject parking facilities were "premises" as defined in the Bylaws; whether BTC was operating a "business" as defined in the MGA and the Bylaws; and whether the subject parking facilities were spaces being occupied or used by BTC to operate its business.

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a. Decision that parking facilities are taxable under the Bylaws

[66] The MGB found that the definition of "premises" includes parking facilities.

[67] The City's position was that the term "premises" as defined in the Bylaws should be interpreted expansively as encompassing parking spaces and entire parking facilities.

[68] BTC argued that it was not the intention of the legislature or the City that parking facilities be assessed for business tax. It argued that business tax is in essence an occupancy tax and was intended to be a tax levied on the premises from which a business operates. BTC pointed to several provisions of the MGA, for example, s. 379 (3) (a), which provides for supplemental assessments where the business "moves into new premises" or "increases the storage capacity or floor space of the premises occupied for the purpose of a business..." It also referred to s. 2 of the Bylaws which states that the purpose of the Bylaws is to "...authorize the assessment, supplementary assessment and taxation of Businesses operating in Premises within the City...".

[69] Section 1(g) of the Bylaws states:

> 1(g) "Premises" means any space occupied or used for the purpose of or in connection with a Business, and without limiting the generality of the foregoing includes:
>
> (i) land and buildings or part of buildings on such land; and
>
> (ii) any store, office, warehouse, factory, facility, hotel, motel, enclosure, yard or other space.
>
> [Emphasis added]

[70] The term "space" has been interpreted by the MGB as having its common meaning and including "...space, whether that space is used for parking of vehicles or for retail space": *Tonko* at p. 14.

[71] In *Tonko*, the MGA found that the term "premises" should be given a broad and expansive interpretation based on the purpose of business tax assessment under the MGA and business tax bylaws. Section 372 of the MGA authorizes the City to impose a business tax on all businesses. The Bylaws do not exempt any businesses and more specifically, do not exempt parking businesses. It found that the purpose of the business tax bylaw was to apply to all businesses and the definition of "premises" should be read in a manner that achieves that purpose: *Tonko* at p. 14.

[72] In *Tonko*, the MGB also found that the phrase "used for the purpose of or in connection with a Business" is to be interpreted as providing the flexibility needed to apply a business assessment to the entire space occupied or used. The MGB found that where a parking business

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is being operated from premises in the City, the entire parking facilities, including the physical parking spaces in which vehicles are parked, may be assessed for business tax. A business tax bylaw must apply to all businesses operating in the municipality and must therefore be adaptable to a wide variety of business circumstances: *Tonko* at p. 18.

[73] In the Impugned Order, the MGB concluded that "premises" includes parking facilities. It adopted the reasoning from a passage in *Tonko* as support for its conclusion, stating at pp. 13 - 14 of the Impugned Order:

> Tonko Development Corporation et al. v. City of Calgary (MGB 078/03) on page 14 reads as follows:
>
> > This broad and expansive interpretation of the definition is supported by an examination of the purpose of a business assessment in the Act and the Bylaw. Section 372 of the Act authorizes a municipality to impose a business tax on all businesses operating within the municipality with the exception of businesses that are exempt. Section 4(1) of the Bylaw 3M2002 requires that every person who operates a business in a premises within the city shall be assessed for the purposes of imposing a business tax. The MGB interprets this to mean all businesses. Bylaw 3M2002 has no section which identifies businesses which are exempt, and more specifically does not exempt a business which operates parking facilities. Thus, the MGB comes to the conclusion that the purpose of the bylaw is to apply to all businesses and that the definition of premises should not be read in a restrictive manner in order that this purpose cannot be achieved.
>
> While recognizing that it is not bound by its previous decisions, the MGB still accepts the reasoning in the passage above. Thus, if a parking business is operated on the premises, it is taxable. The parties disagree over whether a parking business was in operation. [Emphasis added]

[74] The MGB concluded that the MGA and the Bylaws were intended to impose a business tax on all businesses operating in premises in the City, including parking businesses. This was a reasonable conclusion, consistent with the plain meaning and purpose of the business tax provisions of the MGA and Bylaws. It is also evident from the MGB's reasoning how it came to this conclusion. The question was whether BTC was operating a business in the subject parking facilities.

b. Decision that BTC did not operate a parking business in the parking facilities

[75] The MGA and the Bylaws provide that business tax is assessable on those operating a business in premises in the City of Calgary. The MGB found that BTC did not operate a parking business in the subject parking facilities.

(i) Position of the Parties

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[76] The City argued that this issue had been decided in *Tonko* and affirmed in a line of subsequent MGB decisions. It argued that prior to *Tonko*, the standard practice had generally been to include a charge for parking in the rent for office space. As a result, the business assessment on the office space captured the NARV of office and parking space. The MGB had decided in *Tonko* and subsequent decisions that the practice had changed. Owners/landlords of parking in office buildings were now charging a separate and additional rent for parking, over and above the rent for office space. As a result, they were operating parking rental businesses separate from their office rental businesses. The City argued that the leases in question and the evidence of the City's witness, the City's former tax assessment officer, supported the City's position that there is a separate market for parking and office space. It argued that since the building leases charged a separate and additional rent for parking, BTC was operating a separate parking business in the subject parking facilities and was therefore assessable for business tax on those facilities.

[77] The City argued that the decisive factor was that BTC charged its tenants a separate and additional fee for parking and was thus in the business of selling parking. It did not matter whether the parking was rented to the tenants, their employees or the public. What mattered was that the owner/landlord generated a separate revenue stream from the rental of its parking space and was thus in the business of renting parking space, in addition to its business of renting office space.

[78] BTC argued that it had always been a standard industry practice in the office building lease market to charge a separate and additional rent for parking space. It argued that the fact that the building leases charged a separate amount for parking over and above the rent for the office space was irrelevant. The relevant factor was whether BTC carried on its business in the parking facilities. It referred to s. 4(1) of the Bylaws as the "liability-creating" section, which states that every person "who operates a Business in Premises within the City shall be assessed..." for business tax. It argued that this contemplates a tax on the space in which the business operates and that BTC did not operate its business in the physical parking spaces, but rather in the offices from which it managed its business. It argued that, in its previous decisions upholding business tax assessments on parking facilities or spaces, the MGB had misdirected itself by failing to address this initial question. It had rather jumped straight to the issue of whether the parking facilities were occupied or used for the purpose of or in connection with the business. It argued that if that was the test, a business tax would apply to all types of space such as vacant space and storage space. The City was not assessing these spaces. The issue was not whether the parking owners/landlords required the space for their businesses but whether they operated their businesses in the space. BTC argued that because the MGB had misdirected itself, it had upheld assessments of business tax on parking facilities, although the parking owners and operators did not operate their businesses in those facilities. If a business does not operate its business in the premises, it is not necessary to take the next step and determine whether the premises are "occupied or used for the purpose of or in connection with a Business."

[79] BTC argued that owners/landlords of office buildings are in the business of renting space, and that the tenants of those office buildings are engaged in the businesses carried on in their

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respective office spaces. It submitted that, as a result, neither the owners/landlords nor the tenants of the office buildings operated their businesses in the parking facilities. It argued, in the alternative, that if anyone was operating a business in the parking facilities, it was the tenants.

(ii) Law and Prior MGB Decisions

[80] Section 372(1) of the MGA states that a business tax bylaw authorizes the City to impose a tax in respect of all "businesses operating in the municipality". Section 4 of the Bylaws requires every person operating a "...Business in Premises within the City" to be assessed for the purpose of imposing a business tax.

[81] In *Bryce, Kipp & Co., Agent for Campeau Corporation v. Calgary (City of)* (23 January 1987), AAAB Order 05/87, the Alberta Assessment Appeal Board (AAAB) allowed the owner's appeal of the 1986 business tax assessed against parking spaces associated with a commercial office building owned by it and rented to tenants of the office space in the building. The AAAB found that the owner was in the business of developing and operating office buildings, rather than the parking business. It also found that the owner did not occupy the parking spaces and did not carry on a business in the parking spaces. The parking spaces were rented to the building tenants, and the AAAB found that this would lead one to believe that the tenants occupied the spaces.

[82] BTC argued that the AAAB's decision in *Bryce/Campeau* was based on the finding that the office tenants occupied the parking stalls, and not on the fact that the lease payments covered both the office and parking space. BTC referred to a passage in *Bryce/Campeau* noting that the tenants paid for parking separate from and in addition to the rent paid for the office space. Based on BTC's interpretation of *Bryce/Campeau*, the fact that BTC's lessees paid for parking space in addition to and separate from the office space had no bearing on whether or not BTC was operating a parking business in the subject parking facilities. The relevant fact in *Bryce/Campeau* was the AAAB's finding that the tenants occupied both the office space and parking space and therefore, that if anyone was assessable for business tax on the parking space, it was the tenants. BTC argued that the City and the MGB had subsequently misinterpreted the findings in *Bryce/Campeau*. This was evident from the City's position, in *Tonko*, that it was not its practice to assess owners/landlords of office buildings on parking space, because the rent for parking was captured in the NARV of the office space. This was obviously wrong, as the industry practice was to charge tenants a separate amount for parking over and above the amount charged for office space.

[83] The City agreed that the AAAB had decided in *Bryce/Campeau* that the owner of the building was not assessable for parking space in the building because it did not operate a business in the parking facilities. However, it submitted that the case did not turn on whether or not there was a separate and additional charge for parking. It argued that the parking rental market had changed since 1986. In 2005 and 2006, when the subject assessments were made, the City had more information, gathered partly from the Assessment Request for Information (ARFI) forms provided to the City by property owners, that led the City to the conclusion that the

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owners/landlords of parking facilities in office buildings operated parking rental businesses separate from their office rental businesses. This was not only based on the fact that the owners/landlords charged a separate fee for parking but also on the fact that they occupied and used the parking for their parking businesses.

[84] As noted earlier, the MGB began assessing owners/landlords of office buildings for business tax on the parking facilities in their buildings as a result of the MGB's decision in *Tonko*. In *Tonko*, various parking facility operators, such as Impark, successfully challenged 2002 business tax assessments on parking facilities owned or operated by them on the basis that a number of competing businesses were not being assessed business taxes on their parking facilities. The competing businesses referred to were principally owners/landlords of parking facilities associated with office buildings. There was evidence that the City assessed only the parking space in those buildings that was allocated to public parkers, but not that allocated to building tenants. The City submitted that the owners/landlords were not assessed for tenant parking space because it was assumed that the rent paid by the tenants for office space included rent for the tenants' associated parking space. As a result, it was the City's view that the assessment for the parking space was included in the assessment for the office space. The MGB found that the parking operators/owners had led sufficient contradictory evidence to show that parking space was not included within the office space rental values. Rather, it was often the practice to charge additional rent to tenants for parking. Since the City had not varied the NARV applied to premises where rent for parking space was charged for separately from rent for office space, the MGB found a systemic inequity in the application of the business tax bylaw. The MGB distinguished *Bryce/Campeau* on the basis that when it was decided, it was customary to include a charge for parking in the rent for the office space.

[85] Subsequent to *Tonko*, the City began to assess certain property owners, including office building owners, for business tax on their associated parking facilities, and those owners launched a succession of appeals. In many cases, the MGB upheld the business tax assessments. One of the grounds upon which the MGB upheld these assessments was that market conditions had changed. It was no longer a standard practice to include rent for parking space in the rent for office space. The market for parking space was now generally separate from the market for office space. If property owners charged separately for parking, they were operating separate parking businesses in their parking facilities and were to be assessed separate business taxes on those facilities: see, for example, *BTC v. Calgary (City of)*, MGB Order 116/03; *Fortune Properties Holdings Ltd. v. Calgary (City of)*, MGB 055/05; *Various Owners, represented by Derbyshire Viceroy Consultants Ltd. v. Calgary (City of)*, MGB Order 124/05; *Queen Creek Land Co. Ltd. v. Calgary (City of)*, MGB 007/06; *Various Owners represented by Deloitte & Touche LLP Property Tax Services v. Calgary (City of)*, MGB Order 064/07.

(iii) Evidence

[86] It is not in dispute that approximately 58 individual leases were in effect at all material times in the three buildings. Nor is it in dispute that BTC submitted only six of those leases in evidence to the MGB and that three of those were incomplete. Under the leases, the building

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tenants were charged a separate and additional charge for parking, over and above that charged for office space.

[87] The MGB heard evidence from BTC's witnesses, Mr. Kerslake and Mr. Fairgrieve-Park. Mr. Kerslake represented the Altus Group, the company representing BTC on the appeal. Mr. Kerslake's testimony was that he had been involved in commercial real estate in Alberta for over 30 years, and that he was an accredited appraiser with the Appraisal Institute, AACI, and had done extensive commercial real estate valuation work in Alberta and specifically in Calgary. Mr. Fairgrieve-Park was an experienced property manager in the office leasing market in Calgary and elsewhere and the senior vice-president of operations for BTC responsible for property operations and property management.

[88] The MGB also heard evidence from the City's witness, Ms. Hess, the City's manager of business. Ms. Hess was previously the City's manager for commercial and multi-residential assessment and in that position was responsible for conducting the business assessments and property assessments for multi-residential and commercial properties from 2001 through 2005.

[89] Both of BTC's witnesses testified that although BP Centre and Energy Plaza had been built in the early 1980s, the City had never assessed the owners/landlords for the parking facilities until 2003. Mr. Kerslake testified that it was the City's practice to assess a parking owner/operator only on the parking space that was rented to the public on an hourly basis. In his experience, it was not the City's practice to assess parking owners/operators for space rented to building tenants. The reason, in his opinion, was that owners renting parking space to their tenants were not operating a parking business. Only where the owner/landlord was charging non-tenants for hourly parking was the owner/landlord assessable for parking. It was Mr. Kerslake's understanding that owners/landlords provided parking to their building tenants as part their space leasing businesses. The parking was therefore incidental to their space leasing business and was not a stand-alone parking business.

[90] The leases in evidence charged for parking in addition to office space. Mr. Kerslake's and Mr. Fairgrieve-Park's evidence was that it was always the practice of owners/landlords to charge separately for parking and that this continued to be the standard practice at all material times. It was therefore Mr. Kerslake's opinion that this factor did not affect whether an owner/landlord was assessable for business tax on the parking facilities.

[91] Ms. Hess testified that it was the practice in the 1980's and up until 2002 to include parking in the rent paid for the office space. However, Ms. Hess testified that subsequent to *Tonko*, the City updated its information on the circumstances under which office building parking was operated and this information revealed that office building owners/landlords were charging a separate and additional rent for their parking space, over and above that charged for their office space. This information was relied upon as a basis for the subsequent business tax assessments on office building owners/landlords.

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[92] It was Ms. Hess's evidence that the City also based its business tax assessments on information contained in the ARFIs sent out to all property owners in the City. Ms. Hess testified that the ARFIs submitted on the subject parking facilities did not indicate that the parking was occupied or used by the tenants.

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(iv) MGB's Decision

[93] The MGB found that BTC was in the business of leasing space but that it was not in the parking business. It stated that this conclusion was based on an examination of the provisions of the leases and other evidence provided by BTC.

[94] The MGB acknowledged that it had found in previous decisions that building owners/landlords were operating parking businesses separate from office lease businesses in the same premises, but distinguished those cases based on the differing terms of the leases or agreements governing the parking in those cases. It stated at p 14:

> With respect to the other provisions in the leases, the MGB recognizes that many arguments brought up by the Respondent, such as the fact that parking is charged separately from the office space, and the degree of control were accepted in previous orders; however, in this case the MGB finds that the other provisions in the leases are more indicative that the parking space being part and parcel of the agreement between the parties for office space. After examining the leases in their entirety, the MGB concludes that the parking is incidental, and is provided to complement the leasing of office space, rather than being operated as a secondary business.
> [Emphasis added]

[95] The other lease provisions considered significant were those giving the tenants the right to additional parking space, and in two cases, giving the tenants the first option on additional parking and tying the allotment of parking space to the square footage of the office space leased. The MGB also found that the access and maintenance provisions of the subject leases indicated that the parking was incidental to BTC's office leasing business and that the tenants were the end users and controlled access to the parking facilities. It stated at p. 14:

> ...When the access and maintenance provisions are examined, they indicate that while the landlord is responsible for the maintenance and upkeep, it is the tenant who is the end user, and who generally controls the general access to the parkade. These are all factors that indicate that the parking is incidental to the office lease.

[96] Although the MGB did not expressly state what other evidence it relied upon, it did state that "[i]n coming to this conclusion, the MGB placed weight on the fact that the parking agreements are solely with the tenants with no public access (other than visitor parking and parking for deliveries to the office space) ...": at p. 14. This evidence did not relate to various provisions of the leases provided by BTC but to the fact that the parking was in fact rented to and used exclusively by the tenants of the buildings. This was not the case in some of the previous

MGB decisions in which the owners of buildings were found to be operating a separate parking business: see *Tonko* and *BTC v. Calgary*, MGB Order 116/03.

[97] The MGB agreed with BTC that the leases in question incorporated the prior practice of encompassing both the office space and the parking facilities in one premises and that the parking was provided to complement the leasing of office space rather than being operated as a separate business. It stated at p 14:

> The MGB concludes from a careful examination of the leases for the subject office buildings and other evidence provided that the Appellant is not operating a parking business. Rather, the Appellant's business is that of leasing space, which encompasses space in both the office portion and the parking facility. The primary relationship between the tenants and the Appellant arises from the lease agreement for the office space. The MGB notes that is consistent with the previous practice of landlords, as noted in the Respondent's position above.
> [Emphasis added]

(v) Conclusion

[98] The MGB's conclusion that BTC was not operating a parking business in the subject parking facilities was consistent with a reasonable interpretation of the MGA and the Bylaws. The MGB recognized that the City only had the power to assess business tax on those operating a business in the parking facilities. It based its decision on the evidence before it, including an evaluation of the provisions of the leases presented to it and the testimony of expert practitioners in the office leasing market. It considered the fact that the leases governed both the office space and the parking space, obligated BTC to provide parking in proportion to the office space leased, and in two cases gave the tenant the first option of obtaining parking. The MGB also considered it significant that the tenants were, in fact, the sole occupiers or users of the parking. The MGB heard arguments from both parties as to the law and the facts over four days of hearings and can be taken to have considered those arguments. It would have been helpful if the MGB had more extensively referred to the specific lease provisions and other evidence that it relied upon, but the fact that it did not does not make the decision unreasonable. Based on the law, evidence and arguments made by the parties, it was reasonable for the MGB to conclude that the provision of parking was complementary to the lease of the office space and that BTC did not operate a separate parking business. It is also clear from its reasons how it came to that conclusion.

c. Decision that the parking facilities were not premises occupied or used by BTC for its business and that the tenants occupied and used the parking

(i) Position of Parties

[99] The Bylaws define "premises" as including "... any space occupied or used for the purpose of or in connection with a Business...".

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[100] This issue revolves around whether parking facilities or parking spaces in office buildings that are rented exclusively to the building tenants are occupied or used by the building owners/landlords or the building tenants.

[101] The City argued that both the tenants and BTC occupied and used the parking premises, which required the MGB to apply the paramount occupancy test in *Gottardo, infra,* to determine who was the proper person to be assessed for business tax purposes. It argued that while the office spaces were demised to the tenants, the parking spaces were shared. It submitted that the parking spaces were more in the nature of common areas to which the tenants had access. There was no expectation of privacy or exclusive possession of the parking spaces, as there was for the tenants' office space. The majority of the parking spaces were unreserved, and if reserved, could be moved by the owner/landlord. The majority of the parking spaces were also accessed by multiple tenants on a random basis.

[102] BTC argued that it did not "occupy or use" the parking facilities for the purpose of or in connection with its business because it did not operate a parking business and did not operate its business in the parking facilities. It also argued that the tenants had exclusive use of the parking, and as a result, it was not necessary to apply the tests articulated in *Gottardo* to determine who had paramount occupancy. It argued that the paramount occupancy test need only be applied where more than one business occupies or uses the premises for their business. As a result, the issue of who had paramount occupancy of the parking premises did not arise. Only the tenants occupied or used the parking facilities.

[103] BTC argued that many of the MGB's previous decisions finding that owners/landlords or parking operators were operating parking businesses in parking facilities could be distinguished on the basis that in those cases all or part of the parking was rented to the public. In this case, BTC rented the parking space exclusively to those renting its office space. Further, in this case, one lease covered both the office space and the parking space and obligated BTC to allocate parking to its office tenants. Former decisions did not deal with the specific facts in this case.

(ii) Law and MGB Orders

[104] Where two or more parties have access to space, "occupancy" is established for municipal tax purposes, by determining who has paramount occupancy of the space.

[105] In *Qu'Appelle Developments Ltd. v. Regina (City)* (1989), 77 Sask. R. 20, 20, [1989] S.J. No. 386 (C.A.), the issue was whether the lessee of parking space or the parkade owner/operator "occupied" the parking facilities and was thus assessable for business tax. The term "occupied" was not defined, as it is in the subject Bylaws, to include premises "used for the purpose of or in connection with a business" however, the Court gave the term an expansive interpretation. It ruled that the term "occupy" was not confined to physical occupancy but extended also to the exercise of power over as well as control and or use of property.

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[106] BTC distinguished *Qu'Appelle* on a number of grounds, including the fact that the parking was rented to individuals who worked in nearby buildings as well as to other persons, rather than to business tenants of the building associated with the parking. They were rented on a first-come-first-served basis. It was argued that in contrast, the leases governing the subject parking facilities granted exclusive occupancy and use of the parking stalls to the business tenants in the building.

[107] The test to determine who has "occupancy" of premises for municipal tax purposes was further refined in *Gottardo Properties (Dome) Inc. v. Toronto (City)*, 111 O.A.C. 272, 162 D.L.R. (4th) 574 as the person with paramount occupancy, at para 40:

> The principle of paramount occupancy holds that when two persons occupy or use the same land at the same time assessability depends on who has the paramount occupancy or use of the land for its business.

[108] In *Gottardo*, the Ontario Court of Appeal applied a three-part test to determine whether the owner or licensee of stadium boxes used to entertain business clients had paramount occupancy of the boxes. The first consideration, although not a determining factor, was who had the greater physical presence in the premises. The Court found that the physical presence of the licensee of the stadium boxes was transitory. The second consideration was what controls were imposed by one occupant over the other's use of the premises and what was the purpose and effect of those controls. In *Gottardo*, the court noted that it is expected that the owner will retain some measure of control, such as the right of access and other restrictions normally attached to a licence. The third consideration was the relative significance of the activities carried out on the premises to the primary business of each of the competing occupants.

[109] BTC distinguished *Gottardo* on its facts. Those renting the stadium boxes used the boxes to entertain clients of their businesses. BTC submitted that a key factor in the court's conclusion that the owner/landlord had paramount occupancy of the boxes was that it continued to operate a food and beverage service in the boxes while they were rented. BTC submitted that the ongoing business being conducted in the boxes by the owner/landlord was the critical fact that compelled the Court to take the analysis further than deciding who occupied the premises, to deciding who had paramount occupancy. BTC argued that unlike the owner/landlord in *Gottardo*, BTC had no ongoing business interest in the subject parking facilities. The subject leases gave exclusive occupation and use of the parking to the tenants. The primary purpose of the parking was for the use of the tenants, while it was incidental to BTC's business. Further, and most importantly, BTC argued that the *Gottardo* test was only applicable where two or more businesses occupied or used a space for their businesses. If BTC did not operate a parking business and did not operate its business in the subject parking facilities, and if the parking was exclusively occupied and used by the office tenants, there was no need to apply the paramount occupancy test.

[110] BTC argued that the present case was similar to *Bryce/Campeau*. There, the AAAB concluded that the owner/operator of an office building did not operate a parking business but was in the business of leasing space, that the tenants of the office space occupied and used the

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parking space, and that if anyone was assessable for business tax on the parking space, it would appear to be the tenants.

[111] The City argued that the MGB was required and had failed to apply the *Gottardo* test and that applying the test, the parking premises were occupied or used for the purpose of or in connection with BTC's business. It argued that the parkers in the subject parking facilities, who were mostly employees of the tenants, had a transitory physical presence in the facilities, but neither BTC nor the tenants had a physical presence. It argued that the leases gave BTC significant control by giving it the right to impose rules regarding entry and exit machinery, to control access hours, to restrict use, to move the reserved parking stalls and to require the tenants to provide it with lists of parkers or vehicles using the facilities. It argued that the collection of rent in exchange for access to the facilities was integral to BTC's parking business. It submitted that the leases provided by BTC were additional evidence that BTC was the proper assessed person for business tax purposes. The leases charged the tenants separately for the parking space and the office space, did not include parking in the definition of the leased premises and showed the significant control that BTC exercised over the parking facilities.

[112] The City argued that the MGB has repeatedly applied *Qu'Appelle* and *Gottardo* to determine which of two or more persons "occupy or use" parking facilities for their business and are thereby assessable for business tax, and that it should continue to apply the principles in those cases.

[113] In *Tonko*, the MGB relied on *Qu'Appelle* to support its conclusion that the office building owners/landlords were in the parking business and occupied or used the parking facilities for their businesses.

[114] In *BTC Properties II Ltd. v. Calgary*, MGB Order 116/03, the MGB granted Impark's appeal of 2002 business tax assessments on a parkade managed by it, but owned by BTC. Impark operated the parkade under a management agreement rather than a lease. All parties agreed that a business was being operated in the parkade. The main issue was who had paramount occupancy of the parkade for their business operations - the commercial tenants renting space in the parkade, Impark (the parkade operator) or BTC (the parkade owner). The MGB found that the tenants were not the paramount occupants of the premises. It based its decision on the fact that the "use of the parking stalls by the tenants is transient and temporary in nature, as the use of the stalls is random and without specific assignment, nor of unrestricted use/access.": at p. 19. The lessees' occupation was distinguished from lessees who had exclusive possession of leased premises. Here, both Impark and BTC could access the entire parkade at any time whether or not there were vehicles parked there. The MGB found that the facts were very similar to those in *Qu'Appelle* and placed considerable weight on that decision. The MGB found that the principles in *Gottardo* also supported its decision.

[115] The final issue was whether BTC or Impark was the paramount occupant of the parking facilities. Based on a review of the management agreement between Impark and BTC, the MGB found that BTC had paramount occupancy. The level of control exercised by Impark was limited

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to managing the parkade. While Impark had day-to-day control over the parkade, its management was subject, "at all times, to the satisfaction and final approval of [BTC] with respect to car parking and operating policies." BTC had ultimate control over the most significant aspects of the arrangement including the hours of operation, the approval of parking fees, responsibility for operating and capital costs, the right to review policies and the right to terminate the management agreement with Impark. Although Impark could restrict access, it was only because it was given that power by BTC under the management agreement. The fact that Impark received a percentage of the revenue after it reached a certain point was characterized by the MGB as compensation for the added services required to manage the parkade when the number of parkers increased.

[116] In *Various Owners, Deloitte & Touche LLP Property Tax Services v. Calgary,* MGB Order 124/05, various property owners, including BTC, again appealed 2004 business tax assessments on parking space owned by them. The parking space was associated with the owners' respective office buildings and leased to commercial tenants of its buildings. There was no dispute that the property owners were operating a business and that the definition of "premises" was broad enough to include parking spaces occupied or used for the purpose of or in connection with a business. The issue was whether the parking spaces were occupied or used for the purpose of or in connection with the property owners' businesses or the tenants' businesses: at p. 4.

[117] The MGB examined the tenant leases entered as evidence. It noted that one lease used the words "for the exclusive use of the Lessee" but could not find that the owners had given the tenants exclusive occupation or demised the parking to the tenants, because it had been given only two pages of the lease. It conceded that "there may be leases that are exceptions to the finding that property owners have paramount occupancy." It noted that the office space and the parking space were dealt with separately in the lease. It noted that the rent charged for parking was additional to the rent charged for the office space.

[118] The MGB applied the *Qu'Appelle* and the *Gottardo* tests to determine who had paramount occupancy and use of the of the parking facilities. First, the tenants' physical occupancy of the parking stalls was transitory in nature. Second, the owners exercised greater control over the parking premises. The leases gave the owners the right to limit access, move parkers from stall to stall, terminate the parking leases separately from the office leases, determine hours of access for unreserved stalls, and close the parkade for purposes of maintenance and access at all times. This was greater control than that exercised over the tenant office space. The MGB found at p. 17:

> There is no indication that the property owners have demised the property to the tenants in the same way that they have demised the office space. The MGB found that the difference in respect to the level of control exerted by the property owners in the office leases versus the parking leases to be instructive. These factors lead the MGB to conclude that the property owners exert a greater level of control with respect to the parking space than the tenants.

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[119] Third, the parking space was more significant to the primary activities carried out on the premises by the owners. The MGB found that the use of the parking facilities by the tenants was incidental to their businesses as they had the option of making other arrangements for parking, and could use other forms of transportation, such as the transit system, which would reduce or eliminate the need for parking. Parking was not central to the operation of their businesses. It rejected, as it had done previously, the owners' argument that the parking space was only provided to comply with parking requirements prescribed under municipal land use bylaws (LUB). It affirmed that *Tonko* was based on the finding that the parking owners/operators were operating a parking business and not on the basis that lessees of parking have paramount occupancy.

[120] *In Various Owners represented by Derbyshire Viceroy Consultants Ltd. v. Calgary (City of)*, MGB Order 064/07, business tax assessments against various owners and operators of parking facilities were appealed. The operators either leased the parking from the property owners/landlords and rented it to parkers with the owners' permission or entered into management agreements with the property owners/landlords and rented the parking spaces to parkers on behalf of the property owners/landlords. The MGB concluded that the parking operators were operated parking businesses in the parking facilities, and were the proper parties to be assessed for business tax as they had paramount occupation and use of the parking facilities

(iii) Evidence

[121] In each of the three leases offered as representative leases for each of the buildings, the section dealing with the "demised premises" does not refer to parking. On the other hand, the three leases show that the tenant's right to parking space is tied to its right to office space and each lease governs both types of spaces. In two of the leases, the amount of parking allotted to each tenant increases or decreases in proportion to office space leased.

[122] There was evidence that the parking was provided for and used solely by the tenants of each of the buildings and that the owners/landlords had no kiosk or other presence in the parking area and did not control access to the parking. Only the office tenants had access to the parking facilities and the parking could only be accessed through the use of electronic key cards provided only to the tenants. BTC did not physically control access to the parkade through the use of parking kiosks or other means.

[123] It was Mr. Kerslake's opinion that where parking space in an office tower is committed to the tenants of the office space under the same lease, it has the effect of transferring occupation and use of both spaces to the tenants. It was Ms. Hess's opinion that the leases in question were confined to granting the lessees the ability to have parking and to pay separately for it but did not grant the same rights as those granted to the demised office space.

[124] The MGB heard evidence that the three leases provided to the MGB by BTC were typical of those in all of the office buildings. BTC's witnesses testified that each lease corresponded to leases in the building governed by the lease and was typical of leases for that building.

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[125] Neither the City's written submissions nor its oral submissions to the MGB raised the issue of the sufficiency of the leases provided by BTC. The City raised no issue as to the sufficiency of the number of leases provided or that the leases were not typical of the leases in each building. The City did not ask the MGB to compel BTC to provide further leases, as it was entitled to do under s. 497 of the MGA.

[126] The MGB also heard evidence that the parking was used exclusively by the tenants and was committed to the use of the tenants. Although the leases did not expressly prohibit BTC from renting the parking space to the public or to businesses other than the tenants, in practice it could not and would not do so specifically because the leases committed the parking to its tenants and because there was always a shortage of parking in comparison to the demand for parking by the tenants.

(iv) MGB's decision

[127] The MGB's reasons refer to the sample leases governing the buildings, which were provided by BTC and said to be typical of those in force in each of the buildings. It found that the provisions of these leases were evidence that the parking was occupied and used by the tenants. The MGB referred to BTC's position that the leases gave the tenants the right to use and occupy the parking stalls, determine who could use the stalls and for what periods, and increase or decrease the number of parking stalls subject to availability. It referred to BTC's position that the leases stipulated that the amount of parking space allocated to a tenant was tied to the amount of office space leased; that it was the tenant's responsibility to ensure that users of the parking facilities did so safely; and that it was the tenant's obligation to indemnify and save BTC harmless against all liabilities, actions, costs and expenses incurred by BTC for expenses arising from the use of the parking facilities: at p. 3 of the Impugned Order. Although it did not refer to the specific provisions of the leases granting these rights, the leases do contain such provisions. The City argues that the MGB only referred to BTC's position on these issues and not the evidence. This evidence was clearly before the MGB and it can be assumed that it not only considered BTC's position but the actual evidence before it.

[128] The MGB distinguished its decision in *Altus v. Calgary (City of)*, MGB 016/06, affirming the 2004 business tax assessment of BTC for the subject parking facilities, on the basis that there was insufficient evidence to support the appeal in that case.

[129] The MGB also distinguished its decision in *Various owners, represented by Derbyshire Viceroy Consultants Ltd. v. Calgary (City)*, MGB 124/05 in which it affirmed the assessment against the owners/landlords rather than the tenants of the parking space. It stated that in that case, the parties had agreed that the owners/landlords were operating a parking business. It is not clear from the decision that this was the case. However, the MGB also based its decision on the finding that there was insufficient evidence before it, based on only two pages of a specific lease, to determine that the tenant had been given exclusive control and occupancy of the parking: at pp. 17 - 18.

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[130] In the Impugned Order, the MGB stated that its finding that there was no parking business did not mean that there was no business at all being operated from the parking facilities. There was no dispute that BTC was in the business of renting property and that the tenants of the buildings were also operating businesses. The MGB stated, but did not conclude, that based on the wording of the Bylaws, the parking facilities appeared to be part of the tenants' premises. It stated at p. 15:

> The wording of the bylaws appears to capture the parking facilities in the tenants' premises, since (1) the tenants use and occupy the space, and (2) the leases demise space to the tenants for the purpose of their businesses, and the spaces demised include both the office space and parking space. While the leases do differentiate between these spaces, an examination of these provisions indicates that the differences relate to the nature of the spaces themselves. For example, the office spaces have different use and occupancy considerations such as fixturing periods, tenant improvements and custodial standards that need to be considered in the lease separately from the considerations such as communal parking and the use and occupancy provisions related thereto. Accordingly, having two separate leases, tied to each other, is understandable.

[131] The MGB stated that the above considerations inclined it to the view that the City could have assessed the tenants for business tax on the parking facilities if their businesses "used the parking facilities as part of the premises from which they carried on their businesses.": at p. 15.

[132] Finally, the MGB expressly stated that it was not necessary in these circumstances to apply the control tests set out in *Qu'Appelle* and *Gottardo*. This was based on its finding that BTC did not operate a parking business in the subject parking facilities and did not occupy or use the parking facilities for the purpose of or in connection with its business of renting property. As a result, there was no issue of who had paramount occupancy of the facilities.

(v) Conclusion

[133] The MGB's conclusion that the parking facilities were not occupied or used for the purpose of or in connection with BTC's space leasing business, was reasonable based on the legislation, the law and the arguments made by the parties. Central to its conclusion was its finding that the building tenants were, in fact, the exclusive users of the parking facilities. The public was not granted access. As a result, although the leases did not prohibit BTC from renting the parking to the public or other third parties, in practice, it did not do so as the parking was committed to its tenants. The MGB also considered the fact that the leases covered both the office space and the parking space. The MGB's conclusion was reasonable and the MGB's reasons show the path from its reasons to its conclusion.

d. Decision as to whether BTC's business tax assessment was correct, equitable and fair

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[134] The MGB has the authority to determine if the business tax bylaw is applied correctly, fairly and equitably. Section 499(2) of the MGA states that the MGB "must not alter any assessment that is fair and equitable, taking into consideration assessments of similar property in the same municipality...". Given the MGB's conclusion that BTC did not operate a parking business and did not occupy or use the parking facilities as premises for its business, it was reasonable for the MGB to conclude that it was not necessary to decide whether the assessment was correct, equitable and fair.

e. Decision on issue of exemption under the MTA

[135] The MGB decided that it was unnecessary to decide BTC's claim for an exemption under the Bylaws stemming from the non-taxable status of parking facilities under the MTA, having concluded that BTC was not operating a parking business in the subject parking facilities: Impugned Order at p. 15. If there was no business being operated, there was no need to decide if such a business would have been exempt under the MTA. This was a reasonable conclusion.

f. Decision to reduce the business tax assessment to "nil"

[136] The MGA gives the City the power to assess business tax. An assessment must be paid by the party operating the business in premises within the City of Calgary. In this case, the MGB found that BTC was not operating a parking business, was not operating a business in the subject parking facilities, and did not occupy or use those premises for the purpose of or in connection with its business. It was entitled and required to make this determination under the MGA. This is not the equivalent of granting an exemption from tax. Exemption from tax was not an issue before the MGB in the subject proceedings. I agree with the MGB's submission that to characterize the MGB's decision as the grant of an exemption would be to negate the requirements of a judicial review analysis and sidestep the application of the appropriate standard of review.

[137] Further, the MGB did not decide that the tenants were assessable for business tax although they were not represented at the ARB or MGB hearings, as the City argues. Rather, the MGB recognized that it could have added the tenants as assessed persons on the assessment roll but rightly concluded, as it had done in *BTC v. Calgary*, MGB Order 116/03, that this should only occur if the party being added has had a reasonable opportunity to become involved in the proceedings. In that case, BTC and Impark were represented and involved in the proceedings, thus no unfairness to BTC resulted. The tenants in the office buildings in issue in the Impugned Order were not represented at the ARB or MGB hearings. There was no determination regarding the assessability of the tenants for business tax and thus no breach of procedural fairness in this regard. The MGB reasonably found that it would have been unfair to add the tenants to the assessment roll in the circumstances.

g. Decision on disclosure of settlements

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[138] At the MGB hearing, as a preliminary matter, BTC requested disclosure of information contained in settlement agreements reached in 2007 between the City and other appellants who had been assessed business tax on parking facilities. After the MGB had received written submissions from both parties and subsequent to the hearing, Imperial Parking requested that it be granted intervener status on the disclosure issue. In light of its decision and reasons, the MGB found it unnecessary to order disclosure of the settlement agreements. As a result, it also found it unnecessary for it to decide the issue of Imperial Parking's right to intervener status. This was a reasonable decision.

2. Application of standard of review to procedural fairness issues

[139] To summarize, the main issue with regard to the City's allegations regarding procedural fairness is that the MGB's reasons are so deficient as to constitute an error of law. If there is a legal obligation to give reasons, there can be no deference granted to the MGB's decision not to give reasons.

[140] The City also argued that it was procedurally unfair for the MGB to decide in the tenants' absence that they were assessable for business tax. As explained earlier, the MGB did not decide that the tenants were assessable. It is therefore not necessary to address this issue in terms of procedural fairness.

[141] Whether or not the judicial review of the adequacy of the reasons is assessed separately from the judicial review of the reasonableness or correctness of the substantive reasons under *Dunsmuir*, the adequacy of the MGB's reasons must be evaluated from a functional perspective.

a. Functional approach to review of adequacy of reasons

[142] The principles for assessing the adequacy of reasons was set out in *R. v. R.E.M.,* 2008 SCC 51, [2008] 3 S.C.R. 3 at paras. 16 to 30. The reasons are to be read as a whole. The reasons must reveal why an issue was decided but do not have to explain how it was decided. In other words, the decision maker is not required to explain every step and finding made in the process of arriving at its conclusions. There is no requirement to explain the findings on each piece of evidence as long as the evidential findings are logically linked to the decision. It is only necessary that the "path" that was taken is clear. Inferences can be drawn from the record. The Court concluded at para 35:

> In summary the cases confirm:
>
> > (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524.)

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> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

[143] Reasons serve three main functions: to explain the decision to the parties, to provide public accountability and to permit effective appellate review: *R. v. R.E.M.* at para. 11. Reasons will be adequate if they satisfy these functions: *R. v. R.E.M.*, at para. 25.

[144] *R. v R.E.M.* was a criminal law case however, in *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193, 99 O.R. (3d) 1, the Ontario Court of Appeal confirmed that the adequacy of reasons of administrative tribunals is also determined by assessing whether they satisfy these three functions. The Court stated at paras. 60 - 62:

> ....it is important that the Law Society explain its discipline decisions to complainants and members of the public at large in a way which renders those decisions comprehensible and transparent. A Hearing Panel can achieve those ends only through the reasons it gives...
>
> Reasons for a decision serve several salutary purposes. Where there is a right of appeal from that decision, reasons must provide a sufficient window into the decision to allow a meaningful appellate review to the extent contemplated by the permitted scope of the appeal. Reasons for a decision that describe both *what* is decided and *why* that decision was made are susceptible to effective appellate review. Whatever other shortcomings may exist in reasons that adequately explain the "what" and the "why", those shortcomings will not render the reasons so inadequate as to justify appellate intervention on that basis: *R. v. Sheppard*, [2002] 1 S.C.R. 869, at paras. 25-26; *R. v. Braich*, [2002] 1 S.C.R. 903, at para. 31; *R. v. R.E.M.*, [2008] 3 S.C.R. 3, at paras. 15 - 18, 52 - 53.
>
> A determination of whether reasons fulfill their purpose and admit of effective appellate review can only be made by examining those reasons in the context of the proceedings that gave rise to the reasons. Context includes the nature of the issues raised before the tribunal, the evidence adduced and the submissions made...
> [Emphasis added]

[145] Similar principles have been adopted in a number of Alberta decisions: see *Keephills Aggregate Co. Ltd. v. Parkland (County of) Subdivision and Appeal Board*, 2003 ABCA 242, 348 A.R. 4 at paras. 19 - 24; *Strathcona (County) v. Allan*, 2006 ABCA 129, 394 A.R. 290 at paras.

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19 and 23; and *Sawatzky v. Alberta (Universities Academic Pension Plan Board)* (1992), 9 Admin. L.R. (2d) 109, [1992] A.J. No. 965.

[146] The above passage from *Neinstein* also explains how a court assesses whether reasons satisfy their three functions. Reasons explain the decision to the parties and make the decision maker publicly accountable by being sufficiently comprehensible and transparent to explain "what" was decided and "why". Reasons permit effective appellate review if they are adequately based upon the issues, the evidence and the submissions before the decision maker.

[147] Reasons are inadequate if there is a total lack of evidence on the essential points to support them. In *Cuff v. Edmonton School District No. 7*, 2009 ABCA 6, [2009] A. J. No. 5, the the Alberta Court of Appeal stated at para. 8 that "lack or absence of evidence to support a particular conclusion warrants judicial intervention regardless of whether the correctness or reasonableness standard of review applies." Reasons are also inadequate, even if there is some evidence on the essential points supporting them, if that evidence is counter to the overwhelming evidence to the contrary: *Mountain Creeks Ranch Inc. v. Yellowhead (County of) Subdivision and Development Appeal Board*, 2004 ABCA 177, [2004] A.J. No. 561at paras. 14 - 15. In both cases, the inadequacy of the reasons results in a jurisdictional error. This should not be taken as putting a positive duty on a decision maker to expressly indicate all relevant considerations that have been taken into account, particularly those that are not problematic: *Strathcona v. Allan,* at para. 19.

[148] The City's argument that the MGB's decision is procedurally unfair is based on two main deficiencies that, either individually or cumulatively, are said to result in the reasons being inadequate: deficiencies in its findings of fact; and deficiencies in its application of the law.

b. Adequacy of the reasons based on MGB's findings of fact

[149] The City alleges that the MGB's findings of fact are insupportable based on the evidence because its fact-finding is based on non-existent evidence, on insufficient evidence and on specific evidence which was contrary to the overwhelming contradictory evidence.

[150] The City submits that there was insufficient evidence, based on the six leases (out of a possible 58), entered as evidence, to make conclusions as to the terms on which parking was provided to all the tenants of the buildings. This issue was not raised at the MGB hearing. The City had the opportunity to request additional leases, or question the sufficiency of the leases, but it did not do so. There was unchallenged and uncontradicted evidence that each of the three leases provided by BTC as evidence was with a major tenant of each of the buildings and was typical of leases in each of those buildings. The MGB's decision is based on this evidence and the leases are sufficient in number and completeness to support its decision. The reasons state that the decision is based on the leases put in evidence and explain that this is one of the reasons why the MGB came to the conclusions it did.

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[151] The City submits that the lease provisions not only do not support the MGB's findings of fact but are, for the most part, contrary to its findings. It argues that although the MGB referred to the leases, it failed to indicate which provisions it was relying upon. The MGB referred to provisions in the leases giving the tenants the right to additional parking space, and in two cases, giving the tenants the first option on additional parking and tying the allotment of parking space to the square footage of the office space leased. The MGB also found that the tenants controlled access to the parking and in fact occupied and used the space to the exclusion of all others. The MGB was not required to refer to all of the evidence that supported its decision, but only to relevant evidence essential to its decision.

[152] The City spent some time arguing that the leases gave BTC exclusive control and management of the parking. However, the MGB's reasons state that it did not have to determine who had exclusive control but rather, whether the parking was occupied or used by the tenants or BTC. The tenants were the only ones who had access to and used the parking. The MGB's reasons adequately explain what facts it relied upon in coming to its conclusion that the parking was not occupied or used by BTC in operating its business. This evidence was not counter to the overwhelming evidence to the contrary.

[153] The City submits that although the MGB stated that its findings of fact were based on "other evidence" it did not identify that evidence and there was no other evidence supporting its findings of fact. The Impugned Order states at p. 14:

> The MGB concludes from a careful examination of the leases for the subject office buildings and the other evidence provided that the Appellant is not operating a parking business.
> [Emphasis added]

The above passage clearly indicates that the MGB relied upon the provisions of the leases provided to it. The nine volumes of the Return also contain considerable "other evidence" on which the MGB could base its decision. Although it would have been convenient if the MGB had identified the "other evidence" it considered, its failure to do so does not deprive the parties of an explanation, the public of accountability or the court the opportunity of effective judicial review. The reasons show how the MGB interpreted the MGA and Bylaws, determined the facts that were applicable to its interpretation and applied those facts to the law. Its reasons were adequate given the issues, evidence and arguments which were before it.

c. Adequacy of reasons based on the law

[154] The City attacks the MGB's decision on grounds that it is not based on the applicable and established law and a proper application of the facts and evidence to that law. It contends that it had a legitimate expectation that BTC was assessable for business tax on the subject parking facilities based on nearly ten years of the MGB's previous decisions relative to the same or a similar fact pattern. It submits that in these previous decisions, the MGB had unequivocally determined that there was a business being conducted in parking facilities rented to tenants or

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third parties and that the parking operators or owners/landlords were operating their businesses in those facilities.

[155] The legitimate expectations of the City do not give rise to a right to a particular substantive result or determination by the MGB, but rather enhanced procedural rights: *Moreau-Bérubé*, *Baker*. The City's contention that it had a legitimate expectation of a substantive result is therefore not well founded. The City does not take issue with its right to make representations or be consulted by the MGB. Instead, the City contends that the MGB's reasons departed from a long line of authority. The result of the MGB's decision is more properly considered in the standard of review analysis of the MGB's substantive reasons, rather than in a procedural fairness analysis: *Clifford*.

[156] The jurisdiction of the MGB to decide the issues before it is distinct from the functional adequacy of its reasons and decision. Although *Cuff* and *Mountain Creeks Ranch* are authority for the proposition that an unreasonable finding results in a jurisdictional error, *Cuff* required a complete lack of evidence and *Mountain Creeks Ranch* required that factual determinations be either unsubstantiated or alternatively, contrary to the vast wealth of relevant evidence, in order to find a jurisdictional error.

[157] In *Dunsmuir*, the Supreme Court of Canada cautioned against an unduly broad view of jurisdictional questions, at para. 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.

d. Conclusion

[158] I find that the reasons of the MGB were sufficient to satisfy procedural fairness requirements. This is not a situation where there is a total lack of evidence supporting the MGB's decision or where the essential facts relied upon by the MGB were contrary to the majority of the evidence.

[159] The MGB defined the issues as whether the subject parking facilities were "premises" under the MGB and the Bylaws, whether BTC was operating a business, and whether it was operating its business in the subject premises. It had the jurisdiction and obligation to make these

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determinations. Its reasons explain why it came to the conclusion that BTC did not operate a business in the parking facilities. They are sufficient to explain to the parties why it came to that conclusion and to satisfy the need for public accountability. The reasons are based upon the issues, the evidence and the submissions presented to the MGB and are thus adequate for purposes of conducting an effective judicial review.

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3. Onus/burden of proof

[160] One of the arguments made by the City, expressly or by implication, is that BTC has not satisfied its onus of proof. For example, the City argues that it is not possible to determine, from only six out of 58 leases, the significant factors bearing on the issue of who occupies or uses the parking spaces in the subject parking facilities in the buildings.

[161] The onus on the parties on an appeal of a tax assessment to the MGB was summarized by the MGB in *Imperial Parking, represented by Deloitte & Touche LLP Property Tax Services v. Calgary (City)*, MGB Order 140/02 as follows at p. 10:

> ...The ultimate burden of proof or onus rests on the Appellant, at an assessment appeal, to convince the MGB their arguments, facts and evidence are more credible than that of the Respondent. However, if the Applicant leads sufficient evidence at the outset to establish a prima facie case, the evidentiary onus shifts to the Respondent. In order to establish a prima facie case, the Appellant must convince the MGB panel that there is merit to the appeal.
>
> The Appellant must establish that it is more probable than not that the assessed value is incorrect or inequitable. Once the evidentiary onus shift occurs, then the validity of the assessment is in question. In order to rebut the Appellants prima facie case, and in order to raise a legitimate inference that the assessment is correct, the Respondent must lead evidence to counter the Appellant's evidence. At the end of the hearing, the MGB considers all the evidence presented and determines which party has established their case on a preponderance of evidence. In theory this means the party with the strongest case should succeed.

In that case, Impark appealed 2002 business tax assessments on various properties operated by it. As the whole of Impark's appeal was based on six hypothetical scenarios unsupported by any substantive factual information, the MGB found that a reasonable person could not conclude that there might be a problem of equity with the assessments and that Impark had therefore failed to meet its onus of proof and the assessment must stand.

[162] In *BTC Properties II Ltd., represented by Derbyshire Viceroy Consultants Ltd. And MacLeod Dixon v. Calgary (City)*, MGB Order 116/03, the MGB found that although Impark and BTC were able to raise some questions as to the correctness and equity of the assessment, there was a considerable lack of evidence to prove their case and that "making broad statements

in narrative form, without any supporting documentation, is simply insufficient to meet the onus": at p. 24.

[163] In *Tonko*, the MGB found that the appellants had provided sufficient evidence that the 2002 office leasing market was substantially different from the 1986 market and that the City had failed to demonstrate that parking space rent was usually included in office space rent. The parking operators had provided evidence to shift the onus of proof to the City. The MGB found that the City had failed to show that the business tax assessments were equitably and fairly applied because they had failed to provide substantive evidence to support their assumption that rent for parking space was included in the rent for the office space: at p. 35.

[164] BTC had the initial onus of proving its case to the MGB, which required it to provide sufficient evidence to establish its case.

[165] As explained above, I find that BTC provided sufficient evidence to the MGB to satisfy the onus of proving that it was not the proper assessed person under the MGA and the Bylaws. It provided three complete leases and three incomplete leases. There was testimony from Mr. Kerslake and Mr. Fairgrieve-Park that each lease was representative of the leases in the building to which it applied. The City did not challenge or contradict this evidence at the MGB Hearing nor request that further leases be provided and it did not provide sufficient contradictory evidence to rebut BTC's *prima facie* case.

V. SUMMARY CONCLUSION

[166] The arguments of both parties, as evidenced in the MGB hearing transcripts, extensively canvassed the relevant issues, and the MGB clearly understood and grappled with those issues.

[167] It is implicit in the MGB's reasons for decision that it had regard to relevant business tax considerations. The MGB was required to consider three key factors: whether parking facilities were "premises" under the MGA and the Bylaws; whether BTC was operating a business in the parking facilities and whether BTC occupied or used the parking premises for the purpose of or in connection with its business. As the foregoing cases illustrate, these issues have been considered and decided before by both the MGB and the courts. Each decision is based on the interpretation of the applicable legislation and bylaws, the prior decisions of the courts and business tax appeal bodies, and the facts of each case. The MGB has not, as the City argues, found unequivocally that the owners/operators of parking facilities in office buildings operate parking businesses separate from their office leasing businesses and that they occupy or use the parking facilities for their businesses. Each case must be decided on its own facts.

[168] It should not be assumed that the MGB failed to have regard to the relevant law or evidence simply because its reasons do not specifically refer to such. The MGB is not obliged to expressly indicate that all relevant considerations have been taken into account. The Record before the MGB included a wealth of materials relating to the law and facts in issue. The MGB

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also heard extensive arguments from both parties on the law and the facts and the correct interpretation of the law in the context of the case before it.

[169] The MGB's reasons highlight the law and facts on which it relied in coming to its conclusions and logically link the evidence to the MGB's conclusions. Its findings were within a reasonable range of conclusions based on the law and the facts. As a result, the Impugned Order stands and the applications are hereby dismissed.

[170] The Consent Order granted March 2, 2010 that preceded this judicial review states that costs of the judicial review will be in the cause. If for any reason there are issues with respect to costs, the parties may speak to them within a reasonable period of time.

Heard on the 18th day of May, 2010.
Dated at the City of Calgary, Alberta this 19th day of November, 2010.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Susan Trylinski
for the Applicant

Gilbert J. Ludwig
for the Respondent BTC Properties II Ltd.

Andrew Sims, Q.C.
for the Respondent Municipal Government Board

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TAB 34

Muhsen Ahmed Ramadan Agraira *Appellant*

v.

Minister of Public Safety and Emergency Preparedness *Respondent*

and

British Columbia Civil Liberties Association, Ahmad Daud Maqsudi, Canadian Council for Refugees, Canadian Association of Refugee Lawyers, Canadian Arab Federation and Canadian Tamil Congress *Interveners*

Indexed as: Agraira *v.* Canada (Public Safety and Emergency Preparedness)

2013 SCC 36

File No.: 34258.

2012: October 18; 2013: June 20.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Ministerial decisions — Immigration — Citizen of Libya found to be inadmissible based on membership in terrorist organization — Application for ministerial relief denied — Appropriate standard of review to apply to Minister's decision — Whether, in light of this standard, Minister's decision is valid — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 34(2).

Administrative law — Natural justice — Doctrine of legitimate expectations — Citizen of Libya found to be inadmissible based on membership in terrorist organization — Application for ministerial relief denied — Whether there was failure to meet legitimate expectations — Whether there was failure to discharge duty of procedural fairness.

Muhsen Ahmed Ramadan Agraira *Appelant*

c.

Ministre de la Sécurité publique et de la Protection civile *Intimé*

et

Association des libertés civiles de la Colombie-Britannique, Ahmad Daud Maqsudi, Conseil canadien pour les réfugiés, Association canadienne des avocats et avocates en droit des réfugiés, Fédération canado-arabe et Congrès tamoul canadien *Intervenants*

Répertorié : Agraira *c.* Canada (Sécurité publique et Protection civile)

2013 CSC 36

N° du greffe : 34258.

2012 : 18 octobre; 2013 : 20 juin.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Norme de contrôle — Décisions ministérielles — Immigration — Citoyen de la Libye déclaré interdit de territoire en raison de son appartenance à une organisation terroriste — Demande de dispense ministérielle rejetée — Norme de contrôle applicable à la décision du ministre — La décision du ministre est-elle valide au regard de cette norme? — Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27, art. 34(2).

Droit administratif — Justice naturelle — Théorie des attentes légitimes — Citoyen de la Libye déclaré interdit de territoire en raison de son appartenance à une organisation terroriste — Demande de dispense ministérielle rejetée — La décision a-t-elle porté atteinte aux attentes légitimes de l'appelant? — L'obligation d'équité procédurale a-t-elle été respectée?

Immigration — Inadmissibility and removal — Ministerial relief — Citizen of Libya found to be inadmissible based on membership in terrorist organization — Application for ministerial relief denied — Interpretation of term "national interest" — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 34(2).

A, a citizen of Libya, has been residing in Canada continuously since 1997, despite having been found to be inadmissible on security grounds in 2002. The finding of inadmissibility was based on his membership in the Libyan National Salvation Front ("LNSF") — a terrorist organization according to Citizenship and Immigration Canada ("CIC"). A applied in 2002 under s. 34(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), for ministerial relief from the determination of inadmissibility, but his application was denied in 2009. The Minister of Public Safety and Emergency Preparedness ("Minister") concluded that it was not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations. A's application for permanent residence was denied.

A applied to the Federal Court for judicial review of the Minister's decision regarding relief. The Federal Court granted the application for judicial review. The Federal Court of Appeal allowed the appeal, dismissed the application for judicial review and concluded the Minister's decision was reasonable.

Held: The appeal should be dismissed and the Minister's decision under s. 34(2) of the *IRPA* allowed to stand.

A court deciding an application for judicial review must engage in a two-step process to identify the proper standard of review. First, it must consider whether the level of deference to be accorded with regard to the type of question raised on the application has been established satisfactorily in the jurisprudence. The second inquiry becomes relevant if the first is unfruitful or if the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review. At this second stage, the court performs a full analysis in order to determine what the applicable standard is. The standard of review applicable in the case at bar has been satisfactorily determined in past decisions to be reasonableness.

Immigration — Interdiction de territoire et renvoi — Dispense ministérielle — Citoyen de la Libye déclaré interdit de territoire en raison de son appartenance à une organisation terroriste — Demande de dispense ministérielle rejetée — Interprétation de l'expression « intérêt national » — Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27, art. 34(2).

A, un citoyen de la Libye, réside au Canada sans interruption depuis 1997, même s'il a été déclaré interdit de territoire pour raison de sécurité en 2002. L'interdiction de territoire reposait sur son appartenance au Front du salut national libyen (« FSNL ») — une organisation terroriste selon Citoyenneté et Immigration Canada (« CIC »). En 2002, A a demandé, aux termes du par. 34(2) de la *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27 (« *LIPR* »), une dispense ministérielle à l'égard du constat d'interdiction de territoire, mais sa demande a été rejetée en 2009. Le ministre de la Sécurité publique et de la Protection civile (« ministre ») a conclu qu'il n'était pas dans l'intérêt national d'admettre des individus qui avaient entretenu des contacts suivis avec des organisations terroristes connues ou avec des organisations ayant des liens avec des terroristes. La demande de résidence permanente de A a donc été refusée.

A a saisi la Cour fédérale d'une demande de contrôle judiciaire de la décision du ministre relative à la dispense. La Cour fédérale a accueilli la demande de contrôle judiciaire. La Cour d'appel fédérale a accueilli l'appel, a rejeté la demande de contrôle judiciaire et a conclu que la décision du ministre était raisonnable.

Arrêt : Le pourvoi est rejeté et la décision du ministre rendue au titre du par. 34(2) de la *LIPR* est maintenue.

Pour déterminer la norme de contrôle appropriée, la cour saisie d'une demande de contrôle judiciaire doit entreprendre un processus en deux étapes. Premièrement, elle doit vérifier si la jurisprudence établit de manière satisfaisante le degré de retenue correspondant à une catégorie de questions soulevées dans la demande de contrôle judiciaire. La deuxième étape s'applique lorsque la première démarche se révèle infructueuse ou si la jurisprudence semble devenue incompatible avec l'évolution récente du droit en matière de contrôle judiciaire. À cette deuxième étape, la cour entreprend une analyse complète en vue de déterminer la norme applicable. La jurisprudence a établi de manière satisfaisante que la norme de la décision raisonnable est la norme de contrôle applicable en l'espèce.

The Minister, in making his decision, did not expressly define the term "national interest". Although this Court is not in a position to determine with finality the actual reasoning of the Minister, it may consider what appears to have been the ministerial interpretation of "national interest", based on the Minister's "express reasons" and Chapter 10 of CIC's *Inland Processing Operational Manual*: "Refusal of National Security Cases/Processing of National Interest Requests" (the "Guidelines"), which inform the scope and context of those reasons, and whether this implied interpretation, and the Minister's decision as a whole, were reasonable. Had the Minister expressly provided a definition of the term "national interest" in support of his decision on the merits, it would have been one which related predominantly to national security and public safety, but did not exclude the other important considerations outlined in the Guidelines or any analogous considerations. The Guidelines did not constitute a fixed and rigid code. Rather, they contained a set of factors, which appeared to be relevant and reasonable, for the evaluation of applications for ministerial relief. The Minister did not have to apply them formulaically, but they guided the exercise of his discretion and assisted in framing a fair administrative process for such applications.

The Minister is entitled to deference as regards this implied interpretation of the term "national interest". The Minister's interpretation of the term "national interest" is reasonable. The plain words of the provision favour a broader reading of the term "national interest" rather than one which would limit its meaning to the protection of public safety and national security. The words of the statute, the legislative history of the provision, the purpose and context of the provision, are all consistent with the Minister's implied interpretation of this term. Section 34 is intended to protect Canada, but from the perspective that Canada is a democratic nation committed to protecting the fundamental values of its *Charter* and of its history as a parliamentary democracy. Section 34 should not be transformed into an alternative form of humanitarian review; however, it does not necessarily exclude the consideration of personal factors that might be relevant to this particular form of review. An analysis based on the principles of statutory interpretation reveals that a broad range of factors may be relevant to the determination of what is in the "national interest", for the purposes of s. 34(2) of the *IRPA*.

En prenant sa décision, le ministre n'a pas défini expressément l'expression « intérêt national ». Bien que notre Cour ne soit pas en mesure de déterminer de manière définitive le raisonnement qu'a effectivement tenu le ministre, elle peut examiner l'interprétation que le ministre semble avoir donnée de l'expression « intérêt national », à partir de sa « décision expresse motivée » et du chapitre 10 du guide opérationnel *Traitement des demandes au Canada* : « Refus des cas de sécurité nationale/Traitement des demandes en vertu de l'intérêt national » de CIC (le « guide opérationnel »), qui régissent la portée et le contexte de ces motifs, ainsi que la question de savoir si cette interprétation implicite, et la décision du ministre dans son ensemble, étaient raisonnables. Si le ministre avait défini expressément l'expression « intérêt national » à l'appui de sa décision sur le fond, sa définition aurait porté principalement sur la sécurité nationale et la sécurité publique, sans écarter les autres considérations importantes énoncées dans le guide opérationnel ou toutes autres considérations analogues. Le guide opérationnel ne constituait pas un code définitif et rigide. Il contenait plutôt un ensemble de facteurs, apparemment pertinents et raisonnables, relatifs à l'examen des demandes de dispense ministérielle. Le ministre n'était pas tenu de l'appliquer d'une manière rigide, mais il guidait l'exercice de son pouvoir discrétionnaire et l'aidait à élaborer un processus administratif juste applicable à ces demandes.

Il convient de faire preuve de retenue à l'égard de cette interprétation implicite que le ministre a donnée de l'expression « intérêt national ». Le ministre a donné une interprétation raisonnable de l'expression « intérêt national ». Le sens ordinaire de la disposition milite en faveur d'une interprétation plus large de l'expression « intérêt national » que celle qui limiterait la portée de cette expression à la protection de la sécurité publique et de la sécurité nationale. Le libellé de la loi, l'historique législatif de la disposition, son objectif et son contexte sont conformes à l'interprétation implicite que le ministre donne de cette expression. L'article 34 vise à protéger le Canada, mais dans la perspective du caractère démocratique du Canada, une nation qui entend protéger les valeurs fondamentales de sa *Charte* et de son histoire de démocratie parlementaire. L'article 34 ne devrait pas devenir une formule de rechange à l'examen pour des raisons d'ordre humanitaire; toutefois, il n'exclut pas nécessairement la prise en compte de facteurs personnels qui peuvent être pertinents dans le cadre de ce type particulier d'examen. Une analyse fondée sur les principes d'interprétation législative révèle qu'un large éventail de facteurs peuvent être pertinents à l'égard de la détermination de ce que l'« intérêt national » peut comporter pour les besoins du par. 34(2) de la *LIPR*.

The Minister's reasons were justifiable, transparent and intelligible. Although brief, they made clear the process he had followed in ruling on A's application for ministerial relief. He reviewed and considered all the material and evidence before him. Having done so, he placed particular emphasis on: A's contradictory and inconsistent accounts of his involvement with the LNSF, a group that has engaged in terrorism; the fact that A was most likely aware of the LNSF's previous activity; and the fact that A had had sustained contact with the LNSF. The Minister's reasons revealed that, on the basis of his review of the evidence and other submissions as a whole, and of these factors in particular, he was not satisfied that A's continued presence in Canada would not be detrimental to the national interest. The Minister's reasons allow this Court to clearly understand why he made the decision he did.

The Minister's decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law. The burden was on A to show that his continued presence in Canada would not be detrimental to the national interest. The Minister declined to provide discretionary relief to A, as he was not satisfied that this burden had been discharged. His conclusion was acceptable in light of the facts which had been submitted to him. Courts reviewing the reasonableness of a minister's exercise of discretion are not entitled to engage in a new weighing process. The Minister reviewed and considered (i.e. weighed) all the factors set out in A's application which were relevant to determining what was in the "national interest" in light of his reasonable interpretation of that term. Given that the Minister considered and weighed all the relevant factors as he saw fit, it is not open to the Court to set the decision aside on the basis that it is unreasonable.

The Minister's decision was not unfair, nor was there a failure to meet A's legitimate expectations or to discharge the duty of procedural fairness owed to him. In this case, the Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate expectation that that framework would be followed. The Guidelines were published by CIC, and, although CIC is not the Minister's department, it is clear that they are used by employees of both CIC and the Canada Border Services Agency for guidance in the exercise of their functions and in applying the legislation. The Guidelines are and

Les motifs du ministre étaient justifiables, transparents et intelligibles. Malgré leur brièveté, ils indiquaient clairement le processus décisionnel suivi relativement à la demande de dispense ministérielle de A. Le ministre a examiné toutes les pièces et les éléments de preuve qui lui ont été soumis. Il a particulièrement tenu compte du fait que A avait donné des récits contradictoires et incohérents au sujet de son association au FSNL, un groupe qui s'était livré au terrorisme; du fait que A était fort probablement au courant des activités antérieures du FSNL, et du fait que A avait entretenu des contacts suivis avec le FSNL. Il ressort des motifs du ministre que, en se fondant sur l'examen qu'il a fait des éléments de preuve et des observations dans leur ensemble, et de ces facteurs en particulier, il n'était pas convaincu que la présence continue de A au Canada ne serait nullement préjudiciable à l'intérêt national. Les motifs du ministre permettent à la Cour de saisir clairement pourquoi il est arrivé à cette décision.

La décision du ministre s'inscrit dans un éventail de solutions acceptables possibles qui peuvent se justifier au regard des faits et du droit. Il incombait à A de démontrer que sa présence continue au Canada ne serait pas préjudiciable à l'intérêt national. Le ministre a refusé d'accorder à A une dispense de nature discrétionnaire parce qu'il n'était pas convaincu que ce dernier s'était acquitté de ce fardeau de preuve. Sa conclusion était acceptable au regard des faits qui lui avaient été présentés. Dans le cadre d'un contrôle du caractère raisonnable de l'exercice ministériel d'un pouvoir discrétionnaire, les tribunaux ne sont pas autorisés à utiliser un nouveau processus d'évaluation. Le ministre a examiné et tenu compte de (c.-à-d. a évalué) tous les facteurs exposés dans la demande de A qui étaient pertinents pour décider ce qui était dans l'« intérêt national », selon son interprétation raisonnable de cette expression. Puisque le ministre a examiné et évalué tous les facteurs pertinents comme il l'a jugé à propos, il n'appartient pas à la Cour d'annuler sa décision parce qu'elle serait déraisonnable.

La décision du ministre n'était pas inéquitable et ne constituait pas une atteinte aux attentes légitimes de A; elle respectait l'obligation d'équité procédurale envers ce dernier. En l'espèce, le guide opérationnel a créé un cadre procédural clair, net et explicite pour le traitement des demandes de dispense et, de ce fait, une attente légitime quant à son application. Le guide a été publié par CIC, et bien que ce ministère ne relève pas du ministre, il est clair que ce guide est utilisé à la fois par les agents de CIC et les agents de l'Agence des services frontaliers du Canada dans l'exercice de leurs fonctions et pour l'application de la loi. Le guide opérationnel

were publicly available, and they constitute a relatively comprehensive procedural code for dealing with applications for ministerial relief. Thus, A could reasonably expect that his application would be dealt with in accordance with the process set out in them. A has not shown that his application was not dealt with in accordance with this process outlined in the Guidelines. If A had a legitimate expectation that the Minister would consider certain factors, including the Guidelines and humanitarian and compassionate factors, in determining his application for relief, this expectation was fulfilled.

Cases Cited

Applied: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; **referred to:** *Abdella v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1199, 355 F.T.R. 86; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23; *Esmaeili-Tarki v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 509 (CanLII); *Miller v. Canada (Solicitor General)*, 2006 FC 912, [2007] 3 F.C.R. 438; *Naeem v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 123, [2007] 4 F.C.R. 658; *Al Yamani v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 381, 311 F.T.R. 193; *Soe v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 461 (CanLII); *Kanaan v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FC 241, 71 Imm. L.R. (3d) 63; *Chogolzadeh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 405, 327 F.T.R. 39; *Tameh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 884, 332 F.T.R. 158; *Kablawi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1011, 333 F.T.R. 300; *Ramadan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1155, 335 F.T.R. 227; *Afridi v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FC 1192, 75 Imm. L.R. (3d) 291; *Ismeal v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FC 1366, 77 Imm. L.R. (3d) 310; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Construction Labour Relations v. Driver Iron Inc.*, 2012

était accessible au public et l'est encore, et il constitue un code de procédure relativement exhaustif concernant le traitement des demandes de dispense ministérielle. A pouvait donc raisonnablement s'attendre à ce que sa demande soit traitée conformément au processus qui y est prévu. A n'a pas démontré que ce processus prévu dans le guide opérationnel n'a pas été suivi lors du traitement de sa demande. Si A avait une attente légitime que le ministre tiendrait compte, pour trancher sa demande de dispense, de certains facteurs, dont le guide opérationnel et les facteurs d'ordre humanitaire, il a été satisfait à cette attente.

Jurisprudence

Arrêt appliqué : *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654; **arrêts mentionnés :** *Abdella c. Canada (Sécurité publique et Protection civile)*, 2009 CF 1199 (CanLII); *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Canada (Agence du revenu) c. Telfer*, 2009 CAF 23 (CanLII); *Merck Frosst Canada Ltée c. Canada (Santé)*, 2012 CSC 3, [2012] 1 R.C.S. 23; *Esmaeili-Tarki c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CF 509 (CanLII); *Miller c. Canada (Solliciteur général)*, 2006 CF 912, [2007] 3 R.C.F. 438; *Naeem c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2007 CF 123, [2007] 4 R.C.F. 658; *Al Yamani c. Canada (Sécurité publique et Protection civile)*, 2007 CF 381 (CanLII); *Soe c. Canada (Sécurité publique et Protection civile)*, 2007 CF 461 (CanLII); *Kanaan c. Canada (Sécurité publique et Protection civile)*, 2008 CF 241 (CanLII); *Chogolzadeh c. Canada (Sécurité publique et Protection civile)*, 2008 CF 405 (CanLII); *Tameh c. Canada (Sécurité publique et Protection civile)*, 2008 CF 884 (CanLII); *Kablawi c. Canada (Sécurité publique et Protection civile)*, 2008 CF 1011 (CanLII); *Ramadan c. Canada (Citoyenneté et Immigration)*, 2008 CF 1155 (CanLII); *Afridi c. Canada (Sécurité publique et Protection civile)*, 2008 CF 1192 (CanLII); *Ismeal c. Canada (Sécurité publique et Protection civile)*, 2008 CF 1366 (CanLII); *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708; *Construction Labour Relations c. Driver Iron Inc.*, 2012 CSC 65, [2012] 3 R.C.S. 405; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160; *Medovarski c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CSC 51, [2005] 2 R.C.S. 539; *Bell ExpressVu Limited Partnership*

SCC 65, [2012] 3 S.C.R. 405; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539.

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c. Rex, 2002 CSC 42, [2002] 2 R.C.S. 559; *Lake c. Canada (Ministre de la Justice)*, 2008 CSC 23, [2008] 1 R.C.S. 761; *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, 2001 CSC 41, [2001] 2 R.C.S. 281; *Canada (Procureur général) c. Mavi*, 2011 CSC 30, [2011] 2 R.C.S. 504; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525; *S.C.F.P. c. Ontario (Ministre du Travail)*, 2003 CSC 29, [2003] 1 R.C.S. 539.

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Loi sur l'immigration de 1976, L.C. 1976-77, ch. 52, art. 19(1)*e*).
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357 F.T.R. 246, 87 Imm. L.R. (3d) 135, [2009] F.C.J. No. 1664 (QL), 2009 CarswellNat 4438. Appeal dismissed.

Lorne Waldman, *Jacqueline Swaisland* and *Clare Crummey*, for the appellant.

Urszula Kaczmarczyk and *Marianne Zoric*, for the respondent.

Written submissions only by *Jill Copeland* and *Colleen Bauman*, for the intervener the British Columbia Civil Liberties Association.

Leigh Salsberg, for the intervener Ahmad Daud Maqsudi.

John Norris and *Andrew Brouwer*, for the interveners the Canadian Council for Refugees and the Canadian Association of Refugee Lawyers.

Barbara Jackman and *Hadayt Nazami*, for the interveners the Canadian Arab Federation and the Canadian Tamil Congress.

The judgment of the Court was delivered by

LeBel J. —

I. Introduction

[1] The appellant, Muhsen Ahmed Ramadan Agraira, a citizen of Libya, has been residing in Canada continuously since 1997, despite having been found to be inadmissible on security grounds in 2002. The finding of inadmissibility was based on the appellant's membership in the Libyan National Salvation Front ("LNSF") — a terrorist organization according to Citizenship and Immigration Canada ("CIC"). The appellant applied in 2002 under s. 34(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), for ministerial relief from the determination of inadmissibility, but his application was denied in 2009. The Minister of Public Safety and Emergency

juge Mosley, 2009 CF 1302, 357 F.T.R. 246, 87 Imm. L.R. (3d) 135, [2009] A.C.F. nº 1664 (QL), 2009 CarswellNat 5509. Pourvoi rejeté.

Lorne Waldman, *Jacqueline Swaisland* et *Clare Crummey*, pour l'appelant.

Urszula Kaczmarczyk et *Marianne Zoric*, pour l'intimé.

Argumentation écrite seulement par *Jill Copeland* et *Colleen Bauman*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Leigh Salsberg, pour l'intervenant Ahmad Daud Maqsudi.

John Norris et *Andrew Brouwer*, pour les intervenants le Conseil canadien pour les réfugiés et l'Association canadienne des avocats et avocates en droit des réfugiés.

Barbara Jackman et *Hadayt Nazami*, pour les intervenants la Fédération canado-arabe et le Congrès tamoul canadien.

Version française du jugement de la Cour rendu par

Le juge LeBel —

I. Introduction

[1] L'appelant, Muhsen Ahmed Ramadan Agraira, un citoyen de la Libye, réside au Canada sans interruption depuis 1997, même s'il a été déclaré interdit de territoire pour raison de sécurité en 2002. L'interdiction de territoire reposait sur son appartenance au Front du salut national libyen (« FSNL ») — une organisation terroriste selon Citoyenneté et Immigration Canada (« CIC »). En 2002, l'appelant a demandé, aux termes du par. 34(2) de la *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27 (« *LIPR* »), une dispense ministérielle à l'égard du constat d'interdiction de territoire, mais sa demande a été rejetée en 2009. Le ministre de la Sécurité

new weighing process (para. 37; see also *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 39). As the Minister stated in his reasons, he had "reviewed and considered" (i.e. weighed) all the factors set out in the appellant's application which were relevant to determining what was in the "national interest" in light of his reasonable interpretation of that term. He gave particular weight to certain factors pertaining to national security and public safety and emphasized them in his reasons, namely: the appellant's contradictory and inconsistent accounts of his involvement with the LNSF; the fact that the appellant was most likely aware of the LNSF's previous activity; and the fact that the appellant had had sustained contact with the LNSF. Given that the Minister considered and weighed all the relevant factors as he saw fit, it is not open to the Court to set the decision aside on the basis that it is unreasonable.

[92] In all the circumstances, it cannot be said that either the result or the Minister's decision as a whole was unreasonable. But a final issue remains: it relates to an allegation of a failure to meet the requirements of procedural fairness.

G. *Was the Decision Unfair, and Did It Fail to Meet the Appellant's Legitimate Expectations?*

[93] As this Court noted in *Dunsmuir*, at para. 79, "[p]rocedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual." The Court's comment that "[p]rocedural fairness has many faces" (*Dunsmuir*, at para. 77) is also relevant to this case.

[94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong

les tribunaux ne sont pas autorisés à utiliser un nouveau processus d'évaluation (par. 37; voir également *Lake c. Canada (Ministre de la Justice)*, 2008 CSC 23, [2008] 1 R.C.S. 761, par. 39). Comme il l'a affirmé dans ses motifs, le ministre a [TRADUCTION] « examiné et [. . .] tenu compte [de] » (c.-à-d. a évalué) tous les facteurs exposés dans la demande de l'appelant qui étaient pertinents pour décider ce qui était dans l'« intérêt national », selon son interprétation raisonnable de cette expression. Le ministre a accordé une importance particulière à certains facteurs relatifs à la sécurité nationale et la sécurité publique et les a soulignés dans ses motifs, soit les contradictions et incohérences de l'appelant au sujet de son association au FSNL, le fait que l'appelant était fort probablement au courant des activités antérieures du FSNL, et le fait que l'appelant avait entretenu des contacts suivis avec le FSNL. Puisque le ministre a examiné et évalué tous les facteurs pertinents comme il l'a jugé à propos, il n'appartient pas à la Cour d'annuler sa décision parce qu'elle serait déraisonnable.

[92] Compte tenu de l'ensemble des circonstances, on ne saurait affirmer que l'issue, ou la décision du ministre dans son ensemble, étaient déraisonnables. Il reste toutefois à trancher une dernière question qui porte sur une allégation de manquement aux exigences de l'équité procédurale.

G. *La décision était-elle inéquitable, et constituait-elle une atteinte aux attentes légitimes de l'appelant?*

[93] Ainsi que l'a fait remarquer notre Cour dans l'arrêt *Dunsmuir*, par. 79, « [l]'équité procédurale est un fondement du droit administratif canadien moderne. Les décideurs publics sont tenus de faire preuve d'équité lorsqu'ils prennent des décisions touchant les droits, les privilèges ou les biens d'une personne ». L'observation de la Cour selon laquelle « [l]'équité procédurale comporte de nombreuses facettes » (*Dunsmuir*, par. 77) revêt également de l'importance en l'espèce.

[94] La théorie des attentes légitimes constitue la facette particulière de l'équité procédurale qui nous occupe dans le présent pourvoi. Cette doctrine

foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

[95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis added.]

(D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)

a trouvé de solides assises en droit administratif canadien dans *Baker*, où la Cour a statué qu'il s'agit d'un facteur qu'il faut prendre en compte pour déterminer les exigences de l'obligation d'équité procédurale de la common law. Si un organisme public a fait des déclarations au sujet des procédures qu'il suivrait pour rendre une décision en particulier, ou s'il a constamment suivi dans le passé, en prenant des décisions du même genre, certaines pratiques procédurales, la portée de l'obligation d'équité procédurale envers la personne touchée sera plus étendue qu'elle ne l'aurait été autrement. De même, si un organisme a fait une représentation à une personne relativement à l'issue formelle d'une affaire, l'obligation de cet organisme envers cette personne quant à la procédure à suivre avant de rendre une décision en sens contraire sera plus rigoureuse.

[95] Les conditions précises à satisfaire pour que s'applique la théorie de l'attente légitime sont résumées succinctement comme suit dans un ouvrage qui fait autorité intitulé *Judicial Review of Administrative Action in Canada* :

> [TRADUCTION] La caractéristique qui distingue une attente légitime réside dans le fait que celle-ci découle de la conduite du décideur ou d'un autre acteur compétent. Une attente légitime peut donc découler d'une pratique officielle ou d'une assurance voulant que certaines procédures soient suivies dans le cadre du processus décisionnel, ou qu'il soit possible de prévoir une décision favorable. De même, l'existence des règles de procédure de nature administrative ou d'une procédure que l'organisme a adoptée de son plein gré dans un cas particulier, peut donner ouverture à une attente légitime que cette procédure sera suivie. Certes, la pratique ou la conduite qui auraient suscité une attente raisonnable doivent être claires, nettes et explicites. [Je souligne.]

(D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), §7:1710; voir également *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, 2001 CSC 41, [2001] 2 R.C.S. 281, par. 29; *Canada (Procureur général) c. Mavi*, 2011 CSC 30, [2011] 2 R.C.S. 504, par. 68.)

[96] In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):

> Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[97] An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights (*Baker*, at para. 26; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557). In other words, "[w]here the conditions for its application are satisfied, the Court may [only] grant appropriate procedural remedies to respond to the 'legitimate' expectation" (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131 (emphasis added)).

[98] In the case at bar, the Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate expectation that that framework would be followed. The Guidelines were published by CIC, and, although CIC is not the Minister's department, it is clear that they are "used by employees of [both] CIC and the CBSA for guidance in the exercise of their functions and in applying the legislation" (R.F., at para. 108). The Guidelines are and were publicly available, and, as Appendix 2 to these reasons illustrates, they constitute a relatively comprehensive procedural code for dealing with applications for ministerial relief. Thus, the appellant could reasonably expect that his application would be dealt with in accordance with the process set out in them. In brief, this process is as follows:

1. Following the receipt of an application for relief, the CIC officer provides the applicant with a copy of the "National Interest Information Sheet". The applicant is given 15 days to send his or her submission to the local CIC office.

[96] Récemment, dans l'arrêt *Mavi*, le juge Binnie a expliqué ce que l'on entend par des affirmations « claires, nettes et explicites » en établissant une analogie avec le droit contractuel (par. 69) :

> En général, on juge suffisamment précise pour les besoins de la théorie de l'attente légitime l'affirmation gouvernementale qui, si elle avait été faite dans le contexte du droit contractuel privé, serait suffisamment claire pour être susceptible d'exécution.

[97] L'impossibilité que la théorie de l'attente légitime constitue la source de droits matériels lui apporte une restriction importante (*Baker*, par. 26; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, p. 557). En d'autres mots, « [l]orsque les conditions d'application de la règle sont remplies, la Cour peut [seulement] accorder une réparation procédurale convenable pour répondre à l'expectative "légitime" » (*S.C.F.P. c. Ontario (Ministre du Travail)*, 2003 CSC 29, [2003] 1 R.C.S. 539, par. 131 (je souligne)).

[98] En l'espèce, le guide opérationnel a créé un cadre procédural clair, net et explicite pour le traitement des demandes de dispense et, de ce fait, une attente légitime quant à son application. Le guide opérationnel a été publié par CIC, et bien que ce ministère ne relève pas du ministre, il est clair que le guide opérationnel est utilisé à la fois par [TRADUCTION] « les agents de CIC et les agents de l'ASFC dans l'exercice de leurs fonctions et pour l'application de la loi » (m.i., par. 108). Le guide opérationnel était accessible au public et l'est encore, et comme il ressort de l'annexe 2 aux présents motifs, il constitue un code de procédure relativement exhaustif concernant le traitement des demandes de dispense ministérielle. L'appelant pouvait donc raisonnablement s'attendre à ce que sa demande soit traitée conformément au processus qui y est prévu. Les étapes de ce processus peuvent être résumées comme suit :

1. Après réception d'une demande de dispense ministérielle, l'agent de CIC remet au demandeur une copie de la « Feuille de renseignements sur l'intérêt national ». Le demandeur dispose de 15 jours pour envoyer sa demande au bureau local de CIC.

TAB 35

Apotex Inc. v. Canada (Attorney General) (C.A.)

Federal Courts Reports

Federal Court of Canada - Court of Appeal

Décary, Sexton and Evans JJ.A.

Heard: Toronto, February 28 and 29, 2000.

Judgment: Ottawa, May 12, 2000.

Court File No. A-922-96

[2000] 4 F.C. 264 | *[2000] F.C.J. No. 634*

Apotex Inc. (Appellant) (Applicant) v. The Attorney General of Canada, The Minister of National Health and Welfare, Merck & Co., Inc. and Merck Frosst Canada Inc. (Respondents) (Respondents) and Eli Lilly Canada Inc., Pharmaceutical Manufacturers Association of Canada and Canadian Drug Manufacturers Association (Interveners) (Interveners)

Case Summary

Patents — Validity of Patented Medicines (NOC) Regulations upheld as not ultra vires Patent Act, s. 55.2(4) — Latter provision to be construed broadly, not limited to those who have availed themselves of benefits conferred by Act, s. 55.2(1) or (2) in connection with particular medicine in dispute — Within Governor in Council's authority conferred by Act, s. 55.2(4) to provide expressly Regulations apply to submissions made before they came into effect, but not yet decided by Minister.

Practice — Pleadings — Mootness, abuse of process — As Notice of Compliance (NOC) issued to Apotex for norfloxacin, request for order to issue NOC for same drug moot — Furthermore, as appellant had opportunity to challenge validity of Patented Medicines (NOC) Regulations in earlier prohibition proceedings with respect to same drug, Court could have applied res judicata and issue estoppel to refuse to permit Apotex to raise it herein — However, proceeding not dismissed as validity of Regulations remaining live issue (NOC issued on basis of single allegation), and declaration of legal status would still serve useful purpose — Furthermore, in view of uncertainty about Regulations when litigation started, obvious and continuing interest of Apotex in having validity of Regulations determined, and fact parties had prepared full argument on merits, Motions Judge properly exercised discretion not to dismiss proceeding on this ground without getting to merits.

[page265]

Administrative law — Judicial review — Doctrine of legitimate expectations — Minister's undertaking to consult Canadian Drug Manufacturers Association before Patented Medicines

(Notice of Compliance) Regulations enacted at best personal undertaking of political nature not enforceable by Court; in any event, not binding on decision maker, i.e. Governor in Council.

Construction of statutes — Retroactivity — Application of Patented Medicines (NOC) Regulations to new drug submissions in pipeline when 1993 Regulations came into effect did not engage presumption against retroactivity — No vested right abrogated: in absence of clear legislative indication to contrary, no legal right to have application for statutory benefit determined in accordance with eligibility criteria in place when application made.

Apotex sought a compulsory licence for the generic form of Merck Frosst Canada's patented drug norfloxacin, an antibiotic, under the system in effect before the Patented Medicines (Notice of Compliance) Regulations was enacted. In 1993, before Apotex could obtain the authorization to market the generic drug, the compulsory licence system was abolished. In the application for judicial review with which this appeal is concerned, Apotex sought an order directing the Minister of National Health and Welfare to issue a NOC for its version of norfloxacin and declaring that the Regulations were invalid because they were not authorized by subsection 55.2(4) of the Patent Act. The validity of the Regulations was also attacked on the ground that they were promulgated without prior consultation, in breach of a promise made by the Minister responsible for the statutory amendments that regulations would not be enacted until there had been consultation with the Canadian Drug Manufacturers Association (CDMA), a trade association representing primarily the interests of generic pharmaceutical manufacturers. This was an appeal from the Trial Division decision dismissing the application for judicial review.

Held, the appeal should be dismissed.

Per Décary J.A. (Sexton J.A. concurring): the reasons for judgment of Evans J.A. were agreed with except with respect to the issue of the breach of the undertaking to consult the CDMA before the enactment of regulations.

[page266]

The Patent Act did not contain provisions stating that regulations proposed to be made pursuant to the Act must be published prior to their coming into force. Regulations made by the Governor in Council under section 55.2 of the Act were therefore subject to the general provisions of the Statutory Instruments Act and not required by law to be published prior to their coming into force. And unlike some of the other provisions of the Patent Act, section 55.2 imposed no duty to consult.

Assuming that the doctrine of legitimate expectations may apply to the regulation-making power of the Governor in Council, it would not apply in the circumstances of this case because the alleged undertaking is at best a personal undertaking of a political nature that is not enforceable in a court of law. In any event, even it the alleged undertaking could have bound the Minister and be enforceable by a court, it would not, in the circumstances, have bound the Governor in Council, the decision maker. Absent statutory authority or authority expressly delegated to a minister by the Governor in Council, a minister cannot bind the Governor in Council in the exercise of its regulation-making power.

Serious reservations were expressed as to the applicability of the doctrine of legitimate expectations to Cabinet in the exercise of its regulation-making power. In any event, Evans J.A.'s comments on this point

were obiter dicta. The judiciary should be reluctant to move in and impose procedural restrictions of its own creation on the process leading to the making of regulations by the Governor in Council.

Per Evans J.A.: (1) Given the decision of the Supreme Court of Canada in Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare), *[1998] 2 S.C.R. 193*, as a result of which Apotex was issued with a NOC for norfloxacin, the issue was moot. However, since the NOC was issued on the basis of a single allegation, the validity of the Regulations remained a live issue, and therefore the declaration of their legal status would still serve a useful purpose. Although Apotex had had an opportunity to challenge the validity of the NOC Regulations in the earlier prohibition proceeding brought by Merck Frosst with respect to norfloxacin, the Motions Judge properly exercised his discretion not to dismiss the proceeding on this ground without getting to the merits in view of the uncertainty about the Regulations when the litigation started, the obvious and continuing interest of Apotex in having the validity of the Regulations determined, and the fact that the parties had prepared full argument on the merits.

(2) Subsection 55.2(4) of the Patent Act was not limited to authorizing the making of Regulations that apply to [page267] persons who have taken advantage of subsection 55.2(1) or (2) in respect of new drug products that are the subject of prohibition proceeding. If Parliament had intended to limit the scope to the regulation-making power in that way, it would have used more precise, explicit language. The wording in the English and French versions support a broad interpretation. Furthermore, the nature and subjective definition of the purpose for which the power may be exercised supports a broad interpretation: "such regulations as the Governor in Council considers necessary for preventing the infringement of a patent". For these reasons, and in accordance with the general directive of section 12 of the Interpretation Act (enactments deemed remedial), subsection 55.2(4) should be construed broadly.

(3) The Regulations, which purport to apply to NOC submissions that had been made, but not decided, when the Regulations came into effect, did not engage the presumption against retroactivity.

No vested right was thereby abrogated: in the absence of clear legislative indication to the contrary, no one has a legal right to have an application for a statutory benefit determined in accordance with the eligibility criteria in place when the application was made. Applicants for statutory rights normally have no more than a hope that the granting authority will render a favourable decision. As the applicant's right herein was neither "accrued" nor "accruing", the paragraph 44(c) of the Interpretation Act presumption against retroactive operation of the repeal of an enactment did not apply.

(4) The fact that the Minister of Consumer and Corporate Affairs did not consult the CDMA before regulations were enacted under subsection 55.2(4) of the Patent Act in spite of an undertaking to do so did not make the Regulations invalid.

It is settled law in Canada that the duty of fairness does not apply to the exercise of powers of a legislative nature, which would include the Regulations herein. However, it does not necessarily follow that subordinate legislation can lawfully be made in breach of a categorical and specific assurance of prior consultation given to an individual by a responsible minister of the Crown in the course of discharging departmental business. Nor does the law so provide.

In Reference re Canada Assistance Plan (B.C.), *[1991] 2 S.C.R. 525*, the Supreme Court specifically said that the doctrine of legitimate expectations has no application to the exercise of legislative powers as it

would place a fetter on an essential feature of democracy. However, similar considerations do not apply to the exercise of delegated legislative [page268] powers which is not subject to the same level of scrutiny as primary legislation that must pass through the full legislative process. Moreover, the procedural rights created by the doctrine of legitimate expectations are always subject to proof that, in particular circumstances, the public interest requires that administrative action be taken promptly without complying with the promised procedures.

The legitimate expectations doctrine is not simply a branch of the duty of fairness, in the sense that it serves the same purposes as the participatory rights conferred by the duty of fairness. Hence, there is no reason to limit its reach to the exercise of statutory powers to which the duty applies. In the absence of binding authority to the contrary, the doctrine of legitimate expectations applies in principle to delegated legislative powers so as to create participatory rights when none would otherwise arise, provided that honouring the expectation would not breach some other legal duty, or unduly delay the enactment of regulations for which there was a demonstrably urgent need.

On the facts of this case, the words used were capable of creating a legitimate expectation that the Minister would consult the CDMA before any regulations made under subsection 55.2(4) came into effect. However an undertaking given by a minister that there will be consultation prior to the enactment of regulations cannot give rise to a legitimate expectation when the Governor in Council, not the minister, has the statutory authority to make the regulations in question. While there was no evidence that the Governor in Council expressly delegated to the Minister of Consumer and Corporate Affairs the authority to impose procedural restrictions on the exercise of the Cabinet's regulation-making power, when, as here, the promise of prior consultation is made by the minister with primary responsibility for developing regulations and bringing them before the Cabinet, it may be open to those to whom the promise was made to seek judicial review to prevent the minister from taking proposed regulations to Cabinet until the promised consultation has occurred.

However, when, as here, the Cabinet has already approved the regulations, their validity cannot be impugned because they were enacted in the absence of the consultation that the minister promised. Given the legal protection afforded by the law to the confidentiality of cabinet proceedings and the narrow grounds on which the courts review the exercise of powers by the Cabinet, it would be impermissible for a court to enquire into the state of knowledge possessed by members of the Cabinet about prior procedural assurances given by a minister in order to determine whether otherwise valid regulations were knowingly enacted in breach of a [page269] ministerial undertaking.

In any event, the extensive and effective consultation that occurred after 1993, and prior to the amendments of the Regulations in 1998 which ironed out many of the subsequently identified wrinkles, would make it inappropriate to declare invalid the original Regulations as amended.

Statutes and Regulations Judicially Considered

Canada Assistance Plan, R.S.C. 1970, c. C-1, s. 8.
Canada Labour Code, R.S.C., 1985, c. L-2, s. 159(2) (as enacted by S.C. 1996, c. 12, s. 3).
Canada Shipping Act, R.S.C., 1985, c. S-9, s. 95(1) (as am. by R.S.C., 1985 (3rd Supp.), c. 6, s. 5).
Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 15(4) (as am. by S.C. 1998, c. 9, s. 10).

Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20, s. 12(2).
Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by Canada Act 1982, 1982, c. 11 (U.K.), Schedule to the Constitution Act, 1982, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 11, 12, 13.
Copyright Act, R.S.C., 1985, c. C-42, s. 66.6(2) (as enacted by R.S.C., 1985 (4th Supp.), c. 10, s. 12).
Hazardous Materials Information Review Act, R.S.C., 1985 (3rd Supp.), c. 24, Part III, s. 48(1).
Hazardous Products Act, R.S.C., 1985, c. H-3, s. 19 (as am. by R.S.C., 1985 (3rd Supp.), c. 24, s. 1).
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Interpretation Act (The), R.S.S. 1978, c. I-11, s. 23(1)(c).
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Official Languages Act, R.S.C., 1985 (4th Supp.), c. 31, ss. 84, 86.
Patent Act, R.S.C., 1985, c. P-4, ss. 42 (as am. by R.S.C., 1985 (3rd Supp.), c. 33, s. 16), 55.2 (as enacted by S.C. 1993, c. 2, s. 4), 101(2) (as enacted idem, s. 7).
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Scott v. College of Physicians and Surgeons of Saskatchewan *(1992), 95 D.L.R. (4th) 706*; *[1993] 1 W.W.R. 533*; *100 Sask. R. 291* (C.A.).

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Reference re Canada Assistance Plan (B.C.), *[1991] 2 S.C.R. 525*; *(1991), 83 D.L.R. (4th) 297*; *[1991] 6 W.W.R. 1*; *58 B.C.L.R. (2d) 1*; *127 N.R. 161*.
Hutchins v. Canada (National Parole Board), *[1993] 3 F.C. 505*; *(1993), 16 Admin. L.R. (2d) 236*; *83 C.C.C. (3d) 563*; *156 N.R. 205* (C.A.).
Apotex Inc. v. Canada (Attorney General), *[1994] 1 F.C. 742*; *(1993), 18 Admin. L.R. (2d) 122*; *51 C.P.R. (3d) 339*; *162 N.R. 177* (C.A.); affd *[1994] 3 S.C.R. 1100*; *(1994), 176 N.R. 1*.
Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), *[1990] 3 S.C.R. 1170*; *(1990), 75 D.L.R. (4th) 385*; *[1991] 2 W.W.R. 145*; *2 M.P.L.R. (2d) 217*; *69 Man.R. (2d) 134*; *46 Admin. L.R. 161*; *116 N.R. 46*.
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Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare) *(1998), 80 C.P.R. (3d) 110*; *144 F.T.R. 299* (F.C.T.D.); affd *(1999), 86 C.P.R. (3d) 489*; *236 N.R. 179* (F.C.A.).
Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare) *(1998), 84 C.P.R. (3d) 492*; *160 F.T.R. 161* (F.C.T.D.).
Apotex Inc. v. Canada (Minister of National Health and Welfare) *(1997), 153 D.L.R. (4th) 68*; *76 C.P.R. (3d) 1*; *219 N.R. 151* (F.C.A.); leave to appeal to S.C.C. refused, [1998] 1 S.C.R. viii.
Deprenyl Research Ltd. v. Apotex Inc. *(1994), 55 C.P.R. (3d) 171*; *77 F.T.R. 62* (F.C.T.D.); affd *(1995), 60 C.P.R. (3d) 501*; *180 N.R. 323* (F.C.A.).

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Roche Products, Inc. v. Bolar Pharmaceutical Co. Inc., 733 F.2d 858 (Fed. Cir. 1984).
Hoffmann-LaRoche Ltd. v. Canada (Minister of National Health and Welfare) *(1996), 67 C.P.R. (3d) 484*; *109 F.T.R. 216* (F.C.T.D.); affd *(1996), 70 C.P.R. (3d) 1*; *70 C.P.R. (3d) 206*; *205 N.R. 360* (F.C.A.).
Director of Public Works v. Ho Po Sang, [1961] A.C. 901 (P.C.).
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Lehndorff United Properties (Canada) Ltd. et al. v. Edmonton (City) *(1993), 146 A.R. 37*; *14 Alta. L.R. (3d) 67*; *18 M.P.L.R. (2d) 146* (Q.B.); affd *(1994), 157 A.R. 169*; *23 Alta. L.R. (3d) 1*; 23 M.P.L.R. (2d) 146 (C.A.); leave to appeal to S.C.C. refused, [1995] 2 S.C.R. vii.
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Sunshine Coast Parents for French v. School District No. 46 (Sunshine Coast) *(1990), 44 Admin. L.R. 252*; *49 B.C.L.R. (2d) 252* (B.C.S.C.).
Regina v. Liverpool Corpn. Ex parte Liverpool Taxi Fleet Operators' Association, [1972] 2 Q.B. 299 (C.A.).
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R. v. Lord Chancellor's Department, ex parte Law Society, Crown Office List CO/991/93, June 22, 1993 (Q.B.D.).
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Cardinal et al. v. Director of Kent Institution, *[1985] 2 S.C.R. 643*; *(1985), 24 D.L.R. (4th) 44*; *[1986] 1 W.W.R. 577*; *69 B.C.L.R. 255*; *16 Admin. L.R. 233*; *23 C.C.C. (3d) 118*; *49 C.R. (3d) 35*; *63 N.R. 353*.
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Carpenter Fishing Corp. v. Canada, *[1998] 2 F.C. 548*; *(1997), 155 D.L.R. (4th) 572*; *221 N.R. 372* (C.A.); leave to appeal to S.C.C. refused, [1998] 2 S.C.R. vi.
Baker v. Canada (Minister of Citizenship and Immigration), *[1999] 2 S.C.R. 817*; *(1999), 174 D.L.R. (4th) 193*; *1 Imm. L.R. (3d) 1*; *243 N.R. 22*.

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Mullan, David. "Confining the Reach of Legitimate Expectations: Case Comment: Sunshine Coast Parents for French v. School District No. 46 (Sunshine Coast)" (1991), 44 Admin. L.R. 245.
Small, Joan G. "Legitimate Expectations, Fairness and Delegated Legislation" (1995), 8 C.J.A.L.P. 129.
Wright, David. "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law" *(1997), 35 Osgoode Hall L.J. 139*.

APPEAL from a Trial Division decision (Apotex Inc. v. Canada (Attorney General), *[1997] 1 F.C. 518*; *(1996), 71 C.P.R. (3d) 166*; *123 F.T.R. 161*) dismissing an application for judicial review wherein an order was sought directing the Minister of National Health and Welfare to issue a notice of compliance for the drug norfloxacin and for a declaration that the Patented Medicines (Notice of Compliance) Regulations are ultra vires the authority of the Governor in Council under subsection 55.2(4) of the Patent Act. Appeal dismissed.

Appearances

H. B. Radomski and David M. Scrimger, for the appellant. Frederick B. Woyiwada, for the defendant Attorney General of Canada. W. H. Richardson and Caroline Zayid, for the defendant Merck & Co. Inc. Anthony G. Creber, for the defendants Eli Lilly Canada Inc. and Pharmaceutical Manufacturers Association of Canada. Ronald G. Slaght and Timothy H. Gilbert, for the intervener Canadian Drug Manufacturers Association.

Solicitors of Record

Goodman Phillips & Vineberg, Toronto, for the appellant. Deputy Attorney General of Canada, for the defendant Attorney General of Canada. McCarthy Tétrault, Toronto, for the defendant Merck & Co. Inc.

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Gowling, Strathy & Henderson, Ottawa, for the defendants Eli Lilly Canada Inc. and Pharmaceutical Manufacturers Association of Canada. Lenzcner Slaght Royce Smith Griffin, Toronto, for the intervener Canadian Drug Manufacturers Association.

The following are the reasons for judgment rendered in English by

123 The interests underlying the legitimate expectations doctrine are the non-discriminatory application in public administration of the procedural norms established by past practice or published guidelines, and the protection of the individual from an abuse of power [page311] through the breach of an undertaking. These are among the traditional core concerns of public law. They are also essential elements of good public administration. In these circumstances, consultation ceases to be a matter only of political process, and hence beyond the purview of the law, but enters the domain of judicial review.

124 Accordingly, in my view the legitimate expectations doctrine is not simply a branch of the duty of fairness, in the sense that it serves the same purposes as the participatory rights conferred by the duty of fairness. Hence, there is no reason to limit its reach to the exercise of statutory powers to which the duty applies.

125 On the other hand, as with the duty of fairness, a breach will lead to the imposition of procedural duties, generally of a participatory nature, on the person or body empowered to take some administrative action, rather than requiring a particular substantive outcome to the exercise of power. Indeed, when in Baker v. Canada (Minister of Citizenship and Immigration), supra, at page 839, paragraph 26, the Supreme Court of Canada recently located the legitimate expectations doctrine within the duty of fairness it was in response to an argument that a person may have a legitimate expectation of receiving a substantive, and not merely a procedural benefit. And, in the Canada Assistance Plan case, supra, the Court's concern was to preserve the sovereignty of Parliament from the imposition of novel manner and form requirements on the enactment of legislation. However, in Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), supra, where no contrast was made with substantive rights, it was said only that, as developed in the English cases, the legitimate expectations doctrine was an extension of the duty of fairness.

126 Therefore, in the absence of binding authority to the contrary, I conclude that the doctrine of [page312] legitimate expectations applies in principle to delegated legislative powers so as to create participatory rights when none would otherwise arise, provided that honouring the expectation would not breach some other legal duty, or unduly delay the enactment of regulations for which there was a demonstrably urgent need (see R. v. Lord Chancellor's Department, ex parte Law Society (Q.B.D. Crown Office List; June 22, 1993; CO/991/93)).

127 A court may set aside, or declare invalid, subordinate legislation made in breach of a legal duty to consult: R v Secretary of State for Health, ex p US Tobacco International Inc, [1992] 1 All ER 212 (Q.B.D.), at page 225. For this purpose it should not matter whether the duty arose from statute or by virtue of a promise that created a legitimate expectation of consultation. It remains to consider whether a legitimate expectation arose on the facts of this case and, if it did, whether the Regulations were enacted in breach of it.

(iii) Did a legitimate expectation arise on these facts?

128 Whether a promise by a public official or body that consultation will precede administrative action gives rise to a legitimate expectation that attracts a legal obligation to consult depends on the surrounding

TAB 36

Court of Queen's Bench of Alberta

Citation: Czerwinski v. Mulaner, 2007 ABQB 536

Date: 20080829
Docket: 0601 13756
Registry: Calgary

2007 ABQB 536 (CanLII)

Between:

Lori D. Czerwinski, Manfred H. Czerwinski, Katherine Evans, E. Randall Evans, Wendi Grieve, William Grieve, Jessica F. Hood, Douglas M. Hood, Katrin Lyons and Jay C. Lyons

Applicants

- and -

Jerry C. Mulaner, Rhonda S. Longson, Faye E. Lippitt, C. Laurie Copland, Doug J. Gardner, Each In Their Capacity As a Trustee of the Board of Trustees of the Foothills School Division No. 38, and the Said Foothills School Division No. 38

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice Dennis G. Hart

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[1] This is an application for judicial review of a decision of the Respondent Board of Trustees of Foothills School Division No. 38 (the Board).

[2] Each of the Applicants is a parent of a child or children attending a school within the Foothills School Division No. 38 (the Foothills School Division), which was established pursuant to the provisions of the *School Act*, R.S.A. 2000, c.S-3. The Foothills School Division is divided into five wards bordering the south side of the City of Calgary.

The applicants alleged that the board had failed to comply with the rules of natural justice and procedural fairness because it had raised a legitimate expectation that it would consult with the applicants before any decision was reached, and the board failed to do so. The decision is very directly on point. Spencer J. held that the implementation of French immersion by the board was entirely a policy decision, and that the decision to eliminate it was a legislative act. He held, at p.258, that the decision was therefore "not ordinarily subject to the rules of procedural fairness, including the rule relating to the legitimate expectations of interested residents of the school district." However, Spencer J. went on to consider the board's own policies, and the issue of whether those policies could give rise to legitimate expectations, notwithstanding his conclusion that the board was exercising a legislative function. He noted that the board had a policy in place that required specific steps to be taken, which included consultation with interested parties. Though Spencer J. ultimately concluded that no legitimate expectation had actually arisen because the residents had been unaware of the board's policies, he was clearly of the view that a legitimate expectation could arise in other circumstances. In this regard, he held at p. 261-262:

> By incurring for itself a procedural framework that required specific steps to be taken and in failing to suspend the requirement for the purpose of this resolution, the board as a legislative body attracted to itself the rule of legitimate expectation that prevails in its administrative functions. I distinguish this case from the authorities I have referred to that say the rule does not apply to a decision made under a delegated legislative body where that body by its own procedural rules tells the public what processes it will follow in making a decision and as part of that process offers the public a specific opportunity to comment on the proposed decision. Such a view does not conflict with the tradition of parliamentary supremacy as it applies to a delegated legislative body acting within the field of its jurisdiction because it is the same legislative body that has established the procedural rule in the first place. Until such a rule is suspended, the legislative body, in this case the school board, is as subject to it as are those under its governance. I do not go so far as to say such a body may not suspend its own rules under appropriate circumstances and defeat a legitimate expectation.

[31] There are a number of other decisions that suggest that the doctrine of legitimate expectations may apply to legislative functions in certain circumstances. In Alberta, in *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)*, [1993] A.J. No. 807 (Q.B.), Fruman J. (As she then was) considered *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R 735 and *Reference re Canada Assistance Plan* and concluded that decisions which are purely legislative in nature are not subject to the rules of procedural fairness. However, and significantly, she went on to point out, at para. 47:

> Even in circumstances where there is no duty of procedural fairness, such a duty can arise when there has been a holding out that a specific procedure would be followed by the decision maker and there was reliance upon that position by interested parties. (*Furey v. Conception Bay Centre Roman Catholic School*

2007 ABQB 536 (CanLII)

Board (1991), 2 Admin. L.R. (2d) 263; *Sunshine Coast Parents for French v. Sunshine Coast School District No. 46* (1990), 49 B.C.L.R. (2d) 252.)

[32] In my view, this is just such a case. The Board came to a policy decision through the exercise of its legislative function, but it did so in a manner that was inconsistent with its established practices, its written policies with respect to public consultation, and despite an express promise made by its Chair at the meeting of June 1, 2005. I do not accept the distinction that the Board seeks to draw between the promise made by the Chair and a promise made by the entire Board. The Board was present when the Chair made the representation that no decision would be made until after consultation with school councils. There is no evidence that any objection was raised was any member of the Board. The Applicants were entitled to assume that the representation made by the Chair reflected the position of the Board. I appreciate that the representation made by the Chair was directed at grandfathering rather than walk distances, but the decision of the Board affected its existing practices in respect of both, and the Board's policies. Leaving aside the representation made by the Chair, the Board's policies themselves indicate that some consultation would likely occur in any event. The prerogatives of legislators must be respected by the courts, but in these circumstances there is a competing principle that public bodies should be held to their promises, in the broader interest of procedural fairness.

Nature of the Statutory Scheme

[33] Neither the *School Act*, nor the *Student Transportation Regulation* require public input or consultation prior to making a decision about transportation policy. Moreover, paragraph 4 of Board Policy B-310 provides that the Board retains the right to develop, amend and approve any necessary policy at any time. Thus, this factor, standing alone, would not suggest a high degree of procedural fairness.

Importance of the Decision to the Individuals Affected

[34] The Board contends that this factor is difficult to apply in the present case because the Decision is policy-based, broad in scope, and essentially impacts upon all of the children and parents of children attending schools in the Foothills School Division. The Board points out that this factor refers to the individuals affected by the decision, not just the applicants.

[35] While I understand the Board's submission in this regard, and agree that the impact of the Decision extends beyond the Applicants, it is clear that the Decision impacts certain individuals more directly than others. Specifically, the parents whose children obtained transportation under the grandfathering policy, and parents who will have to make arrangements to mitigate increased walking distances, or will see their young children walking further, are clearly more directly affected by the Decision than parents who will see some less tangible benefit from a redistribution of transportation resources.

[36] I agree with the Board that the interests affected do not rise to the level of those in *Baker*, where the decision involved the deportation of an individual from Canada, or those in *Kane v.*

2007 ABQB 536 (CanLII)

TAB 37

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Office and Professional Employees' Int'l Union et al v. B.C. Hydro et al***
2004 BCSC 422

Date: 20040330
Docket: L031815
Registry: Vancouver

Between:

Office and Professional Employees' International Union, Local 378 and Jerri New

Petitioners

And:

British Columbia Hydro and Power Authority

Respondent

And:

Attorney General of British Columbia

Respondent

Before: The Honourable Madam Justice Neilson

Reasons for Judgment

Counsel for the Petitioners	L. McGrady, Q.C., C. Foy & M. Koroneos
Counsel for the Respondent, B.C. Hydro and Power Authority	C.W. Sanderson, Q.C., R.A. Skolrood & J. McLean
Counsel for the Respondent, the Attorney General of British Columbia	G.H. Copley, Q.C.
Date and Place of Hearing:	December 15-19, 2003 Vancouver, B.C.

2004 BCSC 422 (CanLII)

Canada discussed the principle of legitimate expectations in these terms:

> The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

[111] The Court more recently described the doctrine of legitimate expectations in ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 at para. 26:

> The doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[112] An expectation may legitimately arise in one of two ways: by an express promise made by a public authority responsible for the decision, or by a regular course of conduct that shows a well-defined practice of consultation: ***British Columbia and Yukon Hotels' Assn. v. British Columbia (Liquor Distribution Branch)***, [1997] B.C.J. No. 305 (S.C.) (QL) at para. 14; and ***Sunshine Coast Parents for French v.***

2004 BCSC 422 (CanLII)

Sunshine Coast School District No. 46 (1990), 49 B.C.L.R. (2d) 252 (S.C.) at 255.

[113] Because the doctrine of legitimate expectations is viewed as one aspect of procedural fairness, it is generally said that it does not apply to legislative action: ***Reference Re Canada Assistance Plan (B.C.)***, [1991] 2 S.C.R. 525 at para. 60; ***Sunshine Coast***, *supra* at 255–257; and ***Aasland***, *supra* at para. 52. I note, however, that in ***Sunshine Coast*** at page 260, Spencer J. held that legislative action may be subject to the doctrine of legitimate expectations if the legislative body has enacted procedural rules that give rise to such expectations.

[114] I am unable to find that the doctrine of legitimate expectations assists the petitioners. First, the statutory framework within which the OIC was issued contains no procedural requirements which might lead to an expectation of consultation.

[115] Second, the doctrine does not create substantive rights. Thus, even if it did apply, it would only give rise to a duty on the part of the Lieutenant Governor in Council to consult with the petitioners before issuing the OIC. It would

2004 BCSC 422 (CanLII)

TAB 38

SUPREME COURT OF CANADA

CITATION: Canada (Minister of Citizenship and Immigration) *v.* Vavilov, 2019 SCC 65

APPEAL HEARD: December 4, 5, 6, 2018
JUDGMENT RENDERED: December 19, 2019
DOCKET: 37748

2019 SCC 65 (CanLII)

BETWEEN:

Minister of Citizenship and Immigration
Appellant

and

Alexander Vavilov
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Council for Refugees, Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario Securities Commission, British Columbia Securities Commission, Alberta Securities Commission, Ecojustice Canada Society, Workplace Safety and Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers' Compensation, Workers' Compensation Appeals Tribunal (New Brunswick), British Columbia International Commercial Arbitration Centre Foundation, Council of Canadian Administrative Tribunals, National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association, Conférence des arbitres du Québec, Canadian Labour Congress, National Association of Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the Rule of Law, Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada
Interveners

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

JOINT REASONS FOR JUDGMENT: (paras. 1 to 197)	Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.
JOINT CONCURRING REASONS: (paras. 198 to 343)	Abella and Karakatsanis JJ.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

2019 SCC 65 (CanLII)

Minister of Citizenship and Immigration *Appellant*

v.

Alexander Vavilov *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Canadian Bar Association,

2019 SCC 65 (CanLII)

Canadian Association of Refugee Lawyers,
Community & Legal Aid Services Programme,
Association québécoise des avocats et avocates en droit de l'immigration and
First Nations Child & Family Caring Society of Canada *Interveners*

2019 SCC 65 (CanLII)

Indexed as: Canada (Minister of Citizenship and Immigration) *v.* Vavilov

2019 SCC 65

File No.: 37748.

2018: December 4, 5, 6; 2019: December 19.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decisions — Proper approach to reasonableness review.

Citizenship — Canadian citizens — Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies — Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen — Exception stating that Canadian-born child is not citizen if either parent was

representative or employee in Canada of foreign government at time of child's birth — Whether Registrar's decision to cancel certificate of citizenship was reasonable — Citizenship Act, R.S.C. 1985, c. 29, s. 3(2)(a).

V was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was

2019 SCC 65 (CanLII)

dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

Per **Wagner** C.J. and **Moldaver**, **Gascon**, **Côté**, **Brown**, **Rowe** and **Martin** JJ.: The Registrar's decision to cancel V's certificate of citizenship was unreasonable, and the Court of Appeal's decision to quash it should be upheld. It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

More generally, this appeal and its companion cases (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66) provide an opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and subsequent cases. The submissions presented to the Court have highlighted two aspects of the current framework which need clarification. The first aspect is the analysis for determining the standard of review. The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard.

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It has become clear that *Dunsmuir*'s promise of simplicity and predictability has not been fully realized. Certain aspects of the current standard of review framework are unclear and unduly complex. The former contextual analysis has proven to be unwieldly and offers limited practical guidance for courts attempting to determine the standard of review. The practical effect is that courts struggle in conducting the analysis, and debates surrounding the appropriate standard and its application continue to overshadow the review on the merits, thereby undermining access to justice. A reconsideration of the Court's approach is therefore necessary in order to bring greater coherence and predictability to this area of law. A revised framework to determine the standard of review where a court reviews the merits of an administrative decision is needed.

In setting out a revised framework, this decision departs from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.

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The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to fulfill its mandate and interpret the law applicable to all issues that come before it. Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. Thus, whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. Conclusively closing the door on the application of a contextual analysis to determine the applicable standard streamlines and simplifies the standard of review framework. As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.

The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. This will be the case where it has explicitly prescribed the

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applicable standard of review. Any framework rooted in legislative intent must respect clear statutory language. The legislature may also direct that derogation from the presumption is appropriate by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. Second, there is no satisfactory justification for the recent trend in the Court's

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jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature's institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. First, questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Second, the rule of law requires courts to have the final word with regard to general questions of law that are of central importance

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to the legal system as a whole because they require uniform and consistent answers. Third, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another since the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. The possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case is not definitively foreclosed. However, any new basis for correctness review would be exceptional and would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism. Similarly, a new correctness category based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in this decision.

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For example, the Court is not persuaded that it should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. A lack of unanimity within an administrative tribunal is the price to pay for decision-making freedom and independence. While discord can lead to legal incoherence, a more robust form of reasonableness review is capable of guarding against such threats to the rule of law. As well, jurisdictional questions should no longer be recognized as a distinct category subject to correctness review; there are no clear markers to distinguish such questions from other questions related to interpreting an administrative decision maker's enabling statute. A proper application of the reasonableness standard will enable courts to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment on jurisdictional issues and without having to apply the correctness standard.

Going forward, a court seeking to determine what standard of review is appropriate should look to this decision first in order to determine how the general framework applies. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance and will continue to apply essentially without modification, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between administrative bodies. On other issues, such as the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis, certain cases will necessarily have less precedential force.

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There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would

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have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

In cases where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable. Reasons are the means by which the decision maker communicates the rationale for its decision: they explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against arbitrariness. A principled approach to reasonableness review is therefore one which puts those reasons first. This enables a reviewing court to assess whether the decision as a whole is reasonable. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process.

In many cases, formal reasons for a decision will not be given or required. Even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant factual and

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legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. A failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and

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elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies, are all elements that will generally be relevant in evaluating whether a given decision is reasonable. Such elements are not a checklist; they may vary in significance depending on the context and will necessarily interact with one another.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. A proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.

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Both statutory and common law will also impose constraints on how and what an administrative decision maker can lawfully decide. Any precedents on the issue before the administrative decision maker or on a similar issue, as well as international law in some administrative decision making contexts, will act as a constraint on what the decision maker can reasonably decide. Whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

Furthermore, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized

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where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. The reasons must also meaningfully account for the central issues and concerns raised by the parties, even though reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis.

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

The question of the appropriate remedy — specifically, whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons — is multi-faceted. The choice of remedy must be guided by the rationale for

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applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. However, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative decision maker decide the matter at first instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of

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judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and

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immunities in some form for the exception to apply. Second, the Registrar disregarded compelling submissions that s. 3(2) is a narrow exception consistent with established principles of international law and with the leading international treaties that extend diplomatic privileges and immunities to employees and representatives of foreign governments. Third, it was a significant omission to ignore the relevant cases that were before the Registrar which suggest that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities. Finally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include all individuals who have not been granted diplomatic privileges and immunities. Rules concerning citizenship require a high degree of interpretive consistency in order to shield against arbitrariness. The Registrar's interpretation cannot be limited to the children of spies — its logic would be equally applicable to other scenarios. As well, provisions such as s. 3(2)(a) must be given a narrow interpretation because they potentially take away rights which otherwise benefit from a liberal and broad interpretation. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation, or whether, in light of those potential consequences, Parliament would have intended s. 3(2)(a) to apply in this manner. Although the Registrar knew her interpretation was novel, she failed to provide a rationale for her expanded interpretation.

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and

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immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

Per **Abella** and **Karakatsanis** JJ.: There is agreement with the majority that the appeal should be dismissed. The Registrar's decision to cancel V's citizenship certificate was unreasonable and was properly quashed by the Court of Appeal.

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and "true questions of jurisdiction" should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority's framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to administrative decision-makers. The majority's presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for

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deference. By dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis, the majority's framework fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers and reads out the foundations of the modern understanding of legislative intent. Instead of understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the interpretative upper hand on questions of law. Specialized expertise has become the core rationale for deference. Giving proper effect to the legislature's choice to delegate authority to an administrative decision-maker requires understanding the advantages that the decision-maker may enjoy in exercising its mandate. Chief among those advantages are the institutional expertise and specialization inherent to

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administering a particular mandate on a daily basis. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

In the majority's framework, deference gives way whenever the rule of law demands it. This approach, however, flows from a court-centric conception of the rule of law. The rule of law means that administrative decision-makers make legal determinations within their mandate; it does not mean that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review. The majority's approach not only erodes the presumption of deference; it erodes confidence in the fact that law-making and legal interpretation are shared enterprises between courts and administrative decision-makers. Moreover, access to justice is at the heart of the legislative choice to establish a robust system of administrative law. This goal is compromised when a narrow conception of the rule of law is invoked to impose judicial hegemony over administrative decision-makers, which adds unnecessary expense and complexity. Authorizing more incursions into the administrative system by judges and permitting

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de novo review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument — i.e., that the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional

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circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the Court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine of *stare decisis*. A nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling.

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The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision. Structuring reasonableness review in this fashion

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effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. Reviewing courts must pay respectful attention to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Third, deferential review impacts how a reviewing court

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evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may

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legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

As well, a court conducting deferential review must view claims of error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised to ensure they go to the reasonableness of the decision rather than representing a mere difference of opinion. Courts must also consider the materiality of any alleged errors. An error that is peripheral to the reasoning process is not sufficient to justify quashing a decision. The same deferential approach must apply with equal force to statutory interpretation cases. In such cases, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach imperils deference. A *de novo* interpretation of a statute necessarily omits the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question. By placing that perspective at the heart of the judicial review inquiry, courts display respect for specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies. Conversely, by imposing their own interpretation of a statute, courts undermine legislative intent.

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In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

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Michael H. Morris, *Marianne Zorić* and *John Provart*, for the appellant.

Hadayt Nazami, *Barbara Jackman* and *Sujith Xavier*, for the respondent.

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Sara Blake and *Judie Im*, for the intervener the Attorney General of Ontario.

Stéphane Rochette, for the intervener the Attorney General of Quebec.

J. Gareth Morley and *Katie Hamilton*, for the intervener the Attorney General of British Columbia.

Kyle McCreary and *Johnna Van Parys*, for the intervener the Attorney General of Saskatchewan.

Jamie Liew, for the intervener the Canadian Council for Refugees.

Karen Andrews, for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program.

Matthew Britton and *Jennifer M. Lynch*, for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission.

Laura Bowman and *Bronwyn Roe*, for the intervener Ecojustice Canada Society.

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David Corbett and *Michelle Alton*, for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick).

Written submissions only by *Gavin R. Cameron* and *Tom Posyniak*, for the intervener the British Columbia International Commercial Arbitration Centre Foundation.

Terrence J. O'Sullivan and *Paul Michell*, for the intervener the Council of Canadian Administrative Tribunals.

Written submissions only by *Susan L. Stewart*, *Linda R. Rothstein*, *Michael Fenrick*, *Angela E. Rae* and *Anne Marie Heenan*, for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec.

Steven Barrett, for the intervener the Canadian Labour Congress.

Written submissions only by *William W. Shores*, *Q.C.*, and *Kirk N. Lambrecht*, *Q.C.*, for the intervener the National Association of Pharmacy Regulatory Authorities.

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Brendan Van Niejenhuis and *Andrea Gonsalves*, for the intervener Queen's Prison Law Clinic.

Adam Goldenberg, for the intervener Advocates for the Rule of Law.

Toni Schweitzer, for the intervener Parkdale Community Legal Services.

Paul Warchuk and *Francis Lévesque*, for the intervener the Cambridge Comparative Administrative Law Forum.

James Plotkin and *Alyssa Tomkins*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Guy Régimbald, for the intervener the Canadian Bar Association.

Audrey Macklin and *Anthony Navaneelan*, for the intervener the Canadian Association of Refugee Lawyers.

Written submissions only by *David Cote* and *Subodh Bharati*, for the intervener the Community & Legal Aid Services Programme.

Guillaume Cliche-Rivard and *Peter Shams*, for the intervener Association québécoise des avocats et avocates en droit de l'immigration.

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Nicholas McHaffie, for the intervener the First Nations Child & Family Caring Society of Canada.

Daniel Jutras and *Audrey Boctor*, as *amici curiae*, and *Olga Redko* and *Edward Béchard Torres*.

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The following is the judgment delivered by

THE CHIEF JUSTICE AND MOLDAVER, GASCON, CÔTÉ, BROWN, ROWE AND MARTIN JJ. —

[1] This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

[2] In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: that judicial review functions to

maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

[3] We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29, that Mr. Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*, SOR/93-246. In our view, the standard of review to be applied to the Registrar's decision is reasonableness, and the Registrar's decision was unreasonable. We would therefore uphold the Federal Court of Appeal's decision to quash it, and would dismiss the Minister of Citizenship and Immigration's appeal.

I. Need for Clarification and Simplification of the Law of Judicial Review

[4] Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision

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making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

[5] Given the ubiquity and practical importance of administrative decision making, it is essential that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed.

[6] In granting leave to appeal in the case at bar and in its companion cases, this Court's leave to appeal judgment made clear that it viewed these appeals as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases. In light of the importance of this issue, the Court appointed two *amici curiae*, invited the parties to devote a substantial portion of their submissions to the standard of review issue, and granted leave to 27 interveners, comprising 4 attorneys general and numerous organizations representing the breadth of the Canadian administrative law landscape. We have, as a result, received a wealth of helpful submissions on this issue. Despite this Court's review of the subject in *Dunsmuir*, some aspects of the law remain challenging. In particular, the submissions presented to the Court have highlighted two aspects of the current framework which need clarification.

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[7] The first aspect is the analysis for determining the standard of review. It has become clear that *Dunsmuir*'s promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir*, a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a single "reasonableness" standard, thus reducing the number of standards of review from three to two: paras. 34-50. It also sought to simplify the analysis for determining the applicable standard of review: paras. 51-64. Since *Dunsmuir*, the jurisprudence has evolved to recognize that reasonableness will be the applicable standard for most categories of questions on judicial review, including, presumptively, when a decision maker interprets its enabling statute: see, e.g., *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; *Dunsmuir*, at para. 54. The Court has indicated that this presumption may be rebutted by showing the issue on review falls within a category of questions attracting correctness review: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22. It may also be rebutted by showing that the context indicates that the legislature intended the standard of review to be correctness: *McLean*, at para. 22; *Edmonton (City) v. Edmonton East (Capilano) Shopping*

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Centres Ltd., 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 32; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 ("*CHRC*"), at paras. 45-46. However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made the analysis unwieldy: see, e.g., P. Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527.

[8] In addition, this analysis has in some respects departed from the theoretical foundations underpinning judicial review. While the application of the reasonableness standard is grounded, in part, in the necessity of avoiding "undue interference" in the face of the legislature's intention to leave certain questions with administrative bodies rather than with the courts (see *Dunsmuir*, at para. 27), that standard has come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism.

[9] The uncertainty that has followed *Dunsmuir* has been highlighted by judicial and academic criticism, litigants who have come before this Court, and organizations that represent Canadians who interact with administrative decision makers. These are not light critiques or theoretical challenges. They go to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence. This Court, too, has taken note. In *Wilson v.*

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Atomic Energy of Canada Ltd., 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 19, Abella J. expressed the need to "simplify the standard of review labyrinth we currently find ourselves in" and offered suggestions with a view to beginning a necessary conversation on the way forward. It is in this context that the Court decided to grant leave to hear this case and the companion cases jointly.

[10] This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

[11] The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard. The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". These concerns have been echoed by some members of the legal profession, civil society organizations and legal clinics. The Court has an obligation to take these perspectives seriously and to ensure that the framework it adopts accommodates all types of administrative decision making, in areas that range from immigration, prison

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administration and social security entitlements to labour relations, securities regulation and energy policy.

[12] These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*'s promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.

[13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

[14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a

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culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

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[15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

II. Determining the Applicable Standard of Review

[16] In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.

[17] The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47, see also *Dunsmuir*, at paras. 62-64; *McLean*, at para. 22) in order to identify the appropriate standard.

[18] Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to

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carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach: see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at paras. 24-27; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57 and 129-31, 139; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 43-44; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 849-50.

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[19] On this point, we recall the observation of Gibbs J. in *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), which this Court endorsed in *Craig*, at para. 26:

> No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

[20] Nonetheless, this Court has in the past revisited precedents that were determined to be unsound in principle, that had proven to be unworkable and unnecessarily complex to apply, or that had attracted significant and valid judicial, academic and other criticism: *Craig*, at paras. 28-30; *Henry*, at paras. 45-47; *Fraser*, at para. 135 (per Rothstein J., concurring in the result); *Bernard*, at pp. 858-59. Although adhering to the established jurisprudence will generally promote certainty

and predictability, in some instances doing so will create or perpetuate uncertainty in the law: *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 528; *Bernard*, at p. 858; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 778. In such circumstances, "following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law": *Bernard*, at p. 858. These considerations apply here.

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[21] Certain aspects of the current framework are unclear and unduly complex. The practical effect of this lack of clarity is that courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby undermining access to justice. The words of Binnie J. in his concurring reasons in *Dunsmuir*, at para. 133, are still apt:

> [J]udicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied . . . . If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is [the choice of standard analysis] . . . . A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome . . . .

Regrettably, we find ourselves in a similar position following *Dunsmuir*. As Karakatsanis J. observed in *Edmonton East*, at para. 35, "[t]he contextual approach

can generate uncertainty and endless litigation concerning the standard of review." While counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants "still find the merits waiting in the wings for their chance to be seen and reviewed": *Wilson*, at para. 25, per Abella J.

[22] As noted in *CHRC*, this Court "has for years attempted to simplify the standard of review analysis in order to 'get the parties away from arguing about the tests and back to arguing about the substantive merits of their case'": para. 27, quoting *Alberta Teachers*, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J. The principled changes set out below seek to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward.

A. *Presumption That Reasonableness Is the Applicable Standard*

[23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

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[24] Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir*, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

[25] For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now

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appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

[26] Before turning to an explanation of how the presumption of reasonableness review may be rebutted, we believe it is desirable to clarify one aspect of the conceptual basis for this presumption. Since *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, the central rationale for applying a deferential standard of review in administrative law has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute: *C.U.P.E.*, at pp. 235-36. However, this Court has subsequently identified a number of other justifications for applying the reasonableness standard, some of which have taken on influential roles in the standard of review analysis at various times.

[27] In particular, the Court has described one rationale for applying the reasonableness standard as being the relative expertise of administrative decision makers with respect to the questions before them: see, e.g., *C.U.P.E.*, at p. 236; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 32-35; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 591-92; *Canada (Director of Investigation and Research) v.*

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Southam Inc., [1997] 1 S.C.R. 748, at paras. 50-53; *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 *Dunsmuir*, at para. 68. However, this Court's jurisprudence has sometimes been deeply divided on the question of what expertise entails in the administrative context, how it should be assessed and how it should inform the standard of review analysis: see, e.g., *Khosa*, at paras. 23-25, per Binnie J. for the majority, compared to paras. 93-96, per Rothstein J., concurring in the result; *Edmonton East*, at para. 33, per Karakatsanis J. for the majority, compared to paras. 81-86, per Côté and Brown JJ., dissenting. In the era of what was known as the "pragmatic and functional" approach, which was first set out in *Bibeault*, a decision maker's expertise relative to that of the reviewing court was one of the key contextual factors said to indicate legislative intent with respect to the standard of review, but the decision maker was not presumed to have relative expertise. Instead, whether a decision maker had greater expertise than the reviewing court was assessed in relation to the specific question at issue and on the basis of a contextual analysis that could incorporate factors such as the qualification of an administrative body's members, their experience in a particular area and their involvement in policy making: see, e.g., *Pezim*, at pp. 591-92; *Southam*, at paras. 50-53; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 28-29; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at paras. 28-32; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 50.

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[28] Unfortunately, this contextual analysis proved to be unwieldly and offered limited practical guidance for courts attempting to assess an administrative decision maker's relative expertise. More recently, the dominant approach in this Court has been to accept that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature: *Edmonton East*, at para. 33. However, if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not.

[29] Of course, the fact that the specialized role of administrative decision makers lends itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority. Over the years, the Court has pointed to a number of other compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker. These rationales have included the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.

[30] While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in

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order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa*, for example, the majority understood *Dunsmuir* to stand for the proposition that "with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts": para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review "respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts": para. 22. And in *CHRC*, Gascon J. explained that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review": para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir*, at para. 27.

[31] We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This

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consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

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[32] That being said, our starting position that the applicable standard of review is reasonableness is not incompatible with the rule of law. However, because this approach is grounded in respect for legislative choice, it also requires courts to give effect to clear legislative direction that a different standard was intended. Similarly, a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it. Each of these situations will be discussed in turn below.

B. *Derogation From the Presumption of Reasonableness Review on the Basis of Legislative Intent*

[33] This Court has described respect for legislative intent as the "polar star" of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker.

Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.

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(1) Legislated Standards of Review

[34] Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-32; *Khosa*, at paras. 18-19; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 20; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 55; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587, at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 28.

[35] It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C.

Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

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(2) Statutory Appeal Mechanisms

[36] We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court.

This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

[37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[38] We acknowledge that giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. However, after careful

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consideration, we are of the view that this shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by a weighing of the values of certainty and correctness: *Craig*, at para. 27. Our conclusion is based on the following considerations.

[39] First, there has been significant judicial and academic criticism of this Court's recent approach to statutory appeal rights: see, e.g., Y.-M. Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 244; the Hon. J.T. Robertson, *Administrative Deference: The Canadian Doctrine that Continues to Disappoint* (April 18, 2018) (online), at p. 8; the Hon. D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 *Queen's L.J.* 27, at p. 33; Daly, at pp. 541-42; *Québec (Procureure générale) v. Montréal (Ville)*, 2016 QCCA 2108, 17 Admin. L.R. (6th) 328, at paras. 36-46; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311, at paras. 190-92, per Nadon J.A., concurring, and at 66 and 69-72, per Rennie J.A., dissenting; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1, at paras. 91 and 93-95, per Slatter J.A., concurring; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22, at paras. 250, 255-64 and 274-302 (CanLII), per Beveridge J.A., dissenting; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14, at paras. 9-14 (CanLII). These critiques seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. This criticism observes that legislative choice is not one-

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dimensional; rather, it pulls in two directions. While a legislative choice to delegate to an administrative decision maker grounds a presumption of reasonableness on the one hand, a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts on the other hand.

[40] This Court has in the past held that the existence of significant and valid judicial, academic and other criticism of its jurisprudence may justify reconsideration of a precedent: *Craig*, at para. 29; *R. v. Robinson*, [1996] 1 S.C.R. 683, at paras. 35-41. This consideration applies in the instant case. In particular, the suggestion that the recent treatment of statutory rights of appeal represents a departure from the conceptual basis underpinning the standard of review framework is itself a compelling reason to re-examine the current approach: *Khosa*, at para. 87, per Rothstein J., concurring in the result.

[41] Second, there is no satisfactory justification for the recent trend in this Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording: see *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at paras. 35-39. Indeed, this approach is itself a departure from earlier jurisprudence: the Hon. J. T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014), 66 *S.C.L.R.* (2d) 1, at pp. 91-93. Under the former "pragmatic and functional" approach to determining the applicable standard of review, the existence of a privative clause or a statutory right of appeal

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was one of four contextual factors that a court would consider in order to determine the standard that the legislature intended to apply to a particular decision. Although a statutory appeal clause was not determinative, it was understood to be a key factor indicating that the legislature intended that a less deferential standard of review be applied: see, e.g., *Pezim*, at pp. 589-92; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, at paras. 28-31; *Southam*, at paras. 30-32, 46 and 54-55; *Pushpanathan*, at paras. 30-31; *Dr. Q*, at para. 27; *Mattel*, at paras. 26-27; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 21 and 27-29; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 11; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 7.

[42] The Court did indeed sometimes find that, even in a statutory appeal, a deferential standard of review was warranted for the legal findings of a decision maker that lay at the heart of the decision maker's expertise: see, e.g., *Pezim*. In other instances, however, the Court concluded that the existence of a statutory appeal mechanism and the fact that the decision maker did not have greater expertise than a court on the issue being considered indicated that correctness was the appropriate standard, including on matters involving the interpretation of the administrative decision maker's home statute: see, e.g., *Mattel*, at paras. 26-33; *Barrie Public Utilities*, at paras. 9-19; *Monsanto*, at paras. 6-16.

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[43] Yet as, in *Dunsmuir*, *Alberta Teachers*, *Edmonton East* and subsequent cases, the standard of review analysis was simplified and shifted from a contextual analysis to an approach more focused on categories, statutory appeal mechanisms ceased to play a role in the analysis. Although this simplification of the standard of review analysis may have been a laudable change, it did not justify ceasing to give *any* effect to statutory appeal mechanisms. *Dunsmuir* itself provides little guidance on the rationale for this change. The majority in *Dunsmuir* was silent on the role of a statutory right of appeal in determining the standard of review, and did not refer to the prior treatment of statutory rights of appeal under the pragmatic and functional approach.

[44] More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word "appeal" refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that the legislature intends an appellate standard of review to be applied when it uses the word "appeal" also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further

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support for giving effect to statutory rights of appeal. Our colleagues' suggestion that our position in this regard "hinges" on what they call a "textualist argument" (at para. 246) is inaccurate.

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[45] That there is no principled rationale for ignoring statutory appeal mechanisms becomes obvious when the broader context of those mechanisms is considered. The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding. However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant — contrary to the well-established principle that the legislature does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[46] Finally, and most crucially, the appeals now before the Court have allowed for a comprehensive and considered examination of the standard of review analysis with the goal of remedying the conceptual and practical difficulties that have made this area of the law challenging for litigants and courts alike. To achieve this goal, the revised framework must, for at least two reasons, give effect to statutory appeal mechanisms. The first reason is conceptual. In the past, this Court has looked past an appeal clause primarily when the decision maker possessed greater relative

expertise — what it called the "specialization of duties" principle in *Pezim*, at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature's institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature's choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature's choice of a more involved role for the courts in supervising administrative decision making.

[47] The second reason is that, building on developments in the case law over the past several years, this decision conclusively closes the door on the application of a contextual analysis to determine the applicable standard, and in doing so streamlines and simplifies the standard of review framework. With the elimination of the contextual approach to selecting the standard of review, the need for statutory rights of appeal to play a role becomes clearer. Eliminating the contextual approach means that statutory rights of appeal must now either play no role in administrative law or be accepted as directing a departure from the default position of reasonableness review. The latter must prevail.

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[48] Our colleagues agree that the time has come to put the contextual approach espoused in *Dunsmuir* to rest and adopt a presumption of reasonableness review. We part company on the extent to which the departure from the contextual approach requires corresponding modifications to other aspects of the standard of review jurisprudence. We consider that the elimination of the contextual approach represents an incremental yet important adjustment to Canada's judicial review roots. While it is true that this Court has, in the past several years of jurisprudential development, warned that the contextual approach should be applied "sparingly" (*CHRC*, at para. 46), it is incorrect to suggest that our jurisprudence was such that the elimination of the contextual analysis was "all but complete": reasons of Abella and Karakatsanis JJ., at para. 277; see, in this regard, *CHRC*, at paras. 44-54; *Saguenay*, at para. 46; *Tervita*, at para. 35; *McLean*, at para. 22; *Edmonton East*, at para. 32; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 15. The contextual analysis was one part of the broader standard of review framework set out in *Dunsmuir*. A departure from this aspect of the *Dunsmuir* framework requires a principled rebalancing of the framework as a whole in order to maintain the equilibrium between the roles of administrative decision makers and reviewing courts that is fundamental to administrative law.

[49] In our view, with the starting position of this presumption of reasonableness review, and in the absence of a searching contextual analysis, legislative intent can only be given effect in this framework if statutory appeal

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mechanisms, as clear signals of legislative intent with respect to the applicable standard of review, are given effect through the application of appellate standards by reviewing courts. Conversely, in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review.

[50] We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.

[51] Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and

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determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see *Khosa*, at para. 34. Another example is the current version of s. 470 of Alberta's *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).

[52] Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

C. *The Applicable Standard Is Correctness Where Required by the Rule of Law*

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[53] In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58.

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

(1) Constitutional Questions

[55] Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in

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reviewing such questions: *Dunsmuir*, para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322.

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[56] The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

[57] Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 65). Our jurisprudence holds that

an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

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(2) General Questions of Law of Central Importance to the Legal System as a Whole

[58] In *Dunsmuir*, a majority of the Court held that, in addition to constitutional questions, general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" will require the application of the correctness standard: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are "of central importance to the legal system as a whole". However, a return to first principles reveals that it is not necessary to evaluate the decision maker's specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.

[59] As the majority of the Court recognized in *Dunsmuir*, the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir*, para. 60. In these cases, correctness

review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government: see *Toronto (City)*, at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 20; *Canadian National Railway*, at para. 60; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 17; *Saguenay*, at para. 51; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 38. For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary*, at paras. 19-26. As this shows, the resolution of general questions of law "of central importance to the legal system as a whole" has implications beyond the decision at hand, hence the need for "uniform and consistent answers".

[60] This Court's jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the following general questions of law have been held to be of central importance to the legal system as a whole: when an

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administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process (*Toronto (City)*, at para. 15); the scope of the state's duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary*, at para. 20); and the scope of parliamentary privilege (*Chagnon*, at para. 17). We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions: see, e.g., *CHRC*, at para. 43.

[61] We would stress that the mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue: see, e.g., *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 66; *McLean*, at para. 28; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488, at para. 18. The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole. These include whether a certain tribunal can grant a particular type of compensation (*Mowat*, at para. 25); when estoppel may be applied as an arbitral remedy (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at paras. 37-38); the interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*, at para. 32); the scope of a management rights clause in a collective agreement (*Irving Pulp & Paper*, at paras. 7, 15-16 and 66, per

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Rothstein and Moldaver JJ., dissenting but not on this point); whether a limitation period had been triggered under securities legislation (*McLean*, at paras. 28-31); whether a party to a confidential contract could bring a complaint under a particular regulatory regime (*Canadian National Railway*, at para. 60); and the scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec*, at paras. 17-18). As these comments and examples indicate, this does not mean that simply because expertise no longer plays a role in the selection of the standard of review, questions of central importance are now transformed into a broad catch-all category for correctness review.

[62] In short, general questions of law of central importance to the legal system as a whole require a single determinate answer. In cases involving such questions, the rule of law requires courts to provide a greater degree of legal certainty than reasonableness review allows.

(3) Questions Regarding the Jurisdictional Boundaries Between Two or More Administrative Bodies

[63] Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir*, para. 61. One such question arose in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a

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comprehensive legislative regime. Similarly, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185, the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.

[64] Administrative decisions are rarely contested on this basis. Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.

D. *A Note Regarding Jurisdictional Questions*

[65] We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was "without question" (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or

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vires). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see *Dunsmuir*, at para. 59; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32. Since *Dunsmuir*, however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": *McLean*, at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin*, at paras. 32-36; *CHRC*, at paras. 31-41.

[66] As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*, at para. 38; *Alberta Teachers*, at para. 34; see similarly *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated

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power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, **[2017] 1 S.C.R. 360**; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635.

[67] In *CHRC*, the majority, while noting this inherent difficulty — and the negative impact on litigants of the resulting uncertainty in the law — nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category — in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority — can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly"

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or "narrowly" jurisdictional issue and without having to apply the correctness standard.

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[68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:

> The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional" . . . .

E. *Other Circumstances Requiring a Derogation from the Presumption of Reasonableness Review*

[69] In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case": *Alberta Teachers*, at para. 36, quoting *Dunsmuir*, at para. 145, per Binnie J., concurring.

[70] However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be

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understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

[71] The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law's meaning comes to depend on the

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identity of the decision maker. The *amici curiae* submit that, where competing reasonable legal interpretations linger over time at the administrative level — such that a statute comes to mean, simultaneously, both "yes" and "no" — the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker: factum of the *amici curiae*, at para. 91.

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[72] We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, this Court held that "a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals": p. 800; see also *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 28. That said, we agree that the hypothetical scenario suggested by the *amici curiae* — in which the law's meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence — is antithetical to the rule of law. In our view, however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see *Domtar*, at p. 801), of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to "legal incoherence" and require a court to step in is not obvious. Given these practical

difficulties, this Court's binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

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III. Performing Reasonableness Review

[73] This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice.

[74] In this section of our reasons, we endeavour to provide that guidance. The approach we set out is one that focuses on justification, offers methodological consistency and reinforces the principle "that reasoned decision-making is the lynchpin of institutional legitimacy": *amici curiae* factum, at para. 12.

[75] We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness

review considers all relevant circumstances in order to determine whether the applicant has met their onus.

A. *Procedural Fairness and Substantive Review*

[76] Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case — and in particular whether that duty requires a decision maker to give reasons for its decision — will impact how a court conducts reasonableness review.

[77] It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74‑75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the

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process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

[78] In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in which reasons for an administrative decision are required and available to the reviewing court.

[79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate

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that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

[80] The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker*, at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the "discipline of reasons": *Good Judgment*: *Making Judicial Decisions* (2018), at p. 134; see also *Sheppard*, at para. 23.

[81] Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3

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S.C.R. 708, the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'": para. 1, quoting *Dunsmuir*, at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

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B. *Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes*

[82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.

[83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning

process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

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[85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

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[87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

C. *Reasonableness Is a Single Standard That Accounts for Context*

[88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy"

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on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

[89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa*, at para. 59; *Catalyst*, at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, **[2012] 1 S.C.R. 364,** at para. 44; *Wilson*, at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, **[2018] 2 S.C.R. 293,** at para. 53.

[90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one

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decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

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D. *Formal Reasons for a Decision Should Be Read in Light of the Record and With Due Sensitivity to the Administrative Setting in Which They Were Given*

[91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will

not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency.

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Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

[95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

[96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to

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abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

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[97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn . . . .

[98] As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a

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decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

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E. *A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision*

[99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

[100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

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(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning

[102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis,

inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

[103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission),* 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (see *Blas v. Canada (Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520, at para. 47).

[104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation

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to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

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(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision

[105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

[106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context.

They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

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[107] A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

(a) *Governing Statutory Scheme*

[108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins*

de Jéhovah de St-Jérôme-Lafontaine, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

[109] As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely

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identifies one of the obvious and necessary constraints imposed on administrative decision makers.

[110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

(b) *Other Statutory or Common Law*

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[111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.

[112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the

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same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35-37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

[113] That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority*, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without

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adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

[114] We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with . . . the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71.

(c) *Principles of Statutory Interpretation*

[115] Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance

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or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

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[116] Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

[117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading

the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

[119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision

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maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

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[121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[122] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their

reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

[123] There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

[124] Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision

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maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

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(d) *Evidence Before the Decision Maker*

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must

be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

(e) *Submissions of the Parties*

[127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however

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subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

(f) *Past Practices and Past Decisions*

[129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

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[130] Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid . . . conflicting results": *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

[131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this

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sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[132] As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

(g) *Impact of the Decision on the Affected Individual*

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[133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

[134] Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.

[135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable

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among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

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F. *Review in the Absence of Reasons*

[136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.

[137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the

record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

[138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

G. *A Note on Remedial Discretion*

[139] Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of

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elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

[140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.

[141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

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[142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at paras. 18-19 (CanLII). An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, at paras. 54 and 88 (CanLII). Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada*

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(Fisheries and Oceans), 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

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IV. Role of Prior Jurisprudence

[143] Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases —including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis — will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.

[144] This approach strives for future doctrinal stability under the new framework while clarifying the continued relevance of the existing jurisprudence. Where a reviewing court is not certain how these reasons relate to the case before it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard.

[145] Before turning to Mr. Vavilov's case, we pause to note that our colleagues mischaracterize the framework developed in these reasons as being an "encomium" for correctness, and a turn away from the Court's deferential approach to the point of being a "eulogy" for deference (at paras. 199 and 201). With respect, this is a gross exaggeration. Assertions that these reasons adopt a formalistic, court-centric view of administrative law (at paras. 229 and 240), enable an unconstrained expansion of correctness review (at para. 253) or function as a sort of checklist for "line-by-line" reasonableness review (at para. 284), are counter to the clear wording we use and do not take into consideration the delicate balance that we have accounted for in setting out this framework.

V. Mr. Vavilov's Application for Judicial Review

[146] The case at bar involves an application for judicial review of a decision made by the Canadian Registrar of Citizenship on August 15, 2014. The Registrar's decision concerned Mr. Vavilov, who was born in Canada and whose parents were later revealed to be undercover Russian spies. The Registrar determined that Mr. Vavilov was not a Canadian citizen on the basis of an interpretation of s. 3(2)(a) of

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the *Citizenship Act* and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*. We conclude that the standard of review applicable to the Registrar's decision is reasonableness, and that the Registrar's decision was unreasonable. We would uphold the decision of the Federal Court of Appeal to quash the Registrar's decision and would not remit the matter to the Registrar for redetermination.

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A. *Facts*

[147] Mr. Vavilov was born in Toronto as Alexander Foley on June 3, 1994. At the time of his birth, his parents were posing as Canadians under the assumed names of Tracey Lee Ann Foley and Donald Howard Heathfield. In reality, they were Elena Vavilova and Andrey Bezrukov, two foreign nationals working on a long-term assignment for the Russian foreign intelligence service, the SVR. Their false Canadian identities had been assumed prior to the birth of Mr. Vavilov and of his older brother, Timothy, for purposes of a "deep cover" espionage network under the direction of the SVR. The United States Department of Justice refers to it as the "illegals" program.

[148] Ms. Vavilova and Mr. Bezrukov were deployed to Canada to establish false personal histories as Western citizens. They worked, ran a business, pursued higher education and, as noted, had two children here. After their second son was born, the family moved to France, and later to the United States. In the United States, Mr. Bezrukov obtained a Masters of Public Administration at Harvard University and

worked as a consultant, all while working to collect information on a variety of sensitive national security issues for the SVR. The nature of the undercover work of Ms. Vavilova and Mr. Bezrukov meant that there was no point at which either of them had any publicly acknowledged affiliation with the Russian state, held any official diplomatic or consular status, or had been granted any diplomatic privilege or immunity.

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[149] Until he was about 16 years old, Mr. Vavilov did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, lived and identified as a Canadian, held a Canadian passport, learned both official languages and was proud of his heritage. His parents' true identities became known to him on June 27, 2010, when they were arrested in the United States and charged (along with several other individuals) with conspiracy to act as unregistered agents of a foreign government. On July 8, 2010, they pled guilty, admitted their status as Russian citizens acting on behalf of the Russian state, and were returned to Russia in a "spy swap" the following day. Mr. Vavilov has described the revelation as a traumatic event characterized by disbelief and a crisis of identity.

[150] Just prior to his parents' deportation, Mr. Vavilov left the United States with his brother on a trip that had been planned before their parents' arrest, going first to Paris, and then to Russia on a tourist visa. In October 2010, Mr. Vavilov unsuccessfully attempted to renew his Canadian passport through the Canadian Embassy in Moscow. Although he submitted to DNA testing and changed his

surname from Foley to Vavilov at the behest of passport authorities, his second attempt to obtain a Canadian passport in December 2011 was also unsuccessful. He was then informed that despite his Canadian birth certificate, he would also need to obtain and provide a certificate of Canadian citizenship before he would be issued a passport. Mr. Vavilov applied for that certificate in October 2012, and it was issued to him on January 15, 2013. At that point, he made another passport application through the Canadian Embassy in Buenos Aires, Argentina, and, after a delay, applied for mandamus, a process that was settled out of court in June 2013. The Minister of Citizenship and Immigration undertook to issue a new travel document to Mr. Vavilov by July 19, 2013.

[151] However, Mr. Vavilov never received a passport. Instead, he received a "procedural fairness letter" from the Canadian Registrar of Citizenship dated July 18, 2013 in which the Registrar stated that Mr. Vavilov had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, pursuant to s. 3(2)(a) of the *Citizenship Act*, he was not a citizen of Canada. Mr. Vavilov was invited to make submissions in response, and he did so. On August 15, 2014, the Registrar formally cancelled Mr. Vavilov's Canadian citizenship certificate pursuant to s. 26(3) of the *Citizenship Regulations*.

B. *Procedural History*

(1) Registrar's Decision

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[152] In a brief letter sent to Mr. Vavilov on August 15, 2014, the Registrar informed him that she was cancelling his certificate of citizenship pursuant to s. 26(3) of the *Citizenship Regulations* on the basis that he was not entitled to it. The Registrar summarized her position as follows:

a) Although Mr. Vavilov was born in Toronto, neither of his parents was a citizen of Canada, and neither of them had been lawfully admitted to Canada for permanent residence at the time of his birth.

b) In 2010, Mr. Vavilov's parents were convicted of "conspiracy to act in the United States as a foreign agent of a foreign government", and recognized as unofficial agents working as "illegals" for the SVR.

c) As a result, the Registrar believed that, at the time of Mr. Vavilov's birth, his parents were "employees or representatives of a foreign government".

d) Accordingly, pursuant to s. 3(2)(a) of the *Citizenship Act*, Mr. Vavilov had never been a Canadian citizen and had not been entitled to receive the certificate of Canadian citizenship that had been issued to him in 2013. Section 3(2)(a) provides that s. 3(1)(a) of the *Citizenship Act* (which grants citizenship by birth to persons born in Canada after February 14, 1977) does not apply to an individual if, at the time of the individual's birth, neither of their parents was a citizen or lawfully admitted to Canada for permanent

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residence and either parent was "a diplomatic or consular officer or other representative or employee in Canada of a foreign government."

[153] For these reasons, the Registrar cancelled the certificate and indicated that Mr. Vavilov would no longer be recognized as a Canadian citizen. The Registrar's letter did not offer any analysis or interpretation of s. 3(2)(a) of the *Citizenship Act*. However, it appears that in coming to her decision, the Registrar relied on a 12-page report prepared by a junior analyst, which included an interpretation of this key statutory provision.

[154] In that report, the analyst provided a timeline of the procedural history of Mr. Vavilov's file, a summary of the investigation into and charges against his parents in the United States, and background information on the SVR's "illegals" program. The analyst also discussed several provisions of the *Citizenship Act*, including s. 3(2)(a), and it is this aspect of her report that is most relevant to Mr. Vavilov's application for judicial review. The analyst's ultimate conclusion was that the certificate of citizenship issued to Mr. Vavilov in January 2013 was issued in error, as his parents had been "working as employees or representatives of a foreign government (the Russian Federation) during the time they resided in Canada, including at the time of Mr. Vavilov's birth", and that "[a]s such, Mr. Vavilov was not entitled to receive a citizenship certificate pursuant to paragraph 3(2)(a) of the *Citizenship Act*": A.R., Vol. I, at p. 3. The report was dated June 24, 2014.

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[155] In discussing the relevant legislation, the analyst cited s. 3(1)(a) of the *Citizenship Act*, which establishes the general rule that persons born in Canada after February 14, 1977 are Canadian citizens. The analyst also referred to an exception to that general rule set out in s. 3(2) of the *Citizenship Act*, which reads as follows:

> (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

[156] The analyst noted that s. 3(2)(a) refers both to diplomatic and consular officers and to *other* representatives or employees of a foreign government. She acknowledged that the term "diplomatic or consular officer" is defined in s. 35(1) of the *Interpretation Act* and that the definition lists a large number of posts within a foreign mission or consulate. However, the analyst observed that no statutory definition exists for the phrase "other representative or employee in Canada of a foreign government."

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[157] The analyst compared the wording of s. 3(2)(a) with that of a similar provision in predecessor legislation. That provision, s. 5(3)(b) of the *Canadian Citizenship Act,* R.S.C. 1970, c. C-19, excluded from citizenship children whose "responsible parent" at the time of birth was:

> (i) a foreign diplomatic or consular officer or a representative of a foreign
> government accredited to Her Majesty,
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
> (iii) an employee in the service of a person referred to in subparagraph (i).

[158] The analyst reasoned that because s. 3(2)(a) "makes reference to 'representatives or employees of a foreign government,' but does not link the representatives or employees to 'attached to or in the service of a foreign diplomatic mission or consulate in Canada' (as did the earlier version of the provision), it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff'": A.R., vol. I, at p. 7.

[159] Although the analyst acknowledged that "Ms. Vavilova and Mr. Bezrukov, were employed in Canada by a foreign government without the benefits or protections (i.e.: immunity) that accompany diplomatic, consular, or official status positions", she concluded that they were nonetheless "unofficial employees or representatives" of Russia at the time of Mr. Vavilov's birth: A.R., vol. I, at p. 13. The exception in s. 3(2)(a) of the *Citizenship Act*, as she interpreted it, therefore applied to Mr. Vavilov. As a result, the analyst recommended that the Canadian

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Registrar of Citizenship "recall" Mr. Vavilov's certificate on the basis that he was not, and had never been, entitled to citizenship.

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(2) Federal Court (Bell J.), 2015 FC 960, [2016] 2 F.C.R. 39

[160] Mr. Vavilov sought and was granted leave to bring an application for judicial review of the Registrar's decision in the Federal Court pursuant to s. 22.1 of the *Citizenship Act*. His application was dismissed.

[161] The Federal Court rejected Mr. Vavilov's argument that the Registrar had breached her duty of procedural fairness by failing to disclose the documentation that had prompted the procedural fairness letter. In the Federal Court's view, the Registrar had provided Mr. Vavilov sufficient information to allow him to meaningfully respond, and had thereby satisfied the requirements of procedural fairness in the circumstances.

[162] The Federal Court also rejected Mr. Vavilov's challenge to the Registrar's interpretation of s. 3(2)(a) of the *Citizenship Act*. Applying the correctness standard, the Federal Court agreed with the Registrar that undercover foreign operatives living in Canada fall within the meaning of the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" in s. 3(2)(a). In the Federal Court's view, to interpret s. 3(2)(a) in any other way would render the phrase "other representative or employee in Canada of a foreign government" meaningless and would lead to the "absurd result" that "children

of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth": para. 25.

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[163] Finally, the Federal Court was satisfied, given the evidence, that the Registrar's conclusion that Mr. Vavilov's parents had at the time of his birth been in Canada as part of an undercover operation for the Russian government was reasonable.

(3) Federal Court of Appeal (Stratas J.A. with Webb J.A. Concurring; Gleason J.A. Dissenting), 2017 FCA 132, [2018] 3 F.C.R. 75

[164] A majority of the Federal Court of Appeal allowed Mr. Vavilov's appeal from the Federal Court's judgment and quashed the Registrar's decision.

[165] The Court of Appeal unanimously rejected Mr. Vavilov's argument that he had been denied procedural fairness by the Registrar. In the Court of Appeal's view, the Registrar had provided Mr. Vavilov sufficient information in the procedural fairness letter to enable him to know the case to meet. Even if Mr. Vavilov had been entitled to more information at the time of that letter, the court indicated that his procedural fairness challenge would nevertheless have failed because he had subsequently obtained that additional information through his own efforts and was able to make meaningful submissions.

[166] The Court of Appeal was also unanimously of the view that the appropriate standard of review for the Registrar's interpretation and application of s. 3(2)(a) of the *Citizenship Act* was reasonableness. It split, however, on the application of that standard to the Registrar's decision.

[167] The majority of the Court of Appeal concluded that the analyst's interpretation of s. 3(2)(a), which the Registrar had adopted, was unreasonable and that the Registrar's decision should be quashed. The analysis relied on by the Registrar on the statutory interpretation issue was confined to a consideration of the text of s. 3(2)(a) and an abbreviated review of its legislative history, which totally disregarded its purpose or context. In the majority's view, such a "cursory and incomplete approach to statutory interpretation" in a case such as this was indefensible: para. 44. Moreover, when the provision's purpose and its context were taken into account, the only reasonable conclusion was that the phrase "employee in Canada of a foreign government" in s. 3(2)(a) was meant to apply only to individuals who have been granted diplomatic privileges and immunities under international law. Because it was common ground that neither of Mr. Vavilov's parents had been granted such privileges or immunities, s. 3(2)(a) did not apply to him. The cancellation of his citizenship certificate on the basis of s. 3(2)(a) therefore could not stand, and Mr. Vavilov was entitled to Canadian citizenship under the *Citizenship Act*.

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[168] The dissenting judge disagreed, finding that the Registrar's interpretation of s. 3(2)(a) was reasonable. According to the dissenting judge, the text of that provision admits of at least two rational interpretations: one that includes all employees of a foreign government and one that is restricted to those who have been granted diplomatic privileges and immunities. In the dissenting judge's view, the former interpretation is not foreclosed by the context or the purpose of the provision. It was thus open to the Registrar to conclude that Mr. Vavilov's parents fell within the scope of s. 3(2)(a). The dissenting judge would have upheld the Registrar's decision.

C. *Analysis*

(1) Standard of Review

[169] Applying the standard of review analysis set out above leads to the conclusion that the standard to be applied in reviewing the merits of the Registrar's decision is reasonableness.

[170] When a court reviews the merits of an administrative decision, reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. On this point, we note that ss. 22.1 through 22.4 of the *Citizenship Act* lay down rules that govern applications for judicial review of decisions made under that Act, one of which, in s. 22.1(1), is that such an application may be made only with leave of the

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Federal Court. However, none of these provisions allow for a party to bring an appeal from a decision under the *Citizenship Act*. Given this fact, and given that Parliament has not prescribed the standard to be applied on judicial review of the decision at issue, there is no indication that the legislature intended a standard of review other than reasonableness to apply. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. As a result, the standard to be applied in reviewing the decision is reasonableness.

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(2) Review for Reasonableness

[171] The principal issue before this Court is whether it was reasonable for the Registrar to find that Mr. Vavilov's parents had been "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*.

[172] In our view, it was not. The Registrar failed to justify her interpretation of s. 3(2)(a) of the *Citizenship Act* in light of the constraints imposed by the text of s. 3 of the *Citizenship Act* considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government

representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter (A.R., vol. IV, at pp. 448-52), the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).

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[173] Our review of the Registrar's decision leads us to conclude that it was unreasonable for her to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" applies to individuals who have not been granted diplomatic privileges and immunities in Canada. It is undisputed that Mr. Vavilov's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar.

(a) *Section 3(2) of the Citizenship Act*

[174] The analyst justified her conclusion that Mr. Vavilov is not a citizen of Canada by reasoning that his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act.* Section 3(2)(a) provides that children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" are exempt from the general rule in s. 3(1)(a) that individuals born in Canada after February 14,

1977 acquire Canadian citizenship by birth. The analyst observed that although the term "diplomatic or consular officer" is defined in the *Interpretation Act* and does not apply to individuals like Mr. Vavilov's parents, the phrase "other representative or employee in Canada of a foreign government" is not so defined, and may apply to them.

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[175] The analyst's attempt to give the words "other representative or employee in Canada of a foreign government" a meaning distinct from that of "diplomatic or consular officer" is sensible. It is generally consistent with the principle of statutory interpretation that Parliament intends each word in a statute to have meaning: Sullivan, at p. 211. We accept that if the phrase "other representative or employee in Canada of a foreign government" were considered in isolation, it could apply to a spy working in the service of a foreign government in Canada. However, the analyst failed to address the immediate statutory context of s. 3(2)(a), including the closely related text in s. 3(2)(c):

> (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities

> certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

[176] As the majority of the Court of Appeal noted (at paras. 61-62), the wording of s. 3(2)(c) provides clear support for the conclusion that *all* of the persons contemplated by s. 3(2)(a) — including those who are "employee[s] in Canada of a foreign government" — must have been granted diplomatic privileges and immunities in some form. If, as the Registrar concluded, s. 3(2)(a) includes persons who do not benefit from these privileges or immunities, it is difficult to understand how effect could be given to the explicit equivalency requirement articulated in s. 3(2)(c). However, the analyst did not account for this tension in the immediate statutory context of s. 3(2)(a).

(b) *The Foreign Missions and International Organizations Act and the Treaties It Implements*

[177] Before the Registrar, Mr. Vavilov argued that s. 3(2) of the *Citizenship Act* must be read in conjunction with both the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA*"), and the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29 ("*VCDR*"). The *VCDR* and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, are the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts. Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the *FMIOA*.

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[178] To begin, we note that Canada affords citizenship in accordance both with the principle of *jus soli*, the acquisition of citizenship through birth regardless of the parents' nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent: *Citizenship Act*, s. 3(1)(a) and (b); see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at pp. 391-93. These two principles operate as a backdrop to s. 3 of the *Citizenship Act* as a whole. It is undisputed that s. 3(2)(a) operates as an exception to these general rules. However, Mr. Vavilov took a narrower view of that exception than did the Registrar. In his submissions to the Registrar, he argued that Parliament intended s. 3(2) of the *Citizenship Act* to simply mirror the *FMIOA* and the *VCDR*, as well as Article II of the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, 500 U.N.T.S. 223, which provides that "[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State". Mr. Vavilov made the following submission to the Registrar:

> The purpose in excluding diplomats and their families, including newborn children, from acquiring citizenship in the receiving state relates to the immunities which extend to this group of people. Diplomats and their family members are immune from criminal prosecution and civil liability in the receiving state. As such, they cannot acquire citizenship in the receiving state and also benefit from these immunities. A citizen has duties and responsibilities to its country. Immunity is inconsistent with this principle and so does not apply to citizens. See Article 37 of the *Convention*.
>
> Section 3(2) legislates into Canadian domestic law the above principles and should be narrowly interpreted with these purposes in

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> mind. The term "employee in Canada of a foreign government" must be interpreted to mean an employee of a diplomatic mission, or connected to it, who benefits from the immunities of the *Convention*. Any other interpretation would lead to absurd results. There is no purpose served in excluding any child born of a person not having a connection to a diplomatic mission in Canada while sojourning here from the principle of *Jus soli*.
>
> (A.R., vol. IV, at pp. 449-50)

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[179] In *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559, 64 Imm. L. R. (3d) 67, a case which was referred to in the analyst's report and which we will discuss in greater detail below, the Federal Court, at para. 53, quoted a passage by Professor Brownlie on this point:

> Of particular interest are the special rules relating to the jus soli, appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its application is clearly unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: 'This article is believed to be declaratory of an established rule of international law'. The rule receives ample support from legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: 'Rules of law which confer nationality by reasons of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.'
>
> In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities adopted an Optional Protocol concerning Acquisition of Nationality, which provided in Article II: 'Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State'.

> Some states extend the rule to the children of consuls, and there is some support for this from expert opinion. [Emphasis deleted.]
>
> (Brownlie, at pp. 392-93).

[180] Mr. Vavilov included relevant excerpts from the parliamentary debate that had preceded the enactment of the *Citizenship Act* in support of his argument that the very purpose of s. 3(2) of the *Citizenship Act* was to align Canada's citizenship rules with these principles of international law. These excerpts describe s. 3(2) as "conform[ing] to international custom" and as having been drafted with the intention of "exclud[ing] children born in Canada to diplomats from becoming Canadian citizens": Hon. J. Hugh Faulkner, Secretary of State of Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, respecting Bill C-20*, *An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, at 34:23. The record of that debate also reveals that Parliament took care to avoid the danger that because of how some provisions were written, "a number of other people would be affected such as those working for large foreign corporations": *ibid*. Although the analyst discussed the textual difference between s. 3(2) and a similar provision in the former *Canadian Citizenship Act*, she did not grapple with these other elements of the legislative history, despite the fact that they cast considerable doubt on her conclusions, indicating that s. 3(2) was not intended to affect the status of individuals whose parents have not been granted diplomatic privileges and immunities.

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[181] In attempting to distinguish the meaning of the phrase "other representative or employee in Canada of a foreign government" from that of the term "diplomatic or consular officer", the analyst also appeared to overlook the possibility that some individuals who fall into the former category might be granted privileges or immunities despite not being considered "diplomatic or consular officer[s]" under the *Interpretation Act*. Yet, as the majority of the Federal Court of Appeal pointed out, such individuals do in fact exist: paras. 53-55, citing *FMIOA*, at ss. 3 and 4 and Sched. II, Articles 1, 41, 43, 49, and 53. In light of Mr. Vavilov's submissions regarding the purpose of s. 3(2), the failure to consider this possibility is a noticeable omission.

[182] It is well established that domestic legislation is presumed to comply with Canada's international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law: *Appulonappa*, at para. 40; see also *Pushpanathan*, at para. 51; *Baker*, at para. 70; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 39; *Hape*, at paras. 53- 54; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, at para. 48; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at paras. 31-32. Yet the analyst did not refer to the relevant international law, did not inquire into Parliament's purpose in enacting s. 3(2) and did not respond to Mr. Vavilov's submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of

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compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

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(c) *Jurisprudence Interpreting Section 3(2) of the Citizenship Act*

[183] Although the analyst cited three Federal Court decisions on s. 3(2)(a) of the *Citizenship Act* in a footnote, she dismissed them as being irrelevant on the basis that they related only to "individuals whose parents maintained diplomatic status in Canada at the time of their birth". But this distinction, while true, does not explain why the *reasoning* employed in those decisions, which directly concerned the scope, the meaning and the legislative purpose of s. 3(2)(a), was inapplicable in Mr. Vavilov's case. Had the analyst considered just the three cases cited in her report — *Al-Ghamdi*; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204; and *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 294, 310 F.T.R. 169 — it would have been evident to her that she needed to grapple with and justify her interpretation in light of the persuasive and comprehensive legal reasoning that supports the position that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities.

[184] In *Al-Ghamdi*, the Federal Court considered the constitutionality of paras. (a) and (c) of s. 3(2) of the *Citizenship Act* in reviewing a decision in which

Passport Canada had refused to issue a passport to a child of a Saudi Arabian diplomat. In its reasons, the court came to a number of conclusions regarding the purpose and scope of s. 3(2), including, at para. 5, that:

> The only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status. These are individuals who enter Canada under special circumstances and without undergoing any of the normal procedures. Most importantly, while in Canada, they are granted all of the immunities and privileges of diplomats . . . .

[185] The court went on to extensively document the link between the exception to the rule of citizenship by birth set out in s. 3(2) of the *Citizenship Act* and the rules of international law, the *FMIOA* and the *VCDR*: *Al-Ghamdi*, at paras. 52 et. seq. It noted that there is an established rule of international law that children born to parents who enjoy diplomatic immunities are not entitled to automatic citizenship by birth, and that their status in this respect is an exception to the principle of *jus soli*: *Al-Ghamdi*, at para. 53, quoting Brownlie, at pp. 391-93. In finding that the exceptions under s. 3(2) to citizenship on the basis of *jus soli* do not infringe the rights of children of diplomats under s. 15 of the *Charter*, the court emphasized that *all* children to whom s. 3(2) applies are entitled to an "extraordinary array of privileges under the *Foreign Missions and International Organizations Act*": *Al-Ghamdi*, at para. 62. Citing the *VCDR*, it added that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship": para. 63. In its analysis under s. 1 of the

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Charter, the court found that the choice to deny citizenship to individuals provided for in s. 3(2) is "tightly connected" to a pressing government objective of ensuring "that no citizen is immune from the obligations of citizenship", such as the obligations to pay taxes and comply with the criminal law: *Al-Ghamdi*, at paras. 74-75. In the case at bar, the analyst failed entirely to engage with the arguments endorsed by the Federal Court in *Al-Ghamdi* despite the court's key finding that s. 3(2)(a) applies only to "children born of foreign diplomats or an equivalent", a conclusion upon which the very constitutionality of the provision turned: *Al-Ghamdi*, at paras. 3, 9, 27, 28, 56 and 59.

[186] In *Lee*, another case cited by the analyst, the Federal Court confirmed the finding in *Al-Ghamdi* that "[t]he only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status": *Lee*, at para. 77. The court found in *Lee* that the "functional duties of the applicant's father" were not relevant to whether or not the applicant was excluded from citizenship pursuant to s. 3(2)(a) of the *Citizenship Act*: para. 58. Rather, what mattered was only that at the time of the applicant's birth, his father had been a registered consular official and had held a diplomatic passport and the title of Vice-Consul: paras. 44, 58, 61 and 63.

[187] *Hitti*, the third case cited in the analyst's report, concerned a decision to confiscate two citizenship certificates on the basis that, under s. 3(2) of the *Citizenship Act*, their holders had never been entitled to them. In that case, the

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applicants' father, a Lebanese citizen, had been employed as an information officer of the League of Arab States in Ottawa. Although the League did not have diplomatic standing at that time, Canada had agreed as a matter of courtesy to extend diplomatic status to officials of the League's information centre, treating them as "attachés" of their home countries' embassies: *Hitti*, at paras. 6 and 9; see also *Interpretation Act*, s. 35(1). Mr. Hitti argued he did not, in practice, fulfill diplomatic tasks or act as a representative of Lebanon, but there was nonetheless a record of his being an accredited diplomat, enjoying the benefits of that status and being covered by the *VCDR* when his children were born: paras. 5 and 8. The Federal Court rejected a submission that Mr. Hitti would have had to perform duties in the service of Lebanon in order for his children to fall within the meaning of s. 3(2)(a), and concluded that "what Mr. Hitti did when he was in the country is not relevant": para. 32.

[188] What can be seen from both *Lee* and *Hitti* is that what matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. Thus, in addition to the Federal Court's decision in *Al-Ghamdi*, the analyst was faced with two cases in which the application of s. 3(2) had turned on the existence of diplomatic status rather than on the "functional duties" or activities of the child's parents. In these circumstances, it was a significant omission for her to ignore the Federal Court's reasoning when determining whether the espionage activities of Ms. Vavilova and Mr. Bezrukov were sufficient to ground the application of s. 3(2)(a).

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(d) *Possible Consequences of the Registrar's Interpretation*

[189] When asked why the children of individuals referred to in s. 3(2)(a) would be excluded from acquiring citizenship by birth, another analyst involved in Mr. Vavilov's file (who had also been involved in Mr. Vavilov's brother's file) responded as follows:

> Well, usually the way we use section 3(2)(a) is for – you're right, for diplomats and that they don't -- because they are not -- they are not obliged . . . to the law of Canada and everything, so that's why their children do not obtain citizenship if they were born in Canada while the person was in Canada under that status. But then there is also this other part of the Act that says other representatives or employees of a foreign government in Canada, that may open the door for other person than diplomats and that's how we interpreted in this specific case 3(2)(a) but there is no jurisprudence on that.
>
> (R.R. transcript, at pp. 87-88)

[190] In other words, the officials responsible for these files were aware that s. 3(2)(a) was informed by the principle that individuals subject to the exception are "not obliged . . . to the law of Canada". They were also aware that the interpretation they had adopted in the case of the Vavilov brothers was a novel one. Although the Registrar knew this, she failed to provide a rationale for this expanded interpretation.

[191] Additionally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges and immunities. Citizenship has been described as "the right to have rights": U.S. Supreme Court

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Chief Justice Earl Warren, as quoted in A. Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (July 2003) (online), at p. 2. The importance of citizenship was recognized in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, in which Iacobucci J., writing for this Court, stated: "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship": para. 68. This was reiterated in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, in which this Court unanimously held that "[f]or some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty": para. 108.

[192] It perhaps goes without saying that rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations. We can therefore only assume that the Registrar intended that this new interpretation of s. 3(2)(a) would apply to any other individual whose parent is employed by or represents a foreign government at the time of the individual's birth in Canada but has not been granted diplomatic privileges and immunities. The Registrar's interpretation would not, after all, limit the application of s. 3(2)(a) to the children of spies — its logic would be equally applicable to a number of other scenarios, including that of a child of a non-citizen worker employed by an embassy as a gardener or cook, or of a child of a business traveller who represents a foreign government-owned corporation. Mr. Vavilov had raised the fact that provisions such as s. 3(2)(a) must be given a narrow interpretation because they deny or potentially take away rights — that of

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citizenship under s. 3(1) in this case — which otherwise benefit from a liberal and broad interpretation: *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, at p. 307. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals, which included Mr. Vavilov, or the question whether, in light of those possible consequences, Parliament would have intended s. 3(2)(a) to apply in this manner.

[193] Moreover, we would note that despite following a different legal process, the Registrar's decision in this case had the same effect as a revocation of citizenship — a process which has been described by scholars as "a kind of 'political death'" — depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada: see A. Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (2014), 40 *Queen's L.J.* 1, at pp. 7-8. While we question whether the Registrar was empowered to unilaterally alter Canada's position with respect to Mr. Vavilov's citizenship and recognize that the relationship between the cancellation of a citizenship certificate under s. 26 of the *Citizenship Regulations* and the revocation of an individual's citizenship (as set out in s. 10 of the *Citizenship Act*) is not clear, we leave this issue for another day because it was neither raised nor argued by the parties.

D. *Conclusion*

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[194] Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision. Section 3 of the *Citizenship Act* considered as a whole, other legislation and international treaties that inform the purpose of s. 3, the jurisprudence cited in the analyst's report, and the potential consequences of the Registrar's decision point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities. The Registrar's failure to justify her decision with respect to these constraints renders her interpretation unreasonable, and we would therefore uphold the Federal Court of Appeal's decision to quash the Registrar's decision.

[195] As noted above, we would exercise our discretion not to remit the matter to the Registrar for redetermination. Crucial to our decision is the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history. On the other hand, there is overwhelming support — including in the parliamentary debate, established principles of international law, an established line of jurisprudence and the text of the provision itself — for the conclusion that Parliament did not intend s. 3(2)(a) of the *Citizenship Act* to apply to children of individuals who have not been granted

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diplomatic privileges and immunities. That being said, we would stress that it is not our intention to offer a definitive interpretation of s. 3(2)(a) in all respects, nor to foreclose the possibility that multiple reasonable interpretations of other aspects might be available to administrative decision makers. In short, we do not suggest that there is necessarily "one reasonable interpretation" of the provision as a whole. But we agree with the majority of the Court of Appeal that it was *not* reasonable for the Registrar to interpret s. 3(2)(a) as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

[196] Given that it is undisputed that Ms. Vavilova and Mr. Bezrukov, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. Given that Mr. Vavilov is a person who was born in Canada after February 14, 1977, his status is governed only by the general rule set out in s. 3(1)(a) of the *Citizenship Act*. He is a Canadian citizen.

E. *Disposition*

[197] The appeal is dismissed with costs throughout to Mr. Vavilov.

The following are the reasons delivered by

ABELLA AND KARAKATSANIS JJ. —

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[198] Forty years ago, in *C.U.P.E., Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, this Court embarked on a course to recognize the unique and valuable role of administrative decision-makers within the Canadian legal order. Breaking away from the court-centric theories of years past, the Court encouraged judges to show deference when specialized administrative decision-makers provided reasonable answers to legal questions within their mandates. Building on this more mature understanding of administrative law, subsequent decisions of this Court sought to operationalize deference and explain its relationship to core democratic principles. These appeals offered a platform to clarify and refine our administrative law jurisprudence, while remaining faithful to the deferential path it has travelled for four decades.

[199] Regrettably, the majority shows our precedents no such fidelity. Presented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation's deferential approach and back towards a prior generation's more intrusive one. Rather than confirming a meaningful presumption of deference for administrative decision-makers, as our common law has increasingly done for decades, the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal; rather than following the consistent path of this Court's jurisprudence in understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely and reformulates legislative intent as an overriding intention to

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provide — or not provide — appeal routes; and rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the pre-*C.U.P.E.* era. In other words, instead of *reforming* this generation's evolutionary approach to administrative law, the majority *reverses* it, taking it back to the formalistic judge-centred approach this Court has spent decades dismantling.

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[200] We support the majority's decision to eliminate the vexing contextual factors analysis from the standard of review framework and to abolish the shibboleth category of "true questions of jurisdiction". These improvements, accompanied by a meaningful presumption of deference for administrative decision-makers, would have simplified our judicial review framework and addressed many of the criticisms levied against our jurisprudence since *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[201] But the majority goes much further and fundamentally reorients the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. In so doing, the majority advocates a profoundly different philosophy of administrative law than the one which has guided our Court's jurisprudence for the last four decades. The majority's reasons are an encomium for correctness and a eulogy for deference.

[202] The modern Canadian state "could not function without the many and varied administrative tribunals that people the legal landscape" (The Rt. Hon. Beverley McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online)). Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, "government would be paralyzed, and so would the courts" (Guy Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 3).

[203] In exercising their mandates, administrative decision-makers often resolve claims and disputes within their areas of specialization (Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 13). These claims and disputes vary greatly in scope and subject-matter. Corporate merger requests, professional discipline complaints by dissatisfied clients, requests for property reassessments and applications for welfare benefits, among many other matters, all fall within the purview of the administrative justice system.

[204] The administrative decision-makers tasked to resolve these issues come from many different walks of life (Van Harten et al., at p. 15). Some have legal

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backgrounds, some do not. The diverse pool of decision-makers in the administrative system responds to the diversity of issues that it must resolve. To address this broad range of issues, administrative dispute-resolution processes are generally "[d]esigned to be less cumbersome, less expensive, less formal and less delayed" than their judicial counterparts — but "no less effectiv[e] or credibl[e]" (*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), at p. 279). In the field of labour relations, for example, Parliament explicitly rejected a court-based system to resolve workplace disputes in favour of a Labour Board, staffed with representatives from management and labour alongside an independent member (Bora Laskin, "Collective Bargaining in Ontario: A New Legislative Approach" (1943), 21 *Can. Bar Rev.* 684; John A. Willes, *The Ontario Labour Court: 1943-1944* (1979); Katherine Munro, "A 'Unique Experiment': The Ontario Labour Court, 1943-1944" (2014), 74 *Labour/Le Travail* 199). Other administrative processes — license renewals, zoning permit issuances and tax reassessments, for example — bear even less resemblance to the traditional judicial model.

[205] Courts, through judicial review, monitor the boundaries of administrative decision making. Questions about the standards of judicial review have been an enduring feature of Canadian administrative law. The debate, in recent times, has revolved around "reasonableness" and "correctness", and determining when each standard applies. On the one hand, "reasonableness" review expects courts to defer to decisions by specialized decision-makers that "are defensible in respect of the facts and law"; on the other, "correctness" review allows courts to substitute their own

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opinions for those of the initial decision-maker (*Dunsmuir*, at paras. 47-50). This standard of review debate has profound implications for the extent to which reviewing courts may substitute their views for those of administrative decision-makers. At its core, it is a debate over two distinct philosophies of administrative law.

[206] The story of modern Canadian administrative law is the story of a shift away from the court-centric philosophy which denied administrative bodies the authority to interpret or shape the law. This approach found forceful expression in the work of Albert Venn Dicey. For Dicey, the rule of law meant the rule of courts. Dicey developed his philosophy at the end of the 19th century to encourage the House of Lords to restrain the government from implementing ameliorative social and welfare reforms administered by new regulatory agencies. Famously, Dicey asserted that administrative law was anathema to the English legal system (Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 334-35). Because, in his view, only the judiciary had the authority to interpret law, there was no reason for a court to defer to legal interpretations proffered by administrative bodies, since their decisions did not constitute "law" (Kevin M. Stack, "Overcoming Dicey in Administrative Law" (2018), 68 *U.T.L.J.* 293, at p. 294).

[207] The canonical example of Dicey's approach at work is the House of Lords' decision in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, the judicial progenitor of "jurisdictional error". *Anisminic* entrenched non-deferential judicial review by endorsing a lengthy checklist of "jurisdictional errors"

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capable of undermining administrative decisions. Lord Reid noted that there were two scenarios in which an administrative decision-maker would lose jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to "enter on the inquiry in question" (p. 171). The second was wider:

> [T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. *It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.* [Emphasis added; p. 171.]

[208] The broad "jurisdictional error" approach in *Anisminic* initially found favour with this Court in cases like *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. These cases "took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal", and in each case, "th[e] Court substituted what was, in its opinion, the correct interpretation of the enabling provision of the tribunal's statute for that of the tribunal" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, at p. 650, per Cory J., dissenting, but not on this point). In *Metropolitan Life*, for example, this

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Court quashed a labour board's decision to certify a union, concluding that the Board had "ask[ed] itself the wrong question" and "decided a question which was not remitted to it" (p. 435). In *Bell*, this Court held that a human rights commission had strayed beyond its jurisdiction by deciding to investigate a complaint of racial discrimination filed against a landlord. The Court held that the Commission had incorrectly interpreted the term "self-contained dwelling uni[t]" found in s. 3 of the *Ontario Human Rights Code*, *1961-62*, S.O. 1961-62, c. 93, and by so doing, had lost jurisdiction to inquire into the complaint of discrimination (pp. 767 and 775).

[209] As these cases illustrate, the *Anisminic* approach proved easy to manipulate, allowing courts to characterize any question as "jurisdictional" and thereby give themselves latitude to substitute their own view of the appropriate answer without regard for the original decision-maker's decision or reasoning. The *Anisminic* era and the "jurisdictional error" approach were and continue to be subject to significant judicial and academic criticism (*Public Service Alliance*, at p. 650; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1335, per Wilson J., concurring; Beverley McLachlin, P.C., "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016), 29 *C.J.A.L.P.* 127, at pp. 129-30; Jocelyn Stacey and Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at pp. 215-16; R.A. MacDonald, "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307).

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[210] In 1979, the Court signaled a turn to a more deferential approach to judicial review with its watershed decision in *C.U.P.E.* There, the Court challenged the "jurisdictional error" model and planted the seeds of a home-grown approach to administrative law in Canada. In a frequently-cited passage, Dickson J., writing for a unanimous Court, cautioned that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233; cited in nearly 20 decisions of this Court, including *Dunsmuir*, at para. 35; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 45; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, at para. 33; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230, at para. 31). The Court instead endorsed an approach that respected the legislature's decision to assign legal policy issues in some areas to specialized, non-judicial decision-makers. The Court recognized that legislative language could "bristl[e] with ambiguities" and that the interpretive choices made by administrative tribunals deserved respect from courts, particularly when, as in *C.U.P.E.*, the decision was protected by a privative clause (pp. 230 and 234-36).

[211] By championing "curial deference" to administrative bodies, *C.U.P.E.* embraced "a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state" (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at p. 800). As one scholar has observed:

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> . . . legislatures and courts in . . . Canada have come to settle on the idea that the functional capacities of administrative agencies – their expertise, investment in understanding the practical circumstances at issue, openness to participation, and level of responsiveness to political change – justify not only their law-making powers but also judicial deference to their interpretations and decisions. *Law-making and legal interpretation are shared enterprises in the administrative state*. [Emphasis added.]
>
> (Stack, at p. 310)

[212] In explaining why courts must sometimes defer to administrative actors, *C.U.P.E.* embraced two related foundational justifications for Canada's approach to administrative law — one based on the legislature's express choice to have an administrative body decide the issues arising from its mandate; and one animated by the recognition that an administrative justice system could offer institutional advantages in relation to proximity, efficiency, and specialized expertise (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 304).

[213] A new institutional relationship between the courts and administrative actors was thus being forged, based on "an understanding of the role of expertise in the modern administrative state" which "acknowledge[d] that judges are not always in the best position to interpret the law" (The Hon. Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002), 27 *Queen's L.J.* 859, at p. 866).

[214] In subsequent decades, the Court attempted to reconcile the deference urged by *C.U.P.E.* with the lingering concept of "jurisdictional error". In *U.E.S.,*

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Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, the Court introduced the "pragmatic and functional" approach for deciding when a matter was within the jurisdiction of an administrative body. Instead of describing jurisdiction as a preliminary or collateral matter, the *Bibeault* test directed reviewing courts to consider the wording of the enactment conferring jurisdiction on the administrative body, the purpose of the statute creating the tribunal, the reason for the tribunal's existence, the area of expertise of its members, and the nature of the question the tribunal had to decide — all to determine whether the legislator "intend[ed] the question to be within the jurisdiction conferred on the tribunal" (p. 1087; see also p. 1088). If so, the tribunal's decision could only be set aside if it was "patently unreasonable" (p. 1086).

[215] Although still rooted in a formalistic search for jurisdictional errors, the pragmatic and functional approach recognized that legislatures had assigned courts and administrative decision-makers distinct roles, and that the specialization and expertise of administrative decision-makers deserved deference. In her concurring reasons in *National Corn Growers*, Wilson J. noted that part of the process of moving away from Dicey's framework and towards a more sophisticated understanding of the role of administrative tribunals:

> . . . has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. [p. 1336]

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[216] By the mid-1990s, the Court had accepted that specialization and the legislative intent to leave issues to administrative decision-makers were inextricable and essential factors in the standard of review analysis. It stressed that "the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision . . . [e]ven where the tribunal's enabling statute provides explicitly for appellate review" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335). Of the factors relevant to setting the standard of review, expertise was held to be "the most important" (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 50).

[217] Consistent with these judgments, this Court invoked the specialized expertise of a securities commission to explain why its decisions were entitled to deference on judicial review even when there was a statutory right of appeal. Writing for a unanimous Court, Iacobucci J. explained that "the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise" (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591; see also *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at pp. 1745-46). Critically, the Court's willingness to show deference demonstrated that specialization outweighed a statutory appeal as the most significant indicator of legislative intent.

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[218] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the Court reformulated the pragmatic and functional approach, engaging four slightly different factors from those in *Bibeault*, namely: (1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4) the nature of the problem, i.e., whether it was a question of law, fact, or mixed law and fact (paras. 29-37). Instead of using these factors to answer whether a question was jurisdictional, *Pushpanathan* deployed them to discern how much deference the legislature intended an administrative decision to receive on judicial review. *Pushpanathan* confirmed three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness (para. 27; see also *Southam*, at paras. 55-56).

[219] Significantly, *Pushpanathan* did not disturb the finding reaffirmed in *Southam* that specialized expertise was the most important factor in determining whether a deferential standard applied. Specialized expertise thus remained integral to the calibration of legislative intent, even in the face of statutory rights of appeal (see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paras. 21 and 29-34; *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, at para. 45; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at paras. 88-92 and 100).

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[220] Next came *Dunsmuir*, which sought to simplify the pragmatic and functional analysis while maintaining respect for the specialized expertise of administrative decision-makers. The Court merged the three standards of review into two: reasonableness and correctness. *Dunsmuir* also wove together the deferential threads running through the Court's administrative law jurisprudence, setting out a presumption of deferential review for certain categories of questions, including those where the decision-maker had expertise or was interpreting its "home" statute (paras. 53-54, per Bastarache and LeBel JJ., and para. 124, per Binnie J., concurring). Certain categories of issues remained subject to correctness review, including constitutional questions regarding the division of powers, true questions of jurisdiction, questions of law that were both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, and questions about jurisdictional lines between tribunals (paras. 58-61). Where the standard of review had not been satisfactorily determined in the jurisprudence, four contextual factors — the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal — remained relevant to the standard of review analysis (para. 64).

[221] Notably, *Dunsmuir* did not mention statutory rights of appeal as one of the contextual factors, and left undisturbed their marginal role in the standard of review analysis. Instead, the Court explicitly affirmed the links between deference, the specialized expertise of administrative decision-makers and legislative intent. Justices LeBel and Bastarache held that "deference requires respect for the legislative

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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" (para. 49). They noted 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" (para. 49, citing David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93).

[222] Post-*Dunsmuir*, this Court continued to stress that specialized expertise is the basis for making administrative decision-makers, rather than the courts, the appropriate forum to decide issues falling within their mandates (see *Khosa*, at para. 25; *R. v. Conway*, [2010] 1 S.C.R. 765, at para. 53; *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, at paras. 30-33). Drawing on the concept of specialized expertise, the Court's post-*Dunsmuir* cases expressly confirmed a presumption of reasonableness review for an administrative decision-maker's interpretation of its home or closely-related statutes (see *Alberta Teachers' Association*, at paras. 39-41). As Gascon J. explained in *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3, at para. 46:

> Deference is in order where the Tribunal acts within its specialized area of expertise . . . (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy*

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> *Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 ("*NGC*"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54).

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[223] And in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, the majority recognized:

> 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 . . . . [E]xpertise 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". [Citation omitted; para. 33.]

[224] The presumption of deference, therefore, operationalized the Court's longstanding jurisprudential acceptance of the "specialized expertise" principle in a workable manner, continuing the deferential path Dickson J. first laid out in *C.U.P.E.*

[225] As for statutory rights of appeal, they continued to be seen as either an irrelevant factor in the standard of review analysis or one that yielded to specialized expertise. So firmly entrenched was this principle that in cases like *Bell Canada v.*

Bell Aliant Regional Communications, [2009] 2 S.C.R. 764, *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 S.C.R. 219, and *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016] 2 S.C.R. 80, the Court applied the reasonableness standard without even *referring* to the presence of an appeal clause. When appeal clauses *were* discussed, the Court consistently confirmed that they did not oust the application of judicial review principles.

[226] In *Khosa*, Binnie J. explicitly endorsed *Pezim* and rejected "the idea that in the absence of express statutory language . . . a reviewing court is 'to apply a correctness standard as it does in the regular appellate context'" (para. 26). This reasoning was followed in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 ("*Mowat*"), where the Court confirmed that "care should be taken not to conflate" judicial and appellate review (para. 30; see also para. 31). In *McLean*, decided two years after *Mowat*, the majority cited *Pezim* and other cases for the proposition that "general administrative law principles still apply" on a statutory appeal (see para. 21, fn. 2). Similarly, in *Mouvement laïque*, Gascon J. affirmed that

> [w]here a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal . . . . [para. 38]

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[227] In *Edmonton East*, the Court considered — and again rejected — the argument that statutory appeals should form a new category of correctness review. As the majority noted, "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" (para. 28). Even the dissenting judges in *Edmonton East*, although of the view that the wording of the relevant statutory appeal clause and legislative scheme pointed to the correctness standard, nonetheless unequivocally stated that "a statutory right of appeal is not a new 'category' of correctness review" (para. 70).

[228] By the time these appeals were heard, contextual factors had practically disappeared from the standard of review analysis, replaced by a presumption of deference subject only to the correctness exceptions set out in *Dunsmuir* — which explicitly did *not* include statutory rights of appeal. In other words, the Court was well on its way to realizing *Dunsmuir*'s promise of a simplified analysis. Justice Gascon recognized as much last year in *Canadian Human Rights Commission*:

> *This contextual approach should be applied sparingly*. As held by the majority of this Court in *Alberta Teachers*, it is inappropriate to "retreat to the application of a full standard of review analysis where it can be determined summarily" . . . . After all, the "contextual approach can generate uncertainty and endless litigation concerning the standard of review" (*Capilano* [*Edmonton East*], at para. 35). The presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis may be justified to rebut the presumption, it need not be a long and detailed one (*Capilano* [*Edmonton East*], at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a

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> clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51). [Emphasis added; para. 46.]

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[229] In sum, for four decades, our standard of review jurisprudence has been clear and unwavering about the foundational role of specialized expertise and the limited role of statutory rights of appeal. Where confusion persists, it concerns the relevance of the contextual factors in *Dunsmuir*, the meaning of "true questions of jurisdiction" and how best to conduct reasonableness review. That was the backdrop against which these appeals were heard and argued. But rather than ushering in a simplified next act, these appeals have been used to rewrite the whole script, reassigning to the courts the starring role Dicey ordained a century ago.

The Majority's Reasons

[230] The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers. Although the majority uses language endorsing a "presumption of reasonableness review", this presumption now rests on a totally new understanding of legislative intent and the rule of law. By prohibiting any consideration of well-established foundations for deference, such as "expertise . . . institutional experience . . . proximity and responsiveness to stakeholders . . . prompt[ness], flexib[ility], and efficien[cy]; and . . . access to justice", the majority reads out the foundations of the modern understanding of legislative intent in administrative law.

[231] In particular, such an approach ignores the possibility that specialization and other advantages are embedded into the legislative choice to delegate particular subject matters to administrative decision-makers. Giving proper effect to the legislature's choice to "delegate authority" to an administrative decision-maker requires understanding the *advantages* that the decision-maker may enjoy in exercising its mandate (*Dunsmuir*, at para. 49). As Iacobucci J. observed in *Southam*:

> Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, *it is because the tribunal enjoys some advantage that judges do not*. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. [Emphasis added; para. 55.]

[232] Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. Those appointed to administrative tribunals are often chosen precisely because their backgrounds and experience align with their mandate (Van Harten et al., at p. 15; Régimbald, at p. 463). Some administrative schemes explicitly require a degree of expertise from new members as a condition of appointment (*Edmonton East*, at para. 33; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at para. 29; Régimbald, at p. 462). As institutions, administrative bodies also benefit from specialization as they develop "habitual familiarity with the legislative scheme they administer" (*Edmonton East*, at para. 33) and "grappl[e] with issues on a repeated basis" (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, at para. 53). Specialization and

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expertise are further enhanced by continuing education and through meetings of the membership of an administrative body to discuss policies and best practices (Finn Makela, "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345, at p. 349). In addition, the blended membership of some tribunals fosters special institutional competence in resolving "polycentric" disputes (*Pushpanathan*, at para. 36; *Dr. Q* at paras. 29-30; *Pezim*, at pp. 591-92 and 596).

[233] All this equips administrative decision-makers to tackle questions of law arising from their mandates. In interpreting their enabling statutes, for example, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations; of statutory context; of the purposes that a provision or legislative scheme are meant to serve; and of specialized terminology used in their administrative setting. Coupled with this Court's acknowledgment that legislative provisions often admit of multiple reasonable interpretations, the advantages stemming from specialization and expertise provide a robust foundation for deference to administrative decision-makers on legal questions within their mandate (*C.U.P.E.*, at p. 236; *McLean*, at para. 37). As Professor H.W. Arthurs said:

> There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-

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> trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.
>
> ("Protection against Judicial Review" (1983), 43 *R. du B.* 277, at p. 289)

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[234] Judges of this Court have endorsed both this passage and the broader proposition that specialization and expertise justify the deference owed to administrative decision-makers (*National Corn Growers*, at p. 1343, per Wilson J., concurring). As early as *C.U.P.E.*, Dickson J. fused expertise and legislative intent by explaining that an administrative body's specialized expertise can be essential to achieving the purposes of a statutory scheme:

> The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. [p. 236]

[235] Over time, specialized expertise would become the core rationale for deferring to administrative decision-makers (*Bradco Construction*, at p. 335; *Southam*, at para. 50; Audrey Macklin, "Standard of Review: Back to the Future?", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 381 at pp. 397-98). Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to

legislative intent, and recognizing that they give administrative decision-makers the "interpretative upper hand" on questions of law (*McLean*, at para. 40; see also *Conway*, at para. 53; *Mowat*, at para. 30; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, at para. 13; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, at para. 35; *Mouvement laïque*, at para. 46; *Khosa*, at para. 25; *Edmonton East*, at para. 33).

[236] Although the majority's approach extolls respect for the legislature's "institutional design choices", it accords no weight to the institutional advantages of specialization and expertise that administrative decision-makers possess in resolving questions of law. In so doing, the majority disregards the historically accepted reason *why* the legislature intended to delegate authority to an administrative actor.

[237] Nor are we persuaded by the majority's claim that "if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not". Here, the majority sets up a false choice: expertise must either be assessed on a case-by-case basis or play no role at all in a theory of judicial review.

[238] We disagree. While not every decision-maker necessarily has expertise on every issue raised in an administrative proceeding, reviewing courts do not engage in an individualized, case-by-case assessment of specialization and expertise. The

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theory of deference is based not only on the legislative choice to delegate decisions, but also on institutional expertise and on "the reality that . . . 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" (*Khosa*, at para. 25; see also *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, at para. 53; *Edmonton East*, at para. 33).

[239] The exclusion of expertise, specialization and other institutional advantages from the majority's standard of review framework is not merely a theoretical concern. The removal of the current "conceptual basis" for deference opens the gates to expanded correctness review. The majority's "presumption" of deference will yield all too easily to justifications for a correctness-oriented framework.

[240] In the majority's framework, deference gives way whenever the "rule of law" demands it. The majority's approach to the rule of law, however, flows from a court-centric conception of the rule of law rooted in Dicey's 19th century philosophy.

[241] The rule of law is not the rule of courts. A pluralist conception of the rule of law recognizes that courts are not the exclusive guardians of law, and that others in the justice arena have shared responsibility for its development, including administrative decision-makers. *Dunsmuir* embraced this more inclusive view of the rule of law by acknowledging that the "court-centric conception of the rule of law"

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had to be "reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (para. 30). As discussed in *Dunsmuir*, the rule of law is understood as meaning that administrative decision-makers make legal determinations within their mandate, and not that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review (see McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*; The Hon. Thomas A. Cromwell, "What I Think I've Learned About Administrative Law" (2017), 30 *C.J.A.L.P.* 307, at p. 308; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770, at para. 31, per Abella J.).

[242] Moreover, central to any definition of the rule of law is access to a fair and efficient dispute resolution process, capable of dispensing timely justice (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the particularly vulnerable ones (Angus Grant and Lorne Sossin, "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Régimbald, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:

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> . . . the aims of administrative law . . . generally gravitate towards promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.
>
> (Yves-Marie Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 236)

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[243] These goals are compromised when a narrow conception of the "rule of law" is invoked to impose judicial hegemony over administrative decision-makers. Doing so perverts the purpose of establishing a parallel system of administrative justice, and adds unnecessary expense and complexity for the public.

[244] The majority even calls for a reformulation of the "questions of central importance" category from *Dunsmuir* and permits courts to substitute their opinions for administrative decision-makers on "questions of central importance to the legal system as a whole", even if those questions fall squarely within the mandate and expertise of the administrative decision-maker. As noted in *Canadian Human Rights Commission*, correctness review was permitted only for questions "of central importance to the legal system *and* outside the specialized expertise of the adjudicator" (para. 28 (emphasis in original)). Broadening this category from its original characterization unduly expands the issues available for judicial substitution. Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system. But by ignoring administrative decision-makers' expertise on these matters, this category will inevitably provide more "room . . . for

both mistakes and manipulation" (Andrew Green, "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 *U.B.C. L. Rev.* 443, at p. 483). We would leave *Dunsmuir*'s description of this category undisturbed.[1]

[245] We also disagree with the majority's reformulation of "legislative intent" to include, for the first time, an invitation for courts to apply correctness review to legal questions whenever an administrative scheme includes a right of appeal. We do not see how appeal rights represent a "different institutional structure" that requires a more searching form of review. The mere fact that a statute contemplates a reviewing role for a court says nothing about the *degree of deference* required in the review process. Rights of appeal reflect different choices by different legislatures to permit review for different reasons, on issues of fact, law, mixed fact and law, and discretion, among others. Providing parties with a right of appeal can serve several purposes entirely unrelated to the standard of review, including outlining: where the appeal will take place (sometimes, at a different reviewing court than in the routes provided for judicial review); who is eligible to take part; when materials must be filed; how materials must be presented; the reviewing court's powers on appeal; any leave requirements; and the grounds on which the parties may appeal (among other things). By providing this type of structure and guidance, statutory appeal provisions may allow legislatures to promote efficiency and access to justice, in a way that exclusive reliance on the judicial review procedure would not have.

[1] Other than one of the two *amici*, no one asked us to modify this category.

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[246] In reality, the majority's position on statutory appeal rights, although couched in language about "giv[ing] effect to the legislature's institutional design choices", hinges almost entirely on a textualist argument: the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence.

[247] The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced and disregards long-accepted institutional distinctions between how courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, must be inflexibly applied to every right of "appeal" within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.

[248] In addition, the majority's claim that legislatures "d[o] not speak in vain" is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework. If, as the majority claims, Parliament's decision to provide appeal routes must influence the standard of review analysis, there is no

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principled reason why Parliament's decision via privative clauses to *prohibit* appeals should not be given comparable effect.[2]

[249] In any event, legislatures in this country have known for at least 25 years since *Pezim* that this Court has not treated statutory rights of appeal as a determinative reflection of legislative intent regarding the standard of review (*Pezim*, at p. 590). Against this reality, the continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority retroactively ascribes to it; doing so is inconsistent with the principle that legislatures are presumed to enact legislation in compliance with existing common law rules (Ruth Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 315).

[250] Those legislatures, moreover, understood from our jurisprudence that this Court was committed to respecting *standards* of review that were statutorily prescribed, as British Columbia alone has done.[3] We agree with the Attorney General of Canada's position in the companion appeals of *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, that, absent exceptional circumstances, the existence of a

[2] The "constitutional concerns" cited by the majority are no answer to this dilemma — nothing in *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, prevents privative clauses from influencing the *standard* of review, as they did for years under the pragmatic and functional approach and in *C.U.P.E.* (David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 *Rev. Const. Stud.* 87, at p. 103; David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013), 42 *Adv. Q.* 1, at p. 21).

[3] See *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Quebec's recent attempt to introduce such legislation is another example of a legislature which understood that it was free to set standards of review, and that the mere articulation of a right of appeal did not dictate what those standards would be: see Bill 32, *An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, 1st Sess., 42nd Leg., 2019.

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statutory right of appeal does not displace the presumption that the standard of reasonableness applies.[4] The majority, however, has inexplicably chosen the template proposed by the *amici*,[5] recommending a sweeping overhaul of our approach to legislative intent and to the determination of the standard of review.

[251] The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal — some in highly specialized fields, such as broadcasting, securities regulation and international trade — will now be subject to an irrebuttable presumption of correctness review. This has the potential to cause a stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal — the

[4] The notion that legislative intent finds determinative expression in statutory rights of appeal found no support in the submissions of four of the five attorneys general who appeared before us.

[5] Even the *amici* did not go so far as to say that *all* appeal clauses were indicative of a legislative intent for courts to substitute their views on questions of law.

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inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

[252] Ironically, the majority's approach will be a roadblock to its promise of simplicity. Elevating appeal clauses to indicators of correctness review creates a two-tier system of administrative law: one tier that defers to the expertise of administrative decision-makers where there is no appeal clause; and another tier where such clauses permit judges to substitute their own views of the legal issues at the core of those decision-makers' mandates. Within the second tier, the application of appellate law principles will inevitably create confusion by encouraging segmentation in judicial review (*Mouvement laïque*, at para. 173, per Abella J., concurring in part; see also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527, at pp. 542-43; The Hon. Joseph T. Robertson, "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017), 68 *U.N.B.L.J.* 145, at p. 162). Courts will be left with the task of identifying palpable and overriding errors for factual questions, extricating legal issues from questions of mixed fact and law, reviewing questions of law *de novo*, and potentially having to apply judicial review and appellate standards interchangeably if an applicant challenges in one proceeding multiple aspects of an administrative decision, some falling within an appeal clause and others not. It is an invitation to complexity and a barrier to access to justice.

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[253] The majority's reasons "roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess" (*Khosa*, at para. 26). The reasons elevate statutory rights of appeal to a determinative factor based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to specialized administrative decision-makers. This unravelling of Canada's carefully developed, deferential approach to administrative law returns us to the "black letter law" approach found in *Anisminic* and cases like *Metropolitan Life* whereby specialized decision-makers were subject to the pre-eminent determinations of a judge. Rather than building on *Dunsmuir*, which recognized that specialization is fundamentally intertwined with the legislative choice to delegate particular subject matters to administrative decision-makers, the majority's reasons banish expertise from the standard of review analysis entirely, opening the door to a host of new correctness categories which remain open to further expansion. The majority's approach not only erodes the presumption of deference; it erodes confidence in the existence — and desirability — of the "shared enterprises in the administrative state" of "[l]aw-making and legal interpretation" between courts and administrative decision-makers (Stack, at p. 310).

[254] But the aspect of the majority's decision with the greatest potential to undermine both the integrity of this Court's decisions, and public confidence in the stability of the law, is its disregard for precedent and *stare decisis*.

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[255] *Stare decisis* places significant limits on this Court's ability to overturn its precedents. Justice Rothstein described some of these limits in *Canada v. Craig*, [2012] 2 S.C.R. 489, the case about horizontal *stare decisis* on which the majority relies:

> The question of whether this Court should overrule one of its own prior decisions was addressed recently in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. At paragraph 56, Chief Justice McLachlin and LeBel J., in joint majority reasons, noted that overturning a precedent of this Court is a step not to be lightly undertaken. *This is especially so when the precedent represents the considered views of firm majorities* (para. 57).
>
> Nonetheless, this Court has overruled its own decisions on a number of occasions. (See *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353, *per* Lamer C.J., for the majority; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683.) *However, the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled . . . .*
>
> Courts must proceed with caution when deciding to overrule a prior decision. In *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), at p. 599, Justice Gibbs articulated the required approach succinctly:
>
> > No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court. [Emphasis added; paras. 24-26.]

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[256] Apex courts in several jurisdictions outside Canada have similarly stressed the need for caution and compelling justification before departing from precedent. The United States Supreme Court refrains from overruling its past decisions absent a "special justification", which must be over and above the belief that a prior case was wrongly decided (*Kimble v. Marvel Entertainment, LLC.*, 135 S. Ct. 2401 (2015), at p. 2409; see also *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), at p. 266; *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), at pp. 2418 and 2422; Bryan A. Garner et al., *The Law of Judicial Precedent* (2016), at pp. 35-36).

[257] Similarly, the House of Lords "require[d] much more than doubts as to the correctness of [a past decision] to justify departing from it" (*Fitzleet Estates Ltd. v. Cherry* (1977), 51 T.C. 708, at p. 718), an approach that the United Kingdom Supreme Court continues to endorse (*R. v. Taylor*, [2016] UKSC 5, [2016] 4 All E.R. 617, at para. 19; *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383, at para. 7; *Knauer v. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897, at paras. 22-23).

[258] New Zealand's Supreme Court views "caution, often considerable caution" as the "touchstone" of its approach to horizontal *stare decisis*, and has emphasized that it will not depart from precedent "merely because, if the matter were being decided afresh, the Court might take a different view" (*Couch v. Attorney-General (No. 2)*, [2010] NZSC 27, [2010] 3 N.Z.L.R. 149, at paras. 105, per Tipping J., and 209, per McGrath J.).

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[259] Restraint and respect for precedent also guide the High Court of Australia and South Africa's Constitutional Court when applying *stare decisis* (*Lee v. New South Wales Crime Commission*, [2013] HCA 39, 302 A.L.R. 363, at paras. 62-66 and 70; *Camps Bay Ratepayers' and Residents' Association v. Harrison*, [2010] ZACC 19, 2011 (4) S.A. 42, at pp. 55-56; *Buffalo City Metropolitan Municipality v. Asla Construction Ltd.*, [2019] ZACC 15, 2019 (4) S.A. 331, at para. 65).

[260] The virtues of horizontal *stare decisis* are widely recognized. The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (*Kimble*, at p. 2409, citing *Payne v. Tennessee*, 501 U.S. 808 (1991), at p. 827). This Court has stressed the importance of *stare decisis* for "[c]ertainty in the law" (*Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 38; *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 849; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 527). Other courts have described *stare decisis* as a "foundation stone of the rule of law" (*Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), at p. 798; *Kimble*, at p. 2409; *Kisor*, at p. 2422; see also *Camps Bay*, at pp. 55-56; Jeremy Waldron, "Stare Decisis and the Rule of Law: A Layered Approach" (2012), 111 *Mich. L. Rev.* 1, at p. 28; Lewis F. Powell, Jr., "Stare Decisis and Judicial Restraint" (1990), 47 *Wash. & Lee L. Rev.* 281, at p. 288).

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[261] Respect for precedent also safeguards this Court's institutional legitimacy. The precedential value of a judgment of this Court does not "expire with the tenure of the particular panel of judges that decided it" (*Plourde v. Wal-Mart Canada Corp.*, [2009] 3 S.C.R. 465, at para. 13). American cases have stressed similar themes:

> There is . . . a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.
>
> (*Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992), at p. 866; see also *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981), at p. 153, per Stevens J., concurring.)

[262] Several scholars have made this point as well (see e.g., Michael J. Gerhardt, *The Power of Precedent* (2008), at p. 18; Garner et al., at p. 391). Aharon Barak has warned that

> overruling precedent damages the public's conception of the judicial role, and undermines the respect in which the public holds the courts and its faith in them. Precedent should not resemble a ticket valid only for the day of purchase.
>
> ("Overruling Precedent" (1986), 21 *Is.L.R.* 269, at p. 275)

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[263] The majority's reasons, in our view, disregard the high threshold required to overturn one of this Court's decisions. The justification for the majority abandoning this Court's long-standing view of how statutory appeal clauses impact the standard of review analysis is that this Court's approach was "unsound in principle" and criticized by judges and academics. The majority also suggests that the Court's decisions set up an "unworkable and unnecessarily complex" system of judicial review. Abandoning them, the majority argues, would promote the values underlying *stare decisis*, namely "clarity and certainty in the law". In doing so, the majority discards several of this Court's bedrock administrative law principles.

[264] The majority leaves unaddressed the most significant rejection of this Court's jurisprudence in its reasons — its decision to change the entire "conceptual basis" for judicial review by excluding specialization, expertise and other institutional advantages from the analysis. The lack of any justification for this foundational shift — repeatedly invoked by the majority to sanitize further overturning of precedent — undercuts the majority's stated respect for *stare decisis* principles.

[265] The majority explains its decision to overrule the Court's prior decisions about appeal clauses by asserting that these precedents had "no satisfactory justification". It does not point, however, to any arguments different from those heard and rejected by other panels of this Court over the decades whose decisions are being discarded. Instead, the majority substitutes its own preferred approach to interpreting statutory rights of appeal — an approach rejected by several prior panels of this Court

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in a line of decisions stretching back three decades. The rejection of such an approach was explicitly reaffirmed *no fewer than four times in the past ten years* (*Khosa*, at para. 26; *Mowat*, at paras. 30-31; *Mouvement laïque*, at para. 38; *Edmonton East*, at paras. 27-31; see also *McLean*, at para. 21).

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[266] Overruling these judgments flouts *stare decisis* principles, which prohibit courts from overturning past decisions which "simply represen[t] a preferred choice with which the current Bench does not agree" (*Couch*, at para. 105; see also *Knauer*, at para. 22; *Casey*, at p. 864). "[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance" (*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), at p. 2190, per Kagan J., dissenting). As the United States Supreme Court noted in *Kimble*:

> . . . an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification"—over and above the belief "that the precedent was wrongly decided." [Citation omitted; p. 2409.]

[267] But it is the unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are too numerous to list in full here. It includes many decisions conducting deferential review even in the face of a statutory right of appeal (*Pezim*; *Southam*; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132; *Dr. Q*; *Ryan*; *Cartaway*; *VIA Rail*; *Association des courtiers et agents*

immobiliers du Québec v. Proprio Direct inc., [2008] 2 S.C.R. 195; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678; *McLean*; *Bell Canada (2009)*; *ATCO Gas*; *Mouvement laïque*; *Igloo Vikski*; *Edmonton East*) and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis and to "home statute" deference (*C.U.P.E.*; *National Corn Growers*; *Domtar Inc.*; *Bradco Construction*; *Southam*; *Pushpanathan*; *Alberta Teachers' Association*; *Canadian Human Rights Commission*, among many others).

[268] Most of those decisions were decided unanimously or by strong majorities. At no point, however, does the majority acknowledge this Court's strong reluctance to overturn precedents that "represen[t] the considered views of firm majorities" (*Craig*, at para. 24; *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, at para. 57; see also *Nishi v. Rascal Trucking Ltd.*, [2013] 2 S.C.R. 438, at paras. 23-24), or to overrule decisions of a "recent vintage" (*Fraser*, at para. 57; see also *Nishi*, at para. 23). The decisions the majority *does* rely on, by contrast, involved overturning usually only one precedent and almost always an older one: *Craig* overruled a 34-year-old precedent; *R. v. Henry*, [2005] 3 S.C.R. 609, overruled a 19-year-old precedent (and another 15-year-old precedent, in part); and the dissenting judges in *Bernard* would have overruled a 10-year-old precedent.

[269] The majority's decision to overturn precedent also has the potential to disturb settled interpretations of many statutes that contain a right of appeal. Under the majority's approach, every existing interpretation of such statutes by an

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administrative body that has been affirmed under a reasonableness standard of review will be open to fresh challenge. In *McLean*, for example, this Court acknowledged that a limitations period in British Columbia's *Securities Act*[6] had two reasonable interpretations, but deferred to the one the Commission preferred based on deferential review. We see no reason why an individual in the same situation as Ms. McLean could not now revisit our Court's decision through the statutory right of appeal in the *Securities Act*, and insist that a new reviewing court offer *its* definitive view of the relevant limitations period now that appeal clauses are interpreted to permit judicial substitution rather than deference.

[270] The majority does not address the chaos that such legal uncertainty will generate for those who rely on settled interpretations of administrative statutes to structure their affairs, despite the fact that protecting these reliance interests is a well-recognized and especially powerful reason for respecting precedent (Garner et al., at pp. 404-11; Neil Duxbury, *The Nature and Authority of Precedent* (2008), at pp. 118-19; *Kimble*, at pp. 2410-11). By changing the entire status quo, the majority's approach will undermine legal certainty — "the foundational principle upon which the common law relies" (*Bedford*, at para. 38; see also Cromwell, at p. 315).

[271] Moreover, if this Court had for over 30 years significantly misconstrued the purpose of statutory appeal routes by failing to recognize what *this* majority has ultimately discerned — that in enacting such routes, legislatures were unequivocally

[6] R.S.B.C. 1996, c. 418, s. 159

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directing courts to review *de novo* every question of law that an administrative body addresses, regardless of that body's expertise — legislatures across Canada were free to clarify this interpretation and endorse the majority's favoured approach through legislative amendment. Given the possibility — and continued absence — of legislative correction, the case for overturning our past decisions is even less compelling (*Binus v. The Queen*, [1967] S.C.R. 594, at p. 601; see also *Kimble*, at p. 2409; *Kisor*, at pp. 2422-23; *Bilski v. Kappos*, *Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, 561 U.S. 593 (2010), at pp. 601-2).

[272] Each of these rationales for adhering to precedent — consistent affirmation, reliance interests and the possibility of legislative correction — was recently endorsed by the United States Supreme Court in *Kisor*. There, the Court invoked *stare decisis* to uphold two administrative law precedents which urged deference to administrative agencies when they interpreted ambiguous provisions in their regulations (*Bowles, Price Administrator v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997)). Writing for the majority on the issue of *stare decisis*, Justice Kagan explained at length why the doctrine barred the Court from overturning *Auer* or *Seminole Rock*. To begin, Justice Kagan reiterated the importance of *stare decisis* and the need for special justification to overcome its demands. She then explained that *stare decisis* carried even greater force than usual when applied to two decisions that had been affirmed by a "long line of precedents" going back 75 years or more and cited by lower courts thousands of times (p. 2422).

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She noted that overturning the challenged precedents would cast doubt on many settled statutory interpretations and invite relitigation of cases (p. 2422). Finally, Justice Kagan reasoned that Congress remained free to overturn the cases if the Court had misconstrued legislative intent:

> . . . even if we are wrong about *Auer*, "Congress remains free to alter what we have done." In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are "balls tossed into Congress's court, for acceptance or not as that branch elects." And so far, at least, Congress has chosen acceptance. It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. And it has done so even after Members of this Court began to raise questions about the doctrine. Given that history — and Congress's continuing ability to take up Kisor's arguments — we would need a particularly "special justification" to now reverse *Auer*. [Citations omitted; pp. 2422-23]

[273] In the face of these compelling reasons for adhering to precedent, many of which have found resonance in this Court's jurisprudence, the majority's reliance on "judicial and academic criticism" falls far short of overcoming the demands of *stare decisis*. It is hard to see why the *obiter* views of the handful of Canadian judges referred to by the majority should be determinative or even persuasive. The majority omits the views of any academics or judges who *have* voiced support for a strong presumption of deference without identifying our approach to statutory rights of appeal as cause for concern (Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 109; Green, at pp. 489-90; Matthew

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Lewans, *Administrative Law and Judicial Deference* (2016); Jonathan M. Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017), 68 *U.N.B.L.J.* 87; The Hon. John M. Evans, "Standards of Review in Administrative Law" (2013), 26 *C.J.A.L.P.* 67, at p. 79; The Hon. John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.* 101; Jerry V. DeMarco, "Seeking Simplicity in Canada's Complex World of Judicial Review" (2019), 32 *C.J.A.L.P.* 67).

[274] A selective assortment of criticism is not evidence of generalized criticism or unworkability. This Court frequently tackles contentious, high-profile cases that engender strong and persisting divisions of opinion. The public looks to us to definitively resolve those cases, regardless of the composition of the Court. As Hayne J. noted in *Lee*:

> To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor ... *In such cases, the decision itself determines which solution is, for the purposes of the current law, correct*. It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. *Such an approach would diminish the authority and finality of the judgments of this Court.* As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration.

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> Accordingly, as one commentator has put the point: "the previous decision is to be treated as the primary premise from which other arguments follow, and not just as one potential premise among an aggregate of competing premises". [Emphasis in original; footnote omitted.]
>
> (paras. 65-66, citing *Baker v. Campbell*, [1983] HCA 39, 153 C.L.R. 52, at pp. 102-3)

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[275] This Court, in fact, has been clear that "criticism of a judgment is not sufficient to justify overruling it" (*Fraser*, at para. 86). Differences of legal and public opinion are a natural by-product of contentious cases like *R. v. Jordan*, [2016] 1 S.C.R. 631, or even *Housen*, which, as this Court acknowledged, was initially applied by appeal courts with "varying degrees of enthusiasm" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at para. 76; see also Paul M. Perell, "The Standard of Appellate Review and The Ironies of Housen v. Nikolaisen" (2004), 28 *Adv. Q.* 40, at p. 53; Mike Madden, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *Adv. Q.* 269, at pp. 278-79 and 293; Paul J. Pape and John J. Adair, "Unreasonable review: The losing party and the palpable and overriding error standard" (2008), 27 *Adv. J.* 6, at p. 8; Geoff R. Hall, "Two Unsettled Questions in the Law of Contractual Interpretation: A Call to the Supreme Court of Canada" (2011), 50 *Can. Bus. L.J.* 434, at p. 436).

[276] To justify circumventing this Court's jurisprudence, the majority claims that the precedents being overturned *themselves* departed from the approach to statutory rights of appeal under the pragmatic and functional test. That, with respect,

is wrong. Ever since *Bell Canada (1989)* and in several subsequent decisions outlined earlier in these reasons, statutory rights of appeal have played little or no role in the standard of review analysis. Moreover, in pre-*Dunsmuir* cases, statutory rights of appeal were still seen as only one factor among others — and *not* as unequivocal indicators of correctness review (see, for example, *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, at paras. 27-33; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at paras. 23-24; *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, at paras. 149-51). Our pre- and post-*Dunsmuir* cases on statutory rights of appeal shared in common an unwavering commitment to determining the standard of review in administrative proceedings using administrative law principles, even when appeal rights were involved.

[277] For the majority, the elimination of the contextual factors appears to have justified the reconstruction of the whole judicial review framework. Yet the elimination of the contextual analysis was all but complete in our post-*Dunsmuir* jurisprudence, and does not support the foundational changes to judicial review in the majority's decision. Neither that development, nor the majority's assertion that our precedents have proven "unclear and unduly complex", justifies the conclusion that *all* of our administrative law precedents — even those unconnected to the practical difficulties in applying *Dunsmuir* — are suddenly fair game.

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[278] This Court is overturning a long line of well-established and recently-affirmed precedents in a whole area of law, including several unanimous or strong majority judgments. There is no principled justification for such a dramatic departure from this Court's existing jurisprudence.

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Going Forward

[279] In our view, a more modest approach to modifying our past decisions, one that goes no further than necessary to clarify the law and its application, is justified. "[W]hen a court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine" (Garner et al., at pp. 41-42). Such an approach to changing precedent preserves the integrity of the judicial process and, at a more conceptual level, of the law itself as a social construct. Michael J. Gerhardt summarized this approach eloquently:

> Judicial modesty is . . . . a disposition to respect precedents (as embodying the opinions of others), to learn from their and others' experiences, and to decide cases incrementally to minimize conflicts with either earlier opinions of the Court or other constitutional actors. [p. 7]

[280] Judicial modesty promotes the responsible development of the common law. Lord Tom Bingham described that process in his seminal work, *The Rule of Law* (2010):

> . . . it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. [pp. 45-46]
>
> (See also Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 93; Beverley McLachlin, "The Role of the Supreme Court of Canada in Shaping the Common Law", in Paul Daly, ed., *Apex Courts and the Common Law* (2019), 25, at p. 35; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, at para. 42; *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, at paras. 14-16, per Lebel J., and 73-74, per Binnie J., concurring.)

[281] Lord Bingham's comments highlight that a nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and shifts in societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law. When *stare decisis* is respected, precedent acts as a stabilizing force: providing certainty as to what the law is, consistency that allows those subject to the law to order their affairs accordingly, and continuity that protects reliance on those legal consequences. *Stare decisis* is at the heart of the iterative development of the common law, fostering progressive, incremental and responsible change.

[282] So what do we suggest? We support a standard of review framework with a meaningful rule of deference, based on *both* the legislative choice to delegate decision-making authority to an administrative actor *and* on the specialized expertise that these decision-makers possess and develop in applying their mandates. Outside of the three remaining correctness categories from *Dunsmuir* — and absent clear and

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explicit legislative direction on the *standard* of review — administrative decisions should be reviewed for reasonableness. Like the majority, we support eliminating the category of "true questions of jurisdiction" and foreclosing the use of the contextual factors identified in *Dunsmuir*. These developments introduce incremental changes to our judicial review framework, while respecting its underlying principles and placing the ball in the legislatures' court to modify the standards of review if they wish.

[283] To the extent that concerns were expressed about the quality of administrative decision making by some interveners who represented particularly vulnerable groups, we agree that they must be taken seriously. But the solution does not lie in authorizing more incursions into the administrative system by generalist judges who lack the expertise necessary to implement these sensitive mandates. Any perceived shortcomings in administrative decision making are not solved by permitting *de novo* review of every legal decision by a court and, as a result, adding to the delay and cost of obtaining a final decision. The solution lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system.

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[284] We also acknowledge that this Court should offer additional direction on conducting reasonableness review.[7] We fear, however, that the majority's multi-factored, open-ended list of "constraints" on administrative decision making will encourage reviewing courts to dissect administrative reasons in a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, at para. 54). These "constraints" may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision — a checklist with unsettling similarities to the series of "jurisdictional errors" spelled out in *Anisminic* itself.

[285] Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges. Such an approach undercuts deference and revives a long-abandoned posture of suspicion towards administrative decision making. We are also concerned by the majority's warning that administrative decision-makers cannot "arrogate powers to themselves that they were never intended to have", an unhelpful truism that risks reintroducing the tortured concept of "jurisdictional error" by another name.

[286] We would advocate a continued approach to reasonableness review which focuses on the concept of *deference* and what it requires of reviewing courts. Curial deference, after all, is *the* hallmark of reasonableness review, setting it apart

[7] Consistent with requests from some commentators and some of the interveners at these hearings, including the Canadian Bar Association and the Council of Canadian Administrative Tribunals (see also Mullan, at pp. 76-78).

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from the substitution of opinion permitted under the correctness standard. The choice of a particular standard of review — whether described as "correctness", "reasonableness" or in other terms — is fundamentally about "whether or not a reviewing court should defer"[8] to an administrative decision (see *Dunsmuir*, at para. 141, per Binnie J., concurring; Régimbald, at pp. 539-40). If courts, therefore, are to properly conduct "reasonableness" review, they must properly understand what deference means.

[287] In our view, deference imposes three requirements on courts conducting reasonableness review. It informs the attitude a reviewing court must adopt towards an administrative decision-maker; it affects how a court frames the question it must answer on judicial review; and it affects how a reviewing court evaluates challenges to an administrative decision.

[288] First and foremost, deference is an "attitude of the court" conducting reasonableness review (*Dunsmuir*, at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and for the important role that administrative decision-makers play in upholding and applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, at para. 131, per LeBel J., concurring). Deference also requires respect for administrative decision-makers, their specialized expertise and the institutional setting in which they operate (*Dunsmuir*, at paras. 48-49). Reviewing courts must pay

[8] Factum of the intervener the Canadian Association of Refugee Lawyers, at para. 5; factum of the intervener the Council of Canadian Administrative Tribunals, at paras. 24-26.

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"respectful attention" to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction in light of the entire record (*Newfoundland Nurses*, at paras. 11-14 and 17).

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[289] Second, deference affects how a court frames the question it must answer when conducting judicial review. A reviewing court does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable (*Khosa*, at paras. 59 and 61-62; *Dunsmuir*, at para. 47). Framing the inquiry in this way ensures that the administrative decision under review is the focus of the analysis.

[290] This Court has often endorsed this approach to conducting reasonableness review. In *Ryan*, for example, Iacobucci J. explained:

> . . . When deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been . . . . The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> . . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable. [paras. 50-51]
>
> (See also *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178, at p. 214; *Toronto (City)*, at paras. 94-95, per LeBel J., concurring; *VIA Rail*, at para. 101; *Mason v. Minister of Citizenship and Immigration*, 2019 FC 1251, at para. 22 (CanLII), per Grammond J.; Régimbald, at p. 539; Sharpe, at pp. 204 and 208; Paul Daly, "The Signal and the Noise in

Administrative Law" (2017), 68 *U.N.B.L.J.* 68, at p. 85; Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 107.)

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[291] Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the applicant seeking judicial review to bear the onus of showing that the decision was unreasonable (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 S.C.R. 83, at para. 108; *Mission Institution v. Khela*, [2014] 1 S.C.R. 502, at para. 64; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, at para. 71; *Ryan*, at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, at p. 130). Focusing on whether the applicant has demonstrated that the decision is unreasonable reinforces the central role that administrative decisions play in a properly deferential review process, and confirms that the decision-maker does not have to persuade the court that its decision is reasonable.

[292] Assessing whether a decision is reasonable also requires a qualitative assessment. Reasonableness is a concept that pervades the law but is difficult to define with precision (*Dunsmuir*, at para. 46). It requires, by its very nature, a fact-specific inquiry that involves a certain understanding of common experience. Reasonableness cannot be reduced to a formula or a checklist of factors, many of which will not be relevant to a particular decision. Ultimately, whether an administrative decision is reasonable will depend on the context (*Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at para. 18). Administrative

law covers an infinite variety of decisions and decision-making contexts, as LeBel J. colourfully explained in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 158 (dissenting in part, but not on this point):

> . . . not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate . . . .

[293] Deference, in our view, requires approaching each administrative decision on its own terms and in its own context. But we emphasize that the inherently contextual nature of reasonableness review does not mean that the degree of scrutiny applied by a reviewing court varies (*Alberta Teachers' Association*, at para. 47; *Wilson*, at para. 18). It merely means that when assessing a challenge to an administrative decision, a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised by the applicant, among other factors (see, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 40; *Newfoundland Nurses*, at para. 18; Van Harten et al., at p. 794). Without this context, it is impossible to determine what constitutes a sufficiently compelling justification to quash a decision under reasonableness review. Context may make a challenge to an administrative decision more or less persuasive

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— but it does not alter the deferential posture of the reviewing court (*Suresh*, at para. 40).

[294] Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not "disguised correctness review", as some have used the phrase. Deference, after all, stems from respect, not inattention to detail.

[295] Bearing this in mind, we offer the following suggestions for conducting reasonableness review. We begin with situations where reasons are required.[9]

[296] The administrative decision is the focal point of the review exercise. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably (*Williams Lake*, at para. 36). By beginning with the reasons offered for the decision, read in light of the surrounding context and the grounds raised to challenge the decision, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making.

[9] Under the duty of procedural fairness outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43.

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[297] Reviewing courts should approach the reasons with respect for the specialized decision-makers, the significant role they have been assigned and the institutional context chosen by the legislator. Reasons should be approached generously, on their own terms. Reviewing courts should be hesitant to second-guess operational implications, practical challenges and on-the-ground knowledge used to justify an administrative decision. Reviewing courts must also remain alert to specialized concepts or language used in an administrative decision that may be unfamiliar to a generalist judge (*Newfoundland Nurses*, at para. 13; *Igloo Vikski*, at paras. 17 and 30). When confronted with unfamiliar language or modes of reasoning, judges should acknowledge that such differences are an inevitable, intentional and invaluable by-product of the legislative choice to assign a matter to the administrative system. They may lend considerable force to an administrative decision and, by the same token, render an applicant's challenge to that decision less compelling. Reviewing courts scrutinizing an administrative body's decision under the reasonableness framework should therefore keep in mind that the administrative body holds the "interpretative upper hand" (*McLean*, at para. 40).

[298] Throughout the review process, a court conducting deferential review must view claims of administrative error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised by an applicant to ensure they go to the *reasonableness* of the administrative decision.

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[299] Unsurprisingly, applicants rarely present challenges to an administrative decision as explicit invitations for courts to substitute their opinions for those of administrative actors. Courts, therefore, must carefully probe challenges to administrative decisions to assess whether they amount, in substance, to a mere difference of opinion with how the administrative decision-maker weighed or prioritized the various factors relevant to the decision-making process. Allegations of error may, on deeper examination, simply reflect a legitimate difference in approach by an administrative decision-maker. By rooting out and rejecting such challenges, courts respect the valuable and distinct perspective that administrative bodies bring to answering legal questions, flowing from the considerable expertise and field sensitivity they develop by administering their mandate and working within the intricacies of their statutory context on a daily basis. The understanding and insights of administrative actors enhance the decision-making process and may be more conducive to reaching a result "that promotes effective public policy and administration . . . than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law" (*National Corn Growers*, at pp. 1336-37 (emphasis deleted), per Wilson J., concurring, citing J. M. Evans et al., *Administrative Law: Cases, Text, and Materials* (3rd ed. 1989), at p. 414).

[300] When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker's reasoning. Under reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it

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affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review. Ultimately, the role of the reviewing court is to examine the decision as a whole to determine whether it is reasonable (*Dunsmuir*, at para. 47; *Khosa*, at para. 59). Considering the materiality of any impugned errors is a natural part of this exercise, and of reading administrative reasons "together with the outcome" (*Newfoundland Nurses*, at para. 14).

[301] Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons (*Construction Labour Relations v. Driver Iron Inc.*, [2012] 3 S.C.R. 405, at para. 3; *Newfoundland Nurses*, at para. 16, citing *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, at p. 391). Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision (*Williams Lake*, at para. 37; *Delta Air Lines Inc. v. Lukács*, [2018] 1 S.C.R. 6, at para. 23; *Newfoundland Nurses*, at para. 15; *Alberta Teachers' Association*, at paras. 53 and 56).

[302] The use of the record and other context to supplement a decision-maker's reasons has been the subject of some academic discussion (see, for example, Mullan,

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at pp. 69-74). We support a flexible approach to supplementing reasons, which is consistent with the flexible approach used to determine whether administrative reasons must be provided to begin with and sensitive to the "day-to-day realities of administrative agencies" (*Baker*, at para. 44), which may not be conducive to the production of "archival" reasons associated with court judgments (para. 40, citing Roderick A. Macdonald and David Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123).

[303] Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 *U.N.B.L.J.* 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, "by inference", why an administrative decision-maker reached a particular outcome (*Baker*, at para. 44; see also *Williams Lake*, at para. 37; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal (Ont.)*, 2008 ONCA 436, 237 O.A.C. 71, at paras. 38-39). It may reveal further confirmatory context for a line of reasoning employed by the decision-maker — by showing, for example, that the decision-maker's understanding of the purpose of its statutory mandate finds support in the provision's legislative history (*Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3, at paras. 25-29). Reviewing the record can also yield responses to the specific challenges raised by an applicant on judicial review, responses that are

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"consistent with the process of reasoning" applied by the administrative decision-maker (*Igloo Vikski*, at para. 45). In these ways, reviewing courts may legitimately supplement written reasons without "supplant[ing] the analysis of the administrative body" (*Lukács*, at para. 24).

[304] The "adequacy" of reasons, in other words, is not "a stand-alone basis for quashing a decision" (*Newfoundland Nurses*, at para. 14). As this Court has repeatedly confirmed, reasons must instead "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland Nurses*, at para. 14; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108, at para. 44; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, at para. 52; *Williams Lake*, at para. 141, per Rowe J., dissenting, but not on this point). This approach puts substance over form in situations where the basis for a decision by a specialized administrative actor is evident on the record, but not clearly expressed in written reasons. Quashing decisions in such circumstances defeats the purpose of deference and thwarts access to justice by wasting administrative and judicial resources.

[305] In our view, therefore, if an applicant claims that an administrative decision-maker failed to address a relevant factor in reaching a decision, the reviewing court must consider the submissions and record before the decision-maker, and the materiality of any such omission to the decision rendered. An administrative

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decision-maker's failure, for example, to refer to a particular statutory provision or the full factual record before it does not automatically entitle a reviewing court to conduct a *de novo* assessment of the decision under review. The inquiry must remain focussed on whether the applicant has satisfied the burden of showing that the omission renders the decision reached unreasonable.

[306] We acknowledge that respecting the line between reasonableness and correctness review has posed a particular challenge for judges when reviewing interpretation by administrative decision-makers of their statutory mandates. Judges routinely interpret statutes and have developed a template for how to scrutinize words in that context. But the same deferential approach we have outlined above must apply with equal force to statutory interpretation cases. When reviewing an administrative decision involving statutory interpretation, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach "imperils deference" (Paul Daly, "Unreasonable Interpretations of Law" (2014), 66 *S.C.L.R.* (2d) 233, at p. 250).

[307] We agree with Justice Evans that "once [a] court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal's decision, there seems often to be little room for deference" (Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 109; see also *Mason*, at para. 34; Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 108; Daly, "Unreasonable Interpretations of Law", at

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pp. 254-55). We add that a *de novo* interpretation of a statute, conducted as a prelude to "deferential" review, necessarily omits a vital piece of the interpretive puzzle: the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question (Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", at p. 304; Paul Daly, "Deference on Questions of Law" (2011), 74 *Mod. L. Rev.* 694). By placing that perspective at the heart of the judicial review inquiry, courts display respect for administrative specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies.

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[308] Conversely, by imposing their own interpretation of a statutory provision, courts *undermine* legislative intent to confide a mandate to the decision-maker. Applying a statute will almost always require some interpretation, making the interpretive mandate of administrative decision-makers inherent to their legislative mandate. The decision-maker who applies the statute has primary responsibility for interpreting the provisions in order to carry out their mandate effectively.

[309] Administrative decision-makers performing statutory interpretation should therefore be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime. In many cases, the "ordinary meaning" of a word or term makes no sense in a specialized context. And in some settings, law and policy are so inextricably at play that they give the words of a statute a meaning unique to a particular specialized context (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc.*, at p. 800). Further, not only are

statutory provisions sometimes capable of bearing more than one reasonable interpretation, they are sometimes drafted in general terms or with "purposeful ambiguity" in order to permit adaptation to future, unknown circumstances (see Felix Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 *Colum. L. Rev.* 527, at p. 528). These considerations make it all the more compelling that reviewing courts avoid imposing judicial norms on administrative decision-makers or maintaining a dogmatic insistence on formalism. Where a decision-maker can explain its decision adequately, that decision should be upheld (Daly, "Unreasonable Interpretations of Law", at pp. 233-34, 250 and 254-55).

[310] Justice Brown's reasons in *Igloo Vikski* provide a useful illustration of a properly deferential approach to statutory interpretation. That case involved an interpretation of the *Customs Tariff*, S.C. 1997, c. 36, as it applies to hockey goaltender gloves. The Canada Border Services Agency had classified the gloves as "[g]loves, mittens [or] mitts". Igloo Vikski argued they should have been classified as sporting equipment. The Canadian International Trade Tribunal ("CITT") confirmed the initial classification. The Federal Court of Appeal reversed the decision.

[311] Acknowledging that the "specific expertise" of the CITT gave it the upper hand over a reviewing court with respect to certain questions of law, Justice Brown determined that the standard of review was reasonableness. Writing for seven other members of the Court, he carefully reviewed the reasons of the CITT and how it had engaged with Igloo Vikski's arguments before turning to the errors alleged by

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Igloo Vikski and the Federal Court of Appeal. Conceding that the CITT reasons lacked "perfect clarity", Justice Brown nevertheless concluded that the Tribunal's interpretation was reasonable. While he agreed with Igloo Vikski that an alternate interpretation to that given by the CITT was available, the inclusive language of the applicable statute was broad enough to accommodate the CITT's reasonable interpretation. By beginning with the reasons offered for the interpretation and turning to the challenges mounted against it in light of the surrounding context, *Igloo Vikski* provides an excellent example of respectful and properly deferential judicial review.

[312] We conclude our discussion of reasonableness review by addressing cases where reasons are neither required nor available for judicial review. In these circumstances, a reviewing court should remain focussed on whether the decision has been shown to be unreasonable. The reasonableness of the decision may be justified by past decisions of the administrative body (see *Edmonton East*, at paras. 38 and 44-46; *Alberta Teachers' Association*, at paras. 56-64). In other circumstances, reviewing courts may have to assess the reasonableness of the outcome in light of the procedural context surrounding the decision (see *Law Society of British Columbia v. Trinity Western University*, [2018] 2 S.C.R. 293, at paras. 51-56; *Edmonton East*, at paras. 48-60; *Catalyst Paper Corp.*, at paras. 32-36). In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable.

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[313] In sum, reasonableness review is based on deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue before the administrative decision-maker but instead evaluates whether the decision-maker acted reasonably. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process. By properly conducting reasonableness review, judges provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers.

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Application to Mr. Vavilov

[314] Alexander Vavilov challenges the Registrar of Citizenship's decision to cancel his citizenship certificate. The Registrar concluded that Mr. Vavilov was not a Canadian citizen, and therefore not entitled to a certificate of Canadian citizenship because, although he was born in Canada, his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

[315] The first issue is the applicable standard of review. We agree with the majority that reasonableness applies.

[316] The second issue is whether the Registrar was reasonable in concluding that the exception to Canadian citizenship in s. 3(2)(a) applies not only to parents who enjoy diplomatic privileges and immunities, but also to intelligence agents of a foreign government. The onus is therefore on Mr. Vavilov to satisfy the reviewing court that the decision was unreasonable. In our view, he has met that onus.

[317] Mr. Vavilov was born in Canada in 1994. His Russian parents, Elena Vavilova and Andrey Bezrukov, entered Canada at some point prior to his birth, assumed the identities of two deceased Canadians and fraudulently obtained Canadian passports. After leaving Canada to live in France, Mr. Vavilov and his family moved to the United States. While in the United States, Mr. Vavilov's parents became American citizens under their assumed Canadian identities. Mr. Vavilov and his older brother also obtained American citizenship.

[318] In June 2010, agents of the United States Federal Bureau of Investigation arrested Mr. Vavilov's parents and charged them with conspiracy to act as unregistered agents of a foreign government and to commit money laundering. Mr. Vavilov's parents pleaded guilty to the conspiracy charges in July 2010 and were returned to Russia in a spy swap. Around the same time, Mr. Vavilov and his brother travelled to Russia. The American government subsequently revoked Mr. Vavilov's

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passport and citizenship. In December 2010, he was issued a Russian passport and birth certificate.

[319] From 2010 to 2013, Mr. Vavilov repeatedly sought a Canadian passport. In December 2011, he obtained an amended Ontario birth certificate, showing his parents' true names and places of birth. Using this birth certificate, Mr. Vavilov applied for and received a certificate of Canadian citizenship in January 2013. Relying on these certificates, Mr. Vavilov applied for an extension of his Canadian passport in early 2013. On July 18, 2013, the Registrar wrote to Mr. Vavilov, informing him that there was reason to believe the citizenship certificate had been erroneously issued and asking him for additional information.

[320] On April 22, 2014, Mr. Vavilov provided extensive written submissions to the Registrar. He argued that the narrow exception set out in s. 3(2) of the Act does not apply to him. Because he was born in Canada, he is entitled to Canadian citizenship. Mr. Vavilov also argued that the Registrar had failed to respect the requirements of procedural fairness.

[321] The Registrar wrote to Mr. Vavilov on August 15, 2014, cancelling his certificate of Canadian citizenship. In her view, because Mr. Vavilov met the two statutory restrictions in s. 3(2) of the Act, he was not a Canadian citizen. First, when Mr. Vavilov was born in Canada, neither of his parents were Canadian citizens or lawfully admitted to Canada for permanent residence. Second, as unofficial agents working for Russia's Foreign Intelligence Service, Mr. Vavilov's parents were "other

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representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a).

[322] The Federal Court ([2016] 2 F.C.R. 39) dismissed Mr. Vavilov's application for judicial review. It found that the Registrar had satisfied the requirements of procedural fairness and, applying a correctness standard, determined that the Registrar's interpretation of s. 3(2)(a) was correct. The Federal Court then reviewed the application of s. 3(2)(a) on a reasonableness standard and concluded that the Registrar had reasonably determined that Mr. Vavilov's parents were working in Canada as undercover agents of the Russian government at the time of his birth.

[323] The Federal Court of Appeal ([2018] 3 F.C.R. 75) allowed the appeal and quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate. Writing for the majority, Stratas J.A. agreed that the requirements of procedural fairness were met but held that the Registrar's interpretation of s. 3(2)(a) was unreasonable. In his view, only those who enjoy diplomatic privileges and immunities fall within the exception to citizenship found in s. 3(2)(a). Justice Stratas reached this conclusion after considering the context and purpose of the provision, its legislative history and international law principles related to citizenship and diplomatic privileges and immunities.

[324] As a general rule, administrative decisions are to be judicially reviewed for reasonableness. None of the correctness exceptions apply to the Registrar's

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interpretation of the Act in this case. As such, the standard of review is reasonableness.

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[325] The following provisions of the *Citizenship Act* are relevant to this appeal:

> **Persons who are citizens**
>
> **3 (1)** Subject to this Act, a person is a citizen if
>
> > **(a)** the person was born in Canada after February 14, 1977;
> >
> > . . .
>
> **Not applicable to children of foreign diplomats, etc.**
>
> **(2)** Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> > **(a)** a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
> >
> > **(b)** an employee in the service of a person referred to in paragraph (a); or
> >
> > **(c)** an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

The general rule embodied in s. 3(1)(a) of the Act is that persons born in Canada are Canadian citizens. Section 3(2) sets out an exception to this rule. As such, if s. 3(2) applies to Mr. Vavilov, he was never a Canadian citizen.

[326] The specific issue in this case is whether the Registrar's interpretation of the statutory exception to citizenship was reasonable. Reasonableness review entails deference to the decision-maker, and we begin our analysis by examining the reasons offered by the Registrar in light of the context and the grounds argued.

[327] In this case, the Registrar's letter to Mr. Vavilov summarized the key points underlying her decision. In concluding that Mr. Vavilov was not entitled to Canadian citizenship, the Registrar adopted the recommendations of an analyst employed by Citizenship and Immigration Canada. As such, the analyst's report properly forms part of the reasons supporting the Registrar's decision.

[328] The analyst's report sought to answer the question of whether Mr. Vavilov was erroneously issued a certificate of Canadian citizenship. The report identifies the key question in this case as being whether either of Mr. Vavilov's parents was a "representative" or "employee" of a foreign government within the meaning of s. 3(2)(a). Much of the report relates to matters not disputed in this appeal, including the legal status of Mr. Vavilov's parents in Canada and their employment as Russian intelligence agents.

[329] The analyst began her analysis with the text of s. 3(2)(a). In concluding that the provision operates to deny Mr. Vavilov Canadian citizenship, she set out two textual arguments. First, she compared the current version of s. 3(2)(a) to an earlier iteration of the exception found in s. 5(3) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19:

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Not applicable to children of foreign diplomats, etc.

(3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent

(*a*) is an alien who has not been lawfully admitted to Canada for permanent residence; and

(*b*) is

(i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,

(ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or

(iii) an employee in the service of a person referred to in subparagraph (i).

[330] The analyst stated that the removal of references to official accreditation or a diplomatic mission indicate that the previous exception was narrower than s. 3(2)(a). She then pointed out that the definition of "diplomatic or consular officer" in s. 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, clearly associates these individuals with diplomatic positions. Because the current version of s. 3(2)(a) does not link "other representative or employee in Canada of a foreign government" to a diplomatic mission, the analyst determined "it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff.'" Finally, the analyst stated that the phrase "other representative or employee in Canada of a foreign government" has not been previously interpreted by a court.

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[331] Beyond the analyst's report, there is little in the record to supplement the Registrar's reasons. There is no evidence about whether the Registrar has previously applied this provision to individuals like Mr. Vavilov, whose parents did not enjoy diplomatic privileges and immunities. Neither does there appear to be any internal policy, guideline or legal opinion to guide the Registrar in making these types of decisions.

[332] In challenging the Registrar's decision, Mr. Vavilov bears the onus of demonstrating why it is not reasonable. Before this Court, Mr. Vavilov submitted that the analyst focussed solely on the text of the exception to citizenship. In his view, had the broader objectives of s. 3(2)(a) been considered, the analyst would have concluded that "other representative" or "employee" only applies to individuals who benefit from diplomatic privileges and immunities.

[333] In his submissions before the Registrar, Mr. Vavilov offered three reasons why the text of s. 3(2) must be read against the backdrop of Canadian and international law relating to the roles and functions of diplomats.

[334] First, Mr. Vavilov explained that s. 3(2)(a) should be read in conjunction with the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA"*). This statute incorporates into Canadian law aspects of the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29, Sched. I to the *FMIOA*, and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, Sched. II to the *FMIOA*, which deal with diplomatic privileges and immunities. He submitted

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that s. 3(2) denies citizenship to children of diplomats because diplomatic privileges and immunities, including immunity from criminal prosecution and civil liability, are inconsistent with the duties and responsibilities of a citizen. Because Mr. Vavilov's parents did not enjoy such privileges and immunities, there would be no purpose in excluding their children born in Canada from becoming Canadian citizens.

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[335] Second, Mr. Vavilov provided the Registrar with Hansard committee meeting minutes such as the comments of the Honourable J. Hugh Faulkner, Secretary of State, when introducing the amendments to s. 3(2), who explained that the provision had been redrafted to narrow the exception to citizenship.

[336] Third, Mr. Vavilov cited case law, arguing that: (i) the exception to citizenship should be narrowly construed because it takes away substantive rights (*Brossard (Town) v. Quebec Commission des droits de la personne*, [1988] 2 S.C.R. 279, at p. 307); (ii) s. 3(2)(a) must be interpreted functionally and purposively (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, at para. 8); and (iii) because Mr. Vavilov's parents were not immune from criminal or civil proceedings, they fall outside the scope of s. 3(2) (*Greco v. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (QL) (S.C.J.); *R. v. Bonadie* (1996), 109 C.C.C. (3d) 356 (Ont. C.J.); *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)* (2007), 64 Imm. L.R. (3d) 67 (F.C.)).

[337] The Federal Court's decision in *Al-Ghamdi*, a case which challenged the constitutionality of s. 3(2)(a), was particularly relevant. In that case, Shore J. wrote

that s. 3(2)(a) only applies to the "children of individuals with diplomatic status" (paras. 5 and 65). Justice Shore also stated that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship" (para. 63).

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[338] The Registrar's reasons failed to respond to Mr. Vavilov's extensive and compelling submissions about the objectives of s. 3(2)(a). It appears that the analyst misunderstood Mr. Vavilov's arguments on this point. In discussing the scope of s. 3(2), she wrote, "[c]ounsel argues that CIC [Citizenship and Immigration Canada] cannot invoke subsection 3(2) because CIC has not requested or obtained verification with the Foreign Affairs Protocol to prove that [Mr. Vavilov's parents] held diplomatic or consular status with the Russian Federation while they resided in Canada." It thus appears that the analyst did not recognize that Mr. Vavilov's argument was more fundamental in nature — namely, that the objectives of s. 3(2) require the terms "other representative" and "employee" to be read narrowly. During discovery, in fact, the analyst acknowledged that her research did not reveal a policy purpose behind s. 3(2)(a) or why the phrase "other representative or employee" was included in the Act. It also appears that the analyst did not understand the potential relevance of the *Al-Ghamdi* decision, since her report stated that "[t]he jurisprudence that does exist only relates to individuals whose parents maintained diplomatic status in Canada at the time of their birth."

[339] The Registrar, in the end, interpreted s. 3(2)(a) broadly, based on the analyst's purely textual assessment of the provision, including a comparison with the text of the previous version. This reading of "other representative or employee" was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Rather, as Mr. Vavilov points out, the modifications made to s. 3(2) in 1976 appear to mirror those embodied in the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*, which were incorporated into Canadian law in 1977. The judicial treatment of this provision, in particular the statements in *Al-Ghamdi* about the narrow scope of s. 3(2)(a) and the inconsistency between diplomatic privileges and immunities and citizenship, also points to the need for a narrow interpretation of the exception to citizenship.

[340] In addition, as noted by the majority of the Federal Court of Appeal, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation. That provision denies citizenship to children born to individuals who enjoy "diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)". As Stratas J.A. noted, this language suggests that s. 3(2)(a) covers *only* those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

[341] By ignoring the objectives of the provision, the Registrar rendered an unreasonable decision. In particular, the arguments supporting a reading of s. 3(2)

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that is restricted to those who have diplomatic privileges and immunities, likely would have changed the outcome in this case.

[342] Mr. Vavilov has satisfied us that the Registrar's decision is unreasonable. As a result, the Court of Appeal properly quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate, and he is thus entitled to a certificate of Canadian citizenship.

[343] We would therefore dismiss the appeal with costs to Mr. Vavilov throughout.

Appeal dismissed with costs throughout.

Solicitor for the appellant: Attorney General of Canada, Toronto.

Solicitors for the respondent: Jackman Nazami & Associates, Toronto; University of Windsor — Faculty of Law, Windsor.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

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Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

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

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Canadian Council for Refugees: The Law Office of Jamie Liew, Ottawa.

Solicitor for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program: Advocacy Centre for Tenants Ontario, Toronto.

Solicitor for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission: Ontario Securities Commission, Toronto.

Solicitor for the intervener Ecojustice Canada Society: Ecojustice Canada Society, Toronto.

Solicitor for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest

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Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick): Workplace Safety and Insurance Appeals Tribunal, Toronto.

Solicitors for the intervener the British Columbia International Commercial Arbitration Centre Foundation: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Council of Canadian Administrative Tribunals: Lax O'Sullivan Lisus Gottlieb, Toronto.

Solicitors for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec: Susan L. Stewart, Toronto; Paliare Roland Rosenberg Rothstein, Toronto; Rae Christen Jeffries, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the intervener the National Association of Pharmacy Regulatory Authorities: Shores Jardine, Edmonton.

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Solicitors for the intervener Queen's Prison Law Clinic: Stockwoods, Toronto.

Solicitors for the intervener Advocates for the Rule of Law: McCarthy Tétrault, Vancouver.

Solicitor for the intervener the Parkdale Community Legal Services: Parkdale Community Legal Services, Toronto.

Solicitors for the intervener the Cambridge Comparative Administrative Law Forum: Cambridge University — The Faculty of Law, Cambridge, U.K.; White & Case, Washington, D.C.

Solicitors for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: Caza Saikaley, Ottawa.

Solicitors for the intervener the Canadian Bar Association: Gowling WLG (Canada), Ottawa.

Solicitors for the intervener the Canadian Association of Refugee Lawyers: Centre for Criminology & Sociolegal Studies — University of Toronto, Toronto; Legal Aid Ontario, Toronto.

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Solicitor for the intervener the Community & Legal Aid Services Programme: Community & Legal Aid Services Programme, Toronto.

Solicitors for the intervener Association québécoise des avocats et avocates en droit de l'immigration: Nguyen, Tutunjian & Cliche-Rivard, Montréal; Hadekel Shams, Montréal.

Solicitors for the intervener the First Nations Child & Family Caring Society of Canada: Stikeman Elliott, Ottawa.

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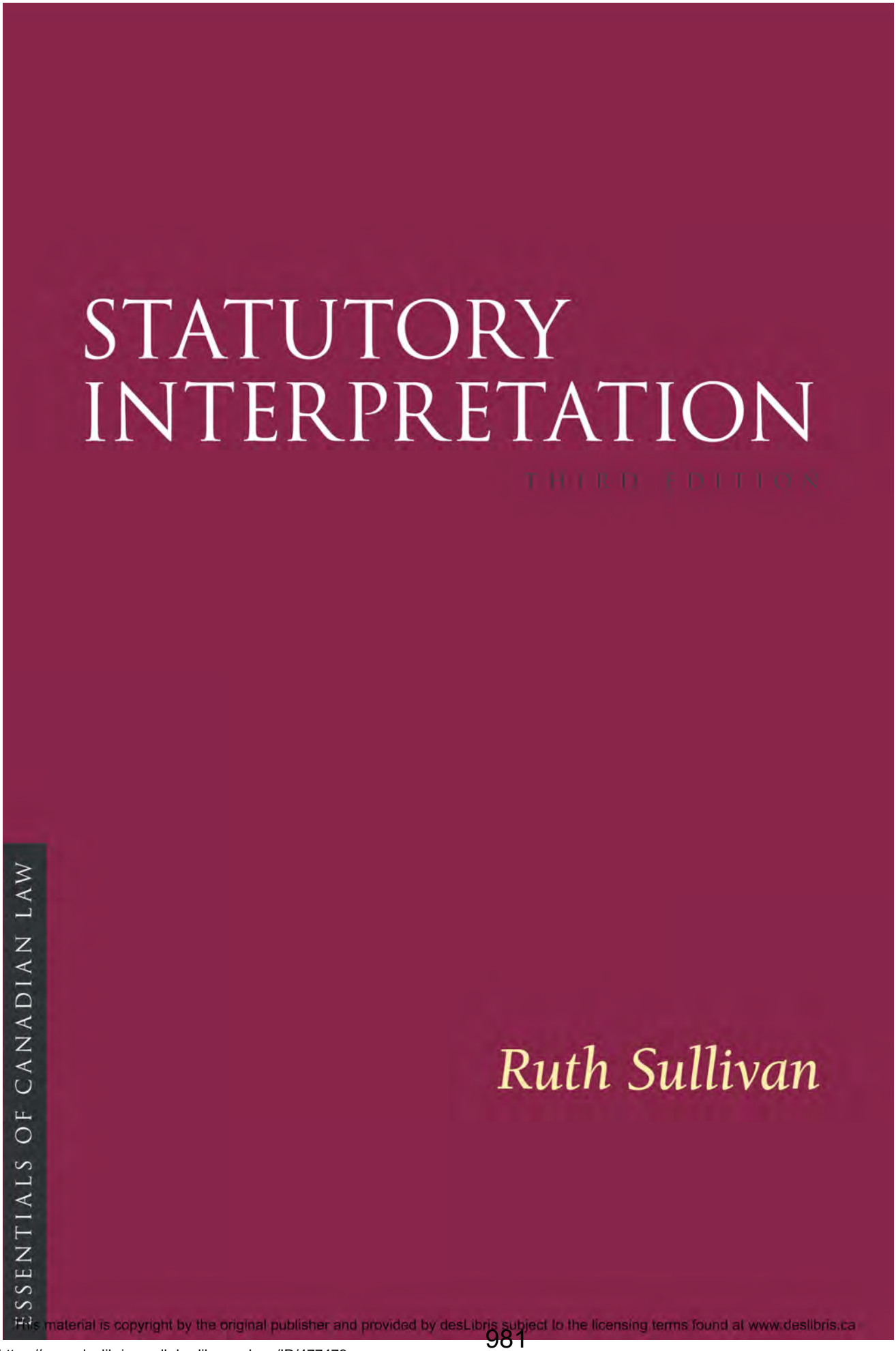
TAB 39



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ESSENTIALS OF
CANADIAN LAW

STATUTORY INTERPRETATION

THIRD EDITION

RUTH SULLIVAN

IRWIN LAW

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the operation of the program, but also legislative power to create rules and standards and judicial or quasi-judicial power to resolve disputes. The exercise of these powers is supervised by the courts through appeal and judicial review. In some jurisdictions, it is also reviewed by a parliamentary committee.[19]

The emergence of a significant body of program legislation in the nineteenth and twentieth centuries led to the development of the branch of law known as administrative law. Acting pursuant to this law, the superior court of each jurisdiction reviews the work of the executive branch to ensure that it has been carried out in accordance with the rule of law.[20] Judicial review is based primarily on the principles of legality, reasonableness, and fairness.[21] The principle of legality, also known as the *vires* doctrine, ensures that every exercise of power is authorized by law; any attempt by the executive to exceed its powers by making an unauthorized decision, order, or regulation may be declared *ultra vires*, or invalid, and without legal effect. The principles of fairness ensure that individuals are given fair treatment, including notice and a chance to be heard, when their interests are affected by the exercise of executive power.

In interpreting program legislation, the focus is normally not on the common law but on the goals sought by the legislature and on the design of the implementing scheme. The meaning of each provision is best understood in light of its contribution to the goals and its function in the scheme.

6) Guidelines and Other Forms of Quasi-Legislation

In addition to the legislative instruments described above, administrative bodies also produce a wide range of non-legislative instruments that set out norms, procedures, and directives designed to facilitate the orderly exercise of governmental functions. These instruments are referred to as quasi-legislation in that they offer guidance in dealing with a legislative scheme, but they are not legally binding. Quasi-legislation is often written for government employees, to tell them how to carry out their jobs. Some quasi-legislation sets out guidelines which government officials are to consult in making discretionary decisions, such as whether to issue a licence or grant an exemption. Other quasi-legislation explains how government officials interpret the legislation they administer. The tax interpretation bulletins produced by the Canada

19 For example, the Standing Joint Committee for the Scrutiny of Regulations, established under the *Statutory Instruments Act*, RSC 1985, c S-22, s 19.

20 The rule of law is explained in Chapter 2.

21 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28.

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Revenue Agency are probably the best-known example of this type. They set out the position the government has taken in interpreting various provisions of the *Income Tax Act*. They are relied on not only by Canada Revenue Agency staff in administering the Act but also by taxpayers in arranging their affairs and preparing tax returns.

While some quasi-legislation is explicitly authorized by statute, much is produced under the implied administrative powers of government. What distinguishes all quasi-legislation from legislation is the fact that quasi-legislation is not legally binding. A prison guard who fails to comply with a directive may be disciplined by the employer, but he or she has not broken the law. An applicant for a benefit who meets the criteria set out in a guideline may nonetheless be denied the benefit, provided the denial is within the statutory discretion conferred on the decision maker. It is the Act, not the non-statutory guideline, that declares the law.

It is sometimes difficult to determine whether a given instrument is legislative or quasi-legislative. The title given to the instrument is not conclusive. For example, instruments entitled "Guidelines" are sometimes found to have statutory force when they are made under a statutory authority and rely on the conventions of legislative drafting.[22]

B. LEGISLATIVE STYLE

Although the content of legislation is infinitely variable, its form and style are fixed to a large extent by the conventions of legislative drafting. These conventions vary in some respects from one jurisdiction to another, but the broad principles are the same throughout Canada. Conventions govern the style in which legislation is drafted, the form and structure of legislative provisions, the arrangement of provisions within an Act, the use of headings, notes, and finders' aids such as marginal notes, and the use of particular words. For example, to confer a power in legislation, the word "may" is normally used; to express the idea of obligation, "shall" or "must" is used.

One of the reasons legislation is considered dull and difficult reading is the style in which it is written. By convention, drafters use a utilitarian prose that shuns metaphor, irony, wit, embellishment, colloquialism, and rhetorical device of any sort. Another hallmark of legislative style is consistency and uniformity: once an idea is expressed in

22 See, for example, *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.

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provision that is enacted but has not commenced. It remains in this limbo until either it or the paramount law is repealed.

5) Invalidity

Legislation continues to form part of the law until expiry or repeal unless it is declared to be invalid by a court. The legal effect of a judicial declaration of invalidity is to erase the legislation from the law, as if it had never been made, unless the judgment provides otherwise. However, to remove it from the physical or electronic statute book, a formal amendment is generally required.

6) Re-enactment

Legislation is re-enacted when it is repealed and immediately enacted again without undergoing any substantive change. In some re-enactments the wording of the new legislation is identical to the old while in others the wording is changed. But so long as the *substance* of the rule is not changed, the legislation is re-enacted rather than amended.

The chief significance of re-enactment is that it does not change the coming into force date of the re-enacted law. Ordinarily a repealed provision stops operating when the repealing legislation comes into force. And ordinarily a newly enacted provision first begins to operate when it comes into force. But in a re-enactment, because the repealed provision and the newly enacted one express the same rule, there is no interruption in temporal operation. The coming into force date of the re-enacted provision is considered to be the coming into force date of the old provision. This rule is called the "continuous operation of rules." It is codified in section 44(f) of the federal *Interpretation Act*:

> Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefore,
>
> . . .
>
> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment.[38]

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38 Most provincial and territorial Interpretation Acts lack a comparable provision. Those jurisdictions rely on the common law rule.

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Legislation is re-enacted for a number of reasons: to consolidate or revise existing law, to declare the true meaning of existing law, or as part of the amending process. In a consolidation, legislation is updated, re-arranged, and re-enacted to make it available in a more convenient format.[39] In a revision, legislation is not only updated and re-arranged, but the style is adjusted and drafting errors are corrected.[40] In a declaration, legislation that has been a source of doubt or controversy is clarified by re-enacting the legislation in a new and clearer form or by enacting an additional provision that clarifies the doubtful one. As explained by Wagner J, speaking for the majority of the Supreme Court of Canada in *Régie des rentes du Québec v Canada Bread Company Ltd*,

> It is settled law in Canada that it is within the prerogative of the legislature to enter the domain of the courts and offer a binding interpretation of its own law by enacting declaratory legislation . . . . As this Court acknowledged in *Western Minerals Ltd. v. Gaumont*, . . . such forays are usually made where the legislature wishes to correct judicial interpretations that it perceives to be erroneous.
>
> In enacting declaratory legislation, the legislature assumes the role of a court and dictates the interpretation of its own law . . . .[41]

Finally, although the primary purpose of amendment is to change the law, many amendments include a partial re-enactment of existing law. Partial re-enactment occurs when existing provisions are repealed and replaced by new ones that incorporate a desired change while retaining elements of the previous law. To the extent the new provision does not substantially differ from the repealed one, the legislation is re-enacted. Suppose, for example, that on 1 February 1950 the following provision was added by way of amendment to the *Criminal Code* and that it came into force immediately upon enactment:

> 250. Every one who fraudulently undertakes, for a consideration, to tell fortunes by reading palms or cards, by gazing into crystals or by any means whatsoever, is guilty of an offence punishable on summary conviction.

Suppose that on 1 February 1954 this provision was repealed and replaced by the following, which also came into force upon enactment:

> 250. Every one who fraudulently
> (a) undertakes, for a consideration, to tell fortunes by any means, or

---

39 The process of consolidation is described in more detail later in this chapter.
40 The process of statute revision is described in more detail later in this chapter.
41 2013 SCC 46 at paras 26–27.

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(b) pretends to use any kind of sorcery, enchantment, or conjuration,

is guilty of an offence punishable on summary conviction.

Because the rule prohibiting the fraudulent use of sorcery embodied in paragraph (b) adds something substantially new, it operates as new law; its coming-into-force day is 1 February 1954. However, the rule prohibiting fraudulent fortune-telling is not new. It has only been reformulated in a less verbose style. Because the rule has been re-enacted rather than amended, its operation is not interrupted; its coming-into-force day remains 1 February 1950.

7) Amendment

Amending legislation adds new provisions to the statute book or substitutes new provisions for existing ones. Insofar as the new provisions make substantive changes to the law, they operate as amendments rather than re-enactments. Amendments operate and come into force on the day the amending legislation comes into force.

Suppose, for example, that the following provision, from a *Human Rights Code*, was first enacted on 1 February 1984 and came into force on 1 June 1984:

5.(1) Every person has a right to equal treatment with respect to employment, without discrimination on grounds of race, colour, ethnic origin, creed, age, family status, or handicap.

Suppose that on 1 February 1995 the following amending Act received royal assent:

An Act to amend the *Human Rights Code*

Her Majesty, by and with the advice and consent of the Senate and the House of Commons of Canada, enacts as follows:

1. Subsection 5(1) of the *Human Rights Code* is replaced by the following:

5.(1) Every person has a right to equal treatment with respect to employment, without discrimination on grounds of race, colour, ethnic origin, creed, age, *gender, sexual orientation*, family status, or handicap.

2. This Act comes into force on 1 December 1996.

Upon coming into force on 1 December 1996, this amending Act would operate (1) by re-enacting the whole of subsection 5(1) of the 1984 code without change and (2) by adding two new provisions to the subsection. The new provisions prohibit discrimination in employment

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on grounds of gender and on grounds of sexual orientation. The coming-into-force date of the re-enacted provisions would remain 1 June 1984 while the coming-into-force date of the new provisions would be 1 December 1996.

When enabling legislation is amended, it is necessary to consider the impact of the amendment on existing regulations. Most Interpretation Acts contain a provision like the following:

> 44. Where an enactment, in this section called the "former enactment," is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> (a) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead.[42]

It is not always clear whether existing regulations are consistent with the new enactment. Ideally, while preparing to amend the parent Act, the department responsible for administering the Act will review the relevant regulations and revoke or amend those that are inconsistent.

8) Codes and Codification

The term "codification" is used in common law in Canada in two distinct ways. First, it refers to the process of enacting common law rules in legislation, thus giving them the force and status of statute law. A codification of this sort does not change the law, but merely "codifies" it—that is, gives it a fixed statutory form. This type of codification is similar to re-enactment. The codified provision does not operate as new law.

The term "codification" also refers to the preparation of a statute or "code" that is meant to set out the entire body of rules on a subject in a coherent, systematic way. Codification in this sense affords an opportunity to bring together all existing statutory and common law rules, to reconcile inconsistencies, to fill gaps, and to make appropriate reforms. The finished product is meant to be a complete and definitive statement of the law on the subject, dispensing with the need to refer to previous law. Federal and provincial Labour Codes are examples of legislation that were enacted as codes in this sense.

It is possible for a statute to be a code for some purposes and not for others. The *Criminal Code*, for example, sets out an exhaustive list of criminal law offences precluding further resort to common law crimes;

42 *Interpretation Act*, above note 32, s 44(a). The application of this rule is illustrated by *9175-7468 Québec inc c Montréal (Ville de)*, 2015 QCCA 811 at para 9ff.

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> accountability through meaningful consequences and effective rehabilitation and reintegration, and *that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons.*[17]

Courts may also look to the preamble of one statute to help interpret another related statute.[18] Finally, they may look to the preamble to an international instrument for help in interpreting the legislation enacted to give domestic effect to that instrument.[19]

C. PURPOSE STATEMENTS

Purpose statements can take different forms, from a short introductory phrase to elaborate, multi-paragraphed provisions.[20] Like preambles, purpose statements reveal the purpose of legislation and draw attention to the principles and policies that should inform the exercise of discretion conferred by the Act. However, unlike preambles, purpose statements are set out in the body of the statute as a numbered provision (or part of a numbered provision), and they unquestionably form an integral part of the legislation in which they appear. They are to be relied on in every interpretive exercise.

The most obvious use of purpose statements is to set out the primary purpose, or the several purposes, of an enactment. Their use is illustrated by the Supreme Court of Canada in *LeBlanc v LeBlanc*.[21] The issue in the case was whether New Brunswick's *Marital Property Act* conferred discretion on the courts to deny a spouse an equal share in the couple's marital property upon marriage breakdown. In holding that it did, the

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17 *R v CD; R v CDK*, above note 15 at paras 34–36. [Emphasis added.] See also *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2013 SCC 42 at para 19.

18 See *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at paras 45–46 where the court relied on s 3 of the *Broadcasting Act* setting out the governing principles of Canadian broadcasting policy to interpret the *Radiocommunication Act*.

19 See *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at paras 93–94, and *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 63.

20 Because purpose statements appear as sentences or parts of sentences within sections or subsections, they are not really components. They are appropriately classified as interpretive provisions. However, it is customary in statutory interpretation texts to examine them in conjunction with preambles, which perform a similar function.

21 [1988] 1 SCR 217.

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Supreme Court of Canada relied on the purpose statement set out in section 2 of the Act. Justice La Forest wrote:

> Section 2 is an interpretative provision in the nature of a preamble announcing the general framework and philosophy of the legislation. It reads:
>
> > "2. Child care, household management and financial provision are joint responsibilities of spouses and are recognized to be of equal importance in assessing the contributions of the respective spouses to the acquisition, management, maintenance, operation or improvement of marital property; and *subject to the equitable considerations recognized elsewhere in the Act the contribution of each spouse to the fulfilment of these responsibilities entitles each spouse to an equal share of the marital property* and imposes on each spouse, in relation to the other, the burden of an equal share of the marital debts." [Emphasis added.]
>
> . . .
>
> In common with similar provisions in other jurisdictions, s. 2 establishes the general principle that each spouse is entitled to an equal share of marital property . . . . The principle must be respected. In applying that principle, the courts are not permitted to engage in measurements of the relative contribution of spouses to a marriage. Nevertheless . . . the principle is expressly made subject to the equitable considerations recognized elsewhere in the Act.[22]

The purpose statement made it clear that the Act was animated by more than one guiding principle, that the ideal of partnership and pooling between spouses might in appropriate circumstances be tempered by concerns of fairness and of avoiding unjust enrichment.

As provisions of the legislation itself, purpose statements generally have more interpretive weight than preambles,[23] but they are unlikely to prevail over a contrary substantive provision.[24] In addition, the Supreme Court of Canada in *Reference re Broadcasting Regulatory Policy* has cast doubt on the support they may provide for generally worded regula-

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22 *Ibid* at 221–22. See also *R* v *T(V)*, [1992] 1 SCR 749 at 765.

23 *Ibid.*

24 *National Farmers' Union* v *Prince Edward Island (Potato Marketing Council)* (1989), 56 DLR (4th) 753 at 756–57 (PEISCTD).

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tion-making powers.[25] Their weight depends on a number of considerations, including how specific the purposes are, their relation to one another, what legislative direction has been given as to their use, and what other indicators of purpose there are.

As purpose statements become more commonplace in legislation, they figure ever more prominently in interpretation.

D. HEADINGS

The majority of Canadian Interpretation Acts state that headings are not part of the enactment in which they appear, the implication being that they should not be taken into account (at least not in the absence of ambiguity). Other Interpretation Acts say nothing of headings. In practice, courts often ignore the Interpretation Acts and rely on caselaw to decide what use should be made of headings. In the older cases, courts emphasize the external nature of headings and refuse to rely on them unless the language of the legislation is ambiguous. In more recent cases, there is a tendency to treat headings as an integral part of the context, to be relied on like any other contextual feature. This is the approach taken by the Supreme Court of Canada toward the headings that appear in the *Charter*. In *Law Society of Upper Canada v Skapinker*, Estey J wrote:

> The *Charter*, from its first introduction into the constitutional process, included many headings including the heading now in question . . . . It is clear that these headings were systematically and deliberately included as an integral part of the *Charter* for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the *Charter*.[26]

This approach to headings has been adopted in interpreting ordinary legislation as well.

---

25 2012 SCC 68 at para 22, stating:

> Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the *Broadcasting Act*, are not jurisdiction-conferring provisions. They describe the objectives of Parliament in enacting the legislation and, thus, they circumscribe the discretion granted to a subordinate legislative body (Sullivan, at pp. 387–88 and 390–91). As such, declarations of policy cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament in jurisdiction-conferring provisions.

26 [1984] 1 SCR 357 at 376. See also *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at paras 25–26.

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CHAPTER 18

PRESUMED COMPLIANCE WITH CONSTITUTIONAL LAW, COMMON LAW, AND INTERNATIONAL LAW

A. PRESUMED COMPLIANCE WITH CONSTITUTIONAL LAW, INCLUDING *CHARTER* NORMS

It is presumed that the legislature does not intend to violate the constitutional limits on its jurisdiction. These include limits on the matters a legislature may deal with under the *Constitution Act, 1867* as well as limits on interference with *Charter*-protected rights. When faced with a choice, courts prefer interpretations that are consistent with these limits and avoid interpretations that would render legislation invalid. As Cartwright J wrote in *McKay v Canada*, "if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* [valid] and the other will have the contrary result the former is to be adopted."[1]

In *McKay*, the Supreme Court of Canada was concerned with a municipal bylaw, authorized by provincial legislation, which prohibited the display of signs on residential property. The issue was whether the bylaw could be relied on to prevent the display of signs advertising candidates for federal office. Since property is a provincial matter under section 92 of the *Constitution Act, 1867*, it was valid for the province to exercise regulatory authority over land use or, as was done here, to delegate this authority to municipalities. Thus, most applications of the bylaw would

1 [1965] SCR 798 at 804 [*McKay*].

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have been valid. However, the regulation of federal elections is a matter within the exclusive jurisdiction of Parliament. Any attempt by a province to interfere with the display of federal election signs would therefore exceed its authority. In these circumstances the court faced a dilemma. Given the ordinary meaning of its language, the bylaw must apply to all signs, including federal election signs, but if that interpretation were adopted, the bylaw would be invalid. By presuming that the legislature did not intend to violate the limits on its jurisdiction, the dilemma was solved: the scope of "signs" was read down or narrowed to exclude application to federal election signs. In this way the bylaw was given maximum effect within jurisdictional limits.

As the *McKay* case illustrates, the presumption in favour of valid interpretations is easy to apply in the context of challenges to validity based on the division of powers under the *Constitution Act, 1867*. It has also been invoked in the context of challenges to validity based on the *Charter*. In *R v Ahmad*,[2] for example, the Supreme Court of Canada was concerned with a challenge to the non-disclosure scheme established by sections 38 to 38.16 of the *Canada Evidence Act*. Under that scheme, in the context of proceedings, including criminal proceedings, the Attorney General of Canada was authorized to prevent the disclosure of information that could pose a threat to international relations, national defence, or national security. Under section 38.03, he or she could withhold disclosure even in the face of a disclosure order from a Federal Court judge. This put the accused and trial judge at the mercy of the Attorney General's discretion. However, under section 38.14, the trial judge was given a discretion to make any order that he or she considered appropriate to protect the accused's right to a fair trial, including ordering a stay of proceedings. The court began its analysis of the scheme with reference to the modern principle followed by the presumption of compliance:

> This Court has repeated on numerous occasions that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament . . . . Moreover, "Parliament is presumed to have intended to enact legislation in conformity with the *Charter*" . . . .[3]
>
> We therefore begin from the proposition that, in the absence of clear and unambiguous statutory language to the contrary, the

2 2011 SCC 6 [*Ahmad*].

3 *Ibid* at para 28. See also *R v Hamilton*, 2005 SCC 47 at para 75; *R v Sharpe*, 2001 SCC 2 at para 33.

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> legislation must be understood not to contemplate that trial judges would determine the impact of non-disclosure on trial fairness in a manner that would result in granting unwarranted stays or declining to grant appropriate remedies. Parliament must have been aware of these potential injustices and cannot have intended either result.[4]

The court then turned to specific aspects of the scheme and in particular to the role of the Federal Court judge in the scheme. It wrote:

> Section 38.04(5)(*b*) contemplates that the Federal Court judge may proceed without a hearing simply on the representations of the Attorney General of Canada . . . . It is only "if" the designated judge decides to proceed to a hearing that he or she will "determine who should be given notice of the hearing" (s. 38.04(5)(*c*)(i)).
>
> In the context of criminal proceedings, it is our view that unless the designated judge decides without a hearing that the information in question should be disclosed to the criminal court, there must be a hearing on the disclosure issues, and that s. 38.04(5) should be read as requiring notice to the criminal court that a s. 38 proceeding has been commenced in Federal Court. Although s. 38.04(5)(*c*)(i) may at first blush appear to grant Federal Court judges a wide discretion in determining who "should" be given notice, this Court has held in the past that "[e]nabling words are always compulsory where they are words [used] to effectuate a legal right" . . . . Given that the criminal trial judge will require notice to effectively discharge the duty to protect the accused's legal rights under the *Charter*, it will always be the case (subject of course to the other provisions of that Act) that he or she "should" be given notice. The word "may" in s. 38.07 will similarly be understood to require that notice of the Federal Court judge's final order be given to the trial judge.[5]

The court here adopts an interpretation that is not self-evident on the face of the legislation, but shows how the legislation may be interpreted and applied in a way that avoids the violation of an accused's *Charter* rights.

In addition to the presumption of compliance with the *Charter*, there is also a presumption of compliance with *Charter* values. Presumed compliance with the *Charter* attributes to the legislature an intention to enact valid legislation because the legislature is presumed to be benevolent and competent and because the alternative would be self-defeating. Presumed compliance with *Charter* values is grounded in the fundamental nature

---

4 *Ahmad*, above note 2 at para 29.

5 *Ahmad*, *ibid* at paras 38 & 39, citing *Labour Relations Board of Saskatchewan v The Queen*, [1956] SCR 82 at 87.

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of *Charter* values in the legal system. The point is well made by Weiler and Sharpe JJA in *Lalonde v Ontario (Commission de restructuration des services de santé)*:

> Fundamental constitutional values have normative legal force . . . . Before the advent of the *Charter* and the constitutional entrenchment of rights and freedoms, there can be no doubt that those same rights were fundamental constitutional values. Although they had not been crystallized in the form of entrenched and directly enforceable rights, they were regularly used by the courts to interpret legislation . . . .[6]

Given the importance of these values, it is plausible to assume that the legislature has them in mind when drafting its legislation.

While the courts acknowledge the importance of *Charter* values, they are concerned that the presumption of compliance with those values not be used as a way to undermine the application of section 1. Allowance must be made for the possibility that the legislature intended to curtail *Charter* rights, believing this curtailment to be justified in a free and democratic society. In such a case it would be inappropriate to invoke the presumption of compliance with *Charter* values to avoid a violation of rights. The government must be given the opportunity to justify such a violation with a section 1 defence. The leading case on this point is *Bell ExpressVu Limited Partnership v Rex*, where Iacobucci J wrote:

> [I]t must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.[7]
>
> . . .
>
> . . . if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance [between courts and legislatures]. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status.[8]

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6 (2001), 208 DLR (4th) 577 at 642 (Ont CA). See also *R v Tse*, 2012 SCC 16 at para 20; *R v Mabior*, 2012 SCC 47 at paras 44 and 48.

7 [2002] 2 SCR 559 at para 62.

8 *Ibid* at para 66. [Emphasis in original.] For discussion and a review of subsequent authorities adopting this position, see *R v Rodgers*, [2006] 1 SCR 554 at paras 18–19. See also *R v Clarke*, 2014 SCC 28 at paras 12–15.

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interpretation is adopted and "institution" is read as not including municipalities, the internal coherence is restored.[19]

Even though Official Languages Acts are quasi-constitutional legislation and therefore attract a broad, goal-promoting interpretation, the presumption of coherence in these circumstances justified the majority preference for the more restrictive interpretation.

4) Conflict Resolution

a) Legislative Rule

In the complete statute book of a jurisdiction, whether federal, provincial, or municipal, there is inevitably a significant potential for conflict between provisions. Part of the job of legislative drafters is to search out such conflicts and seek instruction on how to deal with them — by repeal perhaps, or by designating one of the provisions to be paramount. The latter is conventionally rendered by introducing the paramount provision with words like "notwithstanding (or despite) section xx" or introducing the subordinate provision with words like "subject to section yy." Sometimes general notwithstanding clauses are included that make certain provisions or an entire Act paramount over anything else that might conflict with it.[20]

When two provisions are in conflict, even if the legislature does not provide an express solution, it may be apparent from the scheme and purpose of the legislation that one provision was intended to have priority over the other. However, in the absence of an express or implicit legislative solution, the conflict must be dealt with under common law paramountcy rules. These are essentially ranking rules. They assign a relative status to the provisions in conflict, with the higher-ranked or paramount provision prevailing over the lower-ranked or subordinate one. The paramount provision is applied in accordance with its terms while the subordinate provision is rendered inoperative to the extent it is in conflict with the paramount law. When legislation is rendered inoperative, it remains a valid part of the law, but cannot be applied.[21] It remains in this suspended state until the conflict disappears, usually through repeal or amendment of one or both of the conflicting laws. There are five paramountcy rules.

---

19 *Ibid* at para 19.

20 It may not be wise to rely on a general clause of this sort. Sometimes the provisions in conflict are *both* covered by a general notwithstanding clause, in which case the problem of paramountcy must be resolved through interpretation.

21 It has the same status as a provision that has been enacted but not yet come into force.

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TAB 40

Date: 20180730
Docket: CI 16-01-05501
(Winnipeg Centre)
Indexed as: Manitoba Metis Federation Inc. v. The Government of Manitoba et al.
Cited as: 2018 MBQB 131

2018 MBQB 131 (CanLII)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
MANITOBA METIS FEDERATION INC. Applicant,	Murray N. Trachtenberg for the Applicant
- and -	
THE GOVERNMENT OF MANITOBA, and KELVIN GOERTZEN, MINISTER OF HEALTH, SENIORS AND ACTIVE LIVING FOR THE GOVERNMENT OF MANITOBA, Respondents.	Sean Boyd for the Respondents Judgment delivered: July 30, 2018

JOYAL, C.J.Q.B.

I. INTRODUCTION

[1] This case involves a unique motion for production. It arises in the broader context of an application for judicial review.

[2] The production being sought is for certain advisory notes and internal emails which were prepared by the Respondents, the Government of Manitoba and the Minister of Health, Seniors and Active Living for the Government of Manitoba. Unless otherwise specified hereinafter, the Respondent Government

> administer income assistance programs at rates and standards "comparable" to those offered by the provinces. The only significant point of contention between the parties is the extent to which the National Manual (2012) imposes rates and eligibility requirements that are "comparable" to those offered in the referenced Provinces. In other words, the correct interpretation of the word "comparable" is at issue.
>
> [emphasis added]

[64] Following the above analysis, the Court in ***Simon*** concluded (at para. 39):

> This Court concludes that it has the appropriate authority to review the Minister's Decision to interpret the meaning of the words "adopt", "comparable" and "consistent with", in the MOU, as meaning to mirror provincial rates. Contrary to the Respondent's argument it is not the Minister's spending authority which is being reviewed but his interpretation of the criteria applicable to spending under that authority and whether that interpretation will result in the attainment of the objectives set by the MOU with respect to the Income Assistance Program.
>
> [emphasis added]

[65] While acknowledging the distinctions and nuances upon which the decision was rendered in ***Simon***, it should be noted that the present case does not involve a memorandum of understanding or any other criteria to be interpreted by or applied to the Minister's conduct. To repeat (and as I explain at paras. 70 to 87) the other reference points invoked by the MMF have either no application or are aspirational in nature and they do not create controlling criteria against which the Respondent Minister's conduct or decision should be reviewed. Even in the context of what I acknowledge is the clear and expressed intention on the part of Manitoba government policy to approach the Métis people and community with respect and accountability, it is my view that the MMF, in questioning what may very well be an insufficiently explained and for them, a

2018 MBQB 131 (CanLII)

disappointing decision, are nonetheless questioning the spending decisions of government.

[66] One further distinction and nuance was addressed and negated by the Respondents in their argument against judicial review of the funding decision in question. In that connection, the Respondents addressed the case of ***Attawapiskat First Nation v. Canada***, 2012 FC 948 (CanLII), a decision of the Federal Court relied upon by the MMF. In relying upon ***Attawapiskat***, the MMF contends that different considerations arise in determining whether a decision is subject to judicial review when dealing with Indigenous parties. The MMF argues that the factors the Court should consider in determining whether the decision is subject to judicial review include:

a. Whether the decision includes a public law issue other than a private commercial interest or contract;
b. A nation-to-nation relationship;
c. The duty to consult and accommodate when the decision impacts on an Aboriginal or treaty right;
d. Honour of the Crown;
e. Section 35 and the purpose of reconciliation.

See ***Attawapiskat*** at paras. 55-61.

[67] As I earlier noted, I review some of the above factors at paras. 70 to 87, infra, when I address the additional arguments invoked by the MMF to support its position that the decision is justiciable and subject to judicial review. At this

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TAB 41

Alberta Land Stewardship Act, SA 2009, c A-26.8

ALBERTA LAND STEWARDSHIP ACT

Chapter A-26.8

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

…

Definitions

2(1) In this Act,

(e) "decision-maker" means a person who, under an enactment or regulatory instrument, has authority to grant a statutory consent, and includes a decision-making body;

…

Part 1
Regional Plans

Division 1
Making, Amending and Reviewing Regional Plans

How regional plans are made and amended

4(1) Subject to section 5, the Lieutenant Governor in Council may make or amend regional plans for planning regions.

(2) The Lieutenant Governor in Council may make regulations

(a) classifying amendments to regional plans;

(b) prescribing the process, procedure or criteria, if any, for all or any class of amendments to regional plans;

(c) respecting the notice or consultation, or both, required for amendments to regional plans or for a class of amendment;

(d) respecting the conditions or criteria to be met in applying for an amendment to a regional plan, who may apply for an amendment to a regional plan and to whom the application must be made, and the procedure for verifying that any conditions or criteria have been met;

(e) respecting the role and function of the secretariat, government departments and other persons in reviewing, preparing or developing amendments to regional plans for consideration by the Lieutenant Governor in Council;

(f) appointing or designating a person or entity to perform any function with respect to a proposed amendment to a regional plan and, if required, appointing a person as a commissioner under the *Public Inquiries Act* for the purposes described in the regulation.

(3) A regulation under subsection (2) may be made with respect to all or one or more regional plans.

(4) If a regulation is made under subsection (2) about how a regional plan is to be amended, an amendment to the regional plan may be made by the Lieutenant Governor in Council only in accordance with the regulation.

Consultation required

5 Before a regional plan is made or amended, the Stewardship Minister must

(a) ensure that appropriate public consultation with respect to the proposed regional plan or amendment has been carried out, and present a report of the findings of such consultation to the Executive Council, and

(b) lay before the Legislative Assembly the proposed regional plan or amendment.

Division 2
Contents of Regional Plans

Elements of a regional plan

8(1) A regional plan must

(a) describe a vision for the planning region, and

(b) state one or more objectives for the planning region.

(2) A regional plan may

(a) include policies designed to achieve or maintain the objectives for the planning region;

(b) set or provide for one or more thresholds for the purpose of achieving or maintaining an objective for the planning region;

(c) name, describe or specify indicators to determine or to assist in determining whether an objective or policy in the regional plan has been, is being or will be achieved or maintained and whether policies in the regional plan are working;

(d) describe or specify the monitoring required of thresholds, indicators and policies, who will do the monitoring and when, and to whom the monitoring will be reported;

(e) describe or specify the times and means by which, and by whom, an assessment or analysis will be conducted to determine if the objectives or policies for the planning region have been, are being or will be achieved or maintained;

(f) describe or specify the actions or measures or the nature of the actions or measures to be taken to achieve or maintain the objectives and policies in the regional plan, and by whom they are to be taken or co-ordinated, if

(i) an adverse trend or an adverse effect occurs;

(ii) an objective or policy is or might be in jeopardy or a threshold is or might be exceeded or jeopardized;

(iii) an objective or policy has not been achieved or maintained, is not being achieved or maintained, or might not be achieved or maintained;

(g) describe and convey to a person named in the regional plan authority to achieve or maintain an objective or policy, which may include delegating authority under any enactment or regulatory instrument to the person named;

(h) make different provision for

(i) different parts of a planning region, or for different objectives, policies, activities or effects in a planning region;

(ii) different classes of effect arising from an activity in a planning region;

(i) manage an activity, effect, cause of an effect or person outside a planning region until a regional plan comes into force with respect to the matter or person;

(j) specify that it applies for a stated or described period of time;

(k) provide for an exclusion from, exception to or exemption from its legal effect;

(l) specify whether, in whole or in part, it is specific or general in its application;

(m) delegate and authorize subdelegation of any authority under the regional plan, except authority

(i) to make a regional plan or amend a regional plan, or to make or adopt rules under a regional plan, or

(ii) to approve, adopt or incorporate a subregional plan or issue-specific plan as part of a regional plan, or to adopt or incorporate a plan, agreement or arrangement as part of a regional plan, or to amend any of them.

Subregional plans, issue-specific plans and other arrangements

10(1) A regional plan may

(a) authorize the preparation of a subregional plan or an issue-specific plan and specify or describe how it is to be approved as part of the regional plan;

(b) make or authorize a Designated Minister to make, or authorize a Designated Minister to adopt by incorporation or reference, rules, a code of practice, guidelines, best practices or any other instrument on matters described in the regional plan for the purpose of advancing or implementing an objective or policy in the regional plan;

(c) approve, as part of the regional plan, a plan made under the *Public Lands Act*, whether the plan is made before or after this Act comes into force, with or without modifications, as a subregional plan or an issue-specific plan of the regional plan;

(d) adopt or incorporate, as part of the regional plan, a plan made under an enactment, or an agreement or arrangement, whether made before or after this Act comes into force, with or without modification to the plan, agreement or arrangement, as a subregional plan or an issue-specific plan of the regional plan.

(2) A subregional plan or an issue-specific plan approved by or in accordance with a regional plan, or a plan, agreement or arrangement adopted by or incorporated in a regional plan,

(a) may contain anything that a regional plan may contain;

(b) becomes effective in accordance with section 13(5).

(3) When a subregional plan or an issue-specific plan comes into effect, and when a Designated Minister makes or adopts rules, a code of practice, guidelines, best practices or any other instrument authorized by a regional plan, the subregional plan, issue-specific plan or rules, code of practice, guidelines, best practices or other instrument, as the case may be, becomes part of the regional plan that authorized it or them.

Part 2
Nature and Effect of Regional Plans and Compliance Declarations

Division 1
Nature and Effect of Regional Plans

Legal nature of regional plans

13 (1) A regional plan is an expression of the public policy of the Government and therefore the Lieutenant Governor in Council has exclusive and final jurisdiction over its contents.

(2) Regional plans are legislative instruments and, for the purposes of any other enactment, are considered to be regulations.

(2.1) Notwithstanding subsection (2), a regional plan may provide rules of application and interpretation, including specifying which parts of the regional plan are enforceable as law and which parts of the regional plan are statements of public policy or a direction of the Government that is not intended to have binding legal effect.

(3) The meaning of a regional plan is to be ascertained from its text, in light of the objectives of the regional plan, and in the context in which the provision to be interpreted or applied appears.

(4) A regional plan and every amendment to a regional plan must

(a) be published in Part I of The Alberta Gazette, and

(b) be made publicly available by the secretariat in accordance with section 59(c).

(5) A regional plan and every amendment to a regional plan comes into effect when it is published in Part I of The Alberta Gazette or on any later date specified in the regional plan or amendment.

Division 1
Compliance Declarations

Decision-making bodies

21 (2) Every decision-making body affected by the regional plan must, within the time set in or under, or in accordance with, the regional plan,

(a) make any necessary changes or implement new initiatives to comply with the regional plan, and

(b) file a statutory declaration with the secretariat that the review required by this section is complete and that the decision-making body is in compliance with the regional plan.

Part 3
Conservation and Stewardship Tools

Division 1
Research and Development

Delegation to Stewardship Minister

26 The Lieutenant Governor in Council may delegate any or all of its powers, duties or functions under sections 23 to 25 to the Stewardship Minister subject to any terms and conditions that the Lieutenant Governor in Council imposes.

Part 4
Regional Planning Process and its Administration

Division 2

Regional Advisory Councils

Establishment and appointment

52(1) The Lieutenant Governor in Council may establish a regional advisory council for a planning region.

(2) The Lieutenant Governor in Council may

(a) appoint members of a regional advisory council, including individuals who are members of aboriginal peoples;

(b) provide for the payment of expenses and remuneration for some or all members of a regional advisory council;

(c) provide or authorize the provision of information, data and other materials to assist regional advisory councils in their work.

(3) The Lieutenant Governor in Council may establish a date on which the mandate of a regional advisory council terminates unless the mandate and terms of office of one or more members is extended.

(4) The Lieutenant Governor in Council may delegate to the Stewardship Minister any of the functions of the Lieutenant Governor in Council under this section.

Terms of reference

53(1) For each regional advisory council, the Lieutenant Governor in Council may establish terms of reference, which may include

(a) roles and responsibilities of members of the regional advisory council;

(b) designation of a chair and vice-chair and their responsibilities or delegating that responsibility to the regional advisory council;

(c) rules governing the calling and conduct of meetings;

(d) a means or method for resolving disputes;

(e) a code of ethics for members of the regional advisory council;

(f) a description of the nature or kind of advice to be given by the regional advisory council and to whom it is to be given.

(2) The Lieutenant Governor in Council may delegate to the Stewardship Minister any of the functions of the Lieutenant Governor in Council under this section, including authority to delegate to a regional advisory council any of the functions described in subsection (1)(b) and (c).

Division 3
Land Use Secretariat

Complaint review

62(1) A person may make a written complaint to the secretariat that a regional plan is not being complied with.

(2) The secretariat may investigate a complaint if the stewardship commissioner is satisfied that

(a) the complaint has or may have sufficient merit to warrant an investigation,

(b) the matter complained of is not the subject or part of the subject of an application, process, decision or appeal governed by an enactment or regulatory instrument, or that there is not an adequate remedy under the law or existing administrative practices, and

(c) no other person should investigate the matter complained of.

(3) If the secretariat decides a complaint should not be investigated by the secretariat, the stewardship commissioner must notify the complainant accordingly.

(4) Subject to subsection (2), the secretariat may conduct or authorize a person to conduct any investigation or inquiry as is considered necessary or appropriate in the circumstances and provide a report to the stewardship commissioner.

(5) A government department or local government body must co-operate with an investigation or inquiry conducted by the secretariat or a person authorized by the secretariat.

(6) If the secretariat is satisfied that there is clearly non-compliance with a regional plan, the stewardship commissioner may refer the matter, with or without a report or recommendations, to either or both of the following who have jurisdiction or authority with respect to the matter:

(a) a Minister or government department, or

(b) a local government body.

(7) The stewardship commissioner may delegate the secretariat's authority to conduct an investigation or inquiry under this section to one or more other persons, with or without conditions, but may not delegate authority to decide whether an investigation or inquiry should be conducted.

TAB 42

In the Court of Appeal of Alberta

Citation: Tokio Marine & Nichido Insurance Company v Security National Insurance Company, 2020 ABCA 402

Date: 20201116
Docket: 1903-0100-AC
Registry: Edmonton

Between:

Tokio Marine & Nichido Insurance Co. Ltd.

Appellant

- and -

Security National Insurance Company

Respondent

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Michelle Crighton

Reasons for Judgment Reserved of the Honourable Mr. Justice Wakeling

Reasons for Judgment Reserved of the Honourable Chief Justice Fraser

Reasons for Judgment Reserved of the Honourable Madam Justice Crighton Concurring in the Result

Appeal from the Order by
The Honourable Mr. Justice G.R. Fraser
Dated the 22nd day of March, 2019
Filed on the 21st day of May, 2019
(2019 ABQB 205, Docket: 1803-08530)

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[99] Stripping a statutory interpretation problem of its historical context makes the task more complicated than it need be and dramatically increases the risk that a decision at odds with the purpose that accounted for its enactment will be the result.[54]

[100] *London and India Docks Co. v. Thames Steam Tug and Lighterage Co.*[55] illustrates this conundrum.[56]

[101] At issue was the obligation of lighters – small barges that moved cargo on the river Thames – to pay dock fees to the owners of the dock. Because of unforeseen developments the ship lying at the docks the lighters had contracted to service was unable to accept the cargo the lighters had for it after the lighters had entered the docks to discharge this cargo. Had the lighters discharged any cargo the dock company would not have charged a dock fee. But because the lighters discharged no cargo the dock company claimed it was entitled to dock fees.

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[54] *Bell ExpressVu Ltd. Partnership v. Rex,* 2002 SCC 42, ¶ 27; [2002] 2 S.C.R. 559, 580 ("The preferred approach recognizes the important role that context must inevitably play when a court ... construes the ... words of a statute"); *Chieu v. Minister of Citizenship and Immigration*, 2002 SCC 3, ¶ 34; [2002] 1 S.C.R. 84, 104 ("s. 70(1)(b) must be read in its entire context. This inquiry involves examining the history of the provision at issue; its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue"); *Project Blue Sky Inc. v. Australian Broadcasting Authority*, [1998] HCA 28, ¶ 69; 194 C.L.R. 355, 381 per McHugh, Gummow, Kirby & Hayne, JJ. ("the process of construction must always begin by examining the context of the provision that is being construed") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012) ("context is a primary determinant of meaning").

[55] [1909] A.C. 15 (H.L.).

[56] See also *Mitchell v. Cohen*, 333 U.S. 411, 421-22 (1948) ("In the light of the very clear purpose which Congress had in mind in adopting the Veterans' Preference Act, we are constrained to define the term 'ex-servicemen', for the purposes of this particular statute, as relating only to those who performed military service on full-time active duty with military pay and allowances, thereby dislocating the fabric of their normal economic and social life. It thus becomes obvious that respondents' service with the Volunteer Port Security Force of the Coast Guard Reserve cannot qualify them as 'ex-servicemen' entitled to veterans' preference [to United States government jobs] under this enactment. They continued their normal civilian employment with the War Department and the Navy Department during the war, employment which suffered as little as possible from their military service; they served on active duty for only relatively short periods each week and could be disenrolled at their own request … . They were therefore able to retain the essential elements of their civilian life. As to them, there was no problem of reemployment or rehabilitation caused by their military service. They are not among the 'ex-servicemen' whom Congress desired to assist by means of the Veterans' Preference Act") & 1 W. Blackstone, Commentaries on the Laws of England 61 (4th ed. 1770) ("the most universal and effective way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. … An instance of this is given in the case put by Cicero … . There was a law, that those who in a storm forsook the ship should forfeit all property therein; and the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was to give encouragement to such as should venture their lives to save the vessel: but this is a merit, which he could never pretend to, who neither staid in the ship upon that account, nor contributed anything to … [its] preservation").

TAB 43

1998 CanLII 837 (SCC)

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

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trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

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Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

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Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

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the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

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tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

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

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

TAB 44

Interpretation Act, RSA 2000, c I-8

INTERPRETATION ACT
Chapter I-8

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

…

Powers in name of office

21 (2) Words in an enactment directing or empowering a person to do something, or otherwise applying to the person by the person's name of office, include

(a) a person acting for that person or appointed to act in the office, and

(b) that person's deputy or a person appointed as that person's acting deputy.

General definitions

28 (1) In an enactment,

(r) "Government" or "Government of Alberta" means Her Majesty in right of Alberta;

Citation includes amendments

31 In an enactment a citation of or reference to another enactment of the Province, of another province or territory or of Canada is a citation of or reference to the other enactment as amended, whether amended before or after the commencement of the enactment in which the citation or reference occurs.

Application of other enactments

33 If an enactment provides that another enactment of Alberta, Canada or another province or territory applies, it applies with the necessary changes and so far as it is applicable.

Repeal and replacement

36(1) If an enactment is repealed and a new enactment is substituted for it,

(a) every person acting under the repealed enactment shall continue to act as if appointed or elected under the new enactment until the person is reappointed or another is appointed or elected in the person's place;

(b) every proceeding commenced under the repealed enactment shall be continued under and in conformity with the new enactment so far as may be consistent with the new enactment;

(c) the procedure established by the new enactment shall be followed as far as it can be adapted

(i) in the recovery or enforcement of penalties and forfeitures incurred under the repealed enactment,

(ii) in the enforcement of rights existing or accruing under the repealed enactment, and

(iii) in a proceeding in relation to matters that have happened before the repeal;

(d) if any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment, if imposed or adjudged after the repeal, shall be reduced or mitigated accordingly;

(e) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, insofar as they are not inconsistent with the new enactment;

(f) any reference in an unrepealed enactment to the repealed enactment shall, with respect to a subsequent transaction, matter or thing, be construed as a reference to the provisions of the new enactment relating to the same subject-matter as the repealed enactment, but if there are no provisions in the new enactment relating to the same subject-matter, the repealed enactment shall be construed as being unrepealed insofar as is necessary to maintain or give effect to the unrepealed enactment.

(2) If a statute or regulation of any province or territory or of Canada is repealed in whole or in part and other provisions are substituted for it, a reference in an enactment of Alberta to the repealed statute or regulation shall, with respect to a subsequent transaction, matter or thing, be construed to be a reference to the substituted provisions relating to the same subject-matter as the repealed statute or regulation.

TAB 45

Old St. Boniface Residents Association Inc. *Appellant*

v.

The City of Winnipeg and the St. Boniface-St. Vital Community Committee *Respondents*

INDEXED AS: OLD ST. BONIFACE RESIDENTS ASSN. INC. v. WINNIPEG (CITY)

File No. 21428.

1990: May 1; 1990: December 20.

Present: Dickson C.J.* and Lamer C.J.** and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal law — Municipal corporations — Applications for zoning by-laws — Bias or apprehended bias — Municipal councillor supporting rezoning application in private and subsequently voting in favour of it without revealing prior involvement — Whether councillor's conduct raised a reasonable apprehension of bias.

Municipal law — Planning — Official plan — Effect — City and district plans providing for residential development and park — Rezoning permitting condominium development — Whether proposed development conflicted with plans — City of Winnipeg Act, S.M. 1971, c. 105, ss. 599, 609.

Municipal law — Zoning — Amendment — Procedure — Applicant for rezoning negotiating with municipality to purchase municipal lands and streets to be closed — Municipality approving sale to applicant before rezoning passed — Whether rezoning proper — City of Winnipeg Act, S.M. 1971, c. 105, s. 609(1).

Municipal law — Zoning by-laws — Validity — Rezoning application brought by intended purchaser of municipal land's without city's authorization — Whether rezoning by-law invalid for failure to comply with statute and procedure — City of Winnipeg Act, S.M. 1971, c. 105, s. 609(1).

* Chief Justice at the time of hearing.

** Chief Justice at the time of judgment.

L'Association des résidents du Vieux St-Boniface Inc. *Appelante*

c.

La ville de Winnipeg et le comité municipal de St-Boniface-St-Vital *Intimés*

RÉPERTORIÉ: ASSOC. DES RÉSIDENTS DU VIEUX ST-BONIFACE INC. *c.* WINNIPEG (VILLE)

N° du greffe: 21428.

1990: 1er mai; 1990: 20 décembre.

Présents: Le juge en chef Dickson*, le juge en chef Lamer** et les juges Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Droit municipal — Municipalités — Demandes de règlements de zonage — Partialité ou crainte de partialité — Un conseiller municipal a appuyé en privé une demande de modification de zonage et a subséquemment voté en faveur de la demande sans révéler sa participation antérieure — La conduite du conseiller soulève-t-elle une crainte raisonnable de partialité?

Droit municipal — Urbanisme — Plan officiel — Effet — Aménagement résidentiel et parc prévus dans les plans de la ville et du district — Nouveau zonage permettant l'aménagement de condominiums — L'aménagement proposé contrevient-il aux plans? — City of Winnipeg Act, S.M. 1971, ch. 105, art. 599, 609.

Droit municipal — Zonage — Modification — Procédure — L'auteur d'une demande de modification de zonage négocie avec la municipalité l'acquisition de biens-fonds municipaux et de rues destinées à être fermées — Vente au requérant approuvée par la municipalité avant l'adoption du nouveau zonage — Régularité du nouveau zonage — City of Winnipeg Act, S.M. 1971, ch. 105, art. 609(1).

Droit municipal — Règlements de zonage — Validité — Demande de modification de zonage présentée par l'acquéreur prévu de biens-fonds municipaux sans autorisation de la ville — Le règlement portant modification de zonage est-il invalide pour cause de non-respect de la loi et de la procédure? — City of Winnipeg Act, S.M. 1971, ch. 105, art. 609(1).

* Juge en chef à la date de l'audition.

** Juge en chef à la date du jugement.

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Winnipeg approved a proposed land development in Old St. Boniface, and adopted the recommendations of the Finance Committee, the Community Committee, the Planning and Community Services Committee and, ultimately, City Council that the land in question be rezoned to permit the erection of two condominium towers, that certain streets be closed and that the streets, together with other city-owned land, be sold to the developer. Prior to public hearings before the Community Committee on the application for rezoning submitted by the intended purchaser of the lands, a municipal councillor had been personally involved in the planning of the proposed development and had appeared as advocate in support of the application at in camera private meetings of the Finance Committee. An election intervened during the period between public meetings in which the councillor took part, and he was re-elected. At the public meetings, he did not disclose his earlier involvement with the application.

Before the re-zoning by-law was passed, the appellant attacked the process by way of originating motion filed in the Court of Queen's Bench. The motions judge quashed the Committee's decision, prohibited the passing of the rezoning by-law, and adjourned the appellant's application to quash the street-closing by-law. The City was further prohibited from implementing or acting upon the street-closing by-law until further ordered by the court. The respondents' appeal to the Court of Appeal for Manitoba was allowed and the appellant's cross-appeal concerning the street-closing by-law was dismissed.

The issues raised in this appeal are: (1) whether the municipal councillor was disqualified by reason of bias from participating in the proceedings of the Community Committee; (2) whether the application for rezoning, which was made by someone other than the owner of the subject land, complied with s. 609(1) of the *City of Winnipeg Act*; (3) whether the zoning by-law failed to comply with the Greater Winnipeg development plan ("Plan Winnipeg"); and (4) whether the Community Committee acted in bad faith or in violation of a reasonable expectation of consultation.

Held (La Forest, L'Heureux-Dubé and Cory JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Wilson, Sopinka, Gonthier and McLachlin JJ.: *Wiswell v. Metropolitan Corporation of Greater Winnipeg* was distinguished. A flexible approach based on the context is now taken with respect to the test to be applied for disqualifying bias. Here, it

Winnipeg a approuvé un projet d'aménagement immobilier dans le Vieux St-Boniface et a adopté les recommandations du comité des finances, du comité municipal, du comité de l'urbanisme et des services communautaires et, finalement, du conseil municipal que les biens-fonds en question fassent l'objet d'un nouveau zonage de façon à permettre la construction de deux tours de condominiums, que certaines rues soient fermées et que les rues ainsi que d'autres biens-fonds appartenant à la ville soient vendus au promoteur. Avant que des audiences publiques soient tenues devant le comité municipal relativement à la demande de modification de zonage présentée par l'acquéreur prévu des biens-fonds, un conseiller municipal avait participé personnellement à la planification du projet d'aménagement et avait appuyé la demande dans des réunions à huis clos et privées du comité des finances. Durant la période comprise entre les réunions publiques, il y a eu une élection à laquelle le conseiller a participé et où il a été réélu. Lors des réunions publiques, il n'a pas révélé sa participation antérieure relativement à la demande.

Avant l'adoption du nouveau règlement de zonage, l'appelante a attaqué cette façon de procéder par voie d'avis de requête introductive d'instance déposé auprès de la Cour du Banc de la Reine. Le juge des requêtes a annulé la décision du comité, interdit l'adoption du règlement portant modification de zonage et ajourné l'audition de la demande de l'appelante visant l'annulation du règlement portant fermeture de rues. De plus, il a interdit à la ville d'appliquer ou d'utiliser le règlement de fermeture de rues jusqu'à nouvel ordre de la cour. La Cour d'appel du Manitoba a accueilli l'appel des intimés et rejeté l'appel incident de l'appelante relativement au règlement portant fermeture de rues.

Les questions soulevées dans ce pourvoi sont de savoir (1) si le conseiller municipal était, pour cause de partialité, inhabile à participer aux procédures du comité municipal, (2) si la demande de modification de zonage, présentée par une autre personne que le propriétaire du bien-fonds visé, est conforme au par. 609(1) de la *City of Winnipeg Act*, (3) si le règlement de zonage est conforme au plan directeur de la ville de Winnipeg (le «plan de la ville de Winnipeg»), et (4) si le comité municipal a agi de mauvaise foi ou sans respecter une expectative raisonnable de consultation.

Arrêt (les juges La Forest, L'Heureux-Dubé et Cory sont dissidents): Le pourvoi est rejeté.

Le juge en chef Dickson et les juges Wilson, Sopinka, Gonthier et McLachlin: Une distinction est faite d'avec l'arrêt *Wiswell v. Metropolitan Corporation of Greater Winnipeg*. Il convient d'adopter une approche souple fondée sur le contexte en ce qui concerne le critère à

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would not be appropriate to apply the test of a reasonable apprehension of pre-judgment with full vigour simply because of the councillor's appearance as advocate for the development proposal before the Finance Committee. The Legislature could not have intended that the rule requiring a tribunal to be free of an appearance of bias apply to members of Council with the same force as in the case of other tribunals whose character and functions more closely resemble those of a court. Some degree of prejudgment is inherent in the role of a municipal councillor. Nor, however, could the Legislature have intended that there be a hearing before a body which has already made an irreversible decision.

The applicable test is that objectors or supporters be heard by members of Council who are capable of persuasion. This test is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor. The party alleging disqualifying prejudgment must establish that any representations at variance with the adopted view would be futile. Statements by individual members of Council, while they may give rise to an appearance of bias, will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter.

On the other hand, there is nothing inherent in the councillors' hybrid functions that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have either a personal or other interest. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that it might influence the exercise of that duty. The motions judge erred in applying the reasonable apprehension of bias test once he had found that the councillor whose impartiality was in question had no personal interest in the development, either pecuniary or by reason of a relationship with the developer.

Per Lamer C.J.: The reasons of La Forest J. in *Save Richmond Farmland Society v. Richmond (Township)* were agreed with. Applying his test to the facts of this case, the appeal should be dismissed.

On the issue of conformity with Plan Winnipeg, the reasons of Sopinka J. were agreed with.

appliquer pour conclure à l'inhabilité pour cause de partialité. Il ne serait pas approprié en l'espèce d'appliquer le critère d'une crainte raisonnable de préjugé dans toute sa rigueur simplement parce que le conseiller a défendu le projet d'aménagement devant le comité des finances. Le législateur ne peut pas avoir voulu que la règle qui exige qu'un tribunal soit exempt de toute apparence de partialité s'applique aux membres d'un conseil municipal avec la même rigueur qu'à d'autres tribunaux administratifs dont le caractère et les fonctions ressemblent davantage à ceux d'une cour de justice. Un certain degré de préjugé est inhérent au rôle de conseiller municipal. Le législateur ne pouvait cependant pas non plus avoir voulu d'une audience devant un organisme qui a déjà pris une décision irrévocable.

Le critère applicable est que les tenants de l'un ou l'autre point de vue doivent être entendus par des membres du conseil qu'il est possible de convaincre. Ce critère est compatible avec les fonctions d'un conseiller municipal et lui permet de remplir ses fonctions politiques et législatives. La partie qui allègue l'existence d'un préjugé qui rend inhabile doit établir qu'il ne servirait à rien de présenter des arguments contredisant le point de vue adopté. Bien qu'elles puissent créer une apparence de partialité, les déclarations de conseillers individuels ne satisfont au critère que si la cour conclut qu'elles sont l'expression d'une opinion finale sur la question.

Par contre, il n'y a rien d'inhérent aux fonctions hybrides des conseillers qui rendrait obligatoire ou souhaitable de les soustraire à l'obligation de ne pas intervenir dans des affaires dans lesquelles ils ont un intérêt personnel ou autre. Quant on conclut à l'existence d'un tel intérêt, tant en vertu de la common law que de la loi, un conseiller devient inhabile si l'intérêt est à ce point lié à l'exercice d'une fonction publique qu'une personne raisonnablement bien informée conclurait que cet intérêt risquerait d'influer sur l'exercice de la fonction en question. Le juge des requêtes a commis une erreur en appliquant le critère de la crainte raisonnable de partialité après qu'il eut conclu que le conseiller dont l'impartialité était mise en doute n'avait aucun intérêt personnel dans le projet d'aménagement, que ce soit sur le plan pécuniaire ou sur celui de ses rapports avec le promoteur.

Le juge en chef Lamer: Le juge en chef souscrit aux motifs du juge La Forest dans l'affaire *Save Richmond Farmland Society c. Richmond (Canton)*. En appliquant son critère aux faits de l'espèce, on conclut au rejet du pourvoi.

Quand à la question du respect du plan de la ville de Winnipeg, le juge en chef Lamer souscrit aux motifs du juge Sopinka.

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Per La Forest, L'Heureux-Dubé and Cory JJ. (dissenting): The City was precluded from adopting the zoning by-law in question without first amending Plan Winnipeg. The zoning power of Council is constrained by the community plan, the amendment of which involves consultation with community committees and requires the entire council, rather than simply the executive policy committee, to deliberate on the plan by-law. In adopting a by-law which does not conform to the plan, Council oversteps its statutory authority.

The proposed condominium represented a derogation from Plan Winnipeg. If the City wished to permit development that conflicted with the policy of the Plan, it was first required to seek amendment to the Plan. The procedures for amendment provide for public participation at all stages of policy development and it was not open to Council to circumvent the public process by the simple passage of a zoning by-law.

Judicial review is not inappropriate in this case. The designated commissioner, who determines whether a by-law conforms to the Plan, is not independent of Council but, rather, is appointed by and may be dismissed by Council. Furthermore, there is no privative clause. It is therefore open to the courts to overturn a decision which is legally incorrect. The land in question was clearly designated as parkland on the Plan policy map and the condominium development could not be said to conform to the Plan.

Cases Cited

By Sopinka J.

Distinguished: *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512; **referred to:** *R. ex rel Ellerby v. Winnipeg*, [1930] 1 W.W.R. 914; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Oley and Moffatt v. Fredericton* (1984), 57 N.B.R. (2d) 361; *Re McGill and City of Brantford* (1980), 111 D.L.R. (3d) 405; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1 O.R. (2d) 20; *Re Blustein and Borough of North York*, [1967] 1 O.R. 604; *Re Moll and Fisher* (1979), 23 O.R. (2d) 609; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All E.R. 935; *Attorney General of Hong Kong v. Ng Yuen Shiu*, [1983] 2 All E.R. 346; *R. v. Hull Prison Board of Visitors, ex parte St. Germain*, [1979] 1 All E.R. 701; *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d)

Les juges La Forest, L'Heureux-Dubé et Cory (dissidents): La ville ne pouvait pas adopter le règlement de zonage en cause sans d'abord modifier le plan de la ville de Winnipeg. Le pouvoir de zonage du conseil est limité par le plan d'urbanisme dont la modification nécessite la consultation de comités municipaux et exige que le conseil au complet, et non simplement le comité exécutif, délibère sur le règlement relatif au plan. En adoptant un règlement non conforme au plan, le conseil outrepasse le pouvoir que lui confère la Loi.

Le projet de condominiums constitue une dérogation au plan de la ville de Winnipeg. Si la ville désirait autoriser un aménagement qui ne respectait pas la politique du plan, elle devait d'abord demander la modification du plan lui-même. Les procédures de modification prévoient la participation du public à toutes les étapes de la conception d'une politique et il n'était pas loisible au conseil de se soustraire au processus public par la simple adoption d'un règlement de zonage.

Le contrôle judiciaire n'est pas inopportun en l'espèce. Le commissaire désigné, qui détermine si un règlement est conforme au plan, n'est pas indépendant du conseil; au contraire, il est nommé et peut être démis de ses fonctions par le conseil. En outre, il n'y a aucune clause privative. Les tribunaux peuvent donc infirmer une décision qui est mauvaise du point de vue légal. Le bien-fonds en cause était clairement désigné comme parc sur la carte établie conformémement à la politique du plan et on ne pouvait dire que l'aménagement de condominiums était conforme au plan.

Jurisprudence

Citée par le juge Sopinka

Distinction d'avec l'arrêt: *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] R.C.S. 512; **arrêts mentionnés:** *R. ex rel Ellerby v. Winnipeg*, [1930] 1 W.W.R. 914; *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; *Oley and Moffatt v. Fredericton* (1984), 57 R.N.-B. (2e) 361; *Re McGill and City of Brantford* (1980), 111 D.L.R. (3d) 405; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879; *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1 O.R. (2d) 20; *Re Blustein and Borough of North York*, [1967] 1 O.R. 604; *Re Moll and Fisher* (1979), 23 O.R. (2d) 609; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All E.R. 935; *Attorney General of Hong Kong v. Ng Yuen Shiu*, [1983] 2 All E.R. 346; *R. v. Hull Prison Board of Visitors, ex parte St. Germain*, [1979] 1 All E.R. 701; *Re Multi-Malls Inc. and Minister of Transportation*

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49; *Re Canadian Occidental Petroleum Ltd. and District of North Vancouver* (1983), 148 D.L.R. (3d) 255; *Gaw v. Commissioner of Corrections* (1986), 2 F.T.R. 122; *Re Bruhn-Mou and College of Dental Surgeons of British Columbia* (1975), 59 D.L.R. (3d) 152; *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213.

By Lamer C.J.

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By La Forest J.

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Citée par le juge en chef Lamer

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R. (2d) 252, 39 M.P.L.R. 271, quashing the decision of the respondent, the St. Boniface-St. Vital Community Committee, and granting *certiorari* and prohibition. Appeal dismissed, La Forest, L'Heureux-Dubé and Cory JJ. dissenting.

Arne Peltz and *M. B. Nepon*, for the appellant.

C. Gillespie and *D. McCaffrey*, *Q.C.*, for the respondents.

The judgment of Dickson C.J. and Wilson, Sopinka, Gonthier and McLachlin JJ. was delivered by

SOPINKA J.—This appeal was heard together with *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, and reasons for judgment are being released concurrently. They both raise the question of the application of the rules of natural justice or fairness to municipal councillors when they are called upon to make a decision after hearing representations from interested parties. In particular, these appeals raise the issue of the application to municipal councillors of the rule which requires a member of a tribunal to recuse himself or herself when there exists a reasonable apprehension of bias or prejudgment.

In this appeal the appellant, in addition to the issue of bias, raises the following issues: Did the City have jurisdiction to proceed with the rezoning in the absence of express written authority from all freehold owners of the proposed site? Is the zoning by-law void for non-conformity with Plan Winnipeg? Did breach of an alleged undertaking to involve the Residents Association in a redevelopment plan constitute bad faith or create a right of consultation?

Facts

The appellant is a Residents Association for the area known as Old St. Boniface. It has existed since 1977. It was incorporated in 1979 pursuant to the Neighbourhood Improvement Program, which was a federal, provincial and municipal

Man. R. (2d) 252, 39 M.P.L.R. 271, qui avait annulé une décision de l'intimé, le comité municipal de St-Boniface-St-Vital, et accordé un bref de *certiorari* et de prohibition. Pourvoi rejeté, les juges La Forest, L'Heureux-Dubé et Cory sont dissidents.

Arne Peltz et *M. B. Nepon*, pour l'appelante.

C. Gillespie et *D. McCaffrey*, *c.r.*, pour les intimés.

Version française du jugement du juge en chef Dickson et des juges Wilson, Sopinka, Gonthier et McLachlin rendu par

LE JUGE SOPINKA—Le présent pourvoi et le pourvoi *Save Richmond Farmland Society c. Richmond (Canton)*, [1990] 3 R.C.S. 1213, ont été entendus ensemble et les motifs de jugement sont rendus simultanément. Ils soulèvent l'un et l'autre la question de l'application des règles de justice naturelle ou de l'équité aux conseillers municipaux appelés à prendre une décision après avoir entendu les observations des parties intéressées. Se pose en particulier dans ces pourvois la question de l'application aux conseillers municipaux de la règle imposant à un membre d'un tribunal administratif l'obligation de se récuser lorsqu'il existe une crainte raisonnable de partialité ou de préjugé.

Outre la partialité, l'appelante soulève en l'espèce les questions suivantes: la ville avait-elle compétence pour procéder à la modification du zonage sans en avoir reçu par écrit l'autorisation expresse de tous les propriétaires fonciers du site proposé? Le règlement de zonage est-il entaché de nullité pour cause de non-conformité avec le plan de la ville de Winnipeg? L'engagement qui aurait été pris de faire participer l'association des résidents à la conception d'un plan de réaménagement conférait-il à celle-ci le droit d'être consultée et la violation de cet engagement constituait-elle de la mauvaise foi?

Les faits

L'appelante est une association des résidents du secteur connu sous le nom de Vieux St-Boniface. Elle existe depuis 1977. En 1979, elle a été constituée en personne morale dans le cadre du programme d'amélioration de quartier qui était une

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Plan Winnipeg was adopted as a by-law of the City in April 1986. The Plan is the instrument by which overall planning for the entire territory of the city is instituted. It is a general, long-term policy document which serves as a framework in which specific policies and zoning by-laws are formulated. It may be viewed as the very foundation of all planning. Indeed, master plans like Plan Winnipeg are characterized by Rogers in *Canadian Law of Planning and Zoning* (1990), at pp. 68-69, as "quasi-constitutional documents":

> In some respects a community plan operates as kind of a constitutional document controlling the future development of the municipality. As a constitution, it embodies limitations on the local authority in both its legislative and administrative spheres and is less subject to change than ordinary laws.

Although the author was speaking in general terms, his insights are applicable to Plan Winnipeg. By section 599 of the Act, the zoning power of council is constrained by the plan, although the extent of the constraint may not be entirely clear. In addition, the procedure for amendment to the plan, found in ss. 574-78 of the Act, is more onerous than the process for the amendment of a zoning by-law, in that it involves consultation with community committees, requires the entire council, rather than simply the executive policy committee, to deliberate on the plan by-law, and contains more stringent public notice provisions. Moreover, council is required to obtain the written approval of the minister before it can finally pass the plan by-law.

There is a temptation to view the plan as a document too policy oriented to command any legal status. Such an approach, however, misapprehends the true nature of the plan. Although the policies are articulated in relatively general terms, this does not detract from the legal force of the plan. The specific legal effect of the plan, pursuant to s. 599 of the Act, is to set the parameters of the zoning power of council. If council adopts a by-law which does not conform with the plan, it has overstepped its statutory authority; see *Christie v.*

Le plan de la ville de Winnipeg a été adopté à titre de règlement municipal en avril 1986. Ce plan constitue l'instrument qui établit la planification générale de l'ensemble du territoire de la ville. Il s'agit d'un document énonçant une politique générale à long terme, en fonction duquel des politiques précises et des règlements de zonage sont formulés. Il peut être considéré comme le fondement même de toute planification. En fait, les plans directeurs comme le plan de la ville de Winnipeg sont qualifiés par Rogers dans *Canadian Law of Planning and Zoning* (1990), aux pp. 68 et 69, de [TRADUCTION] «documents quasi constitutionnels»:

> [TRADUCTION] À certains égards, un plan directeur fonctionne comme un genre de document constitutionnel qui contrôle l'aménagement futur de la municipalité. À titre de constitution, il comprend des restrictions imposées au pouvoir local dans ses champs de compétence législative et administrative et est moins susceptible de subir des modifications que les lois ordinaires.

Bien que l'auteur se soit exprimé en termes généraux, ses opinions s'appliquent au plan de la ville de Winnipeg. Aux termes de l'art. 599 de la Loi, le pouvoir de zonage du conseil est limité par le plan, bien que l'étendue de la limite ne soit pas tout à fait claire. De plus, la procédure de modification du plan, qui se trouve aux art. 574 à 578 de la Loi, est plus lourde que la procédure de modification d'un règlement de zonage parce qu'elle comporte une consultation avec les comités municipaux, exige que le conseil au complet, et non simplement le comité exécutif, délibère sur le règlement relatif au plan, et contient des dispositions plus strictes en matière d'avis public. En outre, le conseil est tenu d'obtenir l'autorisation écrite du ministre avant l'adoption finale du règlement relatif au plan.

On est tenté de considérer le plan comme un document qui est trop axé sur des politiques générales pour avoir un statut juridique. Toutefois, une telle position repose sur une mauvaise compréhension de la véritable nature du plan. Bien que les politiques soient formulées en des termes relativement généraux, cela ne diminue pas le caractère juridique du plan. L'effet juridique précis du plan, selon l'art. 599 de la Loi, est d'établir les paramètres du pouvoir de zonage du conseil. Si le conseil adopte un règlement non conforme au plan, il

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TAB 46

IN THE MATTER OF a reference to the Court of Appeal of the Province of British Columbia, pursuant to the provisions of the *Constitutional Question Act*, R.S.B.C. 1979, c. 63, of the questions contained in an Order of the Lieutenant Governor in Council of British Columbia, being No. 287, dated February 27, 1990

and

IN THE MATTER OF the *Canada Assistance Plan*, R.S.C. 1970, c. C-1

and

IN THE MATTER OF a certain agreement, dated March 23, 1967, pursuant to Part I of the *Canada Assistance Plan*, between the Government of Canada, represented by the Minister of National Health and Welfare of Canada, and the Government of the Province of British Columbia, represented by the Minister of Social Welfare of British Columbia

between

The Attorney General of Canada *Appellant*

v.

The Attorney General of British Columbia *Respondent*

and

The Attorney General for Ontario, the Attorney General of Manitoba, the Attorney General for Alberta, the Attorney General for Saskatchewan, the Native Council of

DANS L'AFFAIRE du renvoi à la Cour d'appel de la province de la Colombie-Britannique, conformément aux dispositions de la *Constitutional Question Act*, R.S.B.C. 1979, ch. 63, des questions formulées dans le décret nº 287 en date du 27 février 1990, pris par le lieutenant-gouverneur en conseil de la Colombie-Britannique

et

DANS L'AFFAIRE du *Régime d'assistance publique du Canada*, S.R.C. 1970, ch. C-1

et

DANS L'AFFAIRE d'un certain accord, en date du 23 mars 1967, intervenu, conformément à la partie I du *Régime d'assistance publique du Canada*, entre le gouvernement du Canada, représenté par le ministre de la Santé nationale et du Bien-être social du Canada, et le gouvernement de la province de la Colombie-Britannique, représenté par le ministre du Bien-être social de la Colombie-Britannique

entre

Le procureur général du Canada *Appelant*

c.

Le procureur général de la Colombie-Britannique *Intimé*

et

Le procureur général de l'Ontario, le procureur général du Manitoba, le procureur général de l'Alberta, le procureur général de la Saskatchewan, le

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Canada and the United Native Nations of British Columbia *Interveners*

INDEXED AS: REFERENCE RE *CANADA ASSISTANCE PLAN* (B.C.)

File No.: 22017.

1990: December 11, 12; 1991: August 15.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Federal-provincial agreements — Canada Assistance Plan — Federal government contributing 50 per cent of costs of provincial assistance and welfare services pursuant to Canada Assistance Plan and Agreement with province — Federal government introducing new legislation reducing its fiscal obligation under Canada Assistance Plan and Agreement — Whether federal government has authority to reduce its obligation unilaterally — Whether doctrine of legitimate expectations applies — Whether Canada Assistance Plan imposes requirements as to "manner and form" of subsequent legislation — Whether new legislation ultra vires — Canada Assistance Plan, R.S.C., 1985, c. C-1.

Constitutional law — Reference — Questions — Whether questions referred to Court of Appeal raised justiciable issues.

In 1990, the federal government, in order to reduce the federal budget deficit, decided to cut expenditures and limit the growth of payments made to financially stronger provinces under the *Canada Assistance Plan* (the "Plan"). This change was embodied in Bill C-69, now the *Government Expenditures Restraint Act*. Under the Plan, the federal government concluded agreements with the provinces to share the cost of their expenditures on social assistance and welfare. Section 5 of the Plan authorizes contributions amounting to half of the provinces' eligible expenditures. These agreements continue to be in force so long as the relevant provincial law remains in operation (s. 8(1)). They may be amended or terminated by mutual consent, or terminated on one

Conseil national des autochtones du Canada et les United Native Nations of British Columbia *Intervenants*

RÉPERTORIÉ: RENVOI RELATIF AU *RÉGIME D'ASSISTANCE PUBLIQUE DU CANADA* (C.-B.)

N° du greffe: 22017.

1990: 11, 12 décembre; 1991: 15 août.

Présents: Le juge en chef Lamer et les juges La Forest, Sopinka, Gonthier, Cory, McLachlin et Stevenson.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Accords fédéraux-provinciaux — Régime d'assistance publique du Canada — Moitié du coût des services provinciaux d'assistance publique et de protection sociale payée par le gouvernement fédéral conformément au Régime d'assistance publique du Canada et à un accord conclu avec la province — Dépôt par le gouvernement fédéral d'un projet de loi prévoyant l'allégement de l'obligation financière lui incombant aux termes du Régime d'assistance publique du Canada et de l'accord — Le gouvernement fédéral a-t-il compétence pour alléger unilatéralement son obligation? — La théorie de l'expectative légitime s'applique-t-elle? — Le Régime d'assistance publique du Canada impose-t-il des exigences quant au «mode» et à la «forme» d'une loi subséquente? — La nouvelle mesure législative est-elle inconstitutionnelle? — Régime d'assistance publique du Canada, L.R.C. (1985), ch. C-1.

Droit constitutionnel — Renvoi — Questions — Les questions soumises à la Cour d'appel soulèvent-elles des points relevant de la compétence des tribunaux?

Afin de réduire son déficit budgétaire, le gouvernement fédéral a décidé, en 1990, de couper les dépenses et de limiter l'augmentation des paiements effectués, en vertu du *Régime d'assistance publique du Canada* (le «Régime»), aux provinces les plus fortes financièrement. Cette modification était contenue dans le projet de loi C-69, devenu maintenant la *Loi sur la compression des dépenses publiques*. En vertu du Régime, le gouvernement fédéral a conclu avec les provinces des accords prévoyant le partage des frais engagés par ces dernières au titre de l'assistance publique et de la protection sociale. L'article 5 du Régime autorise le versement de contributions égales à la moitié des dépenses admissibles des provinces. Ces accords resteront en vigueur

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year's notice from either party (s. 8(2)). The Plan also provides for regulations, but regulations affecting the substance of agreements are ineffective unless passed with the consent of any province affected (s. 9(2)).

The Lieutenant Governor in Council of British Columbia, in accordance with s. 1 of the *Constitutional Question Act* of that province, referred to the British Columbia Court of Appeal two constitutional questions to determine: (1) whether the Government of Canada has any authority to limit its obligation under the Plan and its Agreement with British Columbia; and (2) whether the terms of the Agreement, the subsequent conduct of the Government of Canada pursuant to the Agreement and the provisions of the Plan give rise to a legitimate expectation that the Government of Canada would introduce no bill into Parliament to limit its obligation under the Agreement or the Plan without the consent of British Columbia. The Court of Appeal answered the first question in the negative and the second question in the affirmative.

Held: The appeal should be allowed. The first constitutional question is answered in the affirmative. The second constitutional question is answered in the negative.

Justiciability

The reference questions raise matters that are justiciable and should be answered. Both questions have a sufficient legal component to warrant the intervention of the judiciary branch. The first question requires the interpretation of a statute of Canada and an agreement. The second raises the question of the applicability of the legal doctrine of legitimate expectations to the process involved in the enactment of a money bill. A decision on these questions will have the practical effect of settling the legal issues in contention and will assist in resolving the controversy. There is no other forum in which these legal questions could be determined in an authoritative manner.

Question 1

In presenting Bill C-69 to Parliament, the Government of Canada acted in accordance with the Agreement. While the language of the Plan is, in general, duplicated in the Agreement, the contribution formula

tant que sera appliquée la législation provinciale pertinente (par. 8(1)). Ils peuvent être modifiés ou résiliés par consentement mutuel, ou résiliés à la suite d'un préavis d'un an donné par l'une ou l'autre partie (par. 8(2)). Le Régime prévoit aussi l'adoption de règlements d'application. Les règlements portant sur le fond d'un accord ne s'appliquent toutefois que s'ils sont pris avec l'assentiment de toute province concernée (par. 9(2)).

Le lieutenant-gouverneur en conseil de la Colombie-Britannique, en conformité avec l'art. 1 de la *Constitutional Question Act* de cette province, a soumis à la Cour d'appel de la Colombie-Britannique deux questions constitutionnelles: (1) celle de savoir si le gouvernement du Canada a compétence pour limiter son obligation découlant du Régime et de l'accord intervenu entre lui et la Colombie-Britannique, et (2) celle de savoir si les conditions de l'accord, la conduite subséquente du gouvernement du Canada dans l'exécution de cet accord et les dispositions du Régime permettent de s'attendre légitimement à ce que le gouvernement du Canada ne dépose devant le Parlement aucun projet de loi tendant à limiter, sans le consentement de la Colombie-Britannique, l'obligation que lui impose l'accord ou le Régime. La Cour d'appel a répondu par la négative à la première question et par l'affirmative à la seconde.

Arrêt: Le pourvoi est accueilli. La première question constitutionnelle reçoit une réponse affirmative. La seconde question constitutionnelle reçoit une réponse négative.

L'assujettissement à la compétence des tribunaux

Les questions faisant l'objet du renvoi soulèvent des points qui relèvent de la compétence des tribunaux et méritent une réponse. Les deux questions posées présentent un aspect suffisamment juridique pour justifier l'intervention des tribunaux. La première question nécessite l'interprétation d'une loi du Canada et d'un accord. La seconde concerne l'applicabilité de la théorie juridique de l'expectative légitime au processus d'adoption d'un projet de loi de finances. La décision rendue sur ces questions aura l'effet pratique de trancher les questions de droit en litige et contribuera à résoudre la controverse. Il n'existe pas d'autre tribune devant laquelle ces questions de droit pourraient être réglées de manière péremptoire.

La première question

En déposant le projet de loi C-69 devant le Parlement, le gouvernement du Canada a agi en conformité avec l'accord. Bien que l'accord reprenne généralement les termes du Régime, la formule de calcul des contribu-

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which authorizes payments to the provinces, appears only in s. 5 of the Plan. Being part of the Plan, the formula is subject to amendment by virtue of the principle of parliamentary sovereignty reflected in s. 42(1) of the federal *Interpretation Act*, which states that "Every Act shall be construed as to reserve to Parliament the power of repealing or amending it. . .". Under s. 54 of the *Constitution Act, 1867*, a money bill, including an amendment to a money bill like the Plan, can only be introduced on the initiative of the government. In these circumstances, the natural meaning to be given to the Agreement is that Canada's obligation is to pay the contributions which are authorized from time to time and not the contributions that were authorized when the Agreement was signed. The insertion of the formula for payment in the Plan only was a very strong indication that the parties did not intend that the formula should remain forever frozen. To assert that the federal government could prevent Parliament from exercising its powers to legislate amendments to the Plan would be to negate the sovereignty of Parliament. As well, Parliament did not intend to fetter its sovereign legislative power in restricting, in s. 9(2) of the Plan, the federal government's regulatory powers. Finally, the Agreement could be amended otherwise than in accordance with s. 8 of the Plan. The Agreement, which is subject to the amending formula in s. 8, obliges Canada to pay the amounts which Parliament has authorized Canada to pay pursuant to s. 5 of the Plan. Hence, the payment obligations under the Agreement are subject to change when s. 5 is changed. That provision contains its own process of amendment by virtue of the principle of parliamentary sovereignty.

Question 2

The federal government did not act illegally in invoking the power of Parliament to amend the Plan without obtaining the consent of British Columbia. The doctrine of legitimate expectations does not create substantive rights — in this case, a substantive right to veto proposed federal legislation. The doctrine is part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can only create a right to make representations or to be consulted. Moreover, the doctrine does not apply to the legislative process. The government, which is an integral part of this process, is thus not constrained by the doctrine from introducing a bill to Parliament. A restraint on the executive in the introduction of legislation would place a fetter on the sovereignty of Parliament itself. This is particularly true when the restraint relates to the introduction

tions, qui autorise les paiements aux provinces, figure seulement à l'art. 5 du Régime. Comme elle fait partie du Régime, la formule est susceptible de modification en application du principe de la souveraineté du Parlement reflété au par. 42(1) de la *Loi d'interprétation* fédérale, qui prévoit: «Il est entendu que le Parlement peut toujours abroger ou modifier toute loi . . .» Suivant l'art. 54 de la *Loi constitutionnelle de 1867*, c'est seulement à l'initiative du gouvernement que peut être déposé un projet de loi de finances ou un projet de loi modificative d'une loi de finances comme le Régime. Dans ces circonstances, le sens naturel à donner à l'accord est que le Canada est obligé de payer les contributions qui sont autorisées à l'occasion et non celles autorisées lors de la signature de l'accord. L'inclusion de la formule de paiement dans le Régime seulement constitue une très forte indication que les parties n'ont pas voulu que la formule demeure à tout jamais figée. Affirmer que le gouvernement fédéral pourrait empêcher le Parlement d'exercer ses pouvoirs de légiférer pour modifier le Régime reviendrait à nier la souveraineté du Parlement. De même, le Parlement n'a pas voulu limiter son pouvoir législatif souverain en imposant, au par. 9(2) du Régime, une restriction aux pouvoirs de réglementation du gouvernement fédéral. Enfin, l'accord pouvait être modifié autrement qu'en conformité avec l'art. 8 du Régime. L'accord, qui est assujetti à la formule de modification prévue à l'art. 8 oblige le Canada à verser les montants que le Parlement a autorisé le Canada à payer en vertu de l'art. 5 du Régime. Les obligations prévues par l'accord en matière de paiement peuvent donc être changées par une modification de l'art. 5. Cette disposition renferme son propre processus de modification en vertu du principe de la souveraineté du Parlement.

La seconde question

Le gouvernement fédéral n'a pas agi illégalement en invoquant le pouvoir du Parlement afin de modifier le Régime sans obtenir le consentement de la Colombie-Britannique. La théorie de l'expectative légitime n'est pas génératrice de droits fondamentaux, en l'occurrence, celui d'opposer un veto à un projet de loi fédérale. Cette théorie fait partie des règles de l'équité procédurale auxquelles peuvent être soumis les organismes administratifs. Dans les cas où elle s'applique, elle ne peut faire naître que le droit de présenter des observations ou d'être consulté. La théorie ne s'applique pas non plus au processus législatif. Elle ne vient donc pas empêcher le gouvernement, qui fait partie intégrante de ce processus, de déposer un projet de loi au Parlement. Toute restriction imposée au pouvoir de l'exécutif de déposer des projets de loi constituerait une limitation de la souverai-

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of a money bill. It is also fundamental to our system of government that a government is not bound by the undertakings of its predecessor. The doctrine would derogate from this essential feature of democracy.

The Plan does not purport to control the "manner and form" of subsequent legislation. Where a statute is of a constitutional nature and governs legislation generally, rather than dealing with a specific statute, it can impose requirements as to manner and form. But where, as in this case, a statute has no constitutional nature, it will be very unlikely to evidence an intention of the legislative body to bind itself in the future. Sections 8(2) and 9(2) of the Plan, read together, do not reveal, by necessary implication, a requirement that subsequent legislation cannot alter the Plan unless the consent of the affected province or provinces is obtained. They address only amendments to the Agreement and to the regulations under the Plan, and say nothing about amendments to the Plan. Moreover, any "manner and form" requirement in an ordinary statute must overcome the clear words of s. 42(1) of the *Interpretation Act*. This provision requires that federal statutes ordinarily be interpreted to accord with the doctrine of parliamentary sovereignty. This doctrine prevents a legislative body from binding itself as to the substance of its future legislation.

Section 2 of the *Government Expenditures Restraint Act* is *intra vires* Parliament. First, Parliament was not disabled from unilaterally changing the law so as to change the Agreement once it had been authorized by Parliament and executed by the parties. The Agreement was between British Columbia and the federal government. It did not bind Parliament. The applicable constitutional principle is the sovereignty of Parliament. Second, the new legislation does not amount to regulation of an area outside federal jurisdiction. Bill C-69 was not an indirect, colourable attempt to regulate in provincial areas of jurisdiction. It is simply an austerity measure. Further, the simple withholding of federal money, which had previously been granted to fund a matter within provincial jurisdiction, does not amount to the regulation of that matter. The new legislation simply limits the growth of federal contributions. While the *Government Expenditures Restraint Act* impacts upon a constitutional interest outside the jurisdiction of Parliament, such impact is not enough to find that a statute encroaches

neté du Parlement lui-même. Cela est particulièrement vrai dans le cas d'une restriction relative au dépôt d'un projet de loi de finances. Il est également essentiel à notre système de gouvernement qu'un gouvernement ne soit pas lié par les engagements de son prédécesseur. La théorie de l'expectative légitime dérogerait à ce trait essentiel de la démocratie.

Le Régime ne vise pas à déterminer le «mode et la forme» de toute législation subséquente. Une loi qui est de nature constitutionnelle et qui régit la législation en général plutôt que de porter sur une loi précise peut imposer des exigences quant au mode et à la forme. Toutefois, lorsqu'une loi ne présente aucun caractère constitutionnel, comme c'est le cas en l'espèce, il est fort peu probable qu'elle traduise une intention de la part du corps législatif de se lier pour l'avenir. Quand on rapproche les par. 8(2) et 9(2) du Régime, il ne s'en dégage pas, par voie d'interprétation nécessaire, une exigence qu'aucune modification ne soit apportée au Régime au moyen d'une loi subséquente, si ce n'est avec l'assentiment de la province ou des provinces touchées. Ces paragraphes ne concernent que la modification de l'accord et des règlements pris en vertu du Régime et sont muets relativement à la modification du Régime. De plus, toute exigence de «mode» et de «forme» posée dans une loi ordinaire doit surmonter le texte clair du par. 42(1) de la *Loi d'interprétation*. Cette disposition exige que les lois fédérales soient ordinairement interprétées de manière à s'accorder avec la théorie de la souveraineté du Parlement, laquelle vient empêcher un corps législatif de se lier les mains en ce qui concerne la teneur de sa législation future.

L'article 2 de la *Loi sur la compression des dépenses publiques* n'excède pas la compétence du Parlement. Premièrement, le Parlement ne devenait pas inhabile à modifier unilatéralement la loi de manière à changer l'accord, du moment que celui-ci avait été autorisé par le Parlement et signé par les parties. L'accord est intervenu entre la Colombie-Britannique et le gouvernement fédéral. Il ne lie pas le Parlement. Le principe constitutionnel applicable est celui de la souveraineté du Parlement. Deuxièmement, la nouvelle loi ne revient pas à réglementer un domaine qui n'est pas de compétence fédérale. Le projet de loi C-69 ne constitue pas une tentative déguisée et indirecte de réglementer des domaines de compétence provinciale. Il s'agit simplement d'une mesure d'austérité. En outre, le simple refus de verser des fonds fédéraux jusque-là accordés pour financer une matière relevant de la compétence provinciale ne revient pas à réglementer cette matière. La nouvelle loi se borne à limiter l'accroissement des contributions fédérales. Bien que la *Loi sur la compression des dépenses*

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upon the jurisdiction of the other level of government. The Court should not, under the "overriding principle of federalism", supervise the federal government's exercise of its spending power in order to protect the autonomy of the provinces. Supervision of the spending power is not a separate head of judicial review. If a statute is neither *ultra vires* nor contrary to the *Canadian Charter of Rights and Freedoms*, the courts have no jurisdiction to supervise the exercise of legislative power.

Cases Cited

Applied: *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793; **referred to**: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Reference re Magistrate's Court of Quebec*, [1965] S.C.R. 772; *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384; *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Bates v. Lord Hailsham*, [1972] 3 All E.R. 1019; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Penikett v. Canada* (1987), 45 D.L.R. (4th) 108, leave to appeal refused, [1988] 1 S.C.R. xii; *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389; *Attorney-General for New South Wales v. Trethowan*, [1932] A.C. 526; *R. v. Mercure*, [1988] 1 S.C.R. 234; *R. v. Drybones*, [1970] S.C.R. 282; *Hogan v. The Queen*, [1975] 2 S.C.R. 574; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

Statutes and Regulations Cited

Bill C-69, *An Act to amend certain statutes to enable restraint of government expenditures*, 2nd sess., 34th Parl. (assented to on February 1, 1991).

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publiques ait des répercussions sur un droit constitutionnel qui échappe à la compétence du Parlement, ces répercussions ne sont pas suffisantes pour conclure qu'une loi empiète sur la compétence de l'autre palier de gouvernement. La Cour ne doit pas, en vertu du «principe essentiel du fédéralisme», surveiller l'exercice par le gouvernement fédéral de son pouvoir de dépenser, afin de protéger l'autonomie des provinces. La surveillance du pouvoir de dépenser ne constitue pas un sujet distinct de contrôle judiciaire. Si une loi n'est ni inconstitutionnelle ni contraire à la *Charte canadienne des droits et libertés*, les tribunaux n'ont nullement compétence pour surveiller l'exercice du pouvoir législatif.

Jurisprudence

Arrêts appliqués: *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753; *Renvoi: Opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793; **arrêts mentionnés:** *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735; *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49; *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; *Renvoi relatif à la Cour de Magistrat de Québec*, [1965] R.C.S. 772; *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384; *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571; *Reference re Waters and Water-Powers*, [1929] R.C.S. 200; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Bates v. Lord Hailsham*, [1972] 3 All E.R. 1019; *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602; *Penikett v. Canada* (1987), 45 D.L.R. (4th) 108, autorisation de pourvoi refusée, [1988] 1 R.C.S. xii; *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389; *Attorney-General for New South Wales v. Trethowan*, [1932] A.C. 526; *R. c. Mercure*, [1988] 1 R.C.S. 234; *R. c. Drybones*, [1970] R.C.S. 282; *Hogan c. La Reine*, [1975] 2 R.C.S. 574; *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297.

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Loi constitutionnelle de 1907.

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Canada Assistance Plan, R.S.C., 1985, c. C-1, ss. 4, 5(1), (2)(*c*), 5.1 [ad. 1991, c. 9, s. 2], 6(2), (3), 8(1), (2), 9(1), (2).
Canada Assistance Plan, S.C. 1966-67, c. 45, s. 5(2)(*c*).
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Emergencies Act, R.S.C., 1985, c. 22 (4th Supp.), s. 40(1), (2).
Government Expenditures Restraint Act, S.C. 1991, c. 9, s. 2.
Interpretation Act, R.S.C., 1985, c. I-21, ss. 10, 42(1).
Statute Revision Act, R.S.C., 1985, c. S-20, s. 6(*e*), (*f*).
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Loi sur la compression des dépenses publiques, L.C. 1991, ch. 9, art. 2.
Loi sur la Cour suprême, L.R.R.C. (1985), ch. S-26, art. 36.
Loi sur la révision des lois, L.R.C. (1985), ch. S-20, art. 6*e*), *f*).
Loi sur les mesures d'urgence, L.R.C. (1985), ch. 22 (4e suppl.), art. 40(1), (2).
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Régime d'assistance publique du Canada, L.R.C. (1985), ch. C-1, art. 4, 5(1), (2)*c*), 5.1 [aj. 1991, ch. 9, art. 2], 6(2), (3), 8(1), (2), 9(1), (2).
Régime d'assistance publique du Canada, S.C. 1966-67, ch. 45, art. 5(2)*c*).
Régime d'assistance publique du Canada, S.R.C. 1970, ch. C-1, art. 4, 5(1), (2)*c*), 6(2), (3), 8(1), (2), 9(1), (2).

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Beaudoin, Gérald-A. *La Constitution du Canada*. Montréal: Wilson & Lafleur, 1990.
Bagehot, Walter. *La Constitution anglaise*. Traduit de l'anglais par M. Gaulhiac. Paris: Germer Baillière, 1869.

APPEAL from a judgment of the British Columbia Court of Appeal (1990), 46 B.C.L.R. (2d) 273, 71 D.L.R. (4th) 99, 45 Admin. L.R. 34, in the matter of a reference concerning the federal government's authority to limit its obligation under the *Canada Assistance Plan*. Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1990), 46 B.C.L.R. (2d) 273, 71 D.L.R. (4th) 99, 45 Admin. L.R. 34, dans l'affaire d'un renvoi relatif à la compétence du gouvernement fédéral pour limiter son obligation découlant du *Régime d'assistance publique du Canada*. Pourvoi accueilli.

W. I. C. Binnie, *Q.C.*, *Peter W. Hogg*, *Q.C.*, and *Maureen E. Baird*, for the appellant.

W. I. C. Binnie, *c.r.*, *Peter W. Hogg*, *c.r.*, et *Maureen E. Baird*, pour l'appelant.

E. Robert A. Edwards, *Q.C.*, and *Patrick O'Rourke*, for the respondent.

E. Robert A. Edwards, *c.r.*, et *Patrick O'Rourke*, pour l'intimé.

Christopher D. Bredt and *Tanya Lee*, for the intervener the Attorney General for Ontario.

Christopher D. Bredt et *Tanya Lee*, pour l'intervenant le procureur général de l'Ontario.

Vic Toews, for the intervener the Attorney General of Manitoba.

Vic Toews, pour l'intervenant le procureur général du Manitoba.

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Stan Rutwind, for the intervener the Attorney General for Alberta.

Donald J. Dow, for the intervener the Attorney General for Saskatchewan.

Marvin R. V. Storrow, *Q.C.*, and *Maria Morellato*, for the interveners the Native Council of Canada and the United Native Nations of British Columbia.

The judgment of the Court was delivered by

SOPINKA J.—This is an appeal by the Attorney General of Canada from a decision of the British Columbia Court of Appeal, answering two questions which were referred to it under the *Constitutional Question Act*, R.S.B.C. 1979, c. 63. The issues raised by the questions include whether and in what circumstances a court should answer questions referred to it that have a political connotation, the interpretation and binding effect of federal-provincial agreements, and whether the doctrine of legitimate expectations applies to prevent the Cabinet from introducing a money bill.

The Attorneys General for Ontario, Manitoba and Alberta intervened in the Court of Appeal, as did the Native Council of Canada and the United Native Nations of British Columbia. In addition, the Attorney General for Saskatchewan intervened in this Court.

1. The Background

The *Canada Assistance Plan* (the "*Plan*") was enacted by S.C. 1966-67, c. 45; it is now R.S.C., 1985, c. C-1. By its s. 4, it authorizes the Government of Canada to enter into agreements with the provincial governments to pay them contributions toward their expenditures on social assistance and welfare. Section 5 of the *Plan* authorizes payments to the provinces pursuant to such agreements, and broadly speaking it authorizes contributions amounting to half of the provinces' eligible expenditures. The *Plan* (s. 6(2)) specifies certain prerequisites for

Stan Rutwind, pour l'intervenant le procureur général de l'Alberta.

Donald J. Dow, pour l'intervenant le procureur général de la Saskatchewan.

Marvin R. V. Storrow, *c.r.*, et *Maria Morellato*, pour les intervenants le Conseil national des autochtones du Canada et les United Native Nations of British Columbia.

Version française du jugement de la Cour rendu par

LE JUGE SOPINKA — Le présent pourvoi est formé par le procureur général du Canada contre un arrêt de la Cour d'appel de la Colombie-Britannique qui a répondu à deux questions qui lui avaient été soumises en vertu de la *Constitutional Question Act*, R.S.B.C. 1979, ch. 63. Il s'agit notamment de déterminer, par suite de ces questions, si et dans quelles circonstances une cour doit répondre à des questions qui lui ont été soumises et qui présentent un aspect politique, comment il convient d'interpréter des accords fédéraux-provinciaux et quelle est leur force exécutoire, et si la théorie de l'expectative légitime s'applique de manière à empêcher le cabinet de déposer un projet de loi de finances.

Les procureurs généraux de l'Ontario, du Manitoba et de l'Alberta sont intervenus en Cour d'appel, comme l'ont fait également le Conseil national des autochtones du Canada et les United Native Nations of British Columbia. De plus, le procureur général de la Saskatchewan est intervenu en notre Cour.

1. Historique

Le *Régime d'assistance publique du Canada* (le «*Régime*») a été adopté à S.C. 1966-67, ch. 45; il constitue maintenant le chapitre C-1 des L.R.C. (1985). Son article 4 habilite le gouvernement du Canada à conclure avec les gouvernements provinciaux des accords prévoyant le paiement de contributions aux frais encourus par ces derniers au titre de l'assistance publique et de la protection sociale. L'article 5 du *Régime* permet d'effectuer des paiements aux provinces en exécution de ces accords et, d'une manière générale, autorise le versement de contribu-

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(i) *Constitutional Convention*

The Attorney General for Ontario argued, in the words of his factum, that "with respect to federal-provincial cost-sharing agreements a constitutional convention exists that neither Parliament nor the legislatures will use their legislative authority unilaterally to alter their obligations." Presumably the last two words mean "the obligations of the governments which are responsible to them". These submissions were adopted by the Attorneys General for Alberta and Saskatchewan. Additionally, the Attorney General for Alberta argued that there is a convention that the federal government will not introduce legislation to alter unilaterally Canada's obligations under the *Plan*.

The question, as I have interpreted it, does not ask about conventions. The existence of a convention can only relate to the question as an aspect of legitimate expectations. I have concluded that that doctrine does not apply to the legislative process and therefore does not apply here. The existence of a convention, therefore, is irrelevant and need not be considered further in answering this question.

(ii) *Manner and Form*

Again, this is not properly raised by either question. This argument was presented by the Native Council of Canada and the United Native Nations of British Columbia. I refer to them together hereinafter as N.C.C.

This submission differs from all of those heretofore discussed in that it is an argument that the addition of s. 5.1 to the *Plan* by s. 2 of the *Government Expenditures Restraint Act* is *ultra vires* Parliament. The argument is based on the idea that even a sovereign body can restrict itself in respect of the "manner and form" of subsequent legislation. N.C.C. cited *Attorney-General for New South Wales v. Trethowan*, [1932] A.C. 526, in which the Privy Council found that the legislature of New South Wales had so

(i) *La convention constitutionnelle*

Le procureur général de l'Ontario fait valoir, dans son mémoire, qu' [TRADUCTION] «en ce qui concerne les ententes fédérales-provinciales de partage des coûts, il existe une convention constitutionnelle qui veut que ni le Parlement ni les assemblées législatives ne se serviront unilatéralement de leur pouvoir législatif pour changer leurs obligations». Les deux derniers mots signifient vraisemblablement «les obligations du gouvernement qui est comptable au corps législatif en question». Ces arguments ont été adoptés par les procureurs généraux de l'Alberta et de la Saskatchewan. En outre, le procureur général de l'Alberta a soutenu qu'il existe une convention selon laquelle le gouvernement fédéral ne légiférera pas pour modifier unilatéralement les obligations imposées au Canada par le *Régime*.

La question, telle que je l'interprète, ne concerne pas les conventions. Ce n'est qu'en tant qu'aspect de l'expectative légitime que l'existence d'une convention peut se rapporter à la question. J'ai conclu que la théorie de l'expectative légitime ne s'applique pas au processus législatif et qu'elle n'est donc pas applicable en l'espèce. L'existence d'une convention n'a donc aucune pertinence et il n'est pas nécessaire d'en tenir compte davantage pour répondre à cette question.

(ii) *Le mode et la forme*

Encore une fois, il s'agit d'un point qui n'est pas légitimement soulevé par l'une ou l'autre question. L'argument à ce sujet a été présenté par le Conseil national des autochtones du Canada et par les United Native Nations of British Columbia, que je désignerai ci-après par le sigle C.N.A.C.

Cet argument diffère de tous ceux traités jusqu'ici en ce sens qu'on allègue que l'adjonction de l'art. 5.1 au *Régime* opérée par l'art. 2 de la *Loi sur la compression des dépenses publiques* excède la compétence du Parlement. L'argument repose sur l'idée que même un corps législatif souverain peut s'imposer des restrictions quant au «mode» et à la «forme» de toute loi subséquente. Le C.N.A.C. a cité à cet égard l'affaire *Attorney-General for New South Wales v. Trethowan*, [1932] A.C. 526, dans laquelle le Conseil

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restrained itself. Also, it referred to *R. v. Mercure*, [1988] 1 S.C.R. 234, in which it was held that the legislature of Saskatchewan was bound to enact statutes in both English and French.

N.C.C. said that when one reads ss. 8(2) and 9(2) of the *Plan* together, there is revealed, by necessary implication, a requirement that subsequent legislation cannot alter the *Plan* unless the consent of the affected province or provinces is obtained. By these sections Parliament prevented the federal government from unilaterally terminating its obligations under the *Plan* or an agreement; hence, by implication, Parliament imposed upon itself a requirement that provincial consent be obtained before the legislation could be amended. Further, N.C.C. submitted that if the *Plan* does not reveal an intention that Parliament has bound itself to obtain provincial consent before amending the *Plan*, then at least an intention is revealed that the government is bound to do so before introducing amending legislation.

I reject this argument. Neither intention is revealed in the *Plan*. Any "manner and form" requirement in an ordinary statute must overcome the clear words of s. 42(1) of the *Interpretation Act*, which I set out again for ease of reference:

> **42.** (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

This provision requires that federal statutes ordinarily be interpreted to accord with the doctrine of parliamentary sovereignty.

In order for this argument to succeed, it would first have to be shown that Parliament intended, in the face of s. 42(1), to bind itself or to restrict the legislative powers of those of its members who are also members of the executive. The sections of the *Plan* which are supposed to reveal this intention are ss. 8(2) and 9(2). They say absolutely nothing about

privé a conclu que la législature de la Nouvelle-Galles du Sud s'était mise sous le coup d'une telle restriction. Le C.N.A.C. s'est référé en outre à l'arrêt *R. c. Mercure*, [1988] 1 R.C.S. 234, où il a été statué que l'assemblée législative de la Saskatchewan était tenue d'adopter ses lois en français et en anglais.

Selon le C.N.A.C., quand on rapproche les par. 8(2) et 9(2) du *Régime*, il s'en dégage, par voie d'interprétation nécessaire, une exigence qu'aucune modification ne soit apportée au *Régime* au moyen d'une loi subséquente, si ce n'est avec l'assentiment de la province ou des provinces touchées. Au moyen de ces paragraphes, le Parlement empêche le gouvernement fédéral de mettre fin unilatéralement à ses obligations découlant du *Régime* ou d'un accord. Le Parlement s'est donc implicitement imposé l'exigence d'obtenir l'assentiment de la province pour pouvoir modifier la mesure législative. De plus, le C.N.A.C. a fait valoir que, si le *Régime* ne manifeste aucune intention de la part du Parlement de s'imposer l'obligation d'obtenir l'assentiment de la province avant de modifier le *Régime*, il traduit à tout le moins l'intention d'obliger le gouvernement à le faire avant de déposer un projet de loi modificative.

Je rejette cet argument. Le *Régime* n'exprime ni l'une ni l'autre intention. Toute exigence de «mode» et de «forme» posée dans une loi ordinaire doit surmonter le texte clair du par. 42(1) de la *Loi d'interprétation*, que, par souci de commodité, je reproduis de nouveau:

> **42.** (1) Il est entendu que le Parlement peut toujours abroger ou modifier toute loi et annuler ou modifier tous pouvoirs, droits ou avantages attribués par cette loi.

Cette disposition exige que les lois fédérales soient ordinairement interprétées de manière à s'accorder avec la théorie de la souveraineté du Parlement.

Pour que cet argument soit retenu, il faudrait d'abord démontrer que, nonobstant le par. 42(1), le Parlement a eu l'intention de se lier les mains ou de restreindre les pouvoirs législatifs des députés qui composent également l'exécutif. Cette intention est censée se dégager des par. 8(2) et 9(2) du *Régime*. Or, ceux-ci ne disent absolument rien concernant la

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the amendment of the *Plan*, and so reveal no parliamentary intention of the sort argued for by N.C.C.

It is no coincidence that when this Court has found "manner and form" restrictions, the instrument creating the restrictions has not been an ordinary statute. Regard may be had for *R. v. Drybones*, [1970] S.C.R. 282, in which a provision of the *Indian Act* was held to be inoperative pursuant to the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reprinted in R.S.C., 1985, App. III). The latter statute was described as "a quasi-constitutional instrument" by Laskin J. (as he then was) in *Hogan v. The Queen*, [1975] 2 S.C.R. 574, at p. 597. Similarly, in *R. v. Mercure*, *supra*, s. 110 of *The North-West Territories Act*, R.S.C. 1886, c. 50, as re-enacted by S.C. 1891, c. 22, s. 18, was held to impose "manner and form" limitations on the legislature of Saskatchewan. But s. 110 was explicitly directed at the legislature, and the Court observed that the section was continued in force by the constituent statute of the province. Both the *Canadian Bill of Rights* and s. 110 of *The North-West Territories Act* have a constitutional nature. It may be that where a statute is of a constitutional nature and governs legislation generally, rather than dealing with a specific statute, it can impose requirements as to manner and form. But where a statute has no constitutional nature, it will be very unlikely to evidence an intention of the legislative body to bind itself in the future.

That is the case here. The sections of the *Plan* relied upon address amendments to the Agreement and amendments to the regulations under the *Plan*. They say nothing about amendments to the *Plan*. The *Plan* has no constitutional nature. It does not purport to impose any "manner and form" requirement.

There is a further problem with this argument. It is clear that parliamentary sovereignty prevents a legislative body from binding itself as to the substance of its future legislation. The claim that is made in a "manner and form" argument is that the body has

modification du *Régime* et, par conséquent, ils ne révèlent chez le législateur fédéral aucune intention du genre évoqué par le C.N.A.C.

Ce n'est pas une coïncidence que, dans les cas où notre Cour a conclu à l'existence de restrictions quant au «mode» et à la «forme», ce n'était pas par une loi ordinaire que les restrictions étaient édictées. Mentionnons, à cet égard, l'arrêt *R. c. Drybones*, [1970] R.C.S. 282, dans lequel une disposition de la *Loi sur les Indiens* a été jugée inopérante en application de la *Déclaration canadienne des droits*, S.C. 1960, ch. 44 (réimprimée à L.R.C. (1985), app. III). Cette dernière loi a été qualifiée de «document quasi constitutionnel» par le juge Laskin (plus tard Juge en chef) dans l'arrêt *Hogan c. La Reine*, [1975] 2 R.C.S. 574, à la p. 597. De même, dans l'arrêt *R. c. Mercure*, précité, il a été jugé que l'art. 110 de l'*Acte des territoires du Nord-Ouest*, S.R.C. 1886, ch. 50, adopté de nouveau à S.C. 1891, ch. 22, art. 18, imposait à l'assemblée législative de la Saskatchewan des restrictions en matière de «mode» et de «forme». Mais l'article 110 visait expressément l'assemblée législative et la Cour a observé qu'il continuait à s'appliquer aux termes de la loi constitutive de la province. La *Déclaration canadienne des droits* et l'art. 110 de l'*Acte des territoires du Nord-Ouest* sont tous deux de nature constitutionnelle. Il se peut qu'une loi qui est de nature constitutionnelle et qui régit la législation en général plutôt que de porter sur une loi précise puisse imposer des exigences quant au mode et à la forme. Toutefois, lorsqu'une loi ne présente aucun caractère constitutionnel, il est fort peu probable qu'elle traduise une intention de la part du corps législatif de se lier pour l'avenir.

Tel est le cas en l'espèce. Les articles du *Régime* qu'on a invoqués concernent la modification de l'accord et des règlements pris en vertu du *Régime*. Ils sont muets relativement à la modification du *Régime*. Celui-ci n'a aucun caractère constitutionnel. Il n'a pas pour objet d'imposer une exigence quant au «mode» et à la «forme».

Cet argument présente une autre difficulté. Il est évident en effet que la souveraineté du Parlement vient empêcher un corps législatif de se lier les mains en ce qui concerne la teneur de sa législation future. Or, l'argument relatif au «mode» et à la «forme» veut

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restrained itself, not in respect of substance, but in respect of the procedure which must be followed to enact future legislation of some sort, or the form which such legislation must take. In *West Lakes Ltd. v. South Australia*, *supra*, a "manner and form" argument was rejected. King C.J. said (at pp. 397-98):

> Even if I could construe the statute according to the plaintiff's argument, I could not regard the provision as prescribing the manner or form of future legislation. A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure . . . does not, to my mind, prescribe a manner or form of lawmaking, but rather amounts to a renunciation *pro tanto* of the lawmaking power.

Those words are fully applicable here.

(iii) *Jurisdiction*

The Attorney General of Manitoba argued that Parliament lacked legislative jurisdiction to make the proposed change to the *Plan*. Again, this is not raised by the questions, but I will consider these submissions briefly.

Like the N.C.C., the Attorney General of Manitoba argued that s. 2 of the *Government Expenditures Restraint Act* is *ultra vires* Parliament. The argument begins with the observation that the federal spending power is wider than the field of federal legislative competence. So, as with the *Plan*, Parliament can authorize the disbursement of federal funds to the provinces for use in areas within provincial jurisdiction. Manitoba said that once Parliament authorized the federal government to enter into an agreement with British Columbia and such an agreement was executed, Parliament became disabled from unilaterally changing the law so as to change the Agreement. There are two reasons for this.

précisément que le corps législatif en question se soit imposé des restrictions, non pas à l'égard de la teneur, mais quant à la procédure à suivre dans l'adoption d'une loi future quelconque ou bien quant à la forme que doit revêtir pareille loi. Dans l'arrêt *West Lakes Ltd. v. South Australia*, précité, un argument relatif au «mode» et à la «forme» a été rejeté. Le juge en chef King a dit (aux pp. 397 et 398):

> [TRADUCTION] Même s'il m'était possible d'interpréter la loi conformément à l'argument de la demanderesse, je ne pourrais considérer la disposition en cause comme prescrivant le mode ou la forme d'une mesure législative future. Une disposition exigeant qu'une entité qui ne fait pas partie de l'appareil législatif donne son consentement à un certain type de législation [. . .] ne prescrit pas, à mon sens, un mode ou une forme d'adoption de lois, mais équivaut plutôt à une renonciation dans cette mesure au pouvoir législatif.

Ces propos s'appliquent pleinement en l'espèce.

(iii) *La compétence*

Le procureur général du Manitoba a soutenu que le Parlement n'avait pas la compétence législative voulue pour apporter au *Régime* la modification projetée. Bien qu'il s'agisse encore une fois d'un point qui n'est pas soulevé par les questions, je me propose tout de même d'examiner brièvement les arguments avancés à ce propos.

Comme le C.N.A.C., le procureur général du Manitoba a fait valoir que l'art. 2 de la *Loi sur la compression des dépenses publiques* excède la compétence du Parlement. L'argument commence par l'observation que le pouvoir de dépenser du fédéral est plus large que le champ de la compétence législative fédérale. Ainsi, comme il l'a fait dans le cas du *Régime*, le Parlement peut autoriser le paiement de fonds fédéraux aux provinces pour qu'elles s'en servent dans des domaines de compétence provinciale. D'après le Manitoba, du moment que le Parlement autorisait le gouvernement fédéral à conclure un accord avec la Colombie-Britannique et dès que cet accord était signé, le Parlement devenait inhabile à modifier unilatéralement la loi de manière à changer l'accord. Il y a deux raisons à cela.

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TAB 47

Court of Queen's Bench of Alberta

Citation: Nature Conservancy of Canada v Waterton Land Trust Ltd, 2014 ABQB 303

Date: 20140516
Docket: 0601 00089
Registry: Calgary

2014 ABQB 303 (CanLII)

Between:

**The Nature Conservancy of Canada/
La Societe Canadienne Pour La Conservation De La Nature**

[Plaintiff]

- and -

Waterton Land Trust Ltd., Waterton Land Trust, Wild West Buffalo Ranches Ltd., Waterton Land Trust Limited Partnership, Thomas H. Olson, Bruce Lemons, Kenneth Lukowiak and Moose Mountain Buffalo Ranch

[Defendant]

- and -

Waterton Land Trust Ltd., Waterton Land Trust, Wild West Buffalo Ranches Ltd., Waterton Land Trust Limited Partnership, Thomas H. Olson and Moose Mountain Buffalo Ranch

[Plaintiffs by Counter-claim]

- and -

**The Nature Conservancy of Canada/
La Societe Canadienne Pour La Conservation De La Nature, Larry Simpson and Alberta Conservation Association**

[Defendants by Counter-claim]

**Reasons for Judgment
of the
Honourable Mr. Justice P.R. Jeffrey**

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[385] The conservation purposes listed in section 29(1) of *ALSA* must be examined purposively, with a consideration of the legislative intent behind the statute. As the Supreme Court of Canada recently explained in *R v ADH*, 2013 SCC 28 at para 25:

> Presumptions of legislative intent are not self-applying rules. They are instead principles of interpretation. They do not, on their own, prescribe the outcome of interpretation, but rather set out broad principles that ought to inform it. As Professor Sullivan has observed, presumptions of legislative intent, such as this one, serve as a way in which the courts recognize and incorporate important values into the legal context in which legislation is drafted and should be interpreted. These values both inform judicial understanding of legislation and play an important role in assessing competing interpretations: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 365.

[386] The language found in section 29(1) is directional and encompassing, not prescriptive of instances limited in number. It speaks of broad principles not narrow lists.

[387] The Defendants have not advanced any authority for the general proposition that the NCC was required to introduce expert scientific evidence in order to establish the fencing provision's satisfaction of the conservation purposes set out in *ALSA*.

[388] I disagree with what amounts to a presumption of invalidity. I disagree that *a priori* a conservation easement is unenforceable unless the grantee demonstrates with scientific evidence that the conservation easement, or the specific term of it to be enforced, *accomplishes* at least one of the statutory purposes for the legislators creating conservation easements, now set out in *ALSA*. Section 29 permits conservation easements to exist where the grantor had at least one of the stated purposes for the conservation easement. Proof of accomplishing one of those purposes, or proof of the probability of accomplishing one of those purposes, or proof of potentially or even possibly accomplishing one of those purposes is not required. The prerequisite is that the grantor had one of those purposes in mind. There will be many ways to prove such intent, most notably by inference from the wording of the conservation easement. On the face of a conservation easement it will usually be apparent whether the grantor's purposes fell within at least one of the statutory purposes.

[389] Put another way, convincing proof that adherence to a particular term of a conservation easement is actually undermining one or all of the statutory purposes would not prove the grantor did not intend the conservation easement to accomplish one of the statutory purposes.

[390] In this case, the wording of both the Initial ACA CE and, following its amendments, the CE, satisfied me that its grantor, originally the NCC, intended "(a) the protection, conservation and enhancement of the environment" where "environment" includes "living organisms". The NCC's testimony confirmed this intention.

[391] The Waterton Parties asserted the NCC failed to lead evidence demonstrating the validity of the CE's terms. I disagree. The NCC's evidence on this was not in the form of scientific evidence that the Bison Parties maintained was necessary, but Simpson addressed the NCC's

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TAB 48

IN THE MATTER OF Section 55 of the *Supreme Court Act*, R.S.C. 1970, c. S-19;

AND IN THE MATTER OF a Reference by the Governor in Council concerning certain language rights under Section 23 of the *Manitoba Act, 1870*, and Section 133 of the *Constitution Act, 1867* and set out in Order-in-Council P.C. 1984-1136 dated the 5th day of April 1984;

AND IN THE MATTER OF a Special Hearing to establish the minimum period necessary for translation, re-enactment, printing and publishing of:

1. unilingual Acts of the Legislature of Manitoba which would be currently in force were it not for their constitutional defect; and

2. the unilingual repealed and spent Acts of the Legislature of Manitoba;

pursuant to the opinion of the Supreme Court of Canada dated the 13th day of June 1985.

DANS L'AFFAIRE de l'article 55 de la *Loi sur la Cour suprême*, S.R.C. 1970, chap. S-19;

ET DANS L'AFFAIRE d'un renvoi adressé par le gouverneur en conseil au sujet de certains droits linguistiques garantis par l'article 23 de la *Loi de 1870 sur le Manitoba* et par l'article 133 de la *Loi constitutionnelle de 1867*, tel qu'énoncé dans le décret C.P. 1984-1136 en date du 5 avril 1984;

ET DANS L'AFFAIRE d'une audition spéciale visant à l'établissement du délai minimum requis pour la traduction, la réadoption, l'impression et la publication:

1. des lois unilingues de la Législature du Manitoba qui seraient actuellement en vigueur, n'était-ce le vice dont elles sont entachées sur le plan constitutionnel,

2. des lois unilingues abrogées et périmées de la Législature du Manitoba;

conformément à l'opinion de la Cour suprême du Canada datée du 13 juin 1985.

INDEXED AS: REFERENCE RE MANITOBA LANGUAGE RIGHTS

File No.: 18606.

1991: October 8; 1992: January 23.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

SPECIAL HEARING ON MANITOBA LANGUAGE RIGHTS

Constitutional law — Language guarantees — Scope of s. 23 of Manitoba Act, 1870 — Instruments of legislative nature — Whether s. 23 applicable to certain types of orders in council and to documents incorporated by reference in legislation — Whether orders in council fall within phrase "Records and Journals" of legislature in

RÉPERTORIÉ: RENVOI RELATIF AUX DROITS LINGUISTIQUES AU MANITOBA

Nº du greffe: 18606.

1991: 8 octobre; 1992: 23 janvier.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson et Iacobucci.

AUDITION SPÉCIALE SUR LES DROITS LINGUISTIQUES AU MANITOBA

Droit constitutionnel — Garanties linguistiques — Portée de l'art. 23 de la Loi de 1870 sur le Manitoba — Textes de nature législative — L'article 23 s'applique-t-il à certains types de décrets et aux documents incorporés par renvoi dans les «lois de la législature» — Les décrets relèvent-ils de l'expression «archives, procès-

1992 CanLII 115 (SCC)

s. 23 — Criteria for determining legislative nature — Extension of time period for compliance with s. 23 — Period of temporary validity extended — Retroactivity — Manitoba Act, 1870, S.C. 1870, c. 3, s. 23.

Following the judgment of this Court in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, a dispute arose among the parties concerned as to which instruments had to be translated, re-enacted, printed and published, pursuant to s. 23 of the *Manitoba Act, 1870*, in order to comply with the judgment. To solve the dispute, this Court agreed to hear new questions put forward by the parties to determine whether certain types of orders in council and documents incorporated by reference in the "Acts of the Legislature" fell within the scope of s. 23.

Held: Section 23 of the *Manitoba Act, 1870* applies to orders in council which are of a legislative nature and, under certain conditions, to documents incorporated by reference in the legislation.

(1) *Orders in Council*

The requirements of s. 23 of the *Manitoba Act, 1870* apply to orders in council which are determined to be of "a legislative nature". To make this determination, the form, content and effect of the instrument in question must be considered. The criteria indicative of a legislative nature do not operate cumulatively. An instrument may be determined to be legislative in form, though not in content, and under the criteria it would nonetheless be determined to be of a legislative nature. With respect to form, sufficient connection between the legislature and the instrument is indicative of a legislative nature. This connection is established where the instrument is, pursuant to legislation, enacted by the government, or made subject to the approval of the government. With respect to content and effect, the following are indicative of a legislative nature: the instrument embodies a rule of conduct; the instrument has the force of law; and the instrument applies to an undetermined number of persons.

Orders in council as a category do not fall within the phrase "Records and Journals" of the House in s. 23 of the *Manitoba Act, 1870*. The scope of that phrase must be limited to those documents which are actually tabled in the Legislative Assembly.

verbaux et journaux» de la Chambre dans l'art. 23? — Critères permettant de déterminer la nature législative — Prorogation du délai pour se conformer à l'art. 23 — Prorogation de la période de validité temporaire — Rétroactivité — Loi de 1870 sur le Manitoba, S.C. 1870, ch. 3, art. 23.

Par suite de l'arrêt de notre Cour *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, un litige est survenu entre les parties quant à savoir quels textes devaient être traduits, adoptés de nouveau, imprimés et publiés, aux termes de l'art. 23 de la *Loi de 1870 sur le Manitoba*, pour se conformer à l'arrêt. Pour régler le litige, notre Cour a accepté d'entendre de nouvelles questions présentées par les parties pour déterminer si certains types de décrets et de documents incorporés par renvoi dans les «lois de la législature» relèvent de l'art. 23.

Arrêt: L'article 23 de la *Loi de 1870 sur le Manitoba* s'applique aux décrets qui sont de nature législative et, sous réserve de certaines conditions, aux documents incorporés par renvoi dans les «lois de la législature».

(1) *Décrets*

Les exigences de l'art. 23 de la *Loi de 1870 sur le Manitoba* s'appliquent aux décrets qui sont déterminés comme étant de «nature législative». Pour faire cette détermination, il convient d'examiner la forme, le contenu et l'effet du texte en question. Les critères indicatifs d'une nature législative ne s'appliquent pas de façon cumulative. On pourrait déterminer qu'un texte est de caractère législatif du point de vue de la forme mais pas du point de vue du contenu et déterminer néanmoins en vertu des critères que ce texte est de nature législative. En ce qui a trait à la forme, un lien suffisant entre l'Assemblée législative et le texte indique qu'il est de nature législative. Ce lien est établi lorsque le texte est adopté, en vertu de la loi, par le gouvernement, ou assujetti à l'approbation du gouvernement. En ce qui a trait au contenu et à l'effet, les éléments suivants indiquent la nature législative: le texte comprend une règle de conduite; le texte a force de loi; et le texte s'applique à un nombre indéterminé de personnes.

Les décrets en tant que catégorie ne s'inscrivent pas dans le cadre de l'expression «archives, procès-verbaux et journaux» de la Chambre dans l'art. 23 de la *Loi de 1870 sur le Manitoba*. La portée de cette expression doit être limitée aux documents qui sont réellement déposés à l'Assemblée législative.

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(2) *Documents Incorporated by Reference in Legislation*

The requirements of s. 23 also apply to documents incorporated by reference in Acts of the Manitoba Legislature if the following conditions are met: (a) the primary instrument in which the document is incorporated is "a legislative instrument"; (b) the incorporation is a true incorporation in that the document is an integral part of the primary instrument as if reproduced therein; and (c) the document was generated by the Government of Manitoba. Where a document is created by the legislature or the executive or where the document requires ministerial or legislative approval to give it life, the connection between the government and the document is sufficiently strong to conclude that the document is generated by the government itself. Even where the document is generated by an outside source — for example, another government or a non-governmental body — it will still attract s. 23 obligations unless it can be shown that there was a *bona fide* purpose behind its incorporation without translation.

(3) *Extension of Time Period for Compliance*

The period of temporary validity of Acts of the Manitoba Legislature which would currently be in force were it not for their constitutional defect will be extended for a period of time to be determined by agreement between the parties. The period of temporary validity is hereby extended for three months from the date this judgment is handed down. The parties must reach an agreement with respect to the further extension of the time period within those three months,* or apply to this Court for a determination of the issue.

(4) *Retroactivity*

Instruments enacted unilingually by the Government of Manitoba between the handing down of *Reference re Manitoba Language Rights* and the handing down of this judgment, now deemed to fall within the scope of s. 23, will be rendered valid retroactively provided that compliance with s. 23 is achieved within the time period outlined above. The period of temporary validity will not, however, apply to any unilingual Acts of the Legislature enacted after the date of this judgment.

Cases Cited

Referred to: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Attorney General of Que-*

(2) *Les documents incorporés par renvoi dans la loi*

Les exigences de l'art. 23 s'appliquent également aux documents incorporés par renvoi dans les lois de l'Assemblée législative du Manitoba si les conditions suivantes sont respectées: a) le texte primaire auquel le document est incorporé est «un texte législatif»; b) l'incorporation est une incorporation véritable, c'est-à-dire que le document fait partie intégrante du texte primaire comme s'il y était reproduit; et c) le document a été produit par le gouvernement du Manitoba. Lorsqu'un document est créé par l'Assemblée législative ou par l'exécutif ou lorsque le document exige une approbation ministérielle ou législative pour entrer en vigueur, le rapport entre le gouvernement et le document est suffisamment solide pour conclure que le document est produit par le gouvernement lui-même. Même lorsque le document émane d'une source extérieure, par exemple un autre gouvernement ou un organisme non gouvernemental, il sera encore assujetti aux exigences de l'art. 23 à moins qu'on ne puisse démontrer que son incorporation sans traduction est fondée sur un motif légitime.

(3) *Prorogation du délai pour se conformer à l'arrêt*

La période de validité temporaire des lois de l'Assemblée législative du Manitoba qui seraient actuellement en vigueur n'était-ce le vice dont elles sont entachées sur le plan constitutionnel est prorogée d'une période qui sera déterminée par accord entre les parties. La période de validité temporaire est par les présentes prorogée de trois mois à partir de la date du présent arrêt. Les parties doivent, avant l'expiration de ce délai de trois mois, parvenir à un accord sur la durée de la prorogation supplémentaire du délai* ou demander à notre Cour de rendre une décision à ce sujet.

(4) *Rétroactivité*

Les textes unilingues adoptés par le gouvernement du Manitoba entre le prononcé du *Renvoi relatif aux droits linguistiques au Manitoba* et le prononcé du présent arrêt, qui sont maintenant réputés assujettis à l'art. 23, deviendront valides rétroactivement pourvu qu'ils respectent les exigences de l'art. 23 dans le délai prévu précédemment. Toutefois, la période de validité temporaire ne s'appliquera pas aux lois unilingues de l'Assemblée législative adoptée après la date du présent arrêt.

Jurisprudence

Arrêts mentionnés: *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Procureur*

* See p. 235.

* Voir p. 235.

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bec v. Blaikie, [1979] 2 S.C.R. 1016; *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312; *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377; *Re Manitoba Language Rights Order*, [1985] 2 S.C.R. 347; *Re Manitoba Language Rights Order*, [1990] 3 S.C.R. 1417; *Attorney-General of Quebec v. Collier* (1985), 23 D.L.R. (4th) 339, [1985] C.A. 559, aff'd [1990] 1 S.C.R. 260.

général du Québec c. Blaikie, [1979] 2 R.C.S. 1016; *Procureur général du Québec c. Blaikie*, [1981] 1 R.C.S. 312; *MacDonald c. Ville de Montréal*, [1986] 1 R.C.S. 460; *Société des Acadiens du Nouveau-Brunswick Inc. c. Association of Parents for Fairness in Education*, [1986] 1 R.C.S. 549; *Grand Montréal, Commission des écoles protestantes c. Québec (Procureur général)*, [1989] 1 R.C.S. 377; *Ordonnance relative aux droits linguistiques au Manitoba*, [1985] 2 R.C.S. 347; *Ordonnance relative aux droits linguistiques au Manitoba*, [1990] 3 R.C.S. 1417; *Procureur général du Québec c. Collier*, [1985] C.A. 559, conf. [1990] 1 R.C.S. 260.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 93, 133.
Manitoba Act, 1870, S.C. 1870, c. 3, s. 23.

Lois et règlements cités

Loi constitutionnelle de 1867, art. 93, 133.
Loi de 1870 sur le Manitoba, S.C. 1870, ch. 3, art. 23.

Authors Cited

Canada. House of Commons. Special Committee on Statutory Instruments. *Third Report of the Special Committee on Statutory Instruments*. Ottawa: Queen's Printer, 1969.

Doctrine citée

Canada. Chambre des communes. Comité spécial sur les instruments statutaires. *Troisième rapport du Comité spécial sur les instruments statutaires*. Ottawa: Imprimeur de la Reine, 1969.

SPECIAL HEARING concerning certain language rights under s. 23 of the *Manitoba Act, 1870*.

AUDITION SPÉCIALE concernant certains droits linguistiques visés à l'art. 23 de la *Loi de 1870 sur le Manitoba*.

D. Martin Low, Q.C., and *Warren J. Newman*, for the Attorney General of Canada.

D. Martin Low, c.r., et *Warren J. Newman*, pour le procureur général du Canada.

Jean-Yves Bernard, Louis Rochette and *Marise Visocchi*, for the Attorney General of Quebec.

Jean-Yves Bernard, Louis Rochette et *Marise Visocchi*, pour le procureur général du Québec.

Donna J. Miller and *Deborah L. Carlson*, for the Attorney General of Manitoba.

Donna J. Miller et *Deborah L. Carlson*, pour le procureur général du Manitoba.

Michel Bastarache and *Antoine F. Hacault*, for the Société franco-manitobaine.

Michel Bastarache et *Antoine F. Hacault*, pour la Société franco-manitobaine.

Vaughan L. Baird, Q.C., for Roger Bilodeau.

Vaughan L. Baird, c.r., pour Roger Bilodeau.

François Dumaine, for the Fédération des francophones hors Québec.

François Dumaine, pour la Fédération des francophones hors Québec.

Stephen A. Scott and *Victoria Percival-Hilton*, for Alliance Quebec.

Stephen A. Scott et *Victoria Percival-Hilton*, pour Alliance Québec.

1992 CanLII 115 (SCC)

The following is the judgment delivered by

THE COURT—

I. The Facts

On June 13, 1985, this Court issued a judgment in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, which determined that the requirements of s. 133 of the *Constitution Act, 1867* and of s. 23 of the *Manitoba Act, 1870*, S.C. 1870, c. 3, with respect to the use of both the English and French languages in the Records and Journals and in the Acts of Parliament and of the Legislatures of Manitoba and Quebec are mandatory. Consequently it was held that all statutes and regulations of the province of Manitoba that were not printed and published in both English and French were invalid, but they were deemed to have temporary force and effect for the minimum period of time necessary for their translation, re-enactment, printing and publication.

The parties and interveners arrived at a consent agreement with respect to this minimum period which was given effect by this Court on November 4, 1985, [1985] 2 S.C.R. 347. The Order issued dictated that the period would continue to December 31, 1988, for "the Continuing Consolidation of the Statutes of Manitoba" and "the Regulations of Manitoba" and to December 31, 1990 for "all other laws of Manitoba" (p. 349).

The Government of Manitoba then devised a set of criteria for discerning which instruments had to be translated, re-enacted, printed and published in order to comply with this Court's judgment. Essentially, this involved a determination of whether the various instruments were considered to be "of a legislative nature".

This course of action has given rise to a dispute between the parties, the Attorney General of Manitoba and the Société franco-manitobaine ("SFM"), with respect to which types of orders in council are subject to the judgment. It is the position of the Attorney General that only those orders in council

Le jugement suivant a été rendu par

LA COUR—

I. Les faits

Le 13 juin 1985, notre Cour a rendu jugement sur le *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, dans lequel elle a décidé que les exigences de l'art. 133 de la *Loi constitutionnelle de 1867* et de l'art. 23 de la *Loi de 1870 sur le Manitoba*, S.C. 1870, ch. 3, relativement à l'usage du français et de l'anglais dans les archives, procès-verbaux et journaux ainsi que dans les lois du Parlement et des législatures du Manitoba et du Québec sont impératives. Par conséquent, notre Cour a conclu que toutes les lois et tous les règlements de la province du Manitoba qui n'étaient pas imprimés et publiés en anglais et en français étaient invalides mais qu'ils étaient réputés temporairement valides et opérants pendant le délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier.

Les parties et les intervenants se sont entendus sur ce délai minimum auquel notre Cour a donné effet le 4 novembre 1985, [1985] 2 R.C.S. 347. Aux termes de l'ordonnance de la Cour, la période devait continuer jusqu'au 31 décembre 1988 en ce qui concerne «la Consolidation permanente des lois du Manitoba» et «les règlements du Manitoba» et jusqu'au 31 décembre 1990 en ce qui concerne «toutes les autres lois du Manitoba» (p. 349).

Le gouvernement du Manitoba a élaboré alors un ensemble de critères pour déterminer quels textes devaient être traduits, adoptés de nouveau, imprimés et publiés de manière à se conformer à l'arrêt de notre Cour. Essentiellement, il s'agissait de déterminer si les divers textes étaient «de nature législative».

Cette manière de procéder a donné lieu à un litige entre les parties, le procureur général du Manitoba et la Société franco-manitobaine («SFM»), relativement au genre de décrets visés par l'arrêt. Le procureur général est d'avis que seuls les décrets «de nature législative» sont visés

1992 CanLII 115 (SCC)

Documents Incorporated by Reference

The second aspect of this case which must be addressed relates to documents incorporated by reference in "Acts of the Legislature". The question posed is which of these documents must be translated in accordance with the terms of this Court's earlier judgment in *Reference re Manitoba Language Rights*, *supra*. Again the Attorney General of Manitoba seeks to limit the documents which are required to be translated while the SFM essentially argues that all such documents are required to be translated.

The Threshold Questions

At the outset of this inquiry two threshold questions must be answered. First, is the primary instrument in which the document is incorporated an "Act of the Legislature"? Second, what is meant by "incorporation"? It is relatively easy to answer the first question. The first portion of this judgment relating to orders in council was directed toward determining what comprises an "Act of the Legislature". If the primary instrument in which the document is incorporated is not, on the application of the above criteria, "of a legislative nature" and is not itself subject to s. 23, obviously neither is the incorporated document.

The second question requires elaboration. Some documents are simply mentioned in legislative instruments; they need not be consulted before the operation of the instrument in question can be understood. Others are "incorporated by reference" in the sense that they are an integral part of the primary instrument as if reproduced therein. It is this latter type of incorporation that can be termed "true incorporation" and that potentially attracts translation obligations under s. 23. A clear example of a true incorporation can be found in *Attorney-General of Quebec v. Collier* (1985), 23 D.L.R. (4th) 339, [1985] C.A. 559 (upheld by this Court, [1990] 2 S.C.R. 260). There it was held that unilingual session papers effectively formed the substance of two bills which had been passed in both official languages (at p. 346 D.L.R.):

Les documents incorporés par renvoi

Le deuxième point à traiter en l'espèce concerne les documents incorporés par renvoi dans les «lois de la législature». La question est de savoir lesquels, parmi ces documents, doivent être traduits conformément aux termes de l'arrêt antérieur de notre Cour dans le *Renvoi relatif aux droits linguistiques au Manitoba*, précité. Là encore, le procureur général du Manitoba cherche à limiter les documents qui doivent être traduits alors que la SFM soutient essentiellement que tous ces documents doivent être traduits.

Les questions préliminaires

Au début du présent examen, il faut répondre à deux questions préliminaires. Premièrement, le texte primaire, celui auquel le document est incorporé, est-il une «loi de la législature»? Deuxièmement, que signifie «incorporation»? Il est relativement facile de répondre à la première question. La première partie du présent arrêt, qui se rapporte aux décrets, visait à déterminer ce qui constituait une «loi de la législature». Si le texte primaire auquel le document est incorporé n'est pas, en application des critères mentionnés précédemment, «de nature législative» et n'est pas lui-même assujetti à l'art. 23, il est évident que le document incorporé ne le sera pas non plus.

La deuxième question exige des précisions. Certains documents sont simplement mentionnés dans des textes législatifs; il n'est pas nécessaire de les consulter pour comprendre le texte lui-même. D'autres sont «incorporés par renvoi» en ce sens qu'ils font partie intégrante du texte primaire comme s'ils y étaient reproduits. C'est ce dernier type d'incorporation qui peut être qualifié d'«incorporation véritable» et qui est susceptible d'entraîner des obligations en matière de traduction aux termes de l'art. 23. Un exemple clair d'incorporation véritable se trouve dans l'arrêt *Procureur général du Québec c. Collier*, [1985] C.A. 559 (confirmé par notre Cour, [1990] 1 R.C.S. 260). Cet arrêt a conclu que des documents sessionnels unilingues formaient en fait la substance de deux projets de loi qui avaient été adoptés dans les deux langues officielles (à la p. 562):

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TAB 49

Citation: ☼ Tsai v. Atlas Anchor Systems (B.C.) Ltd. 2016 BCPC 406

Date: ☼20161205
File No: 16-54513
Registry: Vancouver

2016 BCPC 406 (CanLII)

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

(Small Claims)

BETWEEN:

JACK YI YO TSAI

CLAIMANT

AND:

ATLAS ANCHOR SYSTEMS (B.C.) LTD.

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE R. HARRIS

Appearing in person:	Jack Tsai
Counsel for the Defendant:	Edward L. Montague
Place of Hearing:	Vancouver, B.C.
Date of Hearing:	September 20, 21, 2016
Date of Judgment:	December 5, 2016

[25] According to Mr. D'Sa, once the claimant received his professional designation, the responsibilities of health and safety, costing, and inventory were passed to others and the claimant assumed the role of signing off on drawings and projects. Mr. D'Sa testified that the claimant was not a direct supervisor and he did not have people reporting to him.

Does the incorporation of the ESA notice provisions render the termination clause unenforceable?

[26] The claimant asserts the termination clause is not enforceable because of the reference to the *ESA*. He argues the *ESA* does not apply to engineers and therefore the defendant cannot rely on the termination clause for the calculation of what is reasonable pay in lieu of notice.

[27] The defendant responds by arguing absent unconscionability, an employment contract can, by reference, incorporate provisions of the *ESA* even if the profession involved is one that is exempted from the *ESA.*

[28] In *U.B.C.* v. *The Association of Administrative and Professional Staff on Behalf of Bill Wong,* 2016 BCCA 491, it was argued that an accountant was by profession exempted from the *ESA* and therefore the incorporation of the *ESA* notice into his collective agreement resulted in the provisions not being enforceable and therefore he was entitled to the common law period of pay in lieu of notice.

[29] In dealing with the matter the Court, agreed with the reviewing chambers judge who stated at paragraphs 34-35:

2016 BCPC 406 (CanLII)

> [34] I agree with the conclusion of the chambers judge that a plain reading of Article 9.3.1 is that the provisions of the ***ESA*** providing for notice or pay in lieu of notice are incorporated into the contract in issue. The effect is that the language of the ***ESA*** concerning notice or pay in lieu of notice is part of the contract. It is as if the draftsman included the words either in the text of or as a schedule to the contract.
>
> [35] The chambers judge described the result as "... binding the parties to such statutory provisions". Insofar as these words are merely descriptive of the text included by reference in Article 9.3.1, they are accurate, but the incorporation by reference in this case does not involve an acceptance of any part of the substantive content of the ***ESA***.

2016 BCPC 406 (CanLII)

[30] In *Brown* v. *Utopia Spas and Salons Ltd.,* 2014 BCSC 1400, the court commented specifically on the incorporation of *ESA* provisions into an employment contract and stated at paragraphs 17 - 18:

> [17] Absent unconscionability, an employer can make contracts with employees that "referentially" incorporate the minimum notice periods in the *ESA.* Such contractual notice provisions are enough to displace the presumption that the contract is terminable without cause only on reasonable notice. *Machtinger* at 1004-1005. See also: *University of British Columbia v. Wong,* 2006 BCCA 491 [*UBC*].
>
> [18] The principle of legislative interpretation which holds that material incorporated by reference into a statute or regulation becomes integral to the instrument that incorporates it applies also to contracts and other instruments: *UBC* at para. 29, citing *R. v. Sims*, 2000 BCCA 437 at para. 20; *UBC* at para. 30 citing *R. v. St. Lawrence Cement Inc.* (2002), 60 O.R. (3d) 712, 162 O.A.C. 363; *UBC* at para. 31.

[31] The above authorities are binding on this Court. As such, I conclude, the contract properly incorporated provisions from the *ESA* and that the parties agreed to be bound by these terms. Accordingly, and there being no evidence of unconscionability, I find the termination provision enforceable.

TAB 50

Her Majesty the Queen v. St. Lawrence Cement Inc.

[Indexed as: R. v. St. Lawrence Cement Inc.]

60 O.R. (3d) 712
[2002] O.J. No. 3030
Docket No. C36943

2002 CanLII 45010 (ON CA)

Court of Appeal for Ontario,
Charron, Borins and Feldman JJ.A.
August 2, 2002

Evidence -- Judicial notice -- Emission Standards Guide incorporated by reference in regulation -- Regulation published in Ontario Gazette -- Regulation did not include text of Guide -- Effect of incorporation by reference was that text of Guide became part of text of regulation -- Section 5(4) of Regulations Act requiring that judicial notice be taken of regulations which have been published in Ontario Gazette -- Justice of the Peace required to take judicial notice of Guide -- Justice erring in acquitting defendant of operating vehicle that contravened emission [page713] standards on basis that Crown had not proved Guide -- Regulations Act, R.S.O. 1990, c. R.21, s. 5(4) -- Ontario Regulation 361/98.

The defendant was charged with operating a heavy diesel-fuelled motor vehicle that contravened emission standards contrary to s. 12(5) of O. Reg. 361/98 made under the Environmental Protection Act, R.S.O. 1990, c. E.19. The relevant emission standards are contained in a document entitled Drive Clean Guide (the "Guide") published by the Ministry of the Environment. The Guide is adopted and incorporated by reference in the regulation by s. 12(2) of the Regulation, and the regulation was published in the Ontario Gazette as required by s. 5(1) of the Regulations Act, although the regulation did not include the text of the Guide. At the

defendant's trial before a justice of the peace, the evidence established that its motor vehicle exceeded the emission standards in the Guide, but the justice of the peace acquitted the defendant on the basis that the Crown had not proved the Guide. The acquittal was upheld by the Ontario Court of Justice. The Crown appealed.

Held, the appeal should be allowed.

Section 5(4) of the Regulations Act provides that judicial notice is to be taken of regulations that have been published in the Ontario Gazette. The Guide was part of the regulation as it was incorporated by reference in the regulation. The effect of incorporation by reference is that the material incorporated is considered to be part of the text of the legislation. Because the text of the Guide was effectively written into s. 12(2) of the regulation by the doctrine of incorporation by reference, and because the regulation had been published in the Ontario Gazette, the Crown was not required to prove the Guide, and the justice of the peace was required to take judicial notice of it.

R. v. Sims (2000), 148 C.C.C. (3d) 308 (B.C.C.A.) (sub nom. R. v. Collins), apld

Other cases referred to

Ainsley Financial Corp. v. Ontario Securities Commission (1994), 21 O.R. (3d) 104, 121 D.L.R. (4th) 79 (C.A.); Denison Mines Ltd. and Ontario Securities Commission (Re) (1981), 32 O.R. (2d) 469, 122 D.L.R. (3d) 98 (Div. Ct.); R. v. Khan, [1990] 2 S.C.R. 531, 41 O.A.C. 353, 113 N.R. 53, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1

Statutes referred to

Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 176, 177
Evidence Act, R.S.O. 1990, c. E.23, ss. 27, 29, 32, 36
Interpretation Act, R.S.O. 1990, c. I.11, s. 7(1)

2002 CanLII 45010 (ON CA)

Regulations Act, R.S.O. 1990, c. R.21, s. 5

Rules and regulations referred to

O. Reg. 361/98 ("Environmental Protection Act"), ss. 1, 12

Authorities referred to

Bennion, F., Statutory Interpretation, 3rd ed. (London: Butterworths, 1997)
Schiff, S., Evidence in the Litigation Process, 4th ed. (Scarborough, Ont.: Carswell, 1993)
Sopinka, J., S. Lederman and A.W. Bryant, The Law of Evidence in Canada, 2nd ed. (Toronto: Butterworths, 1999)

APPEAL from a judgment dismissing an appeal from an acquittal on a charge of operating a vehicle that contravened emission standards. [page714]

Isabelle O'Connor and Laura Nemchin, for appellant.
Neal J. Smitheman and Karyn Wasserstein, for respondent.

The judgment of the court was delivered by

[1] BORINS J.A.: -- The respondent, St. Lawrence Cement Inc., was acquitted of the offence of operating a heavy diesel-fuelled motor vehicle that contravened emission standards contrary to s. 12(5) of Ontario Regulation 361/98 made under the Environmental Protection Act, R.S.O. 1990, c. E.19 ("EPA"). The relevant emission standards are contained in a document entitled Drive Clean Guide (the "Guide") published by the Ministry of the Environment. The Guide is adopted and incorporated by reference in the regulation by s. 12(2) of the regulation. Subsections 12(4) and (5) mandate compliance with the emission standards set out in the Guide.

[2] At the respondent's trial before a justice of the peace, although the evidence established that its motor vehicle

2002 CanLII 45010 (ON CA)

(c) There was no statutory authority to adopt the Guide by reference in the regulation as required by Ainsley Financial Corp. v. Ontario Securities Commission (1994), 21 O.R. (3d) 104, 121 D.L.R. (4th) 79 (C.A.).

Analysis

[13] Although leave to appeal was granted on several grounds, as noted in para. 3, in my view the appeal turns on the issue of judicial notice.

[14] As Ontario Regulation 361/98 had been published in The Ontario Gazette as required by s. 5(1) of the Regulations Act, [page718] pursuant to s. 5(4) of the Act the justice of the peace was required to take judicial notice of the regulation. Since s. 12(4) of the regulation adopted the Guide, or incorporated it by reference, as permitted by s. 177(4) of the EPA, s. 12(4) includes the contents of the Guide just as if the text of the Guide had been written into the regulation. Not only the legislative device of incorporation by reference, but also the language of ss. 5(4)(a) and (b) of the Regulations Act, produce this result. There was, therefore, no requirement that the text of the Guide be published in The Ontario Gazette to make it subject to judicial notice. Nor was the Crown required to authenticate, or prove, the Guide through the testimony of the person, or persons, who prepared the Guide.

[15] The doctrine of judicial notice is the vehicle by which statutes and subordinate legislation are proved. At common law, judicial notice has always been taken of a public Act of Parliament or a provincial legislature. No evidence has ever been required concerning its passage through Parliament or a legislature, nor of its contents. The common law rule has been codified and is found in s. 7(1) of the Interpretation Act. A similar provision in respect to regulations published in The Ontario Gazette is in s. 5(4)(b) of the Regulations Act. There is no need to prove that a regulation has been published to rely on s. 5(4). Publication is presumed, subject to proof to the contrary. Indeed, it can be said that statutes and regulations are the everyday companions of judges and counsel

2002 CanLII 45010 (ON CA)

of common law proof by witnesses to authenticate legislation.

[17] As the justice of the peace was required to take judicial notice of the regulation, it is necessary to determine whether the Guide was part of the regulation and, as such, should have been judicially noticed. As I have indicated, although the respondent agrees that the Guide was properly adopted, and thereby incorporated by reference, in s. 12(2) of the regulation, it maintains that because its text was not published in The Ontario Gazette at the time of the regulation's publication, it had to be independently proved. I do not agree.

[18] A helpful discussion of the legislative device of incorporation by reference is to be found in F. Bennion, Statutory Interpretation, 3rd ed. (London: Butterworths, 1997) at pp. 585-91. It enables the legislative draftsman to include provisions of earlier statutes or other documents into statutes or regulations without actually reproducing the language of the statute or document. As Bennion points out, incorporation by reference is a common device of legislators in accordance with the maxim verba relata hoc maxime operantur per referentiam rit it eis inesse videntur (words to which reference is made in an instrument have the same operation as if they were inserted in the instrument referring to them). The effect of incorporation by reference is that the material incorporated is considered to be part of the text of the legislation.

[19] In a case not unlike this appeal, the British Columbia Court of Appeal held that incorporation by reference was complete without publication of the text of the incorporated documents in the Canada Gazette: R. v. Sims (2000), 148 C.C.C. (3d) 308. The court held that it was unnecessary to publish a regulatory standard incorporated by reference together with the regulation before a prosecution based on contravention of the standard could be pursued. It further held at p. 318 C.C.C. that incorporation by reference does not require that the text of the incorporated [page720] document be reproduced in the incorporating statute or regulation. See, also, Re Denison Mines Ltd. and Ontario Securities Commission (1981), 32 O.R. (2d) 469, 122 D.L.R. (3d) 98 (Div. Ct.).

2002 CanLII 45010 (ON CA)

[20] I would adopt and apply the following statement of the law of Rowles J.A. in Sims at p. 315 C.C.C.:

> When material is incorporated by reference into a statute or regulation it becomes an integral part of the incorporating instrument as if reproduced therein. In that regard, see Mainwaring v. Mainwaring, [1942] 2 D.L.R. 377 (B.C.C.A.), in which McDonald, C.J.B.C., referred to the effect of referential legislation in relation to the incorporating statute, at p. 380:
>
> > . . . Legislation by reference . . . has been consistently construed not to be ambulatory in its effect, but to incorporate the extrinsic law as at the date of the Act that is being construed, and to be unaffected by subsequent change of the law incorporated: [citations omitted.] The effect of such legislation is as though the extrinsic law referred to was written right into the Act.

(Emphasis in original)

[21] It follows, therefore, that because the text of the Guide was effectively written into s. 12(2) of the regulation by the doctrine of incorporation by reference, and because the regulation had been published in The Ontario Gazette, the Crown was not required to prove the Guide. The justice of the peace was required to take judicial notice of it. [See Note 1 at end of document] As s. 5(4)(a) of the Regulations Act provides, the publication of the regulation is proof of its text, which includes the text of the Guide. As the respondent, by the provisions of s. 5(4)(b) of the regulation is deemed to have notice of its contents, it is deemed to have notice of the contents of the Guide. Therefore, had the justice of the peace taken judicial notice of the Guide, as the evidence established that the respondent's motor vehicle exceeded the emission standards in the Guide, the justice of the peace would have been bound to register a conviction.

[22] In her factum, counsel for the Crown listed 26 statutes in which incorporation by reference has been used, as in the

2002 CanLII 45010 (ON CA)

TAB 51

Citation: ***R. v. Sims***
2000 BCCA 437

Date: 20000718
Docket: CA024244
CA024245
CA024246
Registry: Vancouver

2000 BCCA 437 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

NO. CA024244

BETWEEN:

REGINA

APPELLANT

AND:

DALE SIMS

RESPONDENT

NO. CA024245

BETWEEN:

REGINA

APPELLANT

AND:

CONRAD NOEL

RESPONDENT

NO. CA024246

BETWEEN:

REGINA

APPELLANT

AND:

**ROVIC ENTERPRISES LTD. doing business as
WESTERN CANADA FIRE PROTECTION,
WESTERN CANADA FIRE PROTECTION (VICTORIA),
WESTERN CANADA FIRE PROTECTION LTD.,
WESTERN CANADA FIRE PROTECTION (VICTORIA) LTD.
WESTERN FIRE PROTECTION, and
RBC HOLDINGS LTD.**

RESPONDENTS

Before: The Honourable Madam Justice Southin
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Mackenzie

Kenneth J. Yule	Counsel for the Appellant
David A. MacLeod	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia June 30, 2000
Place and Date of Judgment:	Vancouver, British Columbia July 18, 2000

Written Reasons by:
The Honourable Madam Justice Rowles

Concurred in by:
The Honourable Madam Justice Southin
The Honourable Mr. Justice Mackenzie

2000 BCCA 437 (CanLII)

highways located on Federal property within the province, *e.g.* the Defence Establishment of Camp Borden, "otherwise than in accordance with the laws of the province and the municipality".

[19] Material other than statutes may also be incorporated by reference. Examples of such material are international conventions or rules, industrial standards of construction or safety, statistical information from Statistics Canada (***Calder v. Canada (M.E.I.)***, [1980] 1 F.C. 842 (F.C.A.) at 852), and generally accepted accounting principles recommended in the Handbook of the Canadian Institute of Chartered Accountants (***Re Denison Mines Ltd. and Ontario Securities Commission***, (1981), 122 D.L.R. (3d) 98 (Ont. G.D.)).

[20] When material is incorporated by reference into a statute or regulation it becomes an integral part of the incorporating instrument as if reproduced therein. In that regard, see ***Mainwaring v. Mainwaring***, [1942] 2 D.L.R. 377 (B.C.C.A.) in which McDonald C.J.B.C. referred to the effect of referential legislation in relation to the incorporating statute, at 380:

> …Legislation by reference … has been consistently construed not to be ambulatory in its effect, but to incorporate the extrinsic law as at the date of the Act that is being construed, and to be unaffected by subsequent change of the law incorporated: [citations omitted] The effect of such legislation

2000 BCCA 437 (CanLII)

> is as though the extrinsic law referred to was written right into the Act….
>
> [Emphasis added.]

[21] In ***Reference Re Manitoba Language Rights***, [1992] 1 S.C.R. 212 at 228-231, the Supreme Court of Canada referred to the practice of incorporation by reference of standards set by a non-governmental body and held such incorporated standards valid in Manitoba without being translated. In respect of the question of whether there is a *bona fide* reason for incorporation without translation, the Court said at 229-230:

> There are a number of legitimate reasons why a legislature would choose to incorporate outside documents….
>
> Another situation where incorporation without translation is likely to be *bona fide* is one which involves the incorporation of standards set by a non-governmental standard setting body, for example, safety standards developed by a national or international body. Here it is usually legitimate for the legislature to rely on the technical expertise of such bodies. Specific examples provided to this Court in evidence included the incorporation in the Manitoba *Highway Traffic Act* of "Standards respecting motorcycle helmets" developed by the British Standards Institute and the incorporation in the *Steam and Pressure Plants Regulation* of "American National Standards Institute Safety Requirements for the Storage and Handling of Anhydrous Ammonia".

[22] While the respondents do not attack the validity of the regulation incorporating the relevant CSA standard, they nevertheless maintain that under s. 11(2) of the ***Statutory***

2000 BCCA 437 (CanLII)

TAB 52

Court of Queen's Bench of Alberta

Citation: NOV Enerflow ULC (NOV Pressure Pumping ULC) v Enerflow Industries Inc, 2020 ABQB 347

2020 ABQB 347 (CanLII)

Date: 20200630
Docket: 1401 02364
Registry: Calgary

Between:

NOV Enerflow ULC (formerly NOV Pressure Pumping ULC), Grant Prideco, Inc. and Dreco Holding ULC

Plaintiffs

- and -

Enerflow Industries Inc. (an Alberta corporation), Willind Holdings Inc., LGL Two Holdings Ltd., MKW Two Holdings Ltd., Larmar Holdings Inc. (an Alberta Corporation), LGL One Holdings Ltd., MKW One Holdings Ltd., Lindholm Family Holdings Ltd., Lindholm Family Trust, Williamson Family Holdings Ltd., Williamson Family Trust, Larry Lindholm and Mark Williamson

Defendants

Enerflow Industries Inc. and Willind Holdings Inc.

Plaintiffs By Counterclaim

NOV Enerflow ULC (formerly NOV Pressure Pumping ULC) and Grant Prideco, Inc.

Defendants By Counterclaim

2020 ABQB 347 (CanLII)

Corrected judgment: A corrigendum was issued on July 7, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice D.B. Nixon

2020 ABQB 347 (CanLII)

2020 ABQB 347 (CanLII)

2020 ABQB 347 (CanLII)

I. Introduction

[1] This is a claim for the alleged breach of a Purchase and Sale Agreement (the "**PSA**"). The PSA is a detailed 100 page document that was negotiated over several months.

[2] The due diligence concerning the subject transaction commenced in October 2011. The PSA was signed on March 4, 2012 (the "**March 2012 Signing Date**" or "**March 2012 Signing**").

[3] The Plaintiffs were the purchasers under the PSA (collectively, "**NOV**"). The Defendants were the vendors under the PSA (collectively, "**Enerflow**"). The subject transaction closed on May 11, 2012 (the "**May 2012 Closing Date**" or "**May 2012 Closing**").

[4] NOV has made two primary claims under the PSA. The first claim has an accounting focus. The second claim has a quality management focus.

[5] NOV is also alleging claims for the breach of a "material adverse effect" clause (the "**MAE Representation**") and of fiduciary duty, along with claims for resource losses and warranty.

[6] The first primary claim involves a dispute concerning revenue recognition (collectively, the "**GAAP Claim**"). The GAAP Claim concerns allegations that the financial "books and records" of Enerflow were deficient, such that they breached representations and warranties made to NOV under the PSA.

[7] The second primary claim involves a dispute concerning various quality management system assertions (collectively, the "**QMS Claim**"). This claim concerns allegations that the "quality management system" ("**QMS**") of Enerflow was deficient (the "**Enerflow QMS**"), such that it breached representations and warranties made to NOV under the PSA.

II. Background

A. Business History – The Enerflow Principals

[8] Enerflow was established in 2003. The principals behind Enerflow were Mr. Williamson and Mr. Lindholm (collectively, the "**Enerflow Principals**").

[9] During the years between high school and the formation of the Enerflow business (the "**Enerflow Business**"), the Enerflow Principals gained practical experience with different employers. However, prior to establishing Enerflow neither Mr. Williamson nor Mr. Lindholm had formed or run their own business.

(A) Section 8.10 – The "Permits" and "Applicable Laws" Representation

[497] Section 8.10 of the PSA is a representation and warranty aimed at confirming: (i) that Enerflow was operating legally; (ii) that Enerflow had any necessary approvals and licenses required to carry on business; and (iii) that Enerflow was operating in compliance with the law. It also was a representation and warranty that no event had occurred that would reasonably be expected to constitute a violation of a law, and that no authority had issued a notice of a potential violation or failure to comply with the law.

[498] NOV alleges Enerflow breached section 8.10 of the PSA on two footings. First, NOV contends Enerflow breached the representation that the Enerflow Business had been conducted, and was being conducted, in accordance with the API Permits. Second, NOV argues Enerflow breached the representation that "the API Permits were in good standing".

(1) First Argument – Applicable Law Issue

[499] Concerning the first argument advanced by NOV, I take a different view of section 8.10 of the PSA. The provision is directed at ratifying that Enerflow was operating within the "Applicable Laws", and that it is not in breach of any provision of "Applicable Law". In that context, the purpose of section 8.10 of the PSA is to provide NOV with comfort that Enerflow had the necessary approvals and licenses required to carry on its operations, and was conducting in compliance with the "law".

[500] The definition of "Applicable Law" is constrained to matters that have the "effect of law". To address the substantive argument advanced by NOV, it is necessary to consider the definition of "law", and then to consider that term in the context of the phrase "the effect of law".

[501] Before I consider the definition of "law", I first address the relationship between API and Enerflow. That relationship was established by a contract. Enerflow had no obligation to engage with API. It elected to do so because it wanted to accommodate a customer of its Rig Business.

[502] API and Enerflow were both entitled to agree to whatever terms and conditions suited them, and they did so. The underlying agreement between API and Enerflow created a contractual framework between the parties.

[503] A contractual framework does not constitute a "law", although is does establish legal relationships that can be enforced. A "law" is a rule that is established by a lawmaking arm of a body politic.

[504] API is not a body politic. On cross-examination, Mr. Durante agreed with this when he confirmed API was a private entity; and not a government body. As such, API cannot make laws. The most API can do is establish a rule that it can include in, and enforce under, the terms of a contract. A rule established by API is a private direction, which is not a "law" in the classical sense.

[505] In making this determination, I acknowledge there are circumstances were a body politic elevates a direction or policy to the status of a law or regulation. An example of this is the Transport Canada Certificates of Registration, which are listed on line 6 of Schedule 3.1(h) to the Final Enerflow Disclosure Letter. The related *Transportation of Dangerous Goods Regulation*

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incorporates by reference various Canadian Standards Association standards, thereby giving them the force of law[6].

[506] In contrast, there is no evidence the API Permits were ever elevated to the status of a law. To the contrary, Mr. Logan testified the API Permits were of a voluntary nature. The testimony of Mr. Logan on this point is consistent with the evidence of Mr. Durante. In particular, the Durante February 2017 Expert Report stated the API program requirements and obligations, "...are enforced through a legal agreement between API and the Licensee." Again, a contract between parties establishes legal relationships, but such relationships are not "laws".

[507] Further, my determination that the API Permit is voluntary is supported by another statement made in the Durante February 2017 Expert Report. That statement is that "[t]he API Monogram program is a voluntary licensing program designed to facilitate the consistent manufacturing of product that conforms to API standards." Again, that statement is consistent with my finding above that the API Permits do not equate to a "law". It therefore follows that the API Permits cannot have the "effect of law".

[508] Given the evidence and analysis, I find that policies, directives and rules which API included in its agreements with Enerflow do not have the "effect of law" for purposes of section 8.10 of the PSA. In making this finding, I draw a distinction between: (i) legislation that is enacted by a body politic, which has "the effect the law"; and (ii) a contractual provision negotiated between two parties, which establishes legal rights and obligations. As a result, the API standards do not constitute an "Applicable Law" as that phrase is defined in section 1.1 of the PSA.

[509] Consequently, I find NOV has not established that Enerflow has not met the "Applicable Law" standard in section 8.10 of the PSA.

(2) Second Argument – Good Standing Issue

[510] Concerning the second argument advanced by NOV, I again take a different view of section 8.10 of the PSA. As I read the provision, the term "Permit" in the context of the "good standing" issue must be construed by reference to the phrase "*necessary* to carry on the Purchased Business" (emphasis added).

[511] In my view, the "ordinary and grammatical meaning" of the phrase "necessary to carry on the Purchased Business" directs that the only Permits necessary to operate a business are those the law requires. That is consistent with a reading of section 8.10 as whole, which is aimed at making sure the Purchased Business complies with the law. This interpretation is supported by the fact the API and Enerflow relationship is based on a contract, which is a voluntary affiliation.

[512] In making the above findings, I am cognizant of the NOV argument that the contract with ElementCo required the API 4F Monogram on a rig unit that was being constructed for that client. I disagree with the NOV argument on this point for two reasons.

[513] First, while that may have been a contractual requirement between Enerflow and ElementCo, that single requirement was not "necessary to carry on the Purchased Business". To the extent the obligation existed, it was only a requirement to carry out that one contract.

[6] *Transportation of Dangerous Goods Regulations*, SOR/2001-286, Section 5.10.

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TAB 53

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***U.B.C. v. The Association of Administrative and Professional Staff on Behalf of Bill Wong,*** 2006 BCCA 491

Date: 20061102
Docket: CA033351

Between:

The University of British Columbia

Respondent
(Petitioner)

And

The Association of Administrative and Professional Staff on Behalf of Bill Wong

Appellant
(Respondent)

And

Kenneth J. Glasner, Q.C.

Respondent
(Respondent)

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Levine
The Honourable Mr. Justice Chiasson

B.A. Laughton, Q.C.	Counsel for the Appellant
M.A. Davies	Counsel for the Respondent, University of British Columbia
Place and Date of Hearing:	Vancouver, British Columbia 17 October 2006
Place and Date of Judgment:	Vancouver, British Columbia 2 November 2006

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Madam Justice Levine

2006 BCCA 491 (CanLII)

para. 34; Herbert Broom, *A Selection of Legal Maxims,* 10th Edition (London: Sweet & Maxwell, 1939) at 485).

[29] He combines this concept with principles concerning incorporation by reference and refers to ***R. v. Sims*** (2000), 140 B.C.A.C. 311, 2000 BCCA 437 at para. 20:

> When material is incorporated by reference into a statute or regulation it becomes an integral part of the incorporating instrument as if reproduced therein.

[30] The appellant also relies on the decision of the Ontario Court of Appeal in ***R. v. St. Lawrence Cement Inc.*** (2002), 60 O.R. (3d) 712, 162 O.A.C. 363. The Court's comments at para. 18 of this case are particularly apt for the consideration of the contract in issue in the instant case:

> [Incorporation by reference] enables the legislative draftsman to include provisions of earlier statutes or other documents into statutes or regulations without actually reproducing the language of the statute or document . . . words to which reference is made in an instrument have the same operation as if they were inserted in the instrument referring to them . . .The effect of incorporation by reference is that the material incorporated is considered to be part of the text of the legislation.

[31] Although these comments deal with legislation, they are equally applicable to contracts and other instruments.

[32] The Supreme Court of Canada addressed the concept in the employment law context in ***Machtinger v. HOJ Industries Ltd.***, [1992] 1 S.C.R. 986 at 1004 -1005, 91 D.L.R. (4th) 491, as follows:

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TAB 54

Her Majesty the Queen v. Blackbird

[Indexed as: R. v. Blackbird]

64 O.R. (3d) 385
[2003] O.J. No. 1102

Ontario Court of Justice
Hornblower J.
March 31, 2003

Environmental law -- Offences -- Applicants engaging in activities on reserve lands which resulted in charges being laid under Migratory Birds Convention Act -- Band council had passed valid by-law under authority of s. 81 of Indian Act relating to preservation, protection and management of fish and game on Reserve lands -- Band council also establishing mechanism to enforce by-law -- By-law constituting comprehensive regulatory scheme for protection, preservation and management of game -- Act and by-law not co-existing so that Act was applicable to extent that it was not inconsistent with by-law -- By-law ousting operation of Act on reserve lands -- Charges under Act quashed -- Indian Act, R.S.C. 1985, c. I-5, s. 81 -- Migratory Birds Convention Act, 1994, S.C. 1994, c. 22 -- Walpole Island First Nation By-law No. 5.

The applicants were charged with offences under the Migratory Birds Convention Act, 1994 as a result of certain activities which they engaged in as outfitters and guides for hunting excursions carried out on reserve lands. The lands in question were subject to the Indian Act. In 1955, acting under the authority of s. 81 of that Act, the Band council had passed By-law No. 5, providing for the preservation, protection and management of fish and game on the reserve. The by-law was properly enacted and was in full force and effect when the offences were allegedly committed by the applicants. The Band

2003 CanLII 72340 (ON SC)

council also established a mechanism to enforce the by-law. The applicants brought an application to quash the charges on the grounds that the Migratory Birds Convention Act did not apply to the reserve lands because of the enactment of the by-law.

Held, the application should be granted.

Section 81 of the Indian Act empowers a Band council to make by-laws for "[t]he preservation, protection and the management of fur bearing animals, fish and other game on the Reserve". By-law No. 5 was a comprehensive regulatory scheme which demonstrated a sufficient intent to cover the field exclusively and oust the jurisdiction of the Migratory Birds Convention Act. The two schemes did not co-exist, so that the Act was applicable to the extent that it did not conflict with the by-law. Accordingly, the by-law was not a mere defence to charges under the Act.

R. v. Baker, [1983] 4 C.N.L.R. 73 (B.C. Co. Ct.); R. v. Francis, [1988] 1 S.C.R. 1025, 85 N.B.R. (2d) 243, 51 D.L.R. (4th) 418, 85 N.R. 3, 217 A.P.R. 243, 41 C.C.C. (3d) 217, 5 M.V.R. (2d) 268; R. v. Jimmy (1987), 15 B.C.L.R. (2d) 145, [page386] [1987] 5 W.W.R. 755, [1987] 3 C.N.L.R. 77, [1987] B.C.J. 1516 (Quicklaw) (C.A.); R. v. Lewis, [1996] 1 S.C.R. 921, 19 B.C.L.R. (3d) 244, 133 D.L.R. (4th) 700, 196 N.R. 165, [1996] 5 W.W.R. 348, 105 C.C.C. (3d) 523, consd

Other cases referred to

R. v. George, [1966] S.C.R. 267, 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, 47 C.R. 382, 6 C.N.L.C. 360; R. v. Sparrow, [1990] 1 S.C.R. 1075, 46 B.C.L.R. (2d) 1, 70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410, 56 C.C.C. (3d) 263

Statutes referred to

Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11
Indian Act, R.S.C. 1985, c. I-5, ss. 73(1)(a), 81(1)(o)
Migratory Birds Convention Act, 1994, S.C. 1994, c. 22, s. 12

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APPLICATION to quash charges under the Migratory Birds Convention Act, 1994, S.C. 1994, c. 22.

J. McNair, for respondents.
D.F. Dawson and J.C. Peters, for applicant.

HORNBLOWER J.: --

This application seeks to have charges laid against the applicants under the Migratory Birds Convention Act, 1994, S.C. 1994, c. 22 and its regulations quashed. It is the applicant's position that if the actions which give rise to these charges are contrary to any law, it can only be the Walpole Island First Nation By-law No. 5. By virtue of the enactment of that law, the Migratory Birds Convention Act, which would otherwise apply, does not apply on the Walpole Island First Nations lands. The respondent, on the other hand, argues that the Migratory Birds Convention Act is a law of general application, which applies to Indian reserve lands, notwithstanding the regulatory powers of the Band Council.

The essential facts are not in dispute. As a result of an investigation carried out by officers of the Canadian Wild Life Service, the applicants were charged with violations under the Migratory Birds Convention Act. The applicants were all engaged as outfitters or guides for hunting excursions carried out on the reserve. It is alleged that the conduct of the applicants was contrary to the Act and its regulations and thus constitutes offences under the Migratory Birds Convention Act. The conduct in question includes unlawful possession of Canada geese, aiding others to kill migratory birds in excess of daily bag limits, depositing bait for migratory birds, possessing untagged carcasses of migratory birds belonging to or killed by other persons, failing to mak[e] reasonable efforts to retrieve crippled or injured migratory birds, aiding others to hunt before or after the time permitted by the [page387] regulations under the Migratory Birds Convention Act, hunting with shotguns

2003 CanLII 72340 (ON SC)

date when the offences are alleged to have occurred.

It is the applicant's position that By-law No. 5 is a comprehensive code for the protection, preservation and management of ducks and other game. The by-law adopts certain other regulatory provisions as part of the by-law, by reference to those provisions. It is as if those regulations have been specifically set out word for word in the by-law. As it relates to ducks, it is the regulation for the Province of Ontario made under the authority of the Migratory Birds Convention Act that have been adopted and apply. For game other than ducks, the regulations made under the Ontario Game Act have been adopted and apply.

It should be noted that in 1955, there was not an Act known as the Ontario Game Act. The legislation that existed at that time was known as the Game and Fisheries Act. I am satisfied however that it was the Game and Fisheries Act that was adopted by reference in By-law No. 5, notwithstanding the improper reference to the name of the Statute.

The adoption by reference of those provisions of the Ontario Game Act (The Game and Fisheries Act) for game, and the regulations under the Migratory Birds Convention Act for ducks, was static as opposed to ambulatory. In other words, it was the legislation as it stood at the time it was adopted that was incorporated into the by-law. Subsequent revisions or amendments to either the Migratory Birds Convention Act or the Ontario Game Act (the Game and Fisheries Act) or any regulations passed under either of them, were not adopted into the by-law. The only way [page389] for the by-law to change was by an amendment to the by-law either by the Minister, or the Band Council.

It is the respondent's position that the by-law is not a comprehensive scheme. The following reasons are put forward for this proposition: the by-law only partly adopts the Migratory Birds Convention Act; and while for other game the Game and Fisheries Act is adopted, neither Act nor its regulations establishes open season, bag limits or possession limits for migratory birds. Not only does this create a gap in the scheme,

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TAB 55

COURT OF APPEAL FOR ONTARIO

CITATION: Cobb v. Long Estate, 2017 ONCA 717
DATE: 20170919
DOCKET: C61467, C61471, M47419

Doherty, MacFarland and Rouleau JJ.A.

BETWEEN

C61467

Wade Brett Cobb, Erica Mae Cobb and James Wade Cobb,
a minor by his Litigation Guardian, Erica Mae Cobb

Plaintiffs
(Respondents)

and

The Estate of Martin T. Long

Defendant
(Appellant)

AND BETWEEN

C61471

Wade Brett Cobb, Erica Mae Cobb and James Wade Cobb,
a minor by his Litigation Guardian, Erica Mae Cobb

Plaintiffs
(Appellants)

- and -

The Estate of Martin T. Long

Defendant
(Respondent)

2017 ONCA 717 (CanLII)

Chris G. Paliare and Tina H. Lie, for The Estate of Martin T. Long

Allan Rouben and Kris Bonn, for Wade Brett Cobb, Erica Mae Cobb and James Wade Cobb, a minor by his Litigation Guardian, Erica Mae Cobb

Heard: April 3, 2017

On appeal from the judgment of Justice Douglas M. Belch of the Superior Court of Justice, sitting with a jury, dated November 25, 2015, with reasons reported at 2015 ONSC 6799 and at 2015 ONSC 7373, and the costs judgment by the same judge dated December 23, 2015, with reasons reported at 2015 ONSC 7373.

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MacFarland J.A.:

[1] These appeals arise from the judgment of Justice Douglas M. Belch of the Superior Court of Justice, dated November 25, 2015, sitting with a jury, and, if leave be granted, from the accompanying costs judgment dated December 23, 2015. They were heard together with the appeal in *El-Khodr v. Lackie*, 2017 ONCA 716 because these cases raise common issues regarding the regime in Part VI of the *Insurance Act*, R.S.O. 1990, c. I.8 for the treatment of statutory accident benefits ("SABs") in the calculation of damages arising from motor vehicle accidents. They also raise a common issue regarding the applicable rate of prejudgment interest under the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The reasons for judgment in this appeal are being released concurrently with the reasons for judgment in *El-Khodr*.

[2] In the *Cobb* appeals, because separate appeals were instituted by the parties, I propose to refer to them as "the plaintiffs" and "the defendant" in order to avoid any confusion that might arise from referring to each party according to

(b) Section 59 of the Legislation Act, 2006

[117] Section 59 deals with the question of whether the reference to a regulation in a statute is meant to be interpreted in a static fashion, meaning that it is interpreted as it exists at a particular time:

> **59** (1) A reference in an Act or regulation to a provision of another Act or regulation is a reference to the provision,
>
> (a) as amended, re-enacted or remade; or
>
> (b) as changed under Part V (Change Powers).
>
> (2) Subsection (1) applies whether the provision is amended, re-enacted, remade or changed under Part V before or after the commencement of the provision containing the reference.
>
> (3) If the provision referred to is repealed or revoked, without being replaced,
>
> (a) the repealed or revoked provision continues to have effect, but only to the extent that is necessary to give effect to the Act or regulation that contains the reference; and
>
> (b) the reference is to the provision as it read immediately before the repeal or revocation.

[118] Thus, absent persuasive evidence of a legislative intention to apply the version of a regulation in force at a specific date, s. 59 ensures application of the current version of a regulation to which a statutory provision refers. This kind of incorporation of other legislation by reference is a "rolling" or "ambulatory" reference, as opposed to a "static" or "fixed" reference, which incorporates a piece of legislation as it existed at a particular time, with that incorporation

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persisting even after amendment or repeal of the referenced legislation: John Mark Keyes, *Executive Legislation*, 2nd ed. (Markham: LexisNexis Canada Inc., 2010), at pp. 455-456.

[119] Given the direction in s. 59, the interpretation of the regulation at issue must start from the premise that the regulation that is intended to apply to any given case is the regulation that is in force from time to time and not the version of the regulation that was in force at the date of the accident. This premise supports a conclusion that the amount specified in the 2015 amendment to s. 5.1 of the *Court Proceedings* Regulation is the statutory deductible that applies in this case.

(c) The legislature authorized retrospective application of the regulation

[120] On my reading, the language of the relevant provisions of the *Insurance Act* and of the 2015 amendment to the *Court Proceedings* Regulation corresponds with the application of the rolling incorporation rule because these provisions indicate that the 2015 amendment was intended to apply to accidents that occurred both before and after the date of its promulgation. One must interpret s. 267.5(7)3(i) in the broader context of related provisions in the *Insurance Act* that prescribe how the statutory scheme for deduction from non-pecuniary damage awards in automobile accident cases operates.

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TAB 56

MAINWARING v. MAINWARING

B.C.
C.A.
1942.

British Columbia Court of Appeal, McDonald C.J.B.C., Sloan and O'Halloran JJ.A. March 3, 1942.

1942 CanLII 248 (BC CA)

F. S. Cunliffe, for appellant.

A. M. Whiteside, K.C., for respondent.

McDONALD C.J.B.C.:—This is an action by a wife who sets up desertion, and sues for alimony under O. 70a, r. 1 of the *Supreme Court Rules*. This Rule reads as follows:

"1. Alimony may be recovered in an action brought and prosecuted in the ordinary manner:—

"(*a*) By any wife who would be entitled to alimony by the law of England or of this Province; or

"(*b*) By any wife who would be entitled by the law of England or of this Province to a divorce, and to alimony as incident thereto; or

"(*c*) By any wife whose husband lives separate from her without any sufficient cause, and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony, when decreed or adjudged, shall continue until the further order of the Court."

The provisions of this Rule are copied from an Ontario statute, except that the opening words of the statute were: "The High Court shall have jurisdiction to grant alimony to any wife . . . ." and the statute makes no reference to the law "of this Province", but only to the law of England. This statute was passed when Ontario had neither divorce laws nor divorce Courts. Why it was thought desirable to reproduce it in this Province, where the English *Matrimonial Causes Act* of 1857 [c. 85] has been in force since 1858, is not easy to see. The Order first appears in the Rules of 1890, and I feel no doubt that originally it was *ultra vires,* as an attempt to legislate by

B.C.
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1942.
MAIN-WARING. v. MAIN-WARING
McDonald C.J.B.C.

Order in Council on substantive rights under the guise of regulating procedure. However, I shall assume (without deciding) that the order is now law, being either validated by statute that confirmed the *Supreme Court Rules* of 1890, or at any rate, put beyond our power to question by this Court's decision in *Rousseau* v. *Rousseau,* [1920] 3 W.W.R. 384. However, assuming O. 70a, r. 1 to be valid, I find it no small task to discover its meaning. Though it has been copied by several provincial Legislatures, it would be hard to find a more embarrassing piece of legislation. It strikingly demonstrates how unwise it is to copy what another Province has evolved, without enquiring into the reasons for it. Actually, however, though the language in all the legislation is nearly the same, our Province has gone farther than the others in an important respect that I shall examine later.

I first point out some of the anomalies which that Rule 1 creates. The intention obviously is that a wife shall issue a writ and obtain alimony by invoking the common law jurisdiction instead of the matrimonial jurisdiction of the Supreme Court. How this is to be worked consistently with principle, is hard to see. Alimony cannot very well be awarded in lump sums; it calls for periodic payments. But judgments for payment *in futuro* are unknown to common law jurisdiction; and if a judgment is once given for specified sums, how is a common law Court to vary it when the husband's means change? Somewhat similar difficulty was felt in *Dorey* v. *Dorey* (1912), 9 D.L.R. 150, 46 N.S.R. 469, under the same legislation in Nova Scotia, and in *Severn* v. *Severn* (1852), 3 Gr. 431, in Ontario.

In Ontario, however, the anomalies were never as serious. There from the creation of the Court of Chancery in 1837, statute (7 Wm. 4, c. 2, s. 3) gave it all alimony jurisdiction "possessed by any Ecclesiastical or other Court in England". The ecclesiastical Courts did not decree alimony for desertion but enforced restitution of conjugal rights in other ways. The English *Matrimonial Causes Act* of 1857 for the first time enabled an English Court to award alimony for desertion. Presumably as a result, the Legislature of Upper Canada in the same year enacted that the Chancery might give alimony in those cases now included in our R. 1(*c*). The Consolidated Statutes of Upper Canada 1859, c. 12, s. 29 "*An Act respecting the Court of Chancery*", expanded the previous sections so that they read the same as our R. 1, with the variations already noted. These provisions were carried on in the various revisions down to recent times.

The obvious difference however, between the Ontario legisla-

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tion and our own O. 70a, r. 1 is that the former gave the power to award alimony with all the powers of the ecclesiastical Courts, so that it could readily assimilate its machinery to that in matrimonial causes without incongruity. In our own Province, the inference from the passing of Order 70a *at all* is that the Court is to proceed apart from its divorce and matrimonial jurisdiction, but at the same time is given no apt machinery for the purpose. In the North West Territories the same difficulty was felt, as shown in *Harris* v. *Harris* (1896), 3 Terr. L.R. 416, and *Holmes* v. *Holmes,* [1923] 1 D.L.R. 294, 16 S.L.R. 390. There, however, the anomaly was less, because the Court did not also have a divorce jurisdiction existing side by side with this new alimony jurisdiction. As it was, the Courts hacked their way through the difficulties rather than solved them.

I assume therefore that we must likewise manufacture machinery to make O. 70a workable, though it is not only embarrassing and anomalous, but entirely unnecessary in this Province, even if the *Deserted Wives' Maintenance Act,* R.S.B.C. 1936, c. 73, did not offer a third alternative remedy.

The ineptitude of O. 70a, r. 1 becomes the more obvious when we pass from making it workable to finding what field it covers. In all the Provinces where statutes similar to r. 1(*a*) are in force, their meaning has caused difficulty. A common law action for alimony is unknown in England, and it can only be obtained by petition in a matrimonial cause, a deserted wife's remedy at common law being to pledge her husband's credit as agent of necessity. But in order to give sub-clause (*a*) some effect the Courts have decided that it applies where the wife has grounds upon which in England she could file a petition and obtain alimony.

One obvious objection to this construction is that it renders sub-clauses (*b*) and (*c*) meaningless and superfluous, and there is really no getting over the objection; it simply has to be ignored. In Ontario, indeed, where sub-clause (*c*) came from, there was some sort of reason for it, since it was first inserted in 1857, as seen above, to include a remedy newly created in England that year, and hence not included in a previous general reference to English jurisdiction. But that reason is entirely lacking in this Province, where apparently sub-clause (*c*) is meaningless tautology, adding nothing to sub-clause (*a*).

That, however, is not all. Our Legislature, as I think unfortunately, has added to the difficulties, which the Courts of other Provinces found formidable enough, by adding an alternative in sub-clause (*a*) not found in other legislation. Thus, here,

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B.C.
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any wife is to be able to sue "who would be entitled to alimony by the law of England *or of this Province.*" The reference to the law of this Province must be to the *Matrimonial Causes Act* 1857, which is copied into our own statutes. I do not see what other meaning can be assigned to the words. Other Provinces which passed similar legislation had no provincial divorce law to refer to, and had perforce to go to the law of England. Without observing this radical difference, we copied the other Provinces. But what is the result? Where other Provinces have something like certainty, we have an alternative, and the most startling consequences are inherent in that alternative. Before examining them, I must touch on an ancillary point. There has been some argument as to whether "the law of England" means that law as at the date when O.70a became effective, or whatever may be the law of England from time to time. Diverse opinions on this point were expressed in *O'Leary* v. *O'Leary*, [1923] 1 D.L.R. 949, 19 A.L.R. 224; but I cannot feel that there is real doubt. Legislation by reference in this same way has often been the subject of decision, and it has been consistently construed not to be ambulatory in its effect, but to incorporate the extrinsic law as at the date of the Act that is being construed, and to be unaffected by subsequent change of the law incorporated: see *e.g.*, *Reg.* v. *Merionethshire*, 6 Q.B. 343, 115 E.R. 132; *Reg.* v. *Smith* (1873), L.R. 8 Q.B. 146; *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63 at p. 69; *Kilgour* v. *London Street R. Co.* (1914), 19 D.L.R. 827 at pp. 828-9, 30 O.L.R. 603 at p. 606. The effect of such legislation is as though the extrinsic law referred to was written right into the Act; *Re Wood's Estate, Ex p. Her Majesty's Com'rs of Wks & Bldgs* (1886), 31 Ch. D. 607 at p. 615. Order 70a thus refers to the law of England as at the date when O.70a became law. Here I may refer to *Cumpson* v. *Cumpson*, [1934], 1 D.L.R. 461, O.R. 60, *per* Riddell J.A. For our purposes, though the exact date does not seem to be material, I think this should be taken as 1893, the date as of which the Rules of 1890 were confirmed by the *Supreme Court Amendment Act* 1896 (B.C.), c. 14, s. 21.

Order 70a, r. 1 therefore allows a wife to sue for alimony who could petition for it either in England or in this Province, according to the law of 1893. Since the law here is that of the Act of 1857, but that law was considerably changed in England by the Imperial Act of 1884 [c. 68] and rules passed thereunder, some very anomalous situations could obviously arise. A wife whom we would refuse alimony under our divorce jurisdiction, could ignore our divorce law and claim under English law, and presumably she could do this even after her petition had been

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dismissed. On the other hand, if she had been deserted less than two years, so that an action must be based on her right to restitution of conjugal rights, then, according to sub-clause (*c*) of this rule of ours, she could only invoke the law of England, and a more favourable law prevailing under our divorce jurisdiction would avail her nothing.

It was argued for the appellant that the wife could only succeed by showing her right to restitution of conjugal rights. If that were so, there would be little difficulty in this case. Under the English Act of 1884 and rules passed thereunder, a formal request for resumption of cohabitation was made a condition precedent to claiming restitution. No such request was made here. Moreover, it is a further condition of granting restitution, certainly under the English law of 1893, and I think even under the Act of 1857, that the petitioner must satisfy the Court of her sincere desire to resume cohabitation. It would be grotesque to suggest that the evidence here showed any such desire; the respondent's letters state emphatically, again and again, that she does not want to live with her husband, and also express violent hatred for him.

If, then, her claim for alimony was based on her right to restitution of conjugal rights, it would be easily met. However, the decisions indicate that she need not base her claim so; the desertion has lasted more than two years, and if it was without cause she would be entitled to a judicial separation with alimony, which would be sufficient to bring her under R. 1(*a*), without any need to invoke (*c*).

This brings before us squarely the question whether the evidence shows the husband's desertion to have been without cause. I have read the evidence through carefully more than once, and each perusal has satisfied me that he had ample cause for leaving the respondent. Throughout, her evidence strikes me as that of an untrustworthy witness, evasive and prevaricating. The husband's evidence seems to me infinitely more truthful; moreover, any corroboration that is to be found is in his favour.

Descending to particulars, I refer to the wife's evidence found at p. 27 of the appeal book, stating that her husband had kicked her in the stomach while she was pregnant, probably causing her later miscarriage. The statement that she did not know whether he did it accidentally or not, the fact that this alleged assault was never made the basis for a charge of cruelty, but simply dragged in casually, make the evidence incredible to me: I think it must be looked on as "propaganda" evidence. However, its only bearing is on her credibility. Considerably

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more importance attaches to her evidence on her husband's relations with other women, as I think it clear that this touches the main source of the matrimonial troubles. Even taking the wife's evidence alone, I would find it quite unconvincing. According to her, the husband for years was consistently running around with other women, or another woman; he had brought a woman up from Vancouver to Calgary to play about with, a suggestion that I think is not meant to stop short of a charge of adultery. All this is supposed to have gone on, while, by her own evidence, her husband was in poor health, and most of the time on relief. There is not the slightest attempt to identify any woman, in spite of the fact that the wife all the time was watching and following the husband; and the only evidence that is even reasonably concrete is that she saw the woman twice at a distance of about half a block. Against all this we have not only the husband's complete denials; we have the significant and uncontradicted evidence of his brother that the wife eventually admitted to him that her ideas of other women were "most likely hallucinations". I think that very well describes them.

The defence set up is one of cruelty, consisting of persistent nagging, quarrelling and false charges of infidelity carried to the husband's friends and employers, which reached such a pitch that it endangered the husband's health. I think this defence was substantially made out.

According to the husband's uncontradicted evidence the wife made an accusation to his employer in Calgary that the husband was running around with the telephone operator at the office. The employer investigated and satisfied himself the charge was baseless, later intervening to convince the wife. According to the appellant, when he left Calgary for Vancouver it was because she had made his life unbearable in Calgary. Almost as soon as they reached Vancouver she accused him of having brought his "lady friend" to the Coast, her basis being "the expression on his face".

She later went to his employers in Vancouver and made enquiries as to whether he was meeting another woman at the plant. She insisted on escorting him to and from work for the purpose of preventing meetings with his supposed paramours. Her jealousy of him seems to have become such an obsession that his fidelity, or want of same, became the continual topic, "all day and every day".

None of this evidence of what the husband was subjected to is contradicted; the wife's attitude seems to be simply that her jealousy was justified. This is made clear by her counsel's line of cross-examination when the husband was on the witness

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stand. Strong efforts were made to make him admit that he had got some girl into trouble in Vancouver and brought her to Calgary. So that there can be no doubt that her accusations against her husband were not mere accusations of philandering, but of adultery. Judging by the line her counsel takes, after eight years of separation, and from the coarse, indecent and violent vituperation contained in her letters, the types of accusation and abuse that the husband must have had to endure are not hard to imagine. Not many men could have stood it, and I have not the least difficulty in believing that it could break down the appellant's health.

The agreement (ex. 3) by which the husband agreed without consideration, to turn over to his wife all his wages for the next 12 years, seems to me rather significant. I cannot imagine any man signing such an agreement except under strong pressure as indeed both parties agree that he was; and it furnishes strong evidence of who was the dominant personality. The husband's evidence that his health was broken by his wife's persecution does not rest on his own evidence; it is corroborated, at least as to the result, by his brother, and even by the wife herself. In Appeal Book, pp. 39, 40 she gave her account of her husband's disappearance. She was asked about his physical condition at the time and said: "He was very jittery. He looked to me as though he was pretty ill; sometimes I was scared he would have a nervous breakdown."

The questions leading up to that answer carried the implication that the husband's condition was due to the constant quarrelling, and there was nothing said by her to rebut the implication. I infer that the wife herself would have admitted that, but said he brought the quarrels on himself by his conduct. I do not think that he did.

The learned trial Judge [[1941] 4 D.L.R. 324] seems to have disregarded the evidence on the husband's health because it was not given by a doctor. With respect, I do not think that was a good reason. Nothing, unfortunately, is commoner than for people to be seriously ill and to die without medical attention, and I think it would be impossible to hold that lay evidence on such matters would not be admissible. If the husband had been shown to have had a doctor whom he failed to call as witness, it would have been a matter for comment, though here I think adverse comment would have been completely met by the wife's own evidence. Here it is not shown that he ever had a doctor, but that does not say that he was not seriously ill; I think the evidence establishes that he was, and sufficiently establishes that it was due to persistent persecution from his

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wife. I think things reached the stage where it was impossible for him to live with her.

There is some authority for saying that a spouse may resist a legal separation on grounds that would not enable him to obtain one himself. This apparent anomaly is explained by Lord Herschell in *Mackenzie* v. *Mackenzie,* [1895] A.C. 384 at pp. 389 and 390, though he is there referring to restitution of conjugal rights and not to judicial separation.

Here, however, the question does not really arise, because I think the husband has shown legal cruelty by the wife, within the definition of *Russell* v. *Russell,* [1897] A.C. 395, misconduct sufficient to endanger his health.

It is unusual for us to reverse a trial Judge's findings in a case of this kind; but I think we must do so here. It follows that I would allow the appeal and reverse the judgment entered below.

SLOAN J.A.:—I agree with the Chief Justice.

O'HALLORAN J.A.:—The amendment of the *Court Rules of Practice Act* [R.S.B.C. 1936, c. 249] at the last session of the Provincial Legislature has supplied the statutory authority to support O. 70a and has made it retroactive as well.

With due respect to the learned Judge who made the order now complained of, I take the same view of the evidence as my Lord the Chief Justice. The respondent's behaviour to her husband was so persistently and intentionally unreasonable that his health was undermined, he lost one good position after another, and it became impossible for him to live with her any longer.

I agree in allowing the appeal.

Appeal allowed.

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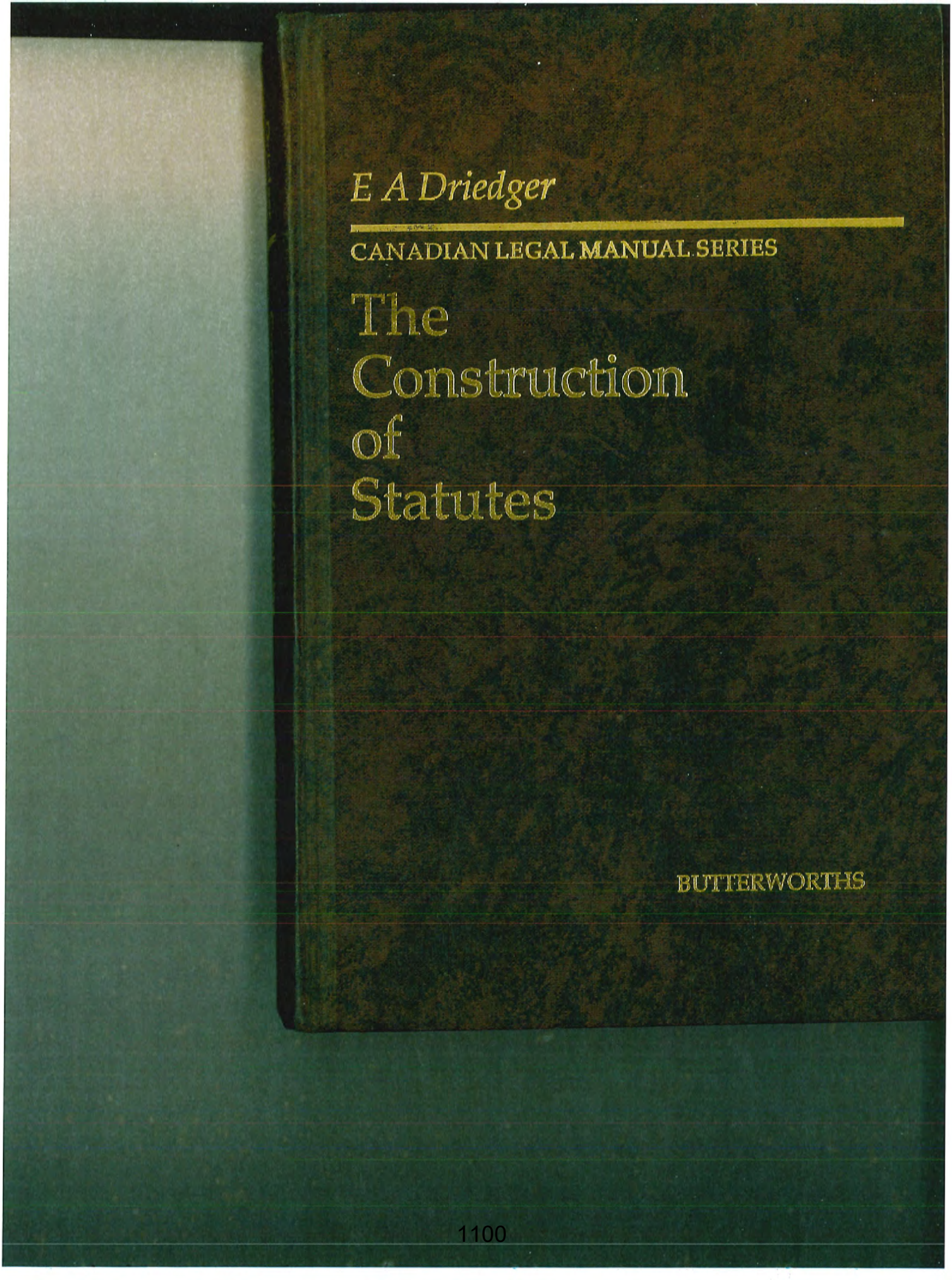
TAB 57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eld Royal assent to a bill that had his successor on the advice of the d to give Royal Assent. Campbell ill had not been presented to the Legislative Assembly as required enant Governor was *functus officio* al Assent, at least until the bill was Assembly.

Canada where legislative jurisdic- Parliament of Canada on the one of the provinces on the other, the ation on the ground that it is outside of the enacting jurisdiction.

allenged on the ground that Parlia- or mistake to enact it. Thus, in *Lee ction Railway Co.*[52] it was argued duced by fraudulent recitals to pass . Willes J. said:

hese Acts of Parliament, that they nd we do not sit here as a court of . . . We sit here as servants of the . Are we to act as regents over what th the consent of the Queen, lords any such authority exists. If an Act obtained improperly, it is for the repealing it; but so long as it exists und to obey it."

or Income Tax v. *Pemsel*[53] Lord

ompetent to any Court to proceed the legislature has made a mistake. y be, I think a Court of law is bound ption that the legislature is an ideal e mistakes."[54]

p. 582.

dge (1881-82), 8 Q.B.D. 119.

But, as we have seen,[55] the courts will correct what may be called a draftsman's error. Thus, in *The Queen* v. *Wilcock*[56] a statute repealed a statute that was described by its title and having been passed in the thirteenth year of Geo. 3; there was no Act so entitled in the statutes of 13 Geo. 3, but there was one in 17 Geo. 3. Lord Denmon C.J. said:

> "A mistake has been committed by the Legislature; but, having regard to the subject matter, and looking to the mere contents of the Act itself, we cannot doubt that the intention was to repeal the 17 Geo. 3, and that the incorrect year must be rejected."

A mistake of fact or of law in a recital, however, is not conclusive, and a court is at liberty to consider the fact or the law to be different from the statement in the recital.[57]

LEGISLATION BY REFERENCE

Where the provisions of one statute are incorporated in another by reference and the earlier statute is afterwards repealed, the provisions so incorporated continue in force so far as they form part of the second enactment.[58]

Where a single section of one Act is incorporated in another "it must be read in the sense which it bore in the original Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act".[59] But an exception or proviso not incorporated cannot be referred to.[60]

[55]*Supra*, p. 105.
[56](1845), 7 Q.B. 317, at p. 338, 115 E.R. 509, at p. 518.
[57]*Hammond* v. *Bank of Ottawa* (1910), 22 O.L.R. 73, at p. 80; *The Queen* v. *Inhabitants of Haughton* (1853), 1 E. & B. 501.
[58]*Ruthardt* v. *Ruthardt* (1949), 23 M.P.R. 70. See also *The Queen* v. *Merionethshire* (1844), 6 Q.B. 343 and *The Queen* v. *Smith and Others* (1873), L.R. 8 Q.B. 146.
[59]*Per* Lord Blackburn in *Mayor of Portsmouth* v. *Smith* (1885), 10 A.C. 364, at p. 371.
[60]*Wilson* v. *Albert*, [1943] 3 D.L.R. 129.

Whether amendments to the incorporated Act apply also to the incorporating Act is a matter of construction,[61] although it has been said that it is a general principle that legislation by reference is not ambulatory in its effect.[62]

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[61]*Couglin* v. *Ontario Highway Transport Board,* [1968] S.C.R. 569; *McKenzie* v. *Jackson* (1898), 31 N.S.R. 70.
[62]*Mainwaring* v. *Mainwaring,* [1942] 1 W.W.R. 728.

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D REPEAL

1 City of Ottawa v. Town of

d. v. Singer & Friedlander Ltd., , Megarry J. said: ". . . it seems iciple to apply if an enactment one wide and the other apply- of case wholly within the wide wide prohibition as not apply- ed prohibition, especially if the subject to some exception and "

Brunswick Liquor Control nan's Transfer Ltd. (1973), 8 Stevenson, J. said that the rules peal are of no assistance in the cted statutes.

": See *A.G. Ont. v. Reciprocal* t p. 345.

h:

ality of Ottawa-Carleton and 974), 5 O.R. (2d) 601 at 609, find it necessary to say in the it the prior general statute has uent and particular statute; the hat the latter statute would

OVERLAPPING

p. 186 ***The following comments should be noted after the first paragraph:***

Acts should be so construed as to avoid or remove inconsistent overlapping. But there is no principle that they should be construed so as to avoid or remove overlapping not inconsistent. There is often overlapping as, for example, in the Criminal Code,[46b] where the overlapping provisions both stand.

p. 18 ***At end of second paragraph, note:***

In *Re Official Languages Act* (1974), 7 N.B.R. (2d) 526 at p. 539 Laskin C.J.C. said that Lord Dunedin's reference to the maxim *expressio unius* in *Whiteman v. Sadler*, [1910] A.C. 514 at p. 527 was "a conclusion upon his construction of a particular section of a statute."

CONCLUSIVENESS

p. 189 ***The following additional comments should be noted:***

In *Corocraft Ltd. v. Pan Am. Airways Inc.*, [1968] 3 W.L.R. 1273, it was held that the original Warsaw Convention must prevail over a mistake in the translation of the Convention in the Carriage by Air Act and that the mistake must be rejected in accordance with the maxim *falsa demonstratio non nocet.*

LEGISLATION BY REFERENCE

p. 190 ***The following additional comments should be noted:***

In *Re Fidanza and Fidanza*[62a] it was held that where a provincial statute, the Deserted Wives' and Children's Maintenance Act, adopted the procedural provisions of the federal Criminal Code, the provincial Legislature had adopted only the "words" of the federal statute and not their particular interpretation; accordingly, any modification in the construction of the provisions of the Criminal Code effected by the Canadian Bill of Rights did not apply to the construction of the adopted provisions in the provincial statute.

[46b] For decisions see those cited in *R. v. Nabis*, [1974] 6 W.W.R. 307.

[62a] (1973), 15 C.C.C. (2d) 87. See also *Board of Trustees of Francis School District No. 777 of Sask. v. Board of Regina School Unit No. 20 of Sask.* (1973), 39 D.L.R. (3d) 1.

TAB 58

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WILSON v. ALBERT.

Alberta Supreme Court, Appellate Division, Ford, Lunney, Ewing and Howson JJ.A. May 14, 1943.

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J. A. Harry Millican, for appellant.
I. F. Fitch, K.C., for respondent.
The judgment of the Court was delivered by

EWING J.A.:—This is an action by the plaintiff appellant who was tenant of a room in a house in Calgary, against her landlord, the respondent herein, for damages for unlawful ejection.

For some years prior to January 18, 1941, the appellant occupied the said room as a monthly tenant and when the house was purchased by the respondent in January 1940 she continued as tenant on the same basis.

On November 6, 1940, the respondent served notice on the appellant to give up possession of the premises at the end of December 1940. Some question arose as to whether the receipt given by the respondent for the December rent did not extend the appellant's term to include January 1, 1941, but in the view I have taken of another issue in the case it is not necessary to consider that question. The respondent then demanded $13.50 as rent for the month of November and $15 for the month of December, both of which amounts the appellant paid without demur. After receipt of the notice to quit the appellant tried to get other premises but was unable to do so. She remained on until January 18, 1941. On the evening of that day she went out on an errand, locking her door as she went out. While she was away the respondent effected an entry into the room and removed all the appellant's furniture into the hall, took off the door of the room, took down the stove, disconnected the lights, thereby rendering the room uninhabitable. The appellant had great difficulty in getting a room for the

night but finally secured a room in a hotel for the night. The next day she was taken to the hospital.

The learned trial Judge denounced the respondent's conduct in scathing terms but thought reluctantly that he was unable as a matter of law, to afford the appellant any relief. The action was therefore dismissed but without costs.

One of the claims set up by the appellant is that she was dispossessed contrary to the then existing regulations governing rentals and housing accommodation. The first order promulgated, which is material to this case, is Order No. 7 [74 Can. Gaz., p. 1186] which became effective on October 1, 1940. This order dealt with maximum rentals. Section 1(*a*) of the order defined "Housing accommodation" as follows:

"1. For the purposes of this Order,

"(*a*) 'Housing accommodation' means any furnished or unfurnished house, apartment, flat, room, or dwelling, designed or used for residential purposes, together with all appurtenances thereto and such heating, lighting, water, garage and other services, equipment or facilities as are supplied by the landlord."

Order No. 7 provided certain machinery for fixing maximum rentals and further provided that until further notice, the order should apply only to the municipalities named in the order. Neither Calgary nor any other municipality in Alberta was named in the order at the time it was made, but on December 7, 1940 the order was, by Order No. 21, [74 Can. Gaz., p. 2066] made applicable to the City of Calgary.

On November 23, 1940 Order No. 15 became effective. This order which is to be found at pp. 1859 and 1860 of Vol. 74 of the Canada Gazette deals with the eviction of tenants. The provisions of Order No. 15 material to the issues in this action are as follows:

"For the purposes of this order:

"1 (*b*) 'Housing accommodation,' 'Landlord,' 'Lease,' 'Rent,' 'Rental,' and 'Rental Administrator' shall have the respective meanings set forth in Order No. 7 of the Board, dated the 24th day of September 1940.

"5. In respect of any aforesaid housing accommodation, any notice to vacate given by any landlord and not followed by actual vacation prior to the effective date of this order, shall have no effect unless the landlord satisfies the said Court as to the existence of one or more of the circumstances set forth in Section 3 hereof.

"6. All leases shall be deemed to have been amended in so far as is necessary to give effect to the provisions of this order.

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"7. Any agreement by a tenant to waive his rights under this order shall be null and void.

"8. This order shall be effective on and after the 23rd day of November 1940."

Order No. 15 from which the above excerpts are quoted is without any territorial limitation and is therefore on its face effective throughout Canada. But it is argued that the expression "aforesaid housing accommodation" as used in s. 5 of Order No. 15 above quoted, must by reason of s. 1(*a*) be limited to the "housing accommodation" mentioned in Order No. 7; and as Order No. 7 was not in force in the City of Calgary at the time that Order No. 15 was made, the latter Order can have no application to the City of Calgary.

The argument seems to me to be untenable. Section 1(*a*) of Order No. 7 merely defines the meaning of the term "housing accommodation" as used in that order. The other provisions of Order No. 7 respecting housing accommodation do not form part of the definition.

Mayor of Portsmouth v. *Smith* (1885), 10 App. Cas. 364, was a case in which a local improvement Act incorporated s. 53 of the *Towns Improvement Clauses Act*. Lord Blackburn, dealing with this aspect of the case, in the House of Lords said (p. 371): "Where a single section of an Act of Parliament is introduced into another Act I think it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by way of a proviso or exception on that which is incorporated, that should be referred to."

It will be noted that Lord Blackburn points out that if there were in the original Act sections which came by way of proviso or exception to that which is incorporated but which provisos or exceptions are not incorporated into the new Act, then such provisos or exceptions cannot be referred to. Much less, it seems to me can sections in the original Act which are not incorporated into the new Act and which have no bearing on the meaning of the section which is incorporated, be referred to.

Section 1(*b*) of Order No. 15 merely imports into that Order the definition of "housing accommodation" contained in s. 1(*a*) of Order No. 7. Section 1(*b*) does not incorporate anything else from Order No. 7. It does not, for example, incorporate s. 8 of Order No. 7 which limits territorially the operation of

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Order No. 7. It seems to me that Order No. 15 is in exactly the same position as it would have been if instead of incorporating by reference s. 1(*a*) of Order No. 7, it had simply repeated the definition contained in that section. In this view the incorporation of s. 1(*a*) of Order No. 7 does not alter or affect the general application of Order No. 15 to all Canada.

In *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63 at p. 69, Brett L.J. said: "There is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second."

This rule seems quite logical. If a new statute incorporates a section from a former statute then that section becomes a part of the new statute and is not affected by the repeal or alteration of the former statute. A similar logic would, I think, apply to the case at bar. Let it be assumed that as far as Calgary was concerned Order No. 7 had no existence prior to November 23, 1940. On the latter date Order No. 15, which had no territorial limitation and was therefore on its face applicable to all Canada came into force. It cannot, I think, reasonably or logically be said that Order No. 15 did not apply to Calgary because it incorporated a definition from Order No. 7 which latter order did not then apply to Calgary and which definition had no reference to the territorial applicability of Order No. 7.

If Order No. 15 was in effect in all Canada on and after November 23, 1940, then it seems clear that under the terms of s. 5 of that Order the respondent's notice to quit had no effect. The notice was not followed by actual vacation prior to November 23, 1940, when Order No. 15 became effective. As already pointed out the appellant remained in possession until January 18, 1941. The evidence establishes that respondent did not make any attempt at any time to satisfy the Court as to the existence of one or more of the circumstances set out in s. 3 of Order No. 15.

But even if it could be said that Order No. 15 did not become effective in the City of Calgary on November 23, 1940, it has been pointed out above that Order No. 7 was made applicable to Calgary on December 7, 1940. It follows in my view of the case that Order No. 15 was effective in Calgary on December 7, 1940. If the effective date of Order No. 15, as far as Calgary is concerned, is December 7, 1940, then s. 5 of Order No. 15 is equally effective to nullify the respondent's notice to quit because the notice to quit, given on November 6, 1940, was not

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followed by actual vacation prior to the effective date of the Order, *viz.*, December 7, 1940.

In either view the respondent's notice to vacate was of no effect. It follows that the appellant was wrongfully dispossessed by the respondent. I would fix the damages at $625. There will be judgment for this amount.

The appeal will therefore be allowed with costs here and in the Court below. Such costs will be taxed in Column 2 and shall include examinations for discovery, Rule 27 not to apply. There will be no set-off for costs.

Appeal allowed.

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TAB 59

Citation: R. v. C. (W. J.), 2008 MBCA 11 Date: 20080201
Docket: AY06-30-06433

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Scott
Madam Justice Freda M. Steel
Mr. Justice Richard J. Chartier

B E T W E E N:

HER MAJESTY THE QUEEN	)	***M. P. Cook***
	)	*for the Appellant*
Respondent	)	
	)	***A. Y. Kotler***
	)	*for the Respondent*
	)	
	)	***S. D. Boyd***
- and -	)	*for the Provincial Director*
	)	*of the Youth Criminal*
	)	*Justice Act*
	)	
	)	*Appeal heard:*
	)	***May 17, 2007***
C. (W. J.)	)	
	)	*Judgment delivered:*
(Young Person, Accused) Appellant	)	***February 1, 2008***

CHARTIER J.A.

The Issue

1 The issue on this appeal is whether a youth court judge, when conducting an annual review pursuant to s. 94 of the *Youth Criminal Justice Act* (*YCJA*), has the authority to convert the remaining secure custody portion of a young person's sentence into an open custody order.

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review conducted by youth court judges (as it was done previously under the *YOA*).

How does repealing a statute affect another statute that incorporates it by reference?

26 As a final point, a concern was raised at the hearing of this matter with respect to the following question: How does repealing a statute affect another statute that incorporates the repealed statute by reference? Section 199 of the *YCJA* repealed the *YOA* at the same time as the *YCJA* came into force on April 1, 2003. The Order in Council, which is dated April 23, 2003, references, *inter alia*, ss. 24.1 and 28 of the repealed *YOA*. The concern raised is that at the same time the *YCJA* incorporated provisions of the *YOA* by reference, it repealed the *YOA*.

27 There is no question that Parliament can legislate by reference, as it did in s. 88 of the *YCJA*. That is not the concern. The concern is whether it was permissible for Parliament to incorporate by reference s. 28 of the *YOA* into the *YCJA* (by way of s. 88) given that the *YCJA* repealed the *YOA* at the same time it referenced s. 28 of the *YOA*. Put another way, the issue is what effect, if any, the repeal of the *YOA*, from which the provisions were incorporated, has on the *YCJA*.

28 Generally speaking, when legislation is repealed, it ceases to be law. As described by Professor Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths Canada Ltd., 2002) (at p. 527):

> Repeal is the key terminal event in the operation of legislation. When a repeal takes effect, the repealed legislation ceases to be law

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> and ceases to be binding or to produce legal effects. … It also means that everything dependent on the repealed legislation for its existence or efficacy ceases to exist or to produce effects. …

29 This rule can be displaced by statute and, indeed, several survival clauses were built into the federal *Interpretation Act*. One of these clauses, s. 44(*h*) of the *Interpretation Act*, provides some assistance in addressing the issue at hand. It reads as follows:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> . . . . .
>
> (*h*) any reference in an unrepealed enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.
>
> [emphasis added]

30 With respect to the consequences of repealing provisions incorporated by reference and its impact on the operation of the referential legislation, Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Toronto: Carswell, 2000) noted (at p. 77):

> The federal *Interpretation Act* (s. 44(h)) provides a special rule in the case of the substitution of one legislative text by another. If a new text brings about the deletion of a provision referred to by another text, the provision remains in force "so far as is necessary to maintain or give effect to the unrepealed enactment." …

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31 The evolution of the law in this area has been described by Horace Emerson Read, "Is Referential Legislation Worth While?" (1940), 18 Can. Bar Rev. 415, as follows (at pp. 423, 424-25):

> … The earlier decisions in both England and the United States hold without qualification that the repeal of the incorporated law leaves the referring one in force, unless it also is repealed expressly or by necessary implication, and that the reference does not carry with it changes afterwards made in the former. …
>
> . . . . .
>
> But, despite their initial declarations of firm loyalty to a rule coined of logic and dedicated to certainty, it was not long before the "American" courts, while in the throes of construction, resorted to the "Intention of the Legislature", that Alladin's lamp which has so often enabled Anglo-American courts to conjure much from little or nothing. The result was a distinction between two types of reference: Where one statute adopts the whole or a part of another *statute* by a particular or descriptive reference to the statute or provisions adopted, such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions, modifications, or repeals of the statute so taken unless it does so expressly or by necessary implication. But where the reference is, not to any particular statute or part of a statute, but to *the law generally* which governs a specified subject, the reference will be regarded as including, not only the law on that subject in force at the date of the referential act, but also that law as it exists from time to time thereafter.
>
> [emphasis in original]

32 As the reference in s. 88 of the *YCJA* is to ss. 24.1 and 28 of the *YOA*, it falls within the first category of referential legislation and appears to be valid. This conclusion is supported by the case law. For instance, in *Mainwaring v. Mainwaring*, [1942] 2 D.L.R. 377 (B.C.C.A.), McDonald C.J.B.C. stated (at p. 380):

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> … Legislation by reference … has been consistently construed not to be ambulatory in its effect, but to incorporate the extrinsic law as at the date of the Act that is being construed, and to be unaffected by subsequent change of the law incorporated: …

33 Another Canadian case on this point is *Wilson v. Albert*, [1943] 2 W.W.R. 151 (Alta. S.C. App. Div.) which involved an action by a tenant against her landlord for damages for unlawful ejection. Issues regarding referential legislation were raised. Ewing J.A. reasoned as follows (at p. 155):

> In *Clarke v. Bradlaugh* (1881) 8 Q.B.D. 63, 51 L.J.Q.B. 1, Brett, L.J. said:
>
> > There is a rule of construction that where a Statute is incorporated by reference in a second Statute the repeal of the first Statute by a third does not affect the second.
>
> This rule seems quite logical. If a new statute incorporates a section from a former statute then that section becomes a part of the new statute and is not affected by the repeal or alteration of the former statute. …

34 A similar result was reached in *Hilborn v. Killam*, [1981] 4 W.W.R. 619 (B.C.S.C.). In that case, the court's family law rules incorporated by reference the *Family Relations Act, 1972*. That *Act* was subsequently repealed and replaced by the *Family Relations Act, 1978*. Gould J. stated (at pp. 625-26):

> … The rule is an example of incorporation by reference. It has so incorporated Pt. IV of the 1972 Family Relations Act. The repeal of that Act cannot invalidate or modify the rule, including the parts of the 1972 Act so incorporated. …
>
> . . . . .

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> Therefore the repeal of the 1972 Family Relations Act does not have any effect upon Pt. IV thereof as incorporated by reference into judge-made R. 36(4).

35 This Canadian law stems from older English authorities. For instance, in *The Queen v. Smith et al.* (1873), 42 L.J.M.C. (N.S.) 46 (Q.B.), the court was facing a situation somewhat similar to the case at bar. In that case, the *Wine and Beerhouse Act, 1869*, 32 & 33 Vict. c. 27, incorporated certain appeal provisions from the earlier *Alehouse Act, 1828*, 9 Geo. 4. c. 61. However, a new *Licensing Act, 1872*, 35 & 36 Vict. c. 94, repealed the *Alehouse Act*. The question before the court was whether, despite this repeal, the appeal provisions were still available under the *Wine and Beerhouse Act*. The case is not on all fours with the case at bar, as there the referentially incorporated provisions were repealed by a third act, and not the act into which they were incorporated by reference. In any event, Cockburn C.J. found (at p. 48):

> … The authorities which have been referred to establish that where an earlier part of an Act is incorporated in a subsequent Act so as to form part of it, it is the same as if it were in the ordinary sense part of it, and the repeal of the first Act will not take away the part incorporated in the second. …

36 Another similar case may be found in the old Australian jurisprudence. In *Osborne v. The Commonwealth* (1911), 12 C.L.R. 321 (H.C.A.), a new *Land Tax Act* was passed. It simply provided that the *Land Tax Assessment Act* be read as one with the *Land Tax Act*. The issue in that case arose from the fact that the *Land Tax Assessment Act* was passed a day later than the *Land Tax Act*; i.e., it was not in force when the *Land Tax Act* was originally passed. It was argued that the *Land Tax Act* was therefore void, as it endeavoured to referentially incorporate an Act that did not exist

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as of the day it was enacted. Griffith C.J. dismissed this argument summarily (at p. 334):

> The first point, that the attempt to incorporate an Act which was not in existence is meaningless and ineffectual, was not very seriously pressed, and indeed could not be. In construing any Act the duty of the Court is to ascertain what the legislature meant. Now what did they mean when they spoke of the *Land Tax Assessment Act* 1910? As a matter of common sense they meant to refer to an Act of that name which was then in process of enactment. As soon as it became law the Act, although before ineffective, became effective. …

37 By analogy, the reference in the *YCJA* to the *YOA* should be given effect, "as a matter of common sense," even though or, perhaps, especially because the *YCJA* also repealed the *YOA*.

38 Two statutory interpretation principles should be borne in mind in this case. The first principle relates to simultaneously enacted provisions (here, s. 88 (which referentially incorporated s. 28 of the *YOA*) and s. 199 (which repealed the *YOA*)). As an illustration of this principle, Professor Sullivan, *ibid.* at 277, cites *Ottawa (City) v. Hunter* (1900), 31 S.C.R. 7. Therein, Taschereau J. wrote (at p. 11):

> The rule that a prior enactment is superseded by a later one incompatible with it cannot be applied here. These two paragraphs became law at one and the same moment. They no doubt cannot but be read one after the other, but Parliament's will as to both was expressed by simultaneous enactments … .

39 In the same way, it cannot be argued that s. 199 should be seen as superseding s. 88 of the *YCJA* just because it comes later, sequentially, in the legislation. Both provisions came into force at the exact same moment.

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TAB 60

Newfoundland Supreme Court
Court of Appeal

Citation: Bow Valley Husky (Bermuda) Ltd. et al. v. Saint John Shipbuilding Ltd. et al. (No. 3)
Date: 1992-05-06
Docket: 1991 No. 180

1992 CanLII 7090 (NL CA)

Between:
Bow Valley Husky (Bermuda) Ltd., Husky Oil Operations Ltd. and Bow Valley Industries Ltd. (Appellants)
and
Raychem Canada Limited, Raychem Corporation and Saint John Shipbuilding Limited (Respondents)

Gushue, Mahoney, O'Neill, Marshall and Steele, JJ.A.

Counsel:
Michael Harrington, Q.C., and Cecily Strickland, for the appellants;
Wylie Spicer, for the respondents Raychem Limited and Raychem Corporation;
Edward Roberts, Q.C., and Glen Noel, for the respondent Saint John Shipbuilding Limited.

[1] Marshall, J.A.: The immediate question raised by this appeal is whether the Supreme Court of Newfoundland can be called upon to adjudicate a negligence claim for damages caused by a fire aboard an offshore drilling rig whilst it was drilling for oil on the Grand Banks of Newfoundland outside the territorial waters. Resolution of this question will necessarily entail inquiry into this court's admiralty jurisdiction.

Circumstances And Nature Of The Claim

[2] The rig is the "Bow Drill 3" which was constructed at Saint John, New Brunswick, and Halifax, Nova Scotia, by Saint John Shipbuilding Limited for its owner, Bow Valley Husky (Bermuda) Limited. Certain electrical components manufactured by Raychem Corporation of California, U.S.A., were utilized in the construction, being incorporated into the rig's pipeline

[106] The court's admiralty jurisdiction extends, as a reading of s. 22(1) shows, over all cases where relief or a remedy is sought under "Canadian maritime law". That law was explicitly defined in one part of s. 2 as including the law administered by the Exchequer Court on its admiralty side by virtue of the repealed *Admiralty Act.* That jurisdiction, together with all preexisting Canadian maritime law prior to enactment of the *Federal Court Act* was continued in existence by s. 42.

[107] In addressing the combined effect of these provisions, Thurlow, A.C.J., said in *Canada v. Canadian Vickers Ltd.* (1978), 77 D.L.R.(3d) 241 (F.C.) [revd. 28 N.R. 486 (F.C.A.)], at p. 250:

> "(T)he effect of these provisions is to continue in effect as law of Canada the body of admiralty law that had become part of the law of Canada by the *Admiralty Act* 1891 and had been administered thereafter by the Exchequer Court of Canada both under that *Act* and the *Admiralty Act* 1934 ..."

[108] Therefore, the jurisdictional powers set out in the *Admiralty Act,* 1934 are incorporated by reference into the *Federal Court Act* and continue to apply notwithstanding repeal of the former statute. This is important in the context of the present case, as the 1934 *Act* granted jurisdiction to hear and determine "(a)ny claim for damage received by a ship, whether received within the body of a country or on the high seas" (the *Admiralty Act,* 1934, s. 18(2), incorporating s. 22(l)(a)(iii) of the *Supreme Court of Judicature (Consolidation) Act,* 1925 (U.K.), 15-16 Geo 5, c. 49). Inasmuch as this is broad enough to include tortious damage, whether through collision or otherwise, the consequential confirmation in this court of this specific jurisdictional grant appears to afford an answer to the contention of Raychem's counsel that maritime torts committed on the high seas are outside the purview of this court's jurisdictional powers.

[109] In the event that the foregoing interpretation should not be deemed to answer completely the contention of Raychem's counsel, then the conclusion to be drawn from the second part of the definition of "Canadian maritime law" in s. 2 must surely suffice. This includes in "Canadian Maritime Law" such law as "would have been" administered by the Exchequer Court if it "had had, on its admiralty side, unlimited jurisdiction in relation to maritime

1992 CanLII 7090 (NL CA)

TAB 61

In the Court of Appeal of Alberta

Citation: 587901 Alberta Ltd. v. Calgary (City), 2007 ABCA 421

Date: 20071220
Docket: 0701-0146-AC
Registry: Calgary

2007 ABCA 421 (CanLII)

Between:

587901 Alberta Ltd., carrying on business as the Centre Street North Liquor Store

Applicant
(Appellant)

- and -

The City of Calgary and the Subdivision and Development Appeal Board of the City of Calgary and Olympia Liquor Store (Centre North) Ltd.

Respondents
(Respondents)

Reasons for Decision of the Honourable Mr. Justice Clifton O'Brien

---

Application for Leave to Appeal the Decision of the
Subdivision and Development Board of the City of Calgary
Dated April 17th, 2007

Reasons for Decision of the
Honourable Mr. Justice Clifton O'Brien

2007 ABCA 421 (CanLII)

Introduction

[1] The applicant, 587901 Alberta Ltd., carrying on business as Centre Street North Liquor Store (Centre Street Liquor), makes application for leave to appeal a decision of the Subdivision and Development Appeal Board of the City of Calgary (SDAB), granting a development permit to the respondent, The Olympia Liquor Store (Centre North) Ltd. (Olympia Liquor).

Background Facts

[2] Centre Street Liquor is the owner of the property at 1716 Centre Street North in Calgary where it operates a liquor store.

[3] Olympia Liquor applied to the City of Calgary Approving Authority (the Authority) for a development permit to change the use of 1915 Centre Street North (the site) to a liquor store. The site is located approximately 184 metres from Centre Street Liquor. The Authority denied the application on March 10, 2007.

[4] Olympia Liquor filed an appeal to the SDAB, which was heard on April 17, 2007. The site was posted and advertised on the SDAB website from March 30, 2007. Notice of the hearing was included in Public Notices published in the *Calgary Herald* prior to the hearing. Persons residing within a 200 feet or 60 metre radius of the site were sent written notice of the appeal. However, no written notice of the appeal was given to Centre Street Liquor and no one appeared on its behalf to oppose the appeal when it was heard by the SDAB.

[5] The SDAB allowed Olympia's appeal, and granted a development permit subject to a number of permanent conditions.

Governing bylaws and legislation

[6] The land use designation of the site is Direct Control, pursuant to Bylaw 6Z2000 passed on January 17, 2000. Schedule "B" of that bylaw set out Development Guidelines as follows:

> 2. Development Guidelines
> (a) Commercial and Mixed Commercial and Residential Development
> For commercial and mixed commercial and residential development, the General Rules for Commercial Districts contained in Section 33 of Bylaw 2P80 and the Permitted and Discretionary Use Rules of C-2(12) General Commercial District shall apply
> . . .

Bylaw 2P80 is the City of Calgary Land Use Bylaw.

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[7] A liquor store is within the discretionary uses for the site as a C-2(12) General Commercial district. The General Criteria for Liquor Stores (General Criteria) in use in at the time, in 2000, for assessing an application for a development permit for liquor stores stated, in part:

> 1. Location in Relation to Existing Liquor Stores
>
> Where a proposed liquor store is within 300 metres radial distance of an existing liquor store, any cumulative impacts of the facilities on existing development within the area must be considered in evaluating the application.

[8] Section 33(7)(d) of Bylaw 2P80 was amended by Bylaw No. 13P 2003 on November 3, 2003, as follows:

> 1. The City of Calgary Land Use Bylaw Number 2P80 is hereby amended.
> 2.Section 33(7) is amended by deleting Section 33(7)(d) and substituting the following therefor:
>
> (d) Liquor Stores
>
> (i)Separation Distance Between Liquor Stores
>
> (A) No liquor store shall be located closer than 300 metres to any other liquor store.
>
> (B) The 300 metre separation distance shall be measured from the closest point of a liquor store to the closest point of another liquor store.
>
> . . .

[9] The pertinent provisions of the *Municipal Government Act*, RSA 2000, c. M-26, (the MGA) are as follows:

> 686.(3) The subdivision and development appeal board must give at least 5 days' notice in writing of the hearing
>
> (a) to the appellant,
>
> (b) to the development authority whose order, decision or development permit is the subject of the appeal, and
>
> (c) to those owners required to be notified under the land use bylaw and any other person that the subdivision and

> development appeal board considers to be affected by the appeal and should be notified.

. . .

687(3) In determining an appeal, the subdivision and development appeal board

> (a) must comply with the land use policies and statutory plan and, subject to clause (d), the land use bylaw in effect;
>
> (b) must have regard to but is not bound by the subdivision and development regulations;
>
> (c) may confirm, revoke or vary the order, decision or development permit or any condition attached to any of them or make or substitute an order, decision or permit of its own;
>
> (d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,
>
> > (i) the proposed development would not
> >
> > > (A) unduly interfere with the amenities of the neighbourhood, or
> > >
> > > (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,
> >
> > and
> >
> > (ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

Decision of the Authority

[10] The decision of the Authority referenced both the General Criteria and that the current rule under the Land Use Bylaw prohibited liquor stores from locating closer than 300 metres from another liquor store. The decision also noted that there was an inadequate number of parking stalls on the site for a liquor store use. The Authority refused the application seemingly on the basis that it met neither the General Criteria nor the current rule.

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Decision of the SDAB

[11] The SDAB considered that the 2003 amendment to the Land Use Bylaw did not apply, and evaluated the application based solely on the General Criteria. The Board found that there would be negligible cumulative impact, even though the two liquor stores were within 300 metres of each other, due to the offsetting locations (different sides of the street) and the high volume of activity on Centre Street North.

Proposed Issues

[12] Centre Street Liquor seeks leave to appeal the SDAB's decision on the following questions of alleged law and jurisdiction:

> (a) Did the Board err by failing to consider that the Applicant is a person that would be affected by the matter under consideration which is entitled to receive notice of the appeal and by failing to give notice to the Applicant of the appeal;
>
> (b) Did the Board err by failing to consider or properly consider and take into account the restrictions imposed by section 33(7)(d) of the City of Calgary's Land Use Bylaw 2P80, and whether those restrictions apply to the property located at 1915 Centre Street N.W. that was the subject of the appeal (the "Subject Land"); and
>
> (c) Did the Board err by improperly applying the General Criteria for Liquor Stores, a policy of the City of Calgary, by failing to consider that by granting the application to develop a liquor store on the Subject Land, the Applicant would by reason of the restrictions imposed by section 33(7)(d) of the City of Calgary Land Use Bylaw be adversely affected.

Test for leave

[13] Section 688(3) of the MGA provides that leave to appeal a decision of the SDAB may be granted if the judge is of the opinion that the appeal involves a question of law or jurisdiction of sufficient importance to merit a further appeal and has a reasonable chance of success.

Analysis

(i) Notice of hearing

[14] Section 686(3) of the MGA requires that notice in writing of the hearing be given to persons that the SDAB considers to be affected by the appeal. This ground of appeal relates to procedural fairness, a breach of which goes to jurisdictional error: *Parkdale-Cromdale Community League Assocation v. Edmonton (City*), 2006 ABCA 78 at para. 7.

[15] Centre Street Liquor was not provided with notice in writing as were persons residing within a 200 feet or 60 metre radius, which persons were deemed by the SDAB to be the affected persons. In this instance, both the General Criteria for consideration of development permit applications for

liquor stores, and the current land use bylaw requires consideration of liquor stores within a radius of 300 metres. There is nothing in the record before me that indicates that the SDAB gave consideration to whether Centre Street North was an affected person entitled to notice in writing and, if so, whether that requirement was met by the posting and advertising carried out by the SDAB.

[16] Centre Street Liquor submits that the SDAB is required, as a prerequisite to exercising its jurisdiction, to give notice of the appeal to any person it considers to be affected by the appeal. Centre Street Liquor further submits that because it was not notified, it was thereby denied the opportunity to present additional evidence of the cumulative impact of another liquor store being located in such proximity. In my view, it is reasonably arguable that Centre Street Liquor is an affected party so that a failure to consider, and consequent failure to give notice, is an error of law or jurisdiction: *Murray v. Edmonton* (City), [1977] A.J. No. 339 (Alta.S.C. A.D.).

(ii) Applicability of the 2003 amendment to the Land Use Bylaw

[17] The amendment to the Land Use Bylaw in 2003 provides, in mandatory terms, that no liquor store shall be located closer than 300 metres to any other liquor store. The City of Calgary and Olympia Liquor submit that this amendment is not applicable to the site. They argue that a direct control bylaw has the effect of incorporating the existing provisions of the then Current Land use Bylaw, but it does not incorporate any amendments made to the Land Use Bylaw after the date of passing of the Direct Control Bylaw.

[18] The interpretation of a bylaw is a question of law. Centre Street Liquor points to section 31 of the *Interpretation Act*, R.S.A. 2000, c. I-8, which provided that reference to another enactment is to the enactment as amended, whether it is amended before or after. There is support for the proposition that the *Interpretation Act* applies to a municipal bylaw: *Barke v. Calgary (City)*, [1993] A.J. No. 107 (Q.B., Hunt J. as she then was). Côté in *The Interpretation of Legislation in Canada*, 3rd ed. (Toronto: Carswell, 2000) at pp. 75-81, sets out a number of factors to determine whether references to other enactments are ambulatory in nature, or static.

[19] In my view, it is reasonably arguable that the reference in the Direct Control Bylaw to the Land Use Bylaw is to the Land Use Bylaw as amended from time to time, except where the amendment states to the contrary.

(iii) Improper application of General Criteria for Liquor Stores

[20] My understanding of Centre Street Liquor's submission with respect to this proposed ground of appeal is that it is something of a "fall back" argument. That is, if the General Criteria are applicable rather than the 2003 amendment, then the SDAB did not properly apply the criteria.

[21] However, the SDAB, in its Reasons, specifically addressed the General Criteria and made a specific finding that there was negligible cumulative impact of the two liquor stores being located

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within 300 metres of each other. This is a finding of fact or mixed fact and law, such that appellate interference is not warranted.

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Conclusion

[22] I am satisfied that the first two proposed grounds of appeal meet the statutory test for leave, and grant leave to appeal to Centre Street Liquor on these grounds. I refuse to grant leave with respect to the third proposed ground.

Application heard on December 5, 2007

Reasons filed at Calgary, Alberta
this 20th day of December, 2007

O'Brien J.A.

Appearances:

R. J. Simpson
for the Applicant

L. J. Gosselin
for the City of Calgary and
The Subdivision and Appeal Board of the City of Calgary

T. W. Bardsley
for the Olympia Liquor Store (Centre North) Ltd.

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TAB 62

GHOST RIVER

SUB-REGIONAL

INTEGRATED RESOURCE PLAN

Approved by the Economic Planning
Committee of Cabinet on June 7, 1988

1988
Edmonton

Pub No. T/180
ISBN: 0-86499-578-4

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PREFACE

This planning document was prepared by government agencies and public consultants in recognition of the need for improved management of Alberta's lands and resources. It applies only to public lands within the Ghost River Planning Area, not to private or federal lands.

The plan presents the Government of Alberta's resource management policy for public lands and resources within the area. It is intended to be a guide for resource managers, industry and the public with responsibility or interests in the area, rather than a regulatory mechanism. Resource potentials and opportunities for development are identified with a view to assisting in the economic progress of Alberta. The plan is sufficiently flexible so that all future proposals for land use and development may be considered. No legitimate proposals will be categorically rejected. Energy resource decisions are subject to the application of legal and approved regulatory processes under the jurisdiction of the Minister of Energy. This plan may influence regulatory decisions, but will not result in the categorical approval or rejection of energy proposals. The provincial government is committed to serving Albertans; should a proposal not be in keeping with the provisions of the plan, staff will work with the proponent to explore alternative means for accommodating the proposal in a more appropriate location, either in this planning area or on other public lands. The rejection of any proposal will be done only in writing by the minister or his designate.

A detailed outline for implementation will be provided for this sub-regional plan in order to identify the necessary implementation actions and roles. This implementation outline will also provide for the continuing review of the plan so that it may accommodate changing needs and situations. Wherever possible, the private sector will be provided the opportunity to be actively involved in the operational delivery of the plan.

Implementation is subject to the normal budgetary approval process. In establishing overall priorities, opportunities in other planning areas and areas currently outside the planning process will be considered.

While the plan identifies resource potentials and opportunities, the realization of these may require the dedication of major amounts of public funds. The plan will be used on the understanding that any actions required for implementation will only be undertaken as budgetary approvals are given in the normal way. The private sector will be given the first opportunity to provide any development required.

This plan has no legal status and is subject to revisions or review at the discretion of the Minister of Forestry, Lands and Wildlife.

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1. INTRODUCTION

1.1 The Planning Area

The Ghost River Planning Area (Figure 1) is located 50 km northwest of Calgary. The area encompasses approximately 2900 km^2 (1120 sq. mi.) and includes most of the Ghost River drainage basin and Burnt Timber and Fallentimber creeks, which are part of the Red Deer River drainage basin.

The boundaries of the planning area are as follows:

NORTH - northern divide of the Burnt Timber/Fallentimber Watershed Basin, and the boundary between Townships 30 and 31, Range 5 (W5M).

SOUTH - Bow Corridor and the northern boundary of the Forest Reserve south of the Stoney Indian Reserve.

EAST - boundary between Ranges 4 and 5, W5M, north of the Stoney Indian Reserve and the I.D. 8 boundary south of the Stoney Indian Reserve.

WEST - Banff National Park.

The planning area contains the settlements of Benchlands, Big Prairie, Waiparous Creek and Water Valley.

The eastern and southeastern portions of the area are used mainly for ranching. Grazing and timber production occur on much of the public land. The entire planning area is also used extensively for a variety of outdoor recreation activities, mainly by people from Cochrane and Calgary. Stoney Indian Reserves 142, 143 and 144 are located along the southern boundary of the Ghost River Planning Area and reserve 142 B is located entirely within the southeastern portion of the area.

Access to the planning area is provided by Highway 1, Highway 1A, Secondary Road 940 (Forestry Trunk Road) and other secondary roads.

1.2 Policy and Planning Context

A Policy for Resource Management of the Eastern Slopes Revised 1984 (Alberta 1984) states that integrated resource planning, conducted under a comprehensive interagency approach, is the key to effective management of Alberta's resources in the Eastern Slopes. The policy also explains that integrated resource plans implement its regional land use zoning priorities and guidelines. The Eastern Slopes Policy articulates further that integrated resource plans will allocate land uses for specific portions of a planning area, and identifies the need for possible changes in policy zone boundaries.

Integrated resource plans have been completed or are under preparation for selected areas of the Eastern Slopes Policy region. In March 1978, the Alberta Energy and Natural Resources/Recreation and Parks Interdepartmental Assistant Deputy Ministers Committee identified the Ghost River area (Figure 1) as a priority for the development of an integrated resource plan. The Ghost River Sub-Regional Integrated Resource Plan will serve to effectively mitigate conflicts between resource use objectives by determining resource priorities and allocating land uses for specific portions of the Ghost River Planning Area.

The Ghost River planning team consists of representatives from the Alberta Forest Service, Public Lands and Fish and Wildlife divisions of the Department of Forestry, Lands and Wildlife, and the Mineral Resources Division of the Department of Energy.

Consultative team members were identified and given the opportunity to present agency concerns and opinions at key stages of the planning process. They include agencies within the Alberta government, federal government and local authorities:

- Alberta government: Alberta Environment, Alberta Recreation and Parks, Alberta Transportation and Utilities, Alberta Culture and Multiculturalism, Alberta Tourism and Alberta Agriculture;

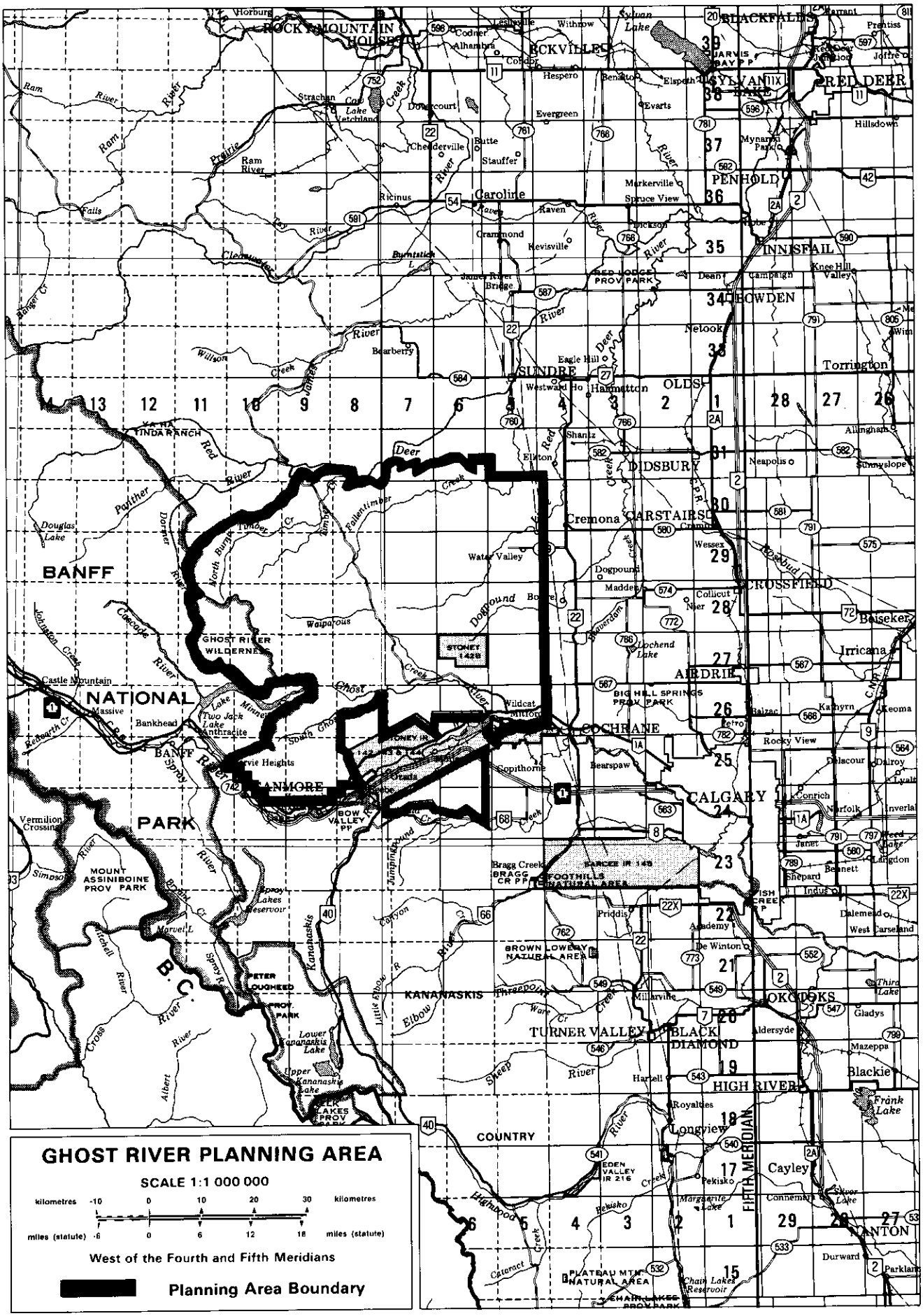


Fig. 1 **REGIONAL LOCATION**

- federal government: Canadian Parks Service; and

- local authorities and MLAs: MLA Banff/Cochrane, MLA Olds/Didsbury, M.D. 8, I.D. 8, M.D. 44, County 17, Red Deer Regional Planning Commission and Calgary Regional Planning Commission.

Throughout development of the plan, public interest groups and associations, industries and individuals have been invited to participate in the planning process. Participation involved submitting letters, briefs and information, reviewing plan documents and attending public meetings.

The final plan will apply only to land and resources vested in the Crown, in both the Green and White Areas. Patent land and private development on public land within the boundaries of the Calgary and Red Deer Regional Planning Commissions remain under the planning control of local municipalities and the planning commissions. In connection with these lands, the integrated resource plan reflects the philosophies of land management of the local authorities. The Alberta government will continue to make every effort to strengthen the existing co-ordination and co-operation with local planning authorities.

A Policy for Resource Management of the Eastern Slopes Revised 1984 (Alberta 1984) provides guidelines and objectives for integrated resource management and planning for the entire Eastern Slopes region including the Ghost River Planning Area. The Eastern Slopes Policy relies on regional land use zoning to designate large areas of land for varying degrees of protection, resource management and development. Table 1 lists the general intent for each of the following eight land use zones:

1) Prime Protection;

2) Critical Wildlife;

3) Special Use;

4) General Recreation;

5) Multiple Use;

6) Agriculture;

7) Industrial; and

8) Facility.

The overriding principle for all the zones is to protect the valuable water resources of the Eastern Slopes and to provide for public land and resource utilization in a manner consistent with principles of conservation and environmental protection. The zoning does not apply to privately owned lands in the planning area. Table 2 defines a range of compatible activities to enact the intent of the eight land use zones. The compatible activities table and regional zoning provide interim direction until sub-regional integrated resource plans are completed.

The Ghost River Sub-Regional Integrated Resource Plan supersedes the zoning configuration in the Eastern Slopes Policy. As a result, the zones have been refined and the regional zoning found in the Eastern Slopes Policy no longer applies in the planning area. Figure 2 shows the revised zoning. It also shows Resource Management Areas (RMAs) which are geographic units that have common resource management intents.

For a discussion of legislation and other associated direction directly related to this plan, refer to APPENDIX A (p. 70).

Table 1

INTENTS OF THE EASTERN SLOPES POLICY ZONES

#	ZONE	INTENT OF THE ZONE
1	Prime Protection	To preserve environmentally sensitive terrain and valuable ecological and aesthetic resources.
2	Critical Wildlife	To protect ranges or terrestrial and aquatic habitat that are crucial to the maintenance of specific fish and wildlife populations.
3	Special Use	To recognize historical resources, lands set aside for scientific research and any lands which are required to meet unique management requirements or legislative status, which can not be accommodated within any of the other zones.
4	General Recreation	To retain a variety of natural environments within which a wide range of outdoor recreational opportunities may be provided.
5	Multiple Use	To provide for the management and development of the full range of available resources, while meeting the objectives for watershed management and environmental protection in the long term.
6*	Agriculture	To recognize those lands within the Eastern Slopes which are presently utilized or are considered suitable for cultivation and/or improved grazing.
7	Industrial	To recognize existing or approved industrial operations such as coal mines, gas processing plants, cement plants and large forest product mills.
8*	Facility	To recognize existing or potential settlement and commercial development areas.

* Not applied in the Ghost River Sub-Regional Integrated Resource Plan.

TABLE 2. COMPATIBLE ACTIVITIES BY LAND USE ZONE

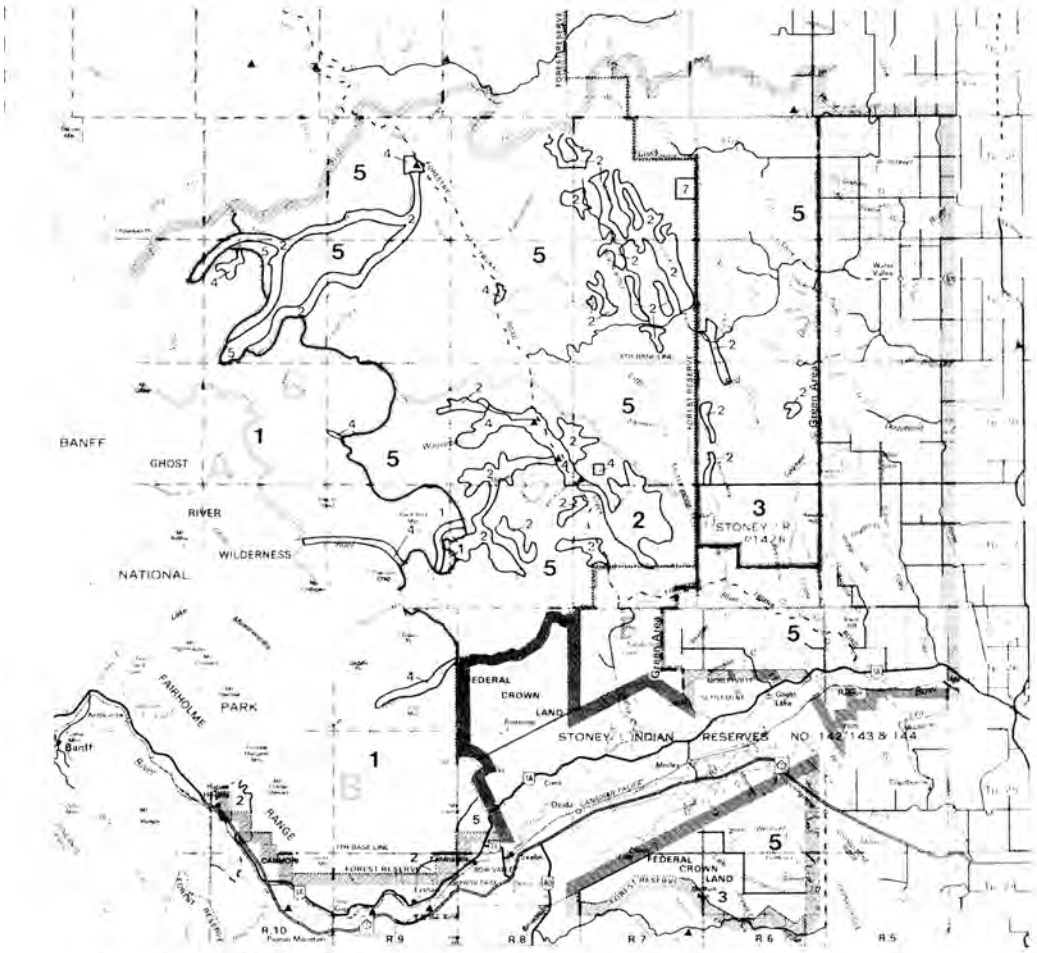
ZONE	1	2	3	4	5	6	7	8
ACTIVITY	PRIME PROTECTION	CRITICAL WILDLIFE	SPECIAL USE	GENERAL RECREATION	MULTIPLE USE	AGRICULTURE	INDUSTRIAL	FACILITY
Non-motorized recreation	▒	▒		▒	▒	▒		▒
Fishing	▒	▒		▒	▒	▒		▒
Hunting	▒	▒			▒	▒		
Scientific study	▒				▒	▒	▒	▒
Trapping	▒				▒	▒		
Trails, non-motorized				▒	▒	▒		▒
Transportation & utility corridors					▒	▒	▒	▒
Primitive camping				▒	▒	▒		
Intensive recreation				▒	▒			▒
Off-highway vehicle activity					▒	▒	▒	▒
Logging					▒	▒	▒	
Domestic grazing					▒	▒		
Petroleum and natural gas exploration & development					▒	▒	▒	
Coal exploration					▒	▒	▒	
Coal development					▒	▒	▒	
Mineral exploration & development					▒	▒	▒	
Serviced camping				▒	▒			▒
Commercial development								▒
Industrial development					▒		▒	
Residential subdivisions						▒		▒
Cultivation						▒		

▒ Compatible Use — Uses that are considered to be compatible with the intent of a land use zone under normal guidelines and land use regulations.

Permitted Use — Uses that may be compatible with the intent of a land use zone under certain circumstances and under special conditions and controls where necessary.

Not Permitted Use — Uses that are not compatible with the intent or capabilities of a land use zone.

These activities are only representative of the range of activities that occur in the Eastern Slopes. For these and any other activities, the possibility of whether they should or should not take place in a particular area must always be measured against the fundamental management intentions for that zone. Since economic opportunities are not all known in advance, site-specific developments may be considered in any zone.



GHOST RIVER
INTEGRATED RESOURCE PLAN
RESOURCE MANAGEMENT AREAS

AREA A Ghost Wilderness
AREA B Upper Ghost
AREA C Callumbella
AREA D Waiparous
AREA E Little Red Deer
AREA F Waiau Valley

REVISED EASTERN SLOPES ZONING
1 Prime Protection
2 Critical Wildlife
3 Special Use
4 General Recreation
5 Multiple Use
6 Agriculture
7 Industrial
8 Facility

Fig 2 Refined Eastern Slopes Zoning and Resource Management Areas

2. BROAD RESOURCE MANAGEMENT OBJECTIVES AND GUIDELINES

This chapter consists of a statement of intent for resource management within the planning area plus a set of broad resource objectives and guidelines that apply to the entire planning area. A resource summary is also provided for each sector.

The primary intent for resource management within the Ghost River Planning Area is as follows:

> To allow for the development and use of the full range of available resources while minimizing adverse environmental impacts on watershed and renewable resources.

The Ghost River plan was developed within the scope of the broad resource objectives identified at the plan policy stage of the planning process by participating agencies. These broad objectives provide future standards which participating agencies will strive to attain. They reflect government priorities for the Ghost River sub-region within the context of the Eastern Slopes region, and are expressed as they relate to a particular resource. Following the broad objectives for each resource are the common resource management guidelines.

2.1 Watershed

The Ghost River Planning Area includes a portion of the headwaters of the Bow and Red Deer rivers that eventually flow into the South Saskatchewan River. The water supplied by the Bow and Red Deer rivers is used downstream for irrigation, hydro-electric generation, and industrial and municipal purposes in south and south-central Alberta. The major drainages in the planning area include Fallentimber and Burnt Timber creeks and the Little Red Deer River of the Red Deer River drainage basin, and Waiparous Creek and the Ghost and Bow rivers of the Bow River drainage basin. These drainages are locally important for their fisheries, wildlife and recreation values.

The lower elevations (900 to 1200 m or 3000 to 3900 ft. asl) of the eastern portion of the planning area are mainly composed of Aspen Parkland with mixed lodgepole/aspen forests in northern areas. Intermediate elevations are dominated by the Montane Ecoregion to the south and the Subalpine Ecoregion through the remainder of the area. Lodgepole pine, Douglas fir and grasslands dominate the Montane Ecoregion. Engelmann spruce occurs at the higher elevations of the mountains in the western portion of the planning area dominated by Subalpine forests, and the Alpine Ecoregion occurs above tree line (approximately 2100 m or 7000 ft. asl). The Alpine Ecoregion is mainly composed of rock, alpine meadows, sedges, shrubs and herbs.

The topography of the planning area is mountainous to the west, giving way to foothills east of the McConnell Thrust Fault and changing to gently rolling topography in the eastern portions. The majority of the surficial deposits in the planning area consist of glacial deposits with areas in the northwest unglaciated. Terrain sensitivity varies throughout the planning area. Stream channels are well armoured with rock material in the western portions of the planning area. Also in these portions, soils are less developed and slopes are steeper with the result that disturbances become more difficult to reclaim. Although soils are more developed in the east, disturbance can cause erosion on some slopes. Precipitation throughout the planning area is high, generally increasing in the west at higher elevations. Fifty to 60 per cent of the annual precipitation occurs as snow. In addition, streamflow peaks in spring as the result of snowmelt.

Current uses of public land in the planning area do not seriously affect water quality or quantity in the Bow or Red Deer drainage systems. However, local impacts (e.g., industrial, agricultural and recreational) have influenced and continue to influence stream conditions in the planning area.

Objectives

1. To maintain an optimum water yield of streams in the planning area to satisfy both increasing downstream and on-site demands.

2. To prevent vegetation changes that could cause extreme fluctuations in streamflow,

resulting in erosion of channel materials, high sediment loads, property damage or water supply problems.

3. To maintain, and where possible improve, the water quality of streams and lakes.

4. To prevent or minimize soil erosion associated with land use activities.

5. To proceed with proposed reclamation projects on vacant public land where unacceptable environmental conditions exist.

6. To ensure that reclamation guidelines and standards are adhered to on surface and subsurface dispositions and on land disturbances from natural and man-made causes.

Guidelines

1. Alberta Environment and the Alberta Forest Service will monitor water yield and quality in the planning area to ensure the maintenance of a high-quality water resource.

2. The Ghost River Planning Area will be included in a watershed management plan prepared for the Bow/Crow Forest by the Alberta Forest Service.

3. Land or resource uses that may alter water quality, quantity and flow regime of surface water and groundwater should be brought to the attention of Alberta Forestry, Lands and Wildlife, and Alberta Environment so that adverse impacts on the water resource can be assessed and co-operatively minimized as required.

4. Fluctuations in water yield and streamflow will be minimized by adhering to operating ground rules for timber harvesting and existing forest protection policies.

5. The frequency of stream crossings will be minimized to lessen point sources of sedimentation.

6. Soil erosion associated with land use activities will be addressed through ground rules established for individual developments and the internal referral systems of the provincial government.

7. Reclamation projects will be initiated and completed based on provincial reclamation policies, approval of an access management plan and availability of funds where the responsibility rests with the provincial government.

8. Reclamation of land use disturbances will proceed progressively to reduce erosion and sedimentation. Reclamation will be included as a condition of surface disposition approvals and completed according to provincial standards.

2.2 Wildlife

The planning area has the capability to support a wide variety of wildlife species including a number of big game species, upland game bird species and furbearers generally sought for consumptive use. The capability of the area to support big game species depends greatly on the availability of certain factors, such as protective cover near available food sources. Mule deer are currently the most extensively distributed big game species in the area. Significant numbers of moose, bighorn sheep and grizzly bear also inhabit the area. Moose use shrublands located on the floodplains of major creeks and bighorn sheep populations are present in the mountainous areas. The capability of the area to support grizzly bear populations depends on the availability of undisturbed feeding areas and territories. Other big game species present include elk, white-tailed deer, black bear, cougar, wolf and mountain goat.

The area has the capability to support productive populations of furbearing animals such as red squirrel, marten, lynx, coyote and beaver. The areas which have the best capabilities for many of these species change with forest succession and the availability of prey and riparian habitat.

The area also has the capability to support upland bird species such as ruffed grouse and spruce grouse. The areas which have the best capabilities for supporting these species change with forest succession and are largely dependent on forest management.

Present use of these wildlife species is both non-consumptive (e.g., viewing) and consumptive

(e.g., hunting and trapping). Commercial use varies from the sale of fur to outfitting service for hunters. There are eight traplines in the area. The average annual revenue from 1974-79 was $4360/trapline. The overall demand for consumptive and non-consumptive uses probably exceeds the available resource within the area.

The overall demand for wildlife resources present in the planning area is high as indicated in Status of Fish and Wildlife Resource in Alberta (Alberta 1984). Current uses of wildlife resources include recreational use such as hunting and viewing, and commercial use such as trapping and hunter and trail ride outfitting.

Specific demands for, and use of, each wildlife resource in the planning area are not fully known. The demand for most hunted species is probably well above the current supply as indicated by hunter questionnaire surveys. Estimates made in 1985 show that hunting demand (in relation to hunting opportunities permitted) is 4-fold for female elk, 12-fold for female moose and 3-fold for female mule deer in wildlife management unit F314, and 3-fold for non-trophy sheep in S412. The number of recreational user-days for hunting elk, moose, bighorn sheep, mule deer and white-tailed deer was estimated to be 24 247 in 1985 for wildlife management units S414, S412, F316 and a portion of F314. Although it is known that recreational hunting also occurs in this area for upland game birds, black bear and cougar, there are currently no estimates of user days available for these species.

The potential for increased use of wildlife species depends on many factors including manipulation of populations and availability of habitat. The potential for maintaining and improving populations is high in the planning area.

Objectives

1. To maintain or increase numbers, distribution, productivity and diversity of wildlife populations, particularly ungulates, furbearers, furbearing carnivores, game birds and endangered, threatened, rare or extirpated species.
2. To maintain or increase distribution, diversity and quality of wildlife habitat required to support wildlife populations at optimal densities.
3. To increase opportunities for sport hunting and other recreational uses of wildlife.
4. To maintain existing levels of commercial trapping.
5. To ensure that wildlife populations remain healthy and in balance with their range.
6. To maintain migratory routes, wintering and calving areas crucial to the survival of specific wildlife populations.

Guidelines

1. Primary management of wildlife densities will continue through commercial trapping, recreational hunting and treaty Indian hunting. Recreational hunting and trapping regulations will be adjusted as necessary to manage wildlife populations. Recreational hunting and trapping may be further restricted temporarily as a means to increase populations.
2. Habitat development and improvement programs will be planned and conducted where needed to maintain or increase wildlife populations. These programs will consider timber, recreation and range values and commitments. Programs will be implemented through range and timber management plans where suitable, and through the Buck for Wildlife Program. They will involve such activities as vegetation manipulation including prescribed burning and/or mechanical treatment where appropriate.
3. Field surveys will be conducted on seismic and industrial access roads to determine where uncontrolled public vehicle use is having significant adverse effects on wildlife populations.
4. The proposed access management plan will be reviewed to ensure that access for hunting will be maintained where compatible with other resource activities and protection of the wildlife resource.

5. Land use activity and resource development applications will be reviewed to identify potential impacts on wildlife. Conditions will be placed on applications and activities to avoid displacement or loss of wildlife or habitat. Conditions may include changes in location and timing of activity and development.

6. Recreational development and range management plans will be reviewed for compatibility with wildlife management objectives. Means to minimize impacts on wildlife resources and improve hunting opportunities will also be identified.

7. Forest management and timber harvesting plans will be reviewed for opportunities to maximize forest diversity for increasing wildlife species, and to ensure habitat requirements for selected species are met.

8. Forage production and use by cattle and wildlife will be monitored to determine if adequate forage is available on rangelands to meet wildlife objectives.

2.3 Fisheries

Lakes which can support fish populations are limited in the area and are discussed by RMA. About half the 19 creeks or river systems in the Ghost River Planning Area are considered to have good capabilities for supporting sportfish. The most common fish species present are brook trout, bull trout, brown trout and mountain whitefish.

Fishing is a major pastime for campers and day users in the area, especially on easily accessible streams. There is no commercial fishing. The number of user-days of fishing is not known, but approximately 46 per cent of the visitors to the area fish during their visit. It is believed that most visitors originate from the Calgary area.

Objectives

1. To maintain and/or increase naturally reproducing fish populations and establish new populations in suitable locations.

2. To maintain optimum instream flows for fish.

3. To maintain and/or increase the quality and quantity of aquatic habitat conducive to maintaining high water quality and supporting fish populations at optimum densities.

4. To protect spawning, overwintering and rearing areas, and migratory routes crucial to the survival of specific fish populations.

5. To increase and diversify recreational fishing opportunities.

6. To provide a success rate of 0.3 fish per angler hour on naturally reproducing populations and high altitude lakes, and 0.5 fish per angler hour on productive stocked lakes.

7. To provide appropriate access to the fisheries resource.

8. To inform and educate the public in the conservation and management of the fisheries resource.

Guidelines

1. Land use applications and resource development plans will be reviewed to identify potential impacts on fisheries. Appropriate conditions will be placed on them to avoid destruction or loss of habitat. Conditions may include changes in location, timing of activity, or development and construction methods. Rehabilitation measures may be required, particularly for key fisheries habitat such as crucial spawning, rearing or overwintering areas.

2. Angling regulations will undergo regular review in relation to angler use, harvest levels and fish population conditions to ensure the long-term survival of naturally reproducing resident sportfish populations, particularly bull and cutthroat trout. Innovative angling regulations may be required to maintain naturally reproducing populations.

3. Motorized and non-motorized trail developments will be reviewed and monitored to ensure that such trails do not damage fish habitat and that adequate stream crossings are installed.

4. Angling opportunities will be provided by enhancing the diversity of fish species available, the angling methods and angling locations. This will include development of new fisheries through lake development and stocking programs.

5. Development of fisheries enhancement or improvement programs will be implemented through the Buck for Wildlife Program and in co-operation with other agencies.

2.4 Recreation

The planning area is noted for its diversity of recreational uses resulting from its proximity to the City of Calgary and the ability of the land to sustain a variety of recreational pursuits. Most of the recreational use originates from the City of Calgary, the Town of Cochrane and smaller communities within and east of the planning area and is concentrated on weekends. A lesser degree of transient recreational use, associated with tourism along the Forestry Trunk Road (SR 940), also occurs. The potential exists to increase recreation use in the area.

Typical recreational pursuits in the planning area include camping, hunting, fishing, off-highway vehicle use, snowmobiling, trail riding, hiking, mountain climbing, ice climbing and scenic drives primarily on developed roads. There are seven forest recreation areas located on a north-south axis provided by the Forestry Trunk Road (SR 940). They provide facilities for three group camps, 328 camping units, 88 picnic sites and staging areas for an estimated 1197 km (960 mi.) of developed off-highway vehicle (OHV), motorcycle and snowmobile trails.

There are currently four Class I commercial trail riding areas in the southern portion of the planning area with trails and campsites located in the more remote, mountainous areas. (See Commercial Trail Riding Policy, APPENDIX A.) Hiking trails are located in the Blackrock Mountain area, along the Ghost River into the Ghost River Wilderness Area, and from the Canmore area through the Exshaw Creek Valley.

Random camping is widespread throughout the planning area and formal camping facilities tend to be heavily overused on long weekends during the summer. Random camping occurs in the planning area as an alternative to the formalized recreational opportunities offered within Kananaskis Country, Alberta Forest Service recreation areas and provincial recreation areas. At present, this recreational pursuit has not created any acute problems within the Ghost River Planning Area with respect to site condition or quality.

Objectives

1. To maintain existing recreational facilities at current provincial standards as required.

2. To provide a wide range of resource-based recreational opportunities.

3. To promote a greater public awareness of existing recreational facilities and opportunities.

4. To create an understanding of environmental concerns associated with recreational use within an integrated management approach.

Guidelines

1. The maintenance and upgrading of existing recreational facilities will continue within the scope of recreational operations and maintenance plans.

2. Public recreational opportunities will be provided according to long-range recreational development plans employing an integrated approach.

3. Development of recreational opportunities by the private sector on public land will be encouraged where the intent of the recreational use is compatible with environmental conditions, demand and other ongoing or anticipated land uses.

4. Visitor services, including user awareness and education, information services and promotional efforts, will be considered as components of the forest recreation approach in the planning area.

5. Management of random camping activity will be determined on the basis of ongoing site observation. Should site impacts resulting from this activity exceed acceptable levels, site hardening, closure and

rehabilitation or relocation of the activity to other identified sites will be considered.

2.5 Access

Most of the planning area is accessible by public and industrial roads and a variety of seismic, hiking, equestrian and other trails. The upper elevations of the western portions have the least access, consisting mainly of hiking, equestrian and off-highway vehicle trails. Access to the central portions is mainly by the Forestry Trunk Road (SR 940) (portions of which are being upgraded) and a variety of seismic, recreational and other trails. The TransAlta Utilities road into Devil's Gap provides access along the Ghost River. In the east-central portion of the study area the Harold Creek road, which is currently being upgraded, provides access along with a large number of seismic trails. Access to the remainder of the eastern portion is by local public roads and seismic trails. The portion of the planning area south of Indian Reserves 142, 143 and 144 is reached by Highway 1 and Secondary Road 968 along with seismic and other trails.

Off-highway vehicle use is a legitimate activity and highly valued by many users of the area. Recreational off-highway vehicle use has had some localized impacts in the Ghost River Planning Area. Indiscriminate use has the potential to cause additional impact on terrain, vegetation, wildlife and water quality.

Objectives

1. To provide a range of opportunities for summer and winter recreational off-highway vehicle use.

2. To minimize conflicts between recreational off-highway vehicle users and other users.

3. To minimize environmental impacts through the management of recreational off-highway vehicle use.

Guidelines

1. An access management plan will be prepared for the entire planning area to determine an access network suitable for summer and winter recreational off-highway vehicle use. In the development and approval of the access management plan, public education and regulatory strategies under the Forests Act will be considered as implementation mechanisms as required. The access management plan will be developed on a co-operative basis and will be subject to involvement and review by interested government resource management agencies, local authorities, the general public and public interest groups. More specific guidelines are given, as necessary, on a RMA basis.

2. Snowmobile use will be considered and permitted on selected routes in Zone 1 when approved through the access management plan. Snowmobile use will be permitted only under certain circumstances in Critical Wildlife (Zone 2) areas providing critical ungulate winter range.

2.6 Tourism

The planning area is within a two-hour drive of a resident population of over 600 000 people. In 1982, the Calgary/Canmore area received over 1 million non-resident visitors. A preliminary profile of these visitors indicates that they visit primarily in the summer from the United States, British Columbia, Saskatchewan and Ontario, and they travel by private vehicle. Almost half these visitors stayed with friends or relatives, while just over 40 per cent stayed in motels/hotels. Only 7 per cent used campgrounds. Vacationing was the main trip purpose for over half these travellers with sightseeing (69 per cent), visiting friends and relatives (57 per cent), and resting and relaxing (45 per cent) as their primary activities. Only 12 per cent indicated they took part in backpacking and hiking.

The Forestry Trunk Road is the major scenic route through the planning area. Many non-resident visitors are interested in the beautiful scenery of the foothills as seen from this road. This passive form of outdoor activity is referred to as "auto touring".

It is anticipated that an increasing number of visitors, both resident and non-resident, will be interested in auto touring on the Forestry Trunk Road in order to experience the splendour of Alberta's foothills. There is no increase in

backcountry use anticipated as a result of an increase in auto touring.

There have been no formal surveys completed on Albertan recreational activity patterns within this area, but from public input and field staff observation, several user types can be described. Residents who frequent the area for recreational purposes include backcountry hikers and backpackers, fishermen, hunters, off-highway vehicle enthusiasts and horseback riders. They are primarily weekend-oriented visitors within a day's drive of their place of residence and enjoy the random use that presently exists. Considering the varied demand on this area for recreation, and the wide range of visitors to the area, it will become increasingly important to allow for some basic service development (e.g., gas station and corner grocery.) It is also important to recognize that certain commercial tourism facilities (such as backcountry lodges) may be economically viable in the planning area.

Objectives

1. To facilitate tourism use of the planning area by resident and non-resident visitors through consideration of a variety of compatible service developments.

2. To provide opportunity for the development of private sector commercial tourism and recreational facilities and activities.

Guidelines

1. A variety of tourism and recreational opportunities such as commercial trail riding and staging areas, backcountry lodges and youth hostels, outfitting/guiding operations for hiking and hunting, summer and winter recreational off-highway vehicle use, cross-country skiing and touring activities will be accommodated where appropriate in the planning area. The development of support services to facilitate travel in, and use of, the area will also be accommodated where appropriate through consultation with M. D. 8, I.D. 8 and other responsible government agencies.

2. Planning assistance will be provided to existing and potential operators of commercial tourism facilities and services in the planning area. Marketing and demand information and promotion advice will be supplied, where possible.

3. Private sector individuals or companies interested in commercial tourism facility development will be expected to show economic feasibility and assess environmental impacts prior to project approval.

2.7 Timber

The timber resource is presently managed under two forest management units (FMUs), B8 and B02. As of May 1, 1986, the B3, B4 and B5 FMUs were amalgamated to form the B8 FMU with an estimated coniferous annual allowable cut of 141 000 m^3 (32 853 mFbm) based on a 15+/11 cm utilization standard. This has resulted in a more balanced age-class distribution incorporating the younger age classes from the former B3 FMU, and will promote a regulated forest situation over the long term. A portion of the former B2 FMU in this planning area has been incorporated in the B7 FMU which, for the most part, is located in the Kananaskis Country Planning Area. As a result, the B7 FMU has not been included in annual allowable cut calculations for the Ghost River Planning Area.

An estimated coniferous annual allowable cut of 17 500 m^3 (4078 mFbm) will be available from the Water Valley, Dogpound, Fallentimber and South Ghost miscellaneous timber use (MTU) areas for local residents and small commercial operators. Firewood cutting areas in the planning area will continue to be available for commercial and non-commercial use.

It is anticipated that commercial demand for forest products will be satisfied through commercial timber permits and three timber quota allocations. Timber quota allocations include an estimated 85 244 m^3 (19 862 mFbm) at a 15+/11 cm utilization standard, and 10 837 m^3 (2525 mFbm) employing a modified 19 cm utilization standard on an annual basis. Existing and/or additional resource allocations will remain within the limits of sustained yield forest management.

The B8 forest management unit is capable of supporting an estimated annual allowable cut of 6200 m^3 (1445 mFbm) for deciduous timber

at a 15+/11 cm utilization standard. Should demand for deciduous forest products become apparent in the future, commercial and local uses of this resource will been encouraged.

Dwarf mistletoe, found in the B8 forest management unit, is a parasitic plant that attacks lodgepole pine and, occasionally, white spruce. The parasite tends to reduce the life functions of its host, resulting eventually in mortality, either directly or through the introduction of secondary pathogens to weakened forest stands.

Intensive and extensive surveys of dwarf mistletoe commenced in November 1984 to develop a method by which occurrences could be systematically surveyed throughout the Bow/Crow Forest and to provide relevant information for forest management purposes. Surveys completed in March 1986 indicate a significant occurrence of the parasite within the planning area. Estimates from aerial reconnaissance suggest that of the 121 656 ha (300 608 ac.) of pine and mixed pine forest types on public land; 16 196 ha (40 020 ac.) have been confirmed as infected and 1526 ha (3771 ac.) have been identified as infected. An estimated 781 ha (1930 ac.) of pine forest types on privately owned lands are also infected.

Forest management throughout the Ghost River Planning Area includes the provision and maintenance of a sustained yield land base capable of satisfying both commercial and local demands for forest products. Forest management techniques intended to promote a healthy and stable forest environment, in conjunction with other demands on the forest land base, are also employed.

As the Ghost River Planning Area provides opportunities for a wide range of land uses, fire protection measures are important to ensure the safety of the public who recreate or make their livelihoods in the area, and to protect natural resources. The planning area is, for the most part, located within the forest protection area and has experienced a high frequency of both man-made and lightning-induced fire starts since 1980.

Forest protection measures, with respect to wildfires, involve a number of components including fire prevention, detection, pre-suppression and suppression. Fire prevention involves public education and direct contact with the public in an effort to prevent or minimize the risk of wildfires before they occur. Detection efforts include five lookouts located in the Keystone Hills, Mockingbird Hill, Burnt Timber (near North Burnt Timber Creek), Blue Hill (north of the Red Deer River) and Barrier Lake (formerly located on Pigeon Mountain in Kananaskis Country). Lightning detectors located throughout the Eastern Slopes provide accurate detection information as does aerial detection involving regular patrols. The public, both local residents and visitors, also play an important role in fire detection.

Pre-suppression and suppression efforts include the mobilization and deployment of initial attack crews generally located at the Ghost Ranger Headquarters and the Red Deer Guardian Station. In addition, a "helitack" crew is periodically located at the station. Airtanker bases are located at Calgary and Rocky Mountain House. The deployment of crews and equipment is dependent upon forest conditions and fire danger ratings. The public, including ranchers, local residents and industry fire suppression crews, have participated in forest fire situations.

Objectives

1. To manage the forest resource and sustained yield land base to satisfy commercial and local requirements for forest products.

2. To examine and promote the expansion of forest product allocation levels, where feasible, allowing a balanced age-class distribution and a regulated forest situation over the long term.

3. To protect the forest from damage, including destruction by fire, insects, disease or other causes, and maintain healthy and stable forest conditions.

4. To protect the forest from wildfires and maintain public safety, prevent property damage and protect the natural resources in the planning area.

5. To encourage forest research in insect and disease management problems, site productivity and reforestation on steep slopes.

6. To manage forest vegetation in a manner that will not cause detrimental changes to streamflow characteristics.

Guidelines

1. The forest land base includes all lands within the Bow/Crow Forest where forest management for sustained yield production or other purposes may be undertaken. The sustained yield land base generally consists of lands designated as zones under the Eastern Slopes Policy where logging is a compatible or permitted land use activity.

2. The sustained yield land base will be managed to provide for an estimated commercial demand level of 85 244 m^3 (19 862 mFbm) at 15+/11 cm utilization standard and 10 837 m^3 (2525 mFbm) employing a modified 19 cm utilization standard on an annual basis for coniferous timber. Existing or additional coniferous timber quota allocations will remain within the limits of sustained yield forest management.

3. An estimated deciduous annual allowable cut of 6200 m^3 (1445 mFbm) will be available for local or commercial use at the 15+/11 cm utilization standard, as demand warrants.

4. Miscellaneous timber use areas will be formally established and continue to be a source of wood products for local residents and small commercial operators. A volume estimate is given within the Little Red Deer RMA. Refer to the Little Red Deer and Water Valley RMAs for specific guidelines.

5. Timber harvesting will be conducted using landscape logging techniques applied in the Bow/Crow Forest, the Forest Landscape Management Guidelines for Alberta (Alberta 1986) and principles contained in the Timber Harvest Cutblock Design Manual (Alberta 1977).

6. Continued and increased productivity of the forest land base will be ensured through intensive forest management techniques, reclamation of surface disturbances and reforestation of harvested stands according to the established reforestation policy.

7. Sanitation treatments and/or salvage operations will occur where required throughout the forest land base following analysis and consideration of potential environmental impacts and referral to resource management agencies.

8. Forest fuel modification treatments by mechanical means or the use of prescribed burns will be considered for forest management purposes throughout the planning area to reduce the risk of wildfire, maintain public safety and increase forest productivity.

9. Timber management plans will integrate harvesting and reforestation with other land use activities such as recreational developments, range management and wildlife habitat management.

10. Reforestation efforts will consider the use of a diversity of tree species in the vicinity of recreation facilities and high use areas under general recreation reservations.

11. The impacts of logging operations on watersheds will be minimized by ensuring adherence to operational ground rules, pre- and post-operational watershed assessments, and procedures in the internal referral systems of the provincial government.

12. The dwarf mistletoe survey program has been concluded in this portion of the Bow/Crow Forest. Assessments of the impacts on the forest resource will be undertaken, with subsequent control treatments expanded and implemented to control the spread of this disease where possible.

13. Forest management activities will be directed at the maintenance or improvement of water yields. The use of tested procedures to predict water yield changes resulting from vegetation changes will guide resource management programming.

14. Resource and land development proposals or projects will include fire protection assessments as part of the internal referral systems of the provincial government through the Forest Protection

Branch. Assessments will address public safety aspects and risk management associated with the size and location of developments within the forest protection area. Consultative services concerning forest protection measures will be available to M.D. 8 and I.D. 8 adjacent to the forest protection area.

15. Fire protection measures will continue to be undertaken throughout the planning area as a component of the fire management program developed for the Bow/Crow Forest. The use of fire prescribed for land or resource management purposes will be strictly controlled and monitored according to fire management policy.

2.8 Range

Domestic grazing has been an integral component of the land use pattern in the planning area since the turn of the century. Rangelands within the forest reserve portion were heavily grazed in the early 1900s to help reduce the wildfire hazard resulting from fuel build-up. As a result of this practice, rangelands were overgrazed and a subsequent deterioration of range conditions occurred. In the 1950s, as the knowledge of range management improved, reductions in range use were employed to return the range to a condition capable of sustaining long-term use. The loss of productive rangelands to brush encroachment and an estimated 200 escaped or abandoned horses within the Ghost River Planning Area have continued to contribute to the reduction of forage available for domestic livestock and wildlife.

There are currently 10 grazing allotments in the Rocky Mountain Forest Reserve portion of the Ghost River Planning Area. The carrying capacity on the grazing allotments is estimated at 7857 animal unit months (AUMs) provided by 19 367 ha (47 855 ac.) of primary and secondary range.

There are 18 complete, and portions of six, grazing leases in the Green Area outside the Rocky Mountain Forest Reserve. Covering approximately 23 660 ha (58 463 ac.), they support an estimated 12 722 AUMs. In addition, there are 10 grazing permits covering approximately 4381 ha (10 825 ac.) supporting an estimated 2274 AUMs.

Grazing leases or permits have been issued for the majority of public land in the White Area portion of the planning area (10 553 ha or 26 076 ac.). In total, 6648 AUMs are provided on 37 grazing leases and seven grazing permits. Grazing leases and permits are grazed in conjunction with adjacent private land. Brush encroachment and increased canopy cover have reduced the forage available for domestic livestock. Rotational logging has helped to offset the decrease of available forage in the short term.

Objectives

1. To provide rangelands within the planning area that will support at least 29 501 AUMs in accordance with the commitment to maintain 1977 grazing levels for domestic livestock.

2. To maintain the rangelands in good condition for use by domestic livestock and wildlife.

3. To reduce the annual loss of rangelands from vegetation succession and conflicting resource uses.

4. To encourage more intensive management of domestic livestock within range allotments, leases and permits to achieve uniform forage use and good range conditions.

Guidelines

1. Range objectives are to be achieved using primary rangelands and range management techniques and improvements prescribed in range management and range development plans. The use of secondary rangelands will be promoted where feasible to supplement existing use on primary rangelands.

2. Range management plans for grazing dispositions will be completed and/or updated every five to 10 years, or more often as needed. Range management plans will contain provisions for range improvement projects and other range management practices required to maintain

the range resources. Range management plans are subject to watershed and wildlife assessments.

3. Range improvement programs will be considered to maintain long-term forage productivity. All improvements will preserve the intent of the zone in which they are conducted.

4. A detailed assessment of range improvement requirements will be undertaken to determine the degree of range improvement on allotments, permits and leases required to achieve range management objectives. Range improvements will be accomplished considering wildlife habitat enhancement as a complementary benefit.

5. Range improvements will generally be conducted on suitable areas of brush or aspen vegetation with minimal disturbance to coniferous growing stock. Improvement efforts will be concentrated on areas where vegetation succession has reduced grazing capacities. Treatments may include mechanical removal of vegetation species and the use of prescribed burns for range management purposes.

6. Opportunities for stocking increases based on sound range management practices will be considered on an operational basis during the development of range management plans.

2.9 Minerals

The most important mineral resource of the planning area is natural gas found in 11 gas fields located along the foothills and Front Ranges of the Rocky Mountains. The 1985 total production of natural gas was 1.25 billion m^3, while gas reserves were about 29 billion m^3. This is just over one-and-one half per cent of Alberta's production and reserves of natural gas. There is no production of petroleum here although the Lochend oil field now extends into the area and has potential for discovery of oil.

Coal-bearing strata of the Upper Cretaceous Edmonton Formation occur in the planning area and there is potential for coal resource development. Limited coal exploration has resulted in the identification of two small deposits at Silver Creek and Grand Valley. Several very small mines operated in the first part of this century at these two locations. There is coal potential in a large part of the area.

The area has substantial volumes of limestone and sandstone. At present there is one quarry mining Rundle stone in the Harvie Heights area and one quarry mining sandstone in the Yamnuska area. There are several limestone quarries on the periphery of the planning area, in the Bow Corridor.

Objectives

1. To encourage industry to define the extent of, develop or produce minerals where reserves have been proven or where productive formations exist.

2. To encourage the exploration for mineral resources in previously unexplored areas and formations.

Guidelines

1. All proposals for coal exploration and development will be processed in accordance with A Coal Development Policy for Alberta (1976). Mining and siting of processing facilities will be considered on a site-specific basis in response to Preliminary Disclosures.

2. Renewable resource values are high in Critical Wildlife and General Recreation Zones, and any mineral exploration or development must mitigate any potential resource conflicts.

3. Mineral activity will be governed by Eastern Slopes zoning through normal referral processes.

4. In most cases, mineral activity will be allowed in Zone 2 if the following criteria are met:

   - avoidance, if possible, of key habitat areas by the project;

- where avoidance is not possible, development should be designed to minimize disturbance of wildlife habitat and provide mitigative measures to maintain habitat capability throughout the project; and

- reclamation plans should have wildlife habitat as a high priority and retain the pre-disturbance wildlife capability of the project area whenever possible.

2.10 Historical Resources

The Ghost River area has not been subjected to intensive investigation of its prehistoric past, but over 100 archaeological sites have been identified. It is likely that the area was used for at least the last 12 000 years, but its use was likely less intensive than in surrounding areas associated with major watercourses. The most intensive use would have been along the Ghost, Dogpound, Waiparous and Fallentimber drainage systems.

Sites representing the material remains of hunters who frequented the region in the past 12 000 years have been identified in, or adjacent to, the planning area. The area is considered to have a high potential for the discovery of additional sites particularly along terraces above streams and rivers, along lakeshores or the margins of wetlands, and in areas where bedrock or cobbles of material suitable for the manufacture of stone tools have been exposed.

The Ghost River area first became readily accessible in the 1880s with completion of the railway to Cochrane. This opened markets for ranchers who had moved into the area in the 1870s. Logging was one of the first commercial activities, occurring along the Burnt Timber, Fallentimber, Ghost and Waiparous basins. Access to the area was mainly by foot or horseback until 1953, when the Forestry Trunk Road was completed and oil and gas exploration intensified through the 1950s, 1960s and 1970s. The waters of the North Ghost River were diverted into Lake Minnewanka in 1942.

The area is within the disturbed belts comprising the Rocky Mountain Front Ranges. The foothills belt (Little Red Deer River and Water Valley RMAs) is underlain by Upper Cretaceous clastic units. Formations include the Blackstone, Cardium, and Wapiabi formations of the Alberta Group and Brazeau Formation. The fossils present in these units include such organisms as foraminifera, pelecypods, gastropods, cephalopods and rare fish bones. Dinosaur bones have been recovered from equivalent units in the Nordegg area of Alberta. At the present time most of this foothills region is covered by thick conifer forests. The outcrops of bedrock, usually occurring along streams, are areas of maximum impact. At times construction of roads in the area has exposed these units and they have provided some fossil material. In the subsurface there should be units of the Blairmore Group (Lower Cretaceous), Kootenay Formation (Upper Jurassic - Lower Cretaceous) and Fernie Formation (Jurassic). These units are exposed both north and south of the Ghost River area and may be close to the surface within the area. All three units are fossiliferous in other areas of the foothills belt, and the Kootenay has been extensively mined for fossils in the Bow River Valley.

Once within the Rocky Mountain Front Ranges (Ghost Wilderness, Upper Ghost, Fallentimber and Waiparous RMAs), the sequence of units changes drastically. The sequence is entirely Palaeozoic with units of Cambrian, Devonian and Carboniferous ages mapped in the area. Invertebrate fossils are common in a large number of the formations and there are probably a number of undescribed potential palaeontological sites in the region. The Cambrian units include the Eldon, Pika and Arctomys formations, and the Lynx Group. Trilobites and brachiopods have been recovered from these units in the vicinity.

The Devonian units include Yahatinda (oldest plants in western Canada and fish bones), Cairn, Southesk, Alexo and Palliser formations.

These contain corals, stromatoporids, brachiopods, crinoids, bryozoa, etc. The Carboniferous units encountered include the Exshaw and Banff formations and Rundle Group which have cephalopods, brachiopods, corals, crinoids, bryozoa, pelecypods and gastropods. Thus, all these units are to some extent fossiliferous. The Front Ranges have excellent exposures not only along streams but

also along the exposed eastern faces of the mountains.

Objective

1. To protect historical resources (historic, prehistoric and palaeontological) from potential or actual impact related to future resource development and to manage these resources for future generations.

Guidelines

1. Resource uses in the planning area involving land surface disturbance may require Historical Resources Impact Assessments before development, as outlined under Section 33(2) of the Historical Resources Act.

2. The Archaeological Survey of Alberta, Resource Management Section, will participate in the land use referral process to review proposed development projects within those areas considered to have high historical resource potential.

2.11 Ecological Resources

Ecological resources are unique or representative features or systems that have been identified in the planning area. One Wilderness Area, two Natural Areas and one significant ecological area are located in the planning area. The Ghost River Wilderness Area is located in the headwaters of the Ghost River. Ole Buck Mountain Natural Area (Section 5, pt. Section 7-25-6 W5) is located in the Westover Lake area south of Indian Reserves 142, 143 and 144, and Wildcat Island Natural Area (SW 15-26-3 W5, the island only) is located in the Bow River near Beaupre Creek. One ecologically significant area is located near Winchell Lake south of Water Valley (Winchell Creek, NW 2-29-5 W5).

Objectives

1. To preserve selected unique or representative ecosystems or features.

2. To provide for the recreational, scientific and educational uses of ecological resources.

Guidelines

1. Existing land use reservations will be maintained to protect ecologically significant areas until further protection, such as natural area or ecological reserve designations, is approved and established.

2. For any areas approved as Ecological Reserves or Natural Areas, a management plan will be prepared with interdepartmental and public participation. The plan will outline purpose, boundaries and permitted uses in keeping with guidelines in the Ghost River Sub-Regional Integrated Resource Plan.

3. RESOURCE MANAGEMENT AREA INTENTS, OBJECTIVES AND GUIDELINES

The general resource management objectives and guidelines described in the previous chapter do not apply evenly across the planning area. To facilitate the planning exercise, the planning area was divided into six resource management areas (RMAs). These RMAs are geographic areas that have common landscapes, resources, demands, current use and potential for resource management. The six RMAs identified in the Ghost River Planning Area (Figure 2, p. 7) are as follows:

A) Ghost Wilderness;
B) Upper Ghost;
C) Fallentimber;
D) Waiparous;
E) Little Red Deer; and
F) Water Valley.

Each RMA is examined individually to provide a detailed framework for decision-making. The specific management intent is unique to each RMA while the specific resource objectives and resource management guidelines may be repeated in two or more RMAs. The specific resource objectives and resource management guidelines are presented by resource sector. As well, the Eastern Slopes zoning configuration is identified.

It is recognized that conflicts between specific resource management objectives may exist within each RMA, so resource management guidelines are provided for each RMA to aid in the integration of objectives and minimize conflict. Whenever a particular resource is not mentioned in the specific resource objectives and guidelines, the broad resource objectives and guidelines described in Chapter 2 apply.

3.1 Ghost Wilderness Resource Management Area

This RMA corresponds to the Ghost River Wilderness Area (Figure 3) which is established under the Wilderness Areas, Ecological Reserves and Natural Areas Act. Management of the wilderness area is the responsibility of Alberta Recreation and Parks. The area is composed entirely of Alpine and Subalpine ecoregions. The Alpine portion is dominated by exposed limestone bedrock while small pockets of dwarf shrubs, graminoids and stunted alpine fir are found on eroded sandstones and shales. Slopes are steep and colluvium with Engelmann spruce and lodgepole pine forests dominate the Subalpine ecoregion.

Significant mountain goat and bighorn sheep populations currently use ranges within the Ghost River Wilderness Area in conjunction with ranges in the Upper Ghost RMA and Banff National Park. Little information is available on other wildlife species such as ptarmigan, grizzly bear and wolverine or on the fisheries resources. This area contains the upper portion of the Ghost River drainage system. There are no known mineral deposits in this RMA.

Recreational activities such as climbing and hiking occur in this RMA to a very limited extent. Because of limited development, presence of wildlife, natural beauty and low recreational uses, this RMA is recognized for its wildland values and ability to provide a quality wildland recreational experience.

The management intent of the Ghost Wilderness RMA is to protect and manage this area of Alberta for the purposes of preserving its natural beauty, and safeguarding it from impairment and industrial development. (See the preamble to the Wilderness Areas, Ecological Reserves and Natural Areas Act, 1984.)

Objectives and Guidelines

Specific resource objectives and guidelines are not required for the Ghost Wilderness RMA as all programs must adhere to conditions set out in the Wilderness Areas, Ecological Reserves and Natural Areas Act. Resource management in this RMA will be subject to management plans where required and prepared and implemented by Alberta Recreation and Parks in accordance with the act and regulations thereunder.

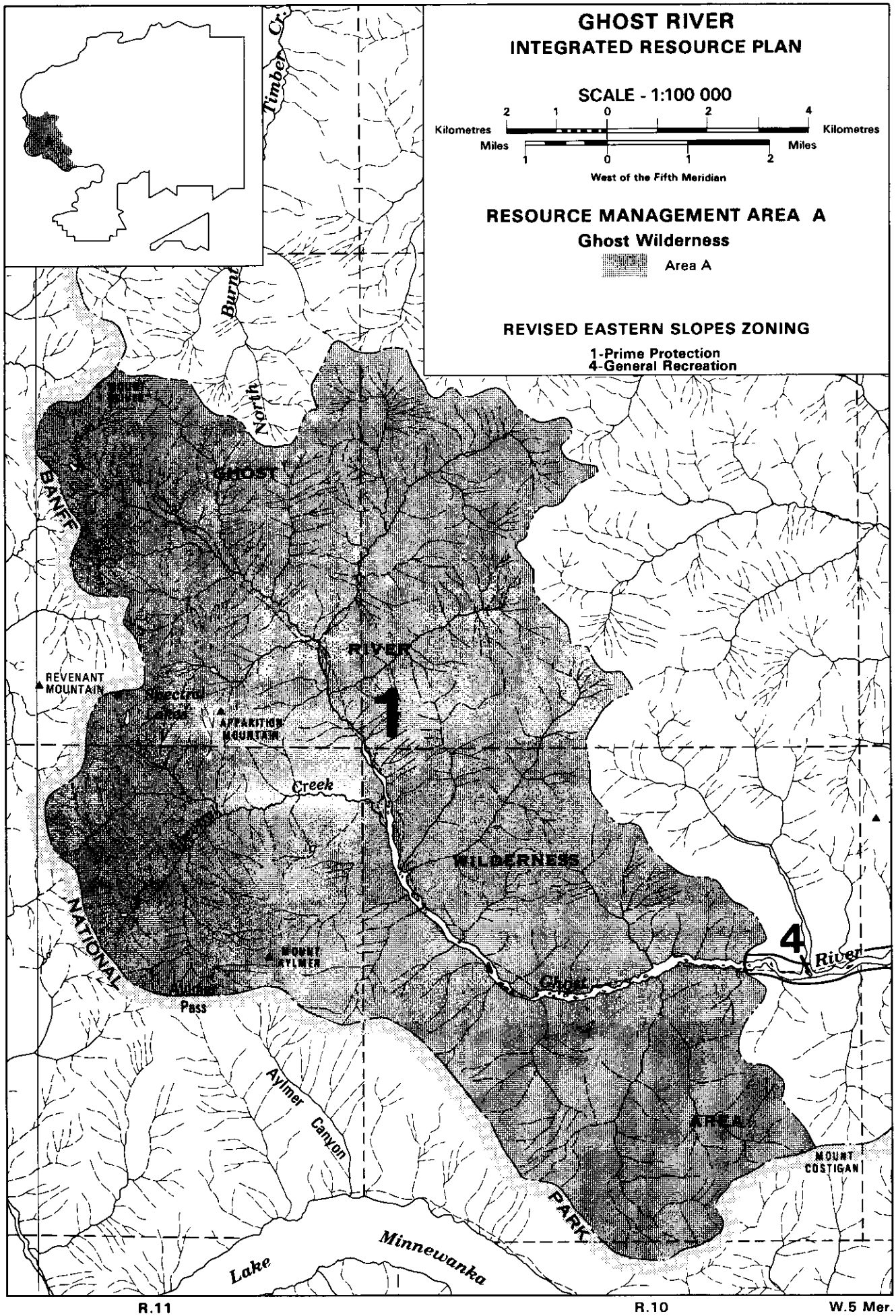


Fig. 3 Ghost Wilderness Resource Management Area

Ghost Wilderness RMA

In keeping with the intent of the Wilderness Areas, Ecological Reserves and Natural Areas Act, no mineral or other resource extraction is permitted in this RMA. Hunting, trapping and fishing are also not permitted. Access is only allowed by foot. Use of the area is strictly controlled.

3.2 Upper Ghost RMA

The Upper Ghost RMA consists of the Front Ranges of the planning area outside the Ghost River RMA (Figure 4). It contains Alpine and Subalpine ecoregions along with portions of the Montane Ecoregion. The Montane Ecoregion in this RMA is dominated by extreme to very steep slopes. South-facing slopes are mainly grassland with scattered aspen, lodgepole pine or Douglas fir. North-facing slopes commonly have mixedwood forests of a variety of age classes.

The management intent of the Upper Ghost RMA is to protect the watershed; environmentally sensitive terrain; rare, fragile or representative landscapes; and critical wildlife ranges.

Watershed

This RMA contains the headwaters of the major drainages in the planning area. Parent materials consist of weathered bedrock, colluvium on slopes and coarse material in river valleys. Stream channels are well protected from disturbances. Steep slopes, poorly developed soil and a harsh climate can make disturbances difficult to reclaim. Land use activity, including seismic exploration, has not been as prevalent in the area compared to more eastern portions of the study area.

Objective

1. The broad watershed management objectives apply.

Guideline

1. There are nine reclamation projects proposed for the RMA. They involve the reclamation of an estimated 20.3 km of seismic lines in the North Burnt Timber, Burnt Timber, Fallentimber and Blackrock Mountain areas, and 11.3 km of access trails in the Upper Waiparous and Ghost River/Johnson Lakes areas will also be evaluated.

Upper Ghost RMA

Wildlife

Significant bighorn sheep and mountain goat populations are distributed throughout the alpine areas. The major winter ranges for bighorn sheep include Burnt Timber, Blackrock, Orient Point, End Mountain, Mount Laurie and Mount Charles Stewart areas. Grizzly bear, moose, mule deer and elk populations are present.

Objectives

1. To maintain the existing bighorn sheep population at about 200 animals, and moose population densities at 0.9 and mule deer at 0.8 animals per km^2.

2. To increase the goat population to a minimum of 100 animals.

3. To provide hunting opportunities for goat when numbers reach a sufficient level.

4. To identify and maintain territories or ranges for grizzly bear, goat, elk and wolverine populations.

5. To maintain sheep range with emphasis on protecting and enhancing key habitats.

6. To maintain current annual harvest levels of 12 male elk, three trophy sheep and one grizzly bear on a sustained basis.

7. To increase hunting opportunities, particularly for trophy elk, grizzly bear and goats.

Guidelines

1. Goat populations will be permitted to naturally re-establish themselves through protective measures.

2. Grizzly bears will be transplanted to this area from other areas.

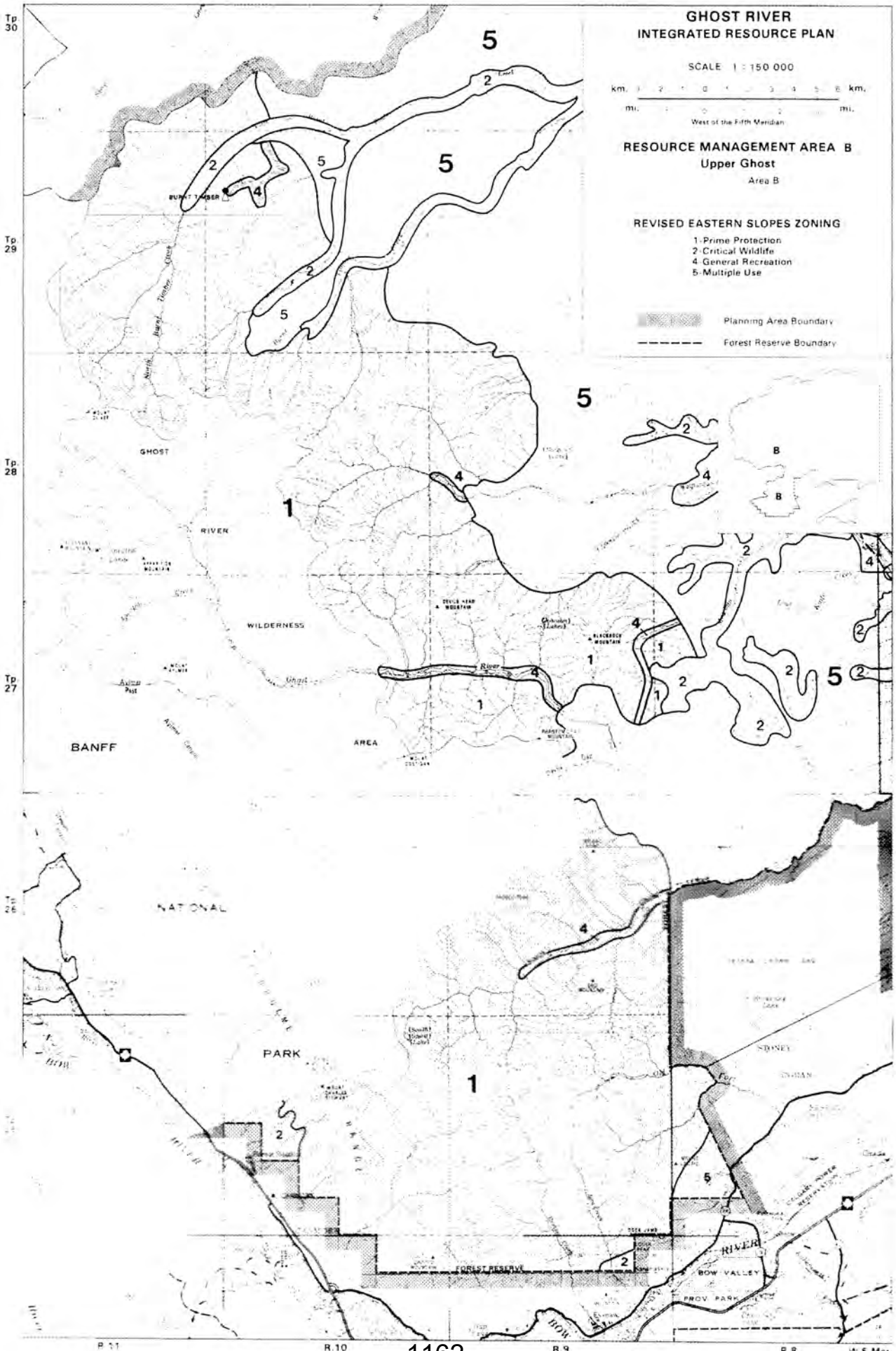


Fig 4 Upper Ghost Resource Management Area

3. Present and proposed non-motorized access and recreational activities will be reviewed to determine whether they avoid areas significant to sheep, goat and grizzly bear populations. Means to mitigate impacts will be applied where appropriate.

4. Forest management plans in Zone 1 and Zone 2 will be reviewed to ensure impacts on wildlife and wildlife habitat resources are minimized.

Fisheries

The Upper Ghost RMA contains the headwaters of the South Ghost and North Ghost rivers and Waiparous, Burnt Timber and North Burnt Timber creeks. These streams support sparse gamefish populations of bull trout, cutthroat trout, brook trout and mountain whitefish. The major limiting factors are high velocity, steep gradient, cold water temperatures and unproductive habitats.

Stenton (South Ghost) Lake, located at the headwaters of the South Ghost River, has been stocked with cutthroat trout. North Johnson Lake has overwintering capabilities for maintaining fish populations. Because of its connection with a Waiparous Creek tributary, this lake is naturally stocked with brook, cutthroat and bull trout. The level of present use of these lakes for fishing is unknown, but there is potential here to accommodate some of the high demand for mountain lake sport fishing.

Objectives

1. To maintain 50 gamefish per km in the North Burnt Timber and Waiparous creeks and South Ghost River.

2. To maintain 100 gamefish per km in Burnt Timber Creek and North Ghost River.

3. To protect spawning, rearing and overwintering areas for bull trout in the headwaters of the North Burnt Timber and Burnt Timber creeks, and other streams identified during surveys.

Upper Ghost RMA

4. To protect areas particularly crucial for bull trout as identified through surveys in the Waiparous Creek and Ghost River drainage.

5. To maintain migratory corridors for bull trout along North Burnt Timber, Burnt Timber and streams identified during surveys.

Guidelines

1. Additional surveys will be conducted by 1990 to identify crucial spawning and rearing areas and to measure fish populations. Populations will be monitored every 10 years to determine changes in populations and habitat conditions.

2. High altitude lake fisheries will be surveyed and developed where feasible by 1995 to broaden the wilderness backcountry experience that is unique to the high country.

3. Naturally reproducing gamefish populations will be expanded into various creeks where feasible, through regulations, habitat development and introduction programs, to increase sport fishing recreational opportunities.

4. Cutthroat trout will be introduced into the North Burnt Timber and Burnt Timber creeks and golden trout or arctic grayling into suitable lakes.

5. Recreational fishing opportunities will be increased by enhancing the primary production of lakes or streams where appropriate.

6. The amount of recreation provided by the various fisheries will be documented by 1995 and monitored every 10 years. The quantity of gamefish harvested will be measured every 10 years to ensure that continued optimum levels of use and harvests are provided.

7. Lakes and beaver ponds will be surveyed by 1990 to determine stocking potential.

8. Alpine and subalpine lakes will be managed according to the Alberta High

Upper Ghost RMA

Mountain Lakes Fisheries Management Program. This requires co-operation with the Alberta Forest Service to manage access to and use around these lakes.

9. Careful regulation of angling in high altitude lakes will be required to maintain the fragile ecosystem and the backcountry experience.

10. An information program to inform the public of the sensitive nature of this RMA and its very limited ability to produce gamefish and support recreation will be provided.

11. A feasibility study on introducing golden trout and arctic grayling to provide angling variety will be conducted.

Access

Access in this RMA is much less prevalent than in more eastern portions of the planning area. Seismic activity has occurred on a limited scale and recreational activity, including the use of snowmobiles and off-highway vehicles, has been noted in the upper Waiparous Creek, Blackrock Mountain and Devil's Gap/Johnson Lakes area up to the Ghost River Wilderness Area. Current access is mainly by foot or horseback. Motorized recreational use has been known to occur to a limited degree within the Ghost River Wilderness Area where such use is prohibited.

Objectives

1. To allow motorcycles, 4x4s, all terrain cycles and snow machines access to selected routes and trails.

Guidelines

1. The majority of this form of recreational activity will be directed to the Fallentimber and Waiparous Creek RMAs where facilities already exist. This may be achieved through the use of signs/posters, brochures, visitor information and management messages at trailheads, and the co-operation of the public through contact with clubs, organizations and school groups.

2. Recreational off-highway vehicle access will be restricted to trails in the Zone 4 corridors.

3. Seasonal use and types of vehicles permitted on the Zone 4 corridor trails will be addressed in the access management plan. Motorized recreational vehicle access on the Burnt Timber Lookout trail will be restricted during bighorn lambing season specifically, but timing of use will also be addressed on all other trails.

4. Motorized recreational vehicle access in the Ghost valley bottom near Ghost Wilderness Area will be addressed through the access management plan.

5. Public education or regulatory strategies under the Forests Act will be considered as implementation mechanisms where required, in the development and approval of the access management plan.

Recreation

There are no forest recreational areas, facilities or formal trails within this RMA. Portions of the Blackrock and the proposed Burnt Timber commercial trail riding areas are located in this RMA. Random camping occurs in the Mount Yamnuska area, Devil's Gap area and along the Ghost River. Climbing and hiking also occur in the Mount Yamnuska, Devil's Gap and Phantom Crag areas. Off-highway vehicle use occurs to a limited degree in this RMA. Because of limited resource development, presence of wildlife and natural beauty, this RMA is recognized for its ability to provide a quality wildland recreational experience.

Objectives

1. To maintain existing dispersed, non-motorized recreational opportunities in the RMA.

2. To provide limited trail facilities for existing hiking trails in the central portion of the RMA.

3. To provide motorized recreational opportunities through selected routes and trails.

Guidelines

1. Non-motorized recreational pursuits such as hiking, horseback riding, hunting, fishing and limited motorized recreation vehicle use are compatible with the management intent of this RMA.

2. Recreational off-highway vehicle access will be restricted to existing Zone 4 corridor trails. Serviced camping will not be permitted in the Zone 4 corridors.

3. Hiking and backpacking trails now used in the Blackrock Mountain and Devil's Gap areas will be considered for formalized trailhead development and trail signs according to recreational operations and maintenance plans.

4. The use of trails for commercial trail riding purposes, including overnight camping, will be permitted in the RMA under the provisions of the Commercial Trail Riding Policy.

Timber

The forest contains a variety of age-classes ranging from immature, mature and overmature in the Burnt Timber and North Burnt Timber creeks area to immature and regenerating stands in the south. Overmature stand conditions are also found in the upper South Ghost and Ghost River areas and the upper Johnson and Waiparous Creek areas.

The emphasis for forest management in this RMA will be on the maintenance of forest conditions amenable to watershed protection and wildlife habitat. With the presence of overmature age-classes, and a resulting trend towards senescent and decadent stand conditions, forest management will also include the maintenance of healthy and stable forest conditions.

Objective

1. To maintain healthy and stable forest conditions recognizing watershed, wildlife and recreational values.

Upper Ghost RMA

Guidelines

1. Watershed protection and wildlife habitat will be important features of forest management planning in the RMA.

2. Sanitation or salvage treatments, if required and feasible, will be concentrated in areas containing forest stands demonstrating senescent and/or decadent conditions or damaged stands in an effort to stabilize forest conditions and minimize the risk or occurrence of wildfire or disease.

Minerals

Natural gas reserves, associated with that part of the Panther River Field which extends into the northern tip of the RMA, are estimated at 300 million m^3. Three natural gas wells associated with this field are located in the Ghost River Planning Area, one of which is in the Upper Ghost RMA. All three wells are capped and there is currently no hydrocarbon production from the RMA. Petroleum and natural gas infrastructure consists of access to the one wellsite. Gas of the Panther River Field contains a high percentage of hydrogen sulphide. Approximately five per cent of the RMA is under petroleum and natural gas disposition, all in the Panther River Field. There is step-out natural gas potential in the area around the field because it was discovered prior to July 21, 1977.

Quarriable mineral resources exist in the extensively exposed Paleozoic strata and this, in combination with the proximity of the Trans-Canada Highway and the Canadian Pacific Railway main line, makes these quarriable mineral resources very important provincially. Three quarriable mineral leases exist along the southern edge of the RMA - two of which have quarries developed on them.

One quarry located near Harvie Heights has been a small operation, providing about 1000 tonnes per year of Rundle stone. The other quarry at Mount Yamnuska is owned by Canada Cement Lafarge and has been producing about 14 000 tonnes per year of sandstone. Both quarries have been granted surface access for the purpose of quarrying. A quarriable

mineral lease also extends into the planning area east of Jura Creek.

Objectives

1. To allow the assessment and development of petroleum and natural gas reserves within the productive geological structures of the Panther River gas field.

2. To allow the existing quarries to continue their operations.

Guideline

1. Except for step-out activities, exploration and development of petroleum and natural gas will not be permitted in the Prime Protection and General Recreation corridor portions of the RMA.

2. Exploration and development of coal in this RMA will not be permitted.

3. Development or expansion of quarries in the Prime Protection portion of the RMA will not be permitted, but activity will be permitted on existing quarriable mineral leases under appropriate conditions in the Zone 2 and Zone 5 portions of the RMA. Additional leases in Zone 2 and Zone 5 may be considered.

Historical Resources

The Upper Ghost RMA has not been the subject of any systematic inventory of historical resources. However, considerable potential exists for the occurrence of prehistoric archaeological sites. Areas exhibiting such potential are those suitable for encampments and other activities associated with exploitation of the high elevation plant and game resources which characterize the area. These include flat terraces (especially south-facing) above streams and rivers, shores or small lakes, alpine meadows and exposures of bedrock suitable for stone tool manufacture. These sites represent the remains of native hunters who have frequented the area for over 12 000 years.

Objective

1. The broad objective applies.

Guidelines

1. The Archaeological Survey of Alberta, Resource Management Section, will participate in the land use referral process to review any proposed developments in the following portions of the RMA considered to be of high historical resource potential.

   - Land adjacent to the headwaters of South Ghost, North Ghost/ Waiparous, Burnt Timber, North Burnt Timber and their tributaries; Johnson Lakes; the unnamed lake at the head of Johnson Creek; South Ghost River and its tributaries; Old Fort Creek and its tributaries; Jura Creek; Exshaw Creek; headwaters of various tributaries to the Bow River; and land adjacent to South Ghost Lake.

   - Any major project outside the above areas involving large areas of land surface disturbance (i.e., coal mines, major roadways, etc.).

3.3 Fallentimber RMA

This RMA is mainly covered by the Subalpine Ecoregion with only a very small area of Boreal Foothills Ecoregion in the northeast portion (Figure 5). The area is made up mainly of foothills running northwest/southeast. The area has a pronounced crest-swale pattern with local relief of about 400 m (1300 ft.). Moraine covers most of the lower slopes and valleys. The subalpine forests are dominated by lodgepole pine and Engelmann/white spruce. The Boreal Foothills Ecoregion to the northeast is mainly composed of a mixture of lodgepole pine, white spruce and aspen.

The management intent of the Fallentimber RMA is to allow the use of the full range of available resources within a multiple use context.

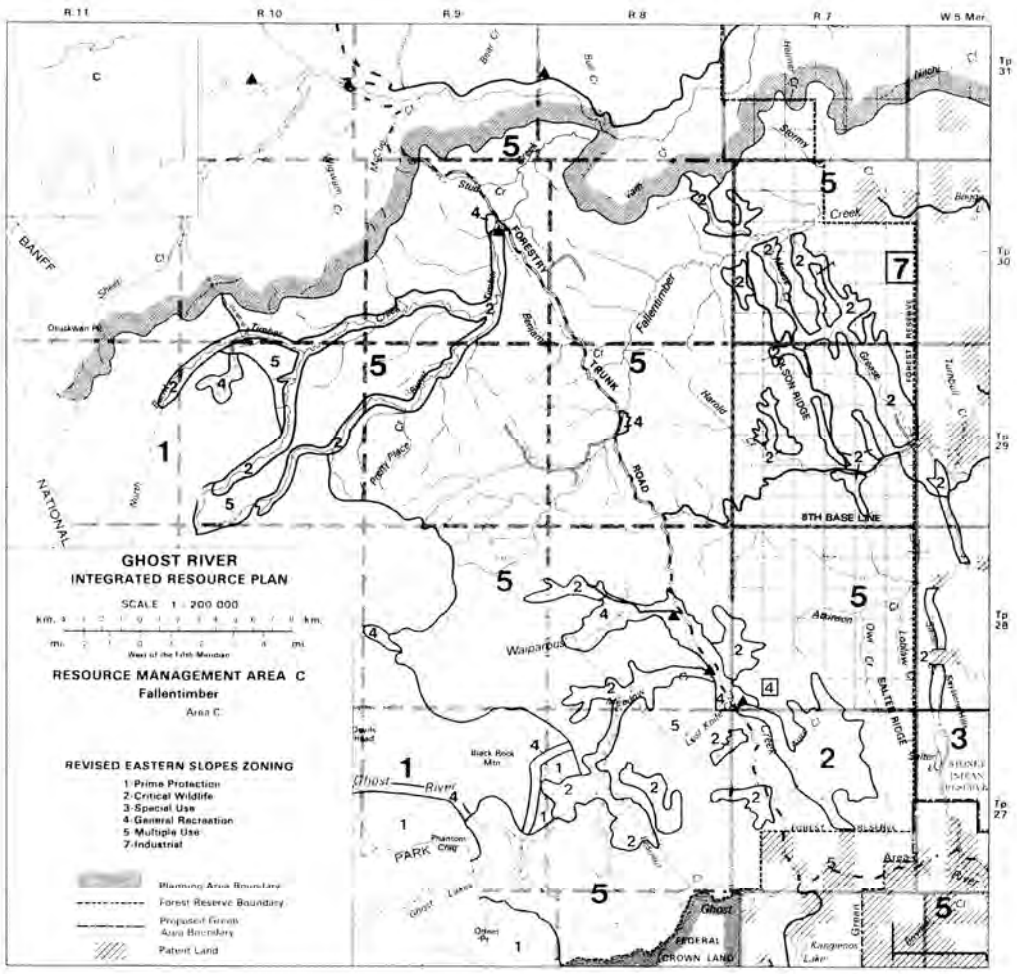


Fig.5 Fallentimber Resource Management Area

Fallentimber RMA

Watershed

The susceptibility of the area to erosion depends largely on steepness of slopes. The North Burnt Timber, Benjamin Creek and Harold Creek areas are particularly susceptible to erosion.

Objective

1. The broad watershed management objectives apply.

Guideline

1. There are 14 reclamation projects proposed in this RMA. They include reclamation of an estimated 32.1 km of seismic lines in the North Burnt Timber, Burnt Timber and the Burnt Timber/Benjamin Creek/Hunter Valley Road areas. There are also 12.3 km of access trails in the North Burnt Timber, Burnt Timber and Hunter Valley Road areas. Portions of the North Burnt Timber and Burnt Timber project overlap into the Upper Ghost RMA.

Wildlife

Winter concentrations of moose occur mainly in the area between Heifer Lake and Harold Creek. Winter concentrations of mule deer are widely distributed, but they are most likely to be found where small snow-free grassy areas are present on south and west-facing slopes especially along Fallentimber Creek. Grizzly bear are most abundant within the Upper Burnt Timber watershed.

The principal source of income from trapline operations comes from coyote, beaver, red squirrel, lynx and marten. Highly productive areas of marten occur in the upper headwaters of Fallentimber Creek and along the Little Red Deer River. Highly productive areas for beaver occur mostly along the Little Red Deer watershed.

Objectives

1. To increase mule deer population densities on suitable habitats from 0.4/km^2 to 4/km^2, and moose populations from 0.4/km^2 to 1.4/km^2.
2. To identify suitable ranges for elk and re-establish elk populations in these areas where feasible.
3. To identify ranges and re-establish fisher populations on currently vacant ranges.
4. To identify and maintain territories for grizzly bear, wolf and wolverine populations.
5. To maintain habitat for spruce grouse and enhance habitat for ruffed grouse.
6. To enhance habitat for mule deer, moose and elk.
7. To maintain adequate forage and thermal cover on current winter ranges for mule deer and moose.
8. To maintain migration corridors for ungulates along watercourses.
9. To maintain habitat for marten and red squirrel populations, and to maintain riparian habitats, particularly for beaver and mink.
10. To maintain the current harvest of at least one grizzly bear and two cougars per year on a sustained basis.
11. To maintain long-term minimal average harvest of 30 beaver, one lynx, 10 marten, 40 red squirrels and five coyotes on an annual sustained basis.

Guidelines

1. Timber management plans will be reviewed for opportunities to increase winter forage for wildlife, particularly on south-facing and southwest-facing slopes.
2. Range development plans will be reviewed to ensure browse and thermal/hiding cover is maintained, and to ensure forage is provided for wildlife.
3. Forage units (AUMs) for wildlife will be assessed to determine whether additional

forage is required and appropriate funding will be allocated as needed.

4. An assessment of mature and old-growth forest cover will be conducted to identify requirements to maintain certain wildlife populations such as red squirrel and marten populations.

5. Trapline damage or loss from industrial activity may be compensated through the Alberta Trappers Compensation Program where appropriate.

Fisheries

The Burnt Timber, Fallentimber and Little Red Deer drainage systems contain major sport fisheries. The North Burnt Timber and Burnt Timber creeks support populations of bull trout and mountain whitefish. Cutthroat trout have been introduced into this drainage over the past few years.

Present use for sport fishing is high where access is good, especially adjacent to Burnt Timber campground. The demand is generally greater than the present capability for consumptive use. Pinto Creek has been completely closed to fishing to protect important spawning areas for bull trout.

The Fallentimber system supports mountain whitefish, brown trout, brook trout and bull trout populations. To support the high demand for sport fishing, beaver ponds of this system were stocked with 23 850 brown trout and 13 740 eastern brook trout between 1957 and 1979.

The Little Red Deer system within this RMA supports brook trout, bull trout and brown trout. Where streams are readily accessible, they are heavily used for sport fishing.

Objectives

1. To maintain 200 gamefish (bull trout and mountain whitefish) per km in North Burnt Timber and Burnt Timber creeks.

2. To establish 300 cutthroat per km in North Burnt Timber and Burnt Timber creeks by 1990.

Fallentimber RMA

3. To maintain 780 mountain whitefish, 50 brown trout, 150 brook trout and 50 bull trout per km in the lower portions of Fallentimber Creek.

4. To maintain 200 brook trout per km in Benjamin Creek.

5. To maintain 100 gamefish per km in the Little Red Deer River and tributaries.

6. To protect spawning, rearing and overwintering areas in Pinto Creek (100 bull trout adults per km).

7. To protect other areas in Burnt Timber and North Burnt Timber creeks to be identified by 1995 that are important to cutthroat trout.

8. To protect spawning, rearing and overwintering areas for all gamefish in the Fallentimber and Grease creeks, and for brook trout in Benjamin Creek.

9. To maintain 10 000 brown trout in the Harold Creek beaver dams.

10. To identify and maintain migratory corridors for bull trout, cutthroat trout and mountain whitefish in North Burnt Timber Creek.

11. To identify and maintain migratory corridors for mountain whitefish, bull trout, brook trout and brown trout in Fallentimber Creek.

Guidelines

1. Surveys will be conducted by 1995 to identify crucial spawning and overwintering areas and to measure fish populations. Populations and habitat will be monitored every 10 years to determine if changes have occurred.

2. The amount of recreation provided by the various fisheries will be documented by 1995 and monitored every 10 years. The quantity of gamefish harvested will be measured every 10 years to ensure that continued optimum levels of use and harvests are provided.

3. Cutthroat trout will be allowed to expand their distribution and numbers to increase sport fishing recreation through regulations and habitat retention on various creeks in the North Burnt Timber and Burnt Timber drainage.

4. Recreational fishing opportunities will be broadened by introducing new species where appropriate (e.g., rainbow trout into all developed land-locked ponds).

5. Primitive access trails will be maintained or provided to stream and river fisheries and any lakes developed for sport fishing through development of an access management plan.

6. Recreational fishing opportunities will be increased by enhancing the primary production of lakes or streams where appropriate.

7. An information program will be provided to inform the public of sport fishing opportunities and also the limitations for supporting intensive recreation.

8. Fieldwork will be conducted every five years and appropriate public information will be provided to deliver an effective beaver dam stocking program.
9. The feasibility of introducing golden trout and arctic grayling to provide angling variety will be evaluated.

10. Lakes in the eastern portion of this RMA will be surveyed and enhanced where feasible to provide additional sport fishing opportunities and to reduce pressure on naturally reproducing populations.

Recreation

There are two formal Alberta Forest Service recreation areas located in this RMA, the Fallentimber and Burnt Timber. They provide facilities for 90 camping units and 58 picnic sites. There are an estimated 108 km of developed recreational trails in this RMA, including approximately 8 km for snowmobile only, 29 km for motorcycle only and 71 km for motorized, summer and winter use. The Fallentimber Forest Recreation Area provides staging areas for 96 km of trails. The remaining 12 km of trails in this RMA are accessible from staging areas provided from forest recreation areas in the Waiparous Creek RMA. The trails established in this RMA and the Waiparous Creek RMA are linked, providing a number of circuits for recreational off-highway vehicle use. The use of recreational off-highway vehicles also occurs throughout the RMA as the result of access created by resource development. The Forestry Trunk Road is important as a transportation route for recreationists.

At present, there is one commercial trail riding permittee operating in the Burnt Timber area of the RMA. Random camping is considered heavy and is generally concentrated in the Hunter Valley Road/ North Burnt Timber and Burnt Timber creeks area, Hunter Valley Road/ Fallentimber Creek area, Stud Creek east of the Forestry Trunk Road (SR 940), Stud Creek Road/Doc Mills Road area and the Benjamin Creek area.

Objective

1. To formalize commercial trail riding areas in the RMA and provide additional commercial trail riding opportunities.

2. To monitor recreational activities and provide additional facilities as demand requires.

Guidelines

1. Two Class II commercial trail riding areas will be recommended for the Burnt Timber area.

2. The long-range recreational development plan will identify areas for camping, picnicking and staging areas for recreation in this RMA. An area under reservation along the Harold Creek Road (N1/2 11-29-7 W5M), previously identified as having potential for a new forest recreation area, will be cancelled.

Access

The major access routes are the Forestry Trunk Road, the roads along Harold Creek and Olson

Ridge and roads in the Fallentimber/Burnt Timber areas. The entire RMA is covered by seismic trails, particularly the northeast portions. Access by recreational off-highway vehicles is concentrated in the Harold Creek area and west of the Forestry Trunk Road, but occurs throughout the RMA mainly as a result of resource development.

Objective

1. The broad access management objective applies.

Guidelines

1. In the Owl Creek/Salter Ridge area, recreational off-highway vehicle use will be limited to selected routes and trails. In the development and approval of the access management, public education and regulatory strategies under the Forests Act will be considered as implementation mechanisms where required to manage motorized recreational access in this portion of, or throughout, the RMA.

2. Recreational off-highway vehicle use will be monitored throughout the RMA to determine whether further mitigative measures are required.

Tourism

There are currently no existing tourism facility developments in this RMA. Non-resident visitor use will probably remain focused along the Forestry Trunk Road. Visitors from the surrounding region actively participating in outdoor activities, including OHV use, should also be encouraged to continue use of this area.

Objectives

1. To recognize that the Forestry Trunk Road corridor is the most realistic area for potential recreation and tourism development opportunities.

2. To maintain opportunities for snowmobiling and encourage additional associated developments.

Fallentimber RMA

Guideline

1. The opportunity for private sector development of commercial tourism facilities and services along the Forestry Trunk Road will be considered where appropriate on public land.

Timber

The timber resources in the Fallentimber RMA are predominantly in the mature and overmature age-classes. Of the commercial species, pine is more prevalent than spruce. Spruce occurs for the most part along the valley bottoms throughout the RMA.

The RMA contains timber quota spheres of interest held by Sunpine Forest Products Ltd. and Spray Lake Sawmills Ltd. Potential sources of timber available to the forest products companies include the reserve stands of cancelled timber licenses. The Fallentimber RMA is expected to accommodate an estimated 44 per cent of the anticipated commercial demand for forest products, within the planning area, over the next 20- to 30-year period (given commercial planning horizons of 20 years and timber management plan revisions at 10-year intervals).

Dwarf mistletoe occurs in the western and east-central portions of the RMA. Affected areas include North Burnt Timber, Burnt Timber, Nuisance, Fallentimber, Benjamin, Harold and Grease creeks and the Little Red Deer River.

The emphasis for forest management in this resource management area will include the provision and maintenance of a sustained yield land base capable of satisfying commercial demands for forest products.

Objectives

1. The broad timber management objectives apply.

Guidelines

1. Timber harvesting operations will be generally located in the Burnt Timber/North Burnt Timber Creek area,

Grease/Turnbull Creek area (30-5 W5), Fallentimber Creek area (30-8 W5) and south of the Little Red Deer River in the vicinity of Atkinson Creek.

Range

There are six range allotments within this RMA: Burnt Timber, Lower Fallentimber, Upper Fallentimber, Grease Creek, Harold Creek and Little Red Deer. The recommended carrying capacity in the RMA is estimated at 4431 animal unit months. For the most part, range use has decreased as the result of brush and aspen encroachment. Most of the allotments are now being managed under guidelines established through range management plans developed in the late 1950s and early 1960s. Generally, allotments have sites that are suitable for range improvement including brushlands dominated by bog birch and occasional bog birch/willow brushland sites. Most sites are flat with good access.

Objectives

1. To provide a rangeland that is capable of supporting an estimated 4431 animal unit months for domestic livestock.

2. To monitor and manage range resources with respect to escaped or abandoned horses.

Guidelines

1. An estimated 300 ha (741 ac.) has been identified as having potential for range improvement. A detailed assessment of range improvement requirements will be undertaken to more accurately determine the extent of range improvement projects required over the long term. Mechanical clearing and prescribed burns will be considered for brush encroachment control.

2. The western portion of the upper Fallentimber range allotment overlaps into the Upper Ghost RMA. The allotment boundary will be adjusted to comply with the intent of the RMA and the Eastern Slopes Policy (revised 1984).

Fallentimber RMA

3. The impact of escaped or abandoned horses along roads and on rangelands will be determined.

Minerals

Two natural gas fields (the Benjamin and Hunter Valley) and parts of two other fields (the Burnt Timber and Panther River) occur in this RMA. Production of natural gas from the seven producing wells was 225 million m^3 in 1984, while reserves were approximately 5.5 billion m^3. There are seven capped gas wells including two associated with the Panther River Field. Although natural gas production is limited by present markets, industry has dispositions covering 85 per cent of the RMA and exploration activity is continuing. This reflects the strong potential of the Mississippian Rundle Formation as well as the industry's interest in the less extensively explored Devonian and Cretaceous strata.

One gas plant with associated pipeline is located here and serves four gas fields in the planning area and beyond. About 400 tonnes per year of sulphur are produced at this plant. Substantial reserves of sulphur in the form of hydrogen sulphide gas are found in this RMA in the Burnt Timber and Panther River gas fields.

Objectives

1. To provide opportunities for the continued exploration and development of petroleum and natural gas within the Benjamin, Burnt Timber, Hunter Valley and Panther River gas fields as well as in other parts of the RMA.

2. To provide opportunities for exploration and development of coal resources within the RMA.

Guidelines

1. The broad mineral guidelines apply.

Historical Resources

The limited archaeological studies undertaken to date have demonstrated that the Fallentimber RMA contains considerable numbers of pre-

historic archaeological sites and has high potential for additional occurrences. These sites represent camps and processing stations associated with the exploitation of game herds which were seasonally present in the area. Areas of potential consist of flat terraces above streams and rivers, lakeshores, the margins of wetland areas, and where bedrock, river gravels or materials suitable for stone tool manufacture are exposed. Prehistoric natives responsible for these sites frequented the area for more than 12 000 years.

Objectives

1. The broad historical resource objective applies.

Guidelines

1. The Archaeological Survey of Alberta, Resource Management Section, will participate in the land use referral process to review any proposed developments in the following areas of the RMA considered to be of high historical resource potential.

    - Land adjacent to North Burnt Timber Creek and its tributaries, Burnt Timber Creek and its tributaries, Nuisance Creek and its tributaries, Fallentimber Creek and its tributaries, Stormy Creek, Benjamin Creek, Mouse Creek, Grease Creek, Harold Creek and its tributaries, the Little Red Deer River and its tributaries, Atkinson Creek, Owl Creek, Loblaw Creek, Pinto Creek, and Heifer Lake.

    - Any major projects outside the above areas involving large areas of land surface disturbance (i.e., coal mines, major roadways, etc.).

3.4 Waiparous RMA

The Waiparous RMA (Figure 6) consists of the Subalpine and Montane ecoregions. Subalpine forests (lodgepole pine and Engelmann-white spruce) cover the northern one-third of the RMA. The area has a pronounced crest-swale pattern with local relief of 400 m (1300 ft.). The Montane Ecoregion covers the southern two-thirds of the area. The foothills of this RMA have been eroded by the Ghost River, forming extensive south-facing slopes. Slopes are moderate to very strong with grassland-forest on the south-facing slopes and forests on north-facing slopes. Douglas fir, aspen, lodgepole pine and white spruce are the dominant tree species in the Montane ecoregion.

The management intent for the Waiparous RMA is to allow the use of the full range of available resources within a multiple use context, with an emphasis on wildlife and intensive recreation in the area of Waiparous Creek.

Watershed

This RMA contains a large portion of the Waiparous drainage basin including Meadow, Lost Knife and Aura creeks. It also includes a part of the Ghost drainage including Lesueur Creek. Within these systems, Meadow Creek has been rated as being particularly sensitive to erosion. The Ghost River and Lesueur Creek flow through coarse alluvial outwash which is resistant to disturbance. The Ghost River is partially diverted into Lake Minnewanka.

Objective

1. The broad watershed management objectives apply.

Guidelines

1. Reclamation projects proposed for the upper Waiparous Creek area southwest of Margaret Lake will be evaluated and undertaken subject to reclamation policies and funding according to availability and provincial priorities. The projects involve reclamation of an estimated 3.0 km of seismic line, and 2.6 km of access. These overlap into the Upper Ghost RMA.

2. Licensed diversions from the Ghost River to Lake Minnewanka for hydro-electric generation purposes will be maintained.

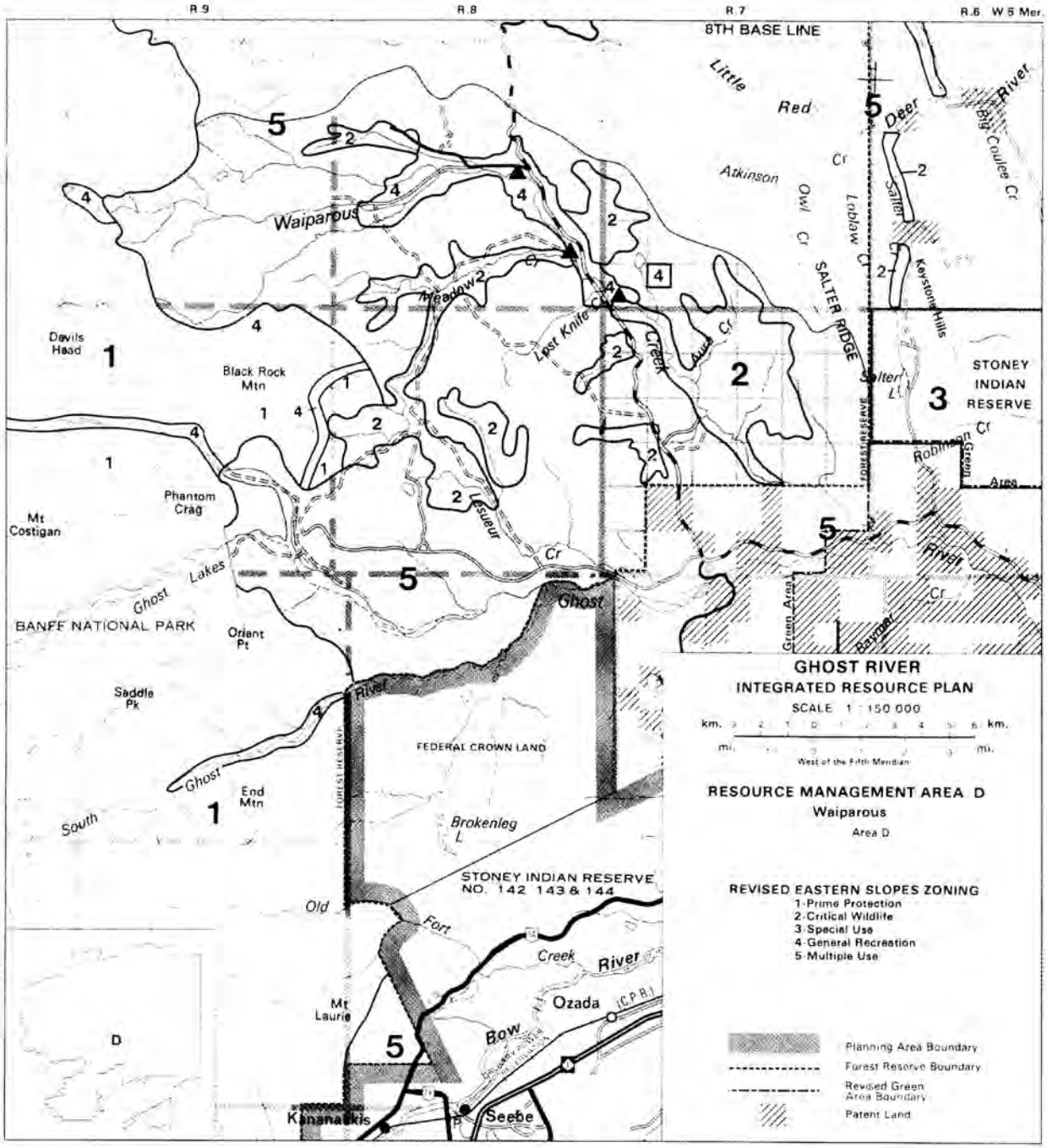


Fig. 6 Waiparous Resource Management Area

Waiparous RMA

Wildlife

Winter concentrations of moose are found mainly in shrubland areas near Meadow Creek, Cow Lake and Aura Lake. Winter concentrations of mule deer are less known but generally are found on south and west-facing grassy slopes along the Waiparous watershed. Traditional winter ranges for elk and mule deer are believed to have existed in the same habitat along the Ghost River and Lesueur Creek.

The principal source of income for trapline operations is from coyote, beaver, red squirrel, lynx and marten.

Objectives

1. To increase mule deer population densities on suitable habitats from 0.8/km^2 to 4/km^2, and moose population densities from 0.8/km^2 to 1.4/km^2.

2. To identify historical ranges for elk and re-establish elk populations on these areas where feasible.

3. To identify ranges and re-establish fisher populations on currently vacant ranges.

4. To enhance habitat for mule deer, moose and elk populations.

5. To ensure adequate forage and thermal cover is maintained on winter ranges for mule deer and moose, and maintain migration corridors for ungulates along watercourses.

6. To identify and maintain territories for grizzly bear, wolf and wolverine populations.

7. To maintain habitat for marten and red squirrel populations.

8. To maintain riparian habitats particularly for beaver and mink.

9. To maintain habitat for spruce grouse and enhance habitat for ruffed grouse.

10. To maintain long-term minimal average harvest levels of one marten, 300 red squirrels, eight coyotes, 11 beaver and one lynx on an annual sustained basis.

Guidelines

1. Timber harvest plans will be reviewed for opportunities to increase winter forage for wildlife, particularly on south or southwest-facing slopes, and to maximize forest diversity.

2. Range development plans will be reviewed to ensure browse and thermal/hiding cover is maintained, and to ensure forage is provided for wildlife.

3. Forage units (AUMs) for wildlife will be assessed to determine whether additional forage is required and appropriate funding will be allocated as required.

4. An assessment of mature and old-growth forest cover will be conducted to identify requirements for maintaining habitat for certain wildlife species such as red squirrel and marten populations.

5. Trapline damage or loss from industrial activity may be compensated for through the Alberta Trapping Compensation Program where appropriate.

Fisheries

The Ghost River and Waiparous, Meadow and Johnson creeks and Margaret Lake form the major sport fisheries in this RMA. Waiparous Creek drainage system supports cutthroat trout, brook trout, bull trout and mountain whitefish. Where access is good, present use for sport fishing is high, especially adjacent to Waiparous Creek campground. The demand is generally greater than the present capability for consumptive use. The South Ghost drainage system supports brook trout, bull trout and mountain whitefish.

Margaret Lake has good capabilities for supporting fish populations and has been stocked annually with brook and rainbow trout since 1963. The lake was stocked with 5000 brook trout in 1982. Cow (Whispering Pines)

Lake is incapable of overwintering fish but has potential to be a productive put-and-take fishery.

Objectives

1. To maintain 200 gamefish (bull trout, brook trout and mountain whitefish) per km in Ghost River.

2. To maintain 50-130 gamefish (bull trout, cutthroat trout, brook trout, brown trout and mountain whitefish) per km in Waiparous Creek.

3. To maintain 125-350 gamefish (cutthroat trout, brook trout, bull trout and mountain whitefish) per km in Meadow Creek.

4. To maintain 80-175 gamefish (cutthroat trout, brook trout, bull trout and mountain whitefish) per km in Johnson Creek.

5. To maintain brook trout in beaver dams along Lesueur Creek.

6. To maintain high water quality and protect habitat areas which are crucial for specific gamefish populations particularly spawning, rearing and overwintering areas for gamefish in Ghost River, Waiparous Creek, Meadow Creek, Johnson Creek and others identified through surveys.

7. To maintain stocking programs for Margaret Lake (5000 brook trout) and other lakes or beaver dams identified through surveys as having stocking potential.

Guidelines

1. Naturally reproducing gamefish populations will be expanded into various creeks where possible through regulations, habitat development and introduction, in order to increase sport fishing recreational opportunities.

2. Flow diversion will be monitored and reviewed to determine means to minimize impacts on gamefish populations along the Ghost River.

Waiparous RMA

3. Recreational fishing opportunities will be broadened by introducing new species where appropriate (e.g., arctic grayling).

4. Recreational fishing opportunities will be increased by enhancing the primary production of lakes and streams where appropriate. Potential for the development of lakes to increase fishing opportunities will be reviewed annually.

5. The Alberta Fish and Wildlife Division will participate in the development of a management plan to maintain or provide primitive access to the streams with bull trout and cutthroat trout, and improve access and facilities at Margaret Lake.

6. An information program will be provided to inform the public of sport fishing opportunities and also limitations for supporting intensive recreation.

7. Alpine and subalpine lakes will be managed according to the Alberta High Mountain Lakes Fisheries Management Program. This program requires co-operation with the Alberta Forest Service to manage access to, and use around, these lakes.

8. Lakes will be surveyed and enhanced where feasible to increase sport fishing opportunities and reduce pressure on naturally reproducing populations.

9. Careful regulation of angling activities at high altitude lakes will be required to maintain the fragile ecosystem and the backcountry experience.

10. Fieldwork will be conducted and appropriate public information provided every five years to deliver an effective beaver dam stocking program.

11. Additional surveys will be conducted to identify crucial spawning and rearing areas, and to measure gamefish populations. Populations and habitat will be monitored every 10 years to determine if changes have occurred.

12. The amount of recreation provided by the various fisheries will be documented by 1995 and monitored every 10 years. The quantity of fish harvested will be measured every 10 years to ensure that continued optimum levels of use and harvests are provided.

Recreation

There are five formal recreation sites located in this RMA including the South Ghost, Waiparous Creek, Ghost Airstrip and North Ghost forest recreation areas and the Waiparous Valley Viewpoint. The forest recreation areas provide facilities for three group camps, 238 camping units, 30 picnic sites and staging areas for an estimated 89 km of developed trails (including approximately 2 km for snowmobiles only), and 87 km for motorized summer and winter use. The Waiparous Valley Viewpoint provides 10 picnic sites with a view of the valley to the west. All forest recreation areas have been upgraded to provincial standards. The Forestry Trunk Road provides the major access route for outdoor recreation.

There are four Class I commercial trail riding areas located in the RMA including the Ghost River, Blackrock, Lesueur Creek and Meadow Creek management areas. Random camping is considered heavy and is generally concentrated along the Ghost River/Lesueur Creek area, Johnson and Waiparous Creeks and along the TransAlta Utilities road west of Lesueur Creek.

Objective

1. To provide opportunities for formalized recreational use in accordance with current provincial standards.

Guidelines

1. Two water access points along Waiparous Creek and a group camp facility north of the existing Ghost Airstrip group camp will be considered for recreational development in accordance with long- range recreational development plans.

Waiparous RMA

2. No changes to the present system of commercial trail riding management areas are anticipated at this time.

Access

The major access routes in the Waiparous RMA are the Forestry Trunk Road, Mockingbird Lookout Tower Road and the TransAlta Utilities Road. The use of recreational off-highway vehicles occurs throughout the RMA as a result of access constructed for resource development. Use is particularly high along the Waiparous, Meadow and Lesueur creeks and along the Ghost River. Motorized recreational use occurs in the vicinity of the Banff National Park boundary and has been known to occur, on occasion, within the park boundary where this is prohibited.

Objective

1. The broad access management objective applies.

Guideline

1. Existing trails and roads will be examined to determine and provide an access network suitable for recreational off-highway vehicle use through the development of an access management plan. In the development and approval of the access management plan, public education and regulatory strategies under the Forests Act will be considered as implementation mechanisms where required to manage recreational motorized access in this RMA.

2. Motorized recreational vehicle access in the Devil's Gap area near Banff National Park will be addressed through the access management plan.

Tourism

The Forestry Trunk Road traverses the RMA and is important for scenic touring opportunities. Currently there are no existing tourism facility developments in this RMA. Part of the Ghost District Snowmobile Area lies in the RMA and staging areas have been developed as a minimal service to visitors. There are five formal recreation sites and

combined with the snowmobile area, the RMA receives a consistent level of visitor use. Additional services are needed to better accommodate existing and anticipated numbers of visitors. The lack of a dumping station at the Ghost Ranger District Information Centre and public access to recreational sites along the Ghost River and Waiparous Creek are immediate problems that must be examined.

Objectives

1. To recognize the Forestry Trunk Road as the focus along which intensive recreational development and tourism opportunities are most appropriate.

2. To provide opportunities for the private and public sectors to develop facilities which cater to the needs of the travelling public and users in the area.

3. To ensure recreational access to the Ghost River and Waiparous Creek is maintained or developed in appropriate locations.

Guidelines

1. The opportunity for private sector development of tourism and recreational facilities will be accommodated on public land where appropriate.

2. A dumping station should be constructed at the Ghost Ranger District Information Centre on the Forestry Trunk Road.

Range

There are four range allotments within this RMA: Ghost River, Aura Cache, Lesueur Creek and Devil's Head. The total recommended carrying capacity is estimated at 3426 animal unit months. For the most part, range use has decreased as the result of brush and aspen encroachment.

Objectives

1. To provide a rangeland that is capable of supporting an estimated 3426 animal unit months.

Waiparous RMA

2. To monitor and manage range resources with respect to escaped or abandoned horses.

Guidelines

1. An estimated 500 ha (1236 ac.) have been identified as having potential for range improvement. A detailed assessment of range improvement requirements will be undertaken to more accurately determine the extent of range improvement projects required over the long term.

2. Portions of Ghost River and Devil's Head range allotments overlap into the Upper Ghost RMA. The allotment boundaries will be adjusted to comply with the intent of that RMA and the Eastern Slopes Policy (revised 1984).

3. The allocation and management of forage used by domestic livestock, escaped or abandoned horses and wildlife will be reviewed in the Ghost River and Aura Cache grazing allotment.

4. The impact of escaped or abandoned horses along roads and on rangelands will be determined.

Minerals

Almost half the Salter natural gas field, with approximate reserves of one billion m^3, falls within the RMA. There is no hydrocarbon production at present. Approximately 40 per cent of the RMA is under petroleum and natural gas disposition and is undergoing exploration.

Objective

1. To provide opportunities for the continued exploration and development of petroleum and natural gas, particularly that resource associated with the Salter gas field.

Guideline

1. The broad minerals guidelines apply.

Waiparous RMA

Timber

The timber resources in the Waiparous Creek RMA are predominantly in the immature age-class as the result of fire in the early 1900s. Stands in the mature to overmature age-classes are found in the Waiparous/Meadow Creek, Waiparous/Cow Lake/Aura Creek and the Ghost River/Waiparous Creek areas. Of the commercial species pine is more prevalent than spruce and forms the majority of stands found in the younger age-classes. Spruce occurs, for the most part, along valley bottoms throughout the RMA.

The RMA contains portions of the timber quota held by Spray Lake Sawmills Ltd. The Waiparous Creek RMA is expected to accommodate an estimated 28 per cent of the anticipated commercial demand for forest products within the planning area over the next 25-year period, (given commercial planning horizons of 20 years and timber management plan revisions at 10-year intervals). Timber harvesting operations are anticipated in the early 1990s.

Dwarf mistletoe occurs in the northwestern and north-central portions of the RMA. Affected areas include the Margaret Lake, Waiparous/Meadow Creek and the Lost Knife/Waiparous Creek areas.

The emphasis for forest management in this resource management area will include the provision and maintenance of a sustained yield land base capable of satisfying commercial demands for forest products.

Objective

1. The broad timber management objectives apply.

Guideline

1. Timber harvesting operations are anticipated in the early 1990s and will generally be located north of Meadow Creek, in the Waiparous Creek drainage, in the Cow Lake/Aura Creek area and east of the Ghost Ranger Headquarters.

Historical Resources

Very limited historical resource inventory studies have taken place in the Waiparous RMA. Nevertheless, several sites have been identified and the potential for additional finds is considerable. Areas of potential are those suitable for encampments and other activities associated with exploitation of the seasonally present game herds in the area. These areas include flat terraces above rivers and streams (especially the Ghost River), lake-shores, margins of wetlands and exposures of bedrock or cobbles of materials suitable for stone tool manufacture. These sites represent the material remains of prehistoric hunting groups known to have frequented the area for over 12 000 years.

Objective

1. The broad historical resource objective applies.

Guidelines

1. The Archaeological Survey of Alberta, Resource Management Section, will participate in the land use referral process to review any proposed developments in the following areas of the RMA considered to be of high historical resource potential.

   - Land adjacent to Waiparous Creek and its tributaries, Meadow Creek and its tributaries, Lost Knife Creek, Aura Creek and land adjacent to its headwaters lake, Lesueur Creek and its tributaries, Ghost River and its tributaries, South Ghost River and its tributaries, and the unnamed lakes and their tributaries east of Mount Laurie.

   - Any major project outside the above areas involving large areas of land surface disturbance (i.e., coal mines, major roadways, etc.).

3.5 Little Red Deer RMA

The Little Red Deer RMA (Figure 7) consists mainly of the Boreal Lower Foothills and Montane ecoregions. The Boreal Foothills covers most of the RMA and includes gently rolling to very steep foothills. It is forested with mixtures of lodgepole pine, aspen and white spruce. The Montane ecoregion covers about 30 per cent of the RMA and consists of grassland-forest on steep south-facing slopes and forests on north-facing slopes.

The management intent for the Little Red Deer RMA is to allow for use of the full range of available resources within a multiple use context, with an emphasis on timber production and domestic livestock grazing in association with private land uses.

Watershed

This RMA contains portions of Turnbull Creek, Silver Creek, Grease Creek, Little Red Deer and Ghost River drainages. Turnbull Creek, Silver Creek and the Little Red Deer River all flow through fine textured material with the result that banks only have fair stability. Slopes are steeper in the southern portions of the RMA but erosion is a lesser problem because of the rocky nature of the terrain and stream channels.

Objective and Guideline

1. The broad objectives and guidelines apply.

Wildlife

Big game populations include mule deer, white-tailed deer and moose. There is little information on the distribution of these populations.

Principal sources of income from trapline operations are beaver, coyote, red squirrel, mink and marten. Areas near Stormy Creek, Boggy Lake, Turnbull Creek and Little Red Deer River are highly productive for marten and red squirrel. Riparian areas along Little Red Deer River and its tributaries, Fallentimber, Stormy and Silver creeks are highly productive for mink and beaver.

Little Red Deer RMA

Objectives

1. To enhance moose population densities from 0.3/km^2 to 1.4/km^2 on suitable habitat, and to maintain mule deer population densities of 0.9/km^2 and white-tailed deer population densities of 0.3/km^2 on suitable habitat.

2. To maintain adequate forest cover for sustaining moose and deer, and to maintain migration corridors for ungulates along watercourses.

3. To maintain habitat for sustaining marten, red squirrel, lynx and coyote populations, and to maintain riparian habitats particularly for mink and beaver.

4. To maintain hunting opportunities for deer, moose, elk, black bear, wolf and ruffed grouse.

5. To maintain the current average annual harvest of 1.4 cougar per year on a sustained basis.

6. To maintain long term minimal annual harvest of 40 beaver, five marten, 150 red squirrels and 12 coyote on a sustained basis.

Guidelines

1. Co-operation will be sought from grazing lessees and landowners to provide access to hunters under the Use Respect Program. Ranchers may be compensated for shot livestock through the Shot Livestock Program.

2. Co-operation will be sought from grazing lessees and landowners to carry out conservation programs for retaining or enhancing habitat for wildlife.

3. Problem wildlife situations will be resolved through animal removal or control where appropriate through the Nuisance Wildlife and Beaver Flood Control programs.

4. Ranchers may be compensated for wildlife depredation through the Livestock Predation Indemnity Program.

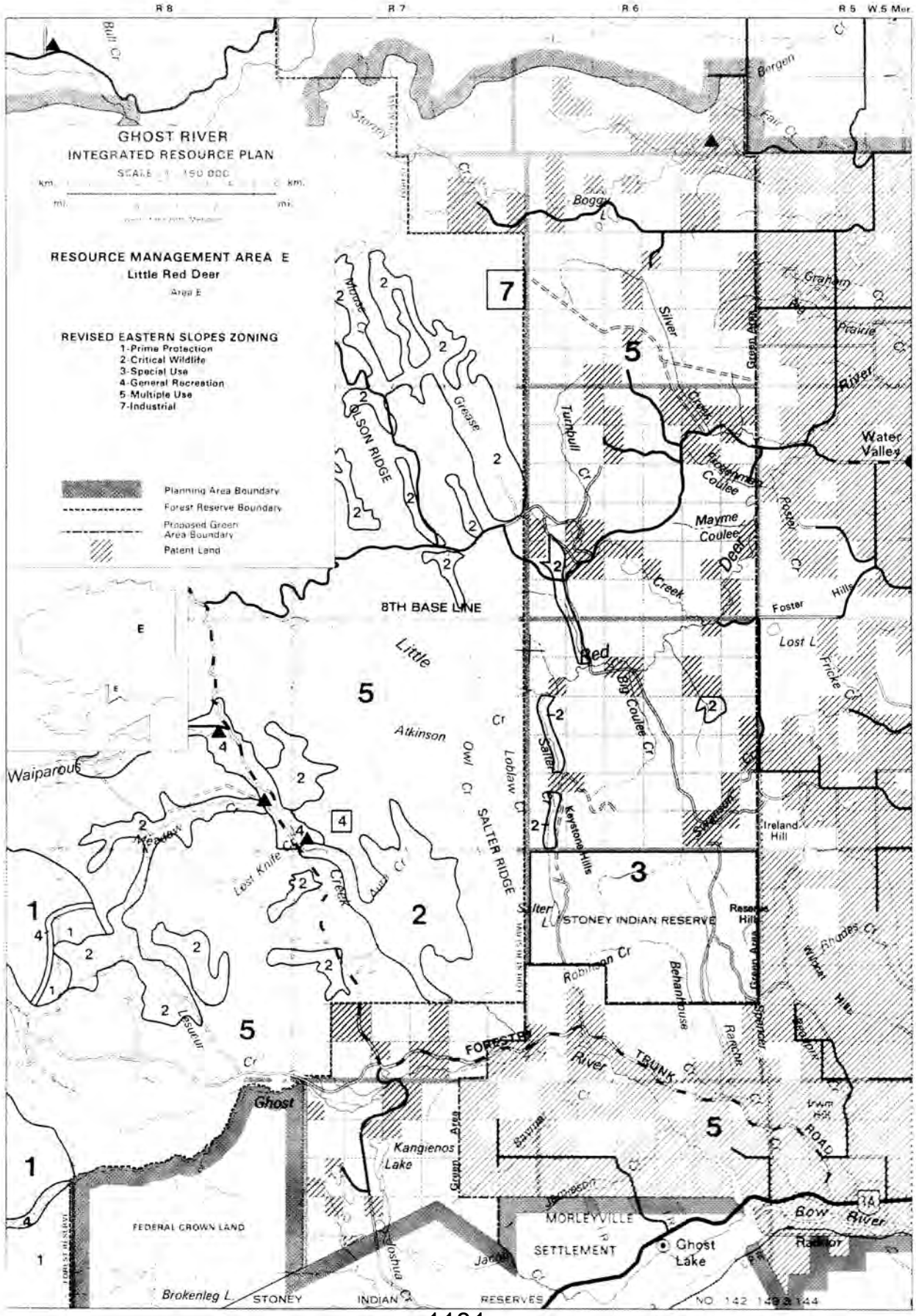


Fig 7 Little Red Deer Resource Management Area

5. Timber harvest plans will be reviewed for opportunities to increase winter forage for wildlife, particularly on south or southwest-facing slopes.

6. Range development plans will be reviewed to ensure that browse and thermal/hiding cover is maintained, and forage is provided for wildlife.

7. Forage units (AUMs) for wildlife will be assessed to determine whether additional forage is required and appropriate funding will be allocated as required.

8. An assessment of public land will be undertaken to identify lands with valuable wildlife resources. Measures will be recommended for reducing wildlife habitat loss to support this resource.

9. Trapline damage or loss due to industrial activity will be compensated for through the Alberta Trappers Compensation Program where appropriate.

Fisheries

The Little Red Deer RMA contains the following major sport fisheries: portions of the Ghost, Little Red Deer and Fallentimber plus important tributaries such as Grease and Turnbull creeks. Boggy and Kangienos lakes have low capabilities to support fish populations.

The Waiparous drainage system supports cutthroat trout, brook trout, bull trout, brown trout and mountain whitefish. The Fallentimber drainage system in this RMA supports bull trout, mountain whitefish, brook trout and brown trout. The Little Red Deer drainage system supports brown trout, bull trout, mountain whitefish and northern pike. Important spawning areas for brown trout have been identified in Turnbull Creek. Beaver ponds associated with Silver Creek were stocked with 2000 brook trout and 105 000 brown trout between 1955 and 1979.

Objectives

1. To maintain 900 gamefish per km in the Fallentimber Creek.

Little Red Deer RMA

2. To maintain 100 gamefish per km in the Little Red Deer River.

3. To maintain high water quality to protect spawning, rearing and overwintering areas of gamefish populations in Fallentimber Creek, Little Red Deer River, Grease Creek, Ghost River and others identified through surveys.

4. To identify lakes or beaver dams with stocking potential to provide continued or additional sport fishing recreation.

5. To maintain Silver Creek beaver dams for stocking programs.

6. To identify and maintain migratory corridors for gamefish along the Fallentimber Creek and Little Red Deer and Ghost rivers.

7. To minimize impacts of agricultural activities adjacent to streams on the fisheries resource.

8. To create additional put-and-take fisheries to reduce pressure on naturally reproducing populations.

Guidelines

1. Through co-operation with other agencies and the public, means for reducing erosion and other impacts on fisheries resources will be implemented.

2. Field work will be conducted every five years and appropriate public information will be provided to deliver an effective beaver dam stocking program.

3. Public information programs will be provided to inform the public of specific management programs or problems.

4. Naturally reproducing gamefish populations will be expanded into various creeks, where possible, through regulations and habitat development and introduction programs to increase sport fishing opportunities.

5. Lakes will be surveyed and enhanced, where feasible, to increase sport fishing

Little Red Deer RMA

opportunities and reduce pressures on naturally reproducing populations.

6. Additional surveys will be conducted by 1995 to identify crucial spawning and rearing areas and measure fish populations. Populations and habitat will be monitored every 10 years to determine if changes have occurred.

7. The amount of recreation provided by the various fisheries will be documented by 1995 and monitored every 10 years. The quantity of fish harvested will be measured to ensure that continued optimum levels of use and harvests are provided.

8. The Alberta Fish and Wildlife Division will participate in the development of an access management plan to maintain or provide primitive access trails to the stream and river fisheries, and to improve appropriate access to sport fisheries near recreational facilities. Access facilities will be developed under the public access program where appropriate.

Recreation

Alberta Recreation and Parks operates the Fallentimber provincial recreation area (SW 1-31-6 W5) with facilities for approximately 20 camping units. There are no forest recreation areas or formal trails within the Little Red Deer RMA. This RMA is, for the most part, under disposition for grazing lease or permit, or is patent land. Although scattered sections or quarter sections of vacant public land may be found, public sector recreational development is not anticipated at the present time.

In the southern portion of the RMA, in the vicinity of the Forestry Trunk Road (SR 940), a limited degree of commercial recreation occurs such as trail riding and hay and sleigh rides. The northern portion of the RMA (north of the Indian Reserve 142B) is used for commercial trail riding operations to varying degrees. There are currently four operators using the Green Area, with one operating under permit. The remaining three operators use the Green Area primarily for day trips, with their bases of operation on patent lands in this RMA or in the Water Valley RMA. Other tourism-related operations are located in the southern portion of this RMA.

Random camping is concentrated both north and south of the Ghost River in the southern portion of the RMA east of the Rocky Mountain Forest Reserve.

Objective

1. To provide the opportunity for the development of commercial trail riding opportunities within this RMA.

Guideline

1. Commercial trail riding opportunities will be encouraged, recognizing the commercial trail riding policy and ongoing land uses present. Permits may be issued to operators wishing to conduct commercial ventures in unclassified commercial trail riding management areas.

Access

The major access roads are the Forestry Trunk Road, Richards Road west of Kangienos Lake, the Keystone Lookout Road and the Harold Creek/Shell/Boggy Creek roads in the northeast portion of the RMA. The use of recreational off-highway vehicles occurs throughout the RMA as the result of access created by resource development.

Objective

1. The broad access management objective applies.

Guideline

1. Recreational off-highway vehicle use will be monitored throughout the RMA to determine whether future mitigative actions are required. In the interim, a "use respect" philosophy will be encouraged with regard to other land uses and an access management plan will be developed for this RMA.

Tourism

Limited information is available on the existing visitor use patterns in this RMA. It is likely that

Little Red Deer RMA

there is very little use because of the restricted access associated with the many grazing dispositions on public land.

Good access is only available into the southern section where it is traversed by the Forestry Trunk Road. There is limited access for recreational sites to the Ghost River from the Forestry Trunk Road. This area of the Ghost River receives seasonal use as a boat put-in area and should be upgraded to accommodate existing and potential public use.

Objective

1. To maintain public access to the Ghost River for recreational purposes.

Guideline

1. Alberta Tourism will provide input into the Ghost River access management plan developed by Alberta Forest Service.

Timber

The timber resources in the Little Red Deer RMA are predominantly in the mature age-class. Of the commercial species, pine is more prevalent than spruce which occurs mainly along the valley bottoms throughout the RMA.
The RMA contains portions of the timber quota held by Spray Lake Sawmills Ltd. Potential sources of timber available to forest products companies include the reserve stands of cancelled timber licenses. The Little Red Deer RMA is expected to accommodate an estimated 28 per cent of the anticipated demand for forest products within the planning area over the next 20 to 25 years (given commercial planning horizons of 20 years and timber management plan revisions at 10-year intervals). This includes both commercial and local requirements.

Local demand for forest products will be satisfied through the provision and maintenance of miscellaneous timber use (MTU) areas including Water Valley (Mayme Coulee area), Dogpound (west and south of Lost Lake), Fallentimber (north and east of Boggy Lake) and South Ghost (balance of the RMA south and west of the Stoney Indian Reserve 142B).

The MTU areas will provide an estimated 17 500 m^3 (4078 mFbm) on an annual basis for use by local residents and small commercial operators. A Christmas tree cutting area has been established in the Boggy Lake area and is expected to supply local residents and residents of Calgary and vicinity for the next 10 to 15 years.

Dwarf mistletoe has been detected in the central portions of the RMA. Affected areas include Turnbull Creek, Grease Creek, Foster Hills and Swanson Creek.

The emphasis for forest management in this resource management area will include the provision and maintenance of a sustained yield land base capable of satisfying commercial and local demands for forest products.

Objective

1. The broad timber management objectives apply.

Guidelines

1. Timber harvesting operations will generally be located in the north-central portion of the RMA and the Salter Creek/Keystone Hills areas.

2. An estimated 17 500 m^3 (4078 mFbm) on an annual basis will be available for use by local residents and small commercial operators from the Water Valley, Dogpound, Fallentimber and South Ghost MTU areas. A portion of the South Ghost MTU area is located in the Water Valley RMA.

3. A Christmas tree cutting site will be maintained in the Boggy Lake area to supply local residents and residents in the vicinity of the planning area. The site is expected to satisfy demand for 10 to 15 years.

Range

There are 18 complete grazing leases and portions of six others covering approximately 23 660 ha (58 463 ac.) that support an estimated 12 722 animal unit months of grazing. In addition

there are 10 grazing permits covering approximately 4381 ha (10 825 ac.) supporting an estimated 2274 animal unit months of grazing. Although rangelands are generally stable and in fair to good condition, range improvements will be required on a number of dispositions to maintain the forage base over the long term.

Objective

1. To provide a forage land base that is capable of supporting an estimated 12 722 animal unit months for grazing leases and 2274 animal unit months for grazing permits.

Guideline

1. The broad range management guidelines apply.

Minerals

Portions of five designated petroleum and natural gas fields occur here: the Jumpingpound West, Morley, Salter, Wildcat Hills and Winchell Coulee. Production of natural gas in 1984 was 350 million m^3 and reserves (based on only six productive wells) were estimated at 8.8 billion m^3. Most of the area is under petroleum and natural gas disposition. In addition, minerals beneath 15 per cent of the land are held in freehold.

Objectives

1. To provide opportunities for industry to explore new areas for petroleum and natural gas and to continue development of those portions of the Jumpingpound West, Morley, Salter, Wildcat Hills and Winchell Coulee gas fields within the RMA.

2. To provide opportunities for exploration and development of coal resources within the RMA.

Guideline

1. The broad minerals guidelines apply.

Little Red Deer RMA

Historical Resources

Few historical resources inventory studies have taken place in the Little Red Deer RMA. Studies conducted have, however, identified a considerable number of sites located along the Little Red Deer River, Harold and Silver creeks. These and other data serve to indicate that the area has high potential for additional occurrences. Areas of potential are those suitable for campsites and other activities associated with exploitation of seasonally abundant game herds, especially bison in prehistoric times. These include flat terraces above streams and rivers, lakeshores, margins of wetland areas and exposures of bedrock and cobbles of materials suitable for stone tool manufacture. The sites represent the material remains of prehistoric hunters who frequented the region for over 12 000 years.

Objective

1. The broad historical resource objective applies.

Guidelines

1. The Archaeological Survey of Alberta, Resource Management Section, will participate in the land use referral process to review any proposed developments in the following areas of the RMA considered to be of high historical resource potential.

   - Land adjacent to Stormy Creek and the unnamed lake associated with this creek, Fallentimber Creek and its tributaries and associated lakes, lands surrounding Boggy Lake and the unnamed lake to the southwest, lands adjacent to Waterstreet Lake, Graham Creek and its tributaries, Big Prairie Creek and its tributaries, Silver Creek and its tributaries, Frozenman Coulee, Mayme Coulee, the Little Red Deer River and its tributaries, Grease Creek and its tributaries, Turnbull Creek, Harold Creek, Lower Atkinson Creek, Salter Creek and its tributaries, Big Coulee Creek and Swanson Creek.

- To the south of the Stoney Indian Reserve, lands adjacent to Robinson Creek and its tributaries, Ghost River and its tributaries, lands adjacent to Kangienos Lake and adjacent unnamed lakes and their tributaries, Baymoor Creek and its tributaries, Jamieson Creek and its tributaries, and Ranche Creek and its tributaries.

- Any major projects outside the above areas involving large areas or land surface disturbance (i.e., coal mines, major roadways, etc.).

3.6 Water Valley RMA

The Water Valley RMA (Figure 8) consists of the Boreal Foothills, Aspen Parkland and Montane ecoregions. Boreal Foothills forests of lodgepole pine, aspen and white spruce cover most the RMA. The Montane ecoregion covers about 20 per cent of the foothills portion. Steep south-facing slopes generally consist of grassland forest, with forests on the north-facing slopes. Portions of the Aspen Parkland ecoregion cover about 20 per cent of the RMA. Rough fescue dominates the grasslands with aspen and shrubs found on moist or north-facing sites. Black Chernozems are characteristic of the Aspen Parkland.

The management intent for the Water Valley RMA is to allow the use of the full range of available resources within a multiple use context, with an emphasis on domestic grazing and timber production in association with private land uses.

Watershed

Soils are finer textured and topography is more gently rolling than found throughout much of the planning area. The RMA is generally not sensitive to disturbances except on steeper slopes. Grand Valley Creek has been identified as having low channel stability.

Objectives

1. To ensure areas disturbed by land use activities are reclaimed in a satisfactory manner.

2. To maintain power generation capabilities on the Bow River.

Guideline

1. Areas disturbed by land use activities will be reclaimed within one year of initial disturbance and on a progressive basis where disturbance is long term.

Wildlife

Big game populations include moose, mule deer and white-tailed deer. Little is known about the distribution of mule deer and white-tailed deer. Moose populations are generally associated with the forested areas adjacent to the Ghost drainage in the north and the Little Jumpingpound drainage south of the Bow River corridor.

Little is known about the furbearer populations because most of the area is privately owned. Beaver and coyote populations are believed to be the major furbearers.

Objectives

1. To maintain mule deer and white-tailed deer population densities at 1.7/km^2 and 0.5/km^2 respectively, and enhance moose population densities from 0.3/km^2 to 1.4/km^2 on suitable habitat.

2. To minimize depredation problems associated with wildlife populations in fringe agricultural areas.

3. To maintain migration corridors for ungulates along watercourses.

4. To maintain riparian habitats and forest cover for wildlife populations.

Guidelines

1. Co-operation will be sought from grazing lessees and landowners to carry out conservation programs for retaining or enhancing habitat for wildlife.

2. Co-operation will be sought from grazing lessees and landowners to provide access to hunters through the Use Respect Program.

Ranchers may be compensated for shot livestock through the Shot Livestock Program as required.

3. Problem wildlife situations will be resolved through animal removal or control, where appropriate, through the Nuisance Wildlife and Beaver Flood Control program.

4. Ranchers may be compensated for wildlife depredation through the Livestock Predator and Indemnity Program as required.

5. Range development plans will be reviewed to ensure browse and thermal/hiding cover is maintained, and forage is provided for wildlife.

6. Forage units (AUMs) for wildlife will be assessed to determine whether additional forage is required and appropriate funding will be allocated as required.

7. An assessment of public land will be undertaken to identify lands with valuable wildlife resources and recommend measures to retain wildlife habitat within forest management areas and on rangelands.

8. Damage to crops and haystacks resulting from maintenance and enhancement of wildlife populations will be prevented through measures taken under the Fencing Assistance and Managing Problem Wildlife programs, and compensated for through the Crop Damage Compensation Program where appropriate.

Fisheries

Major sport fisheries are present in the Little Red Deer River, its tributaries and Dogpound Creek. The Little Red Deer River supports bull trout, mountain whitefish, brook trout, brown trout and northern pike. Between 1959 and 1967, 92 400 brown trout were stocked in the Dogpound system. The fisheries have declined in quality, however, mainly because of industrial and agricultural land uses affecting bank stability. Access to the public is also limited because of private ownership of land adjoining the creek. Spencer and Beaupre creeks have low capabilities to support fish populations. No information on fish populations is available for

Water Valley RMA

Grand Valley Creek, nor does there appear to be a demand for consumptive use. Winchell Lake is the only lake recently stocked. It was stocked with 6600 rainbow trout in 1982. Scott, Westover and Frederick lakes have low capability to support fish populations. The Ghost River supports cutthroat trout, brook trout, bull trout, brown trout and mountain whitefish.

Objectives

1. To maintain 100 gamefish per km in the Little Red Deer River.

2. To identify lakes and beaver ponds with stocking potential to provide new or additional sport fishing opportunities.

3. To maintain and stock the Winchell Lakes.

4. To identify and maintain migratory corridors for gamefish along the Little Red Deer and Ghost drainage systems.

5. To maintain or provide appropriate public access to sport fisheries.

6. To minimize impacts on the fisheries resource of agricultural activities adjacent to streams.

Guidelines

1. Basic facilities and access will be developed through the Alberta Fish and Wildlife public access program where there are no other means of implementation.

2. Through the co-operation of other agencies and the public, means for reducing bank erosion and other impacts on fisheries resources will be implemented.

Recreation

There are five recreational leases in the RMA. Although one site (SW 2-29-5 W5) has been identified as being suitable for cottage subdivision development, no development has been approved by the Municipal District of Rockyview.

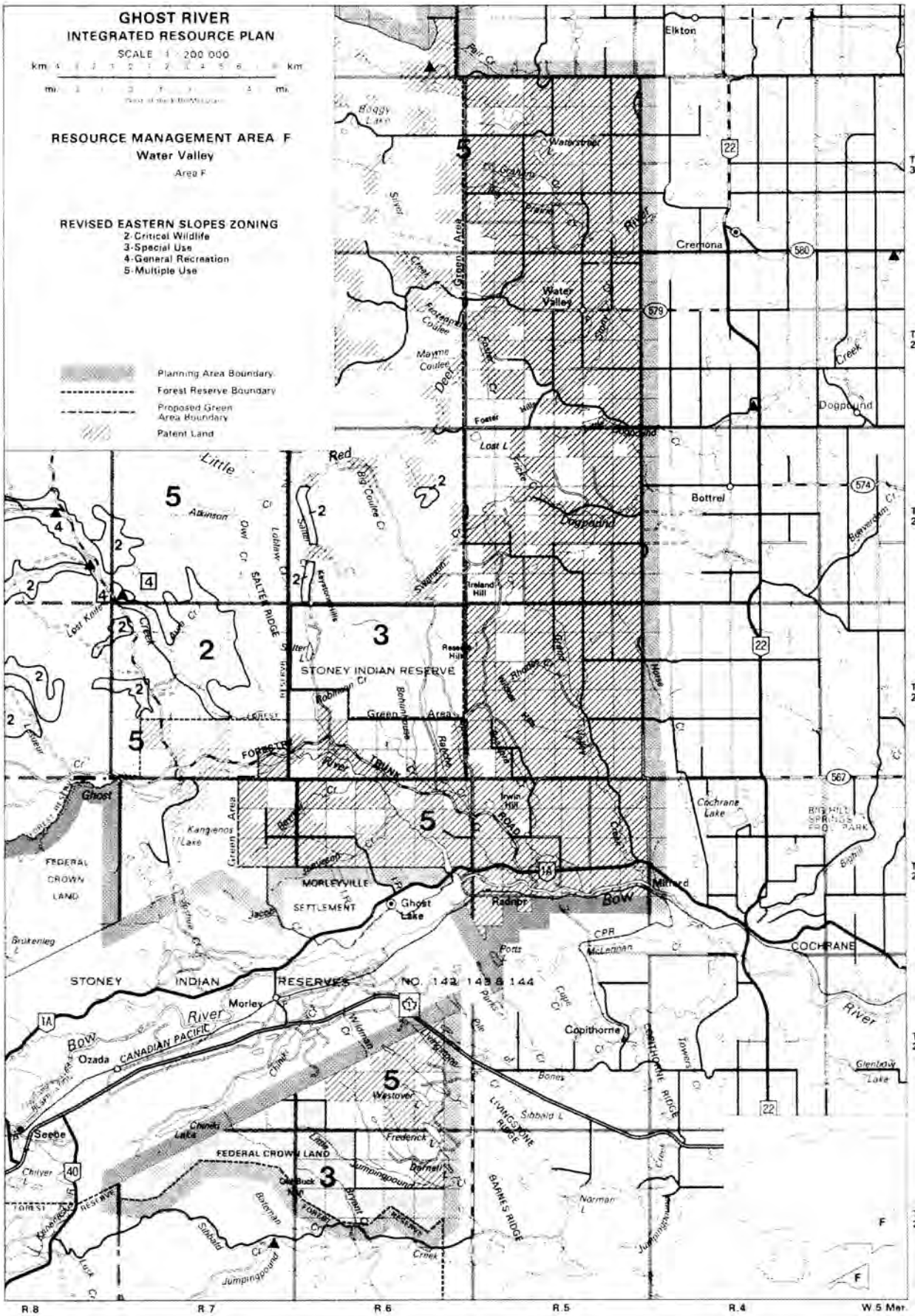


Fig. 8 Water Valley Resource Management Area

Water Valley RMA

Objectives

1. To support extensive recreational use.

2. To support intensive recreational use where it conforms with local municipal zoning.

3. To reduce conflicts between recreational and agricultural resource users.

4. To identify areas suitable for recreational cottage subdivision.

Guidelines

1. Intensive recreational use applications will be assessed for suitability as received.

2. Grazing lessees and permittees will be encouraged to allow extensive recreational use.

Access

Highways 1 and 1A and secondary roads 940, 968 and 579 provide the main access to the RMA along with a large number of improved and unimproved roads. The area also contains a large number of trails and seismic lines. Public access to grazing dispositions on public land for hunting, off-highway vehicle use and other recreation has led to conflicts between ranchers and recreationists. The departure of off-highway vehicles from established trails and road allowances has created range and terrain damage. The Use Respect Program continues to be an effective measure to elicit co-operation among users of public land. Further measures may, however, be required in high use areas.

Objective

1. The broad access management objective applies.

Guidelines

1. Posting of lands under disposition with "Use Respect" signs will be encouraged to reduce conflict between the extensive recreational users and the grazing lessee or permittee.

2. Grazing lessees and permittees will be requested to restrict off-highway vehicle use to existing trails.

3. An access management plan (selected routes) may be developed for selected lands in conjunction with grazing lessees, permittees and other agencies. These plans will be co-ordinated with the access management plan for the remainder of the planning area.

Tourism

The community of Water Valley provides limited tourism service facilities (i.e., gasoline station, grocery store). The larger communities, immediately west of the planning area, mainly service visitors to the area. There may be opportunity to expand Water Valley's role as a service centre. The Forestry Trunk Road (Secondary Road 940), Highway 1A and secondary roads 968 and 569 provide access to the RMA.

Objectives

1. To provide opportunities for the private sector to develop facilities which cater to the needs of the travelling public and users of the area.

2. To recognize the Forestry Trunk Road and Highway 1A as the prime focus along which intensive recreational development and tourism opportunities will occur.

Guideline

1. The opportunity for private sector development of tourism and recreational facilities will be accommodated on public land where appropriate.

Timber

Forest management in the Water Valley RMA has generally included the provision of forest products for local residents through the issuance of local or commercial timber permits. This is combined with the recognition of priority areas for range improvement. Reforestation on areas identified for range improvement may not be undertaken.

The timber resources on public land in the Water Valley RMA are generally in the overmature age-class and are managed as part of the BO2 forest management unit. Three sawmill sites (pt. SW6, pt NW5 and pt NE 6-29-5 W5) are located in the RMA. Of the commercial species, pine is more prevalent than spruce which is found in valley bottoms and on generally wetter sites. Dwarf mistletoe occurs in the central portion of the RMA. The affected areas include the Dogpound/Foster Hills and Swanson Hills areas.

All public land in the BO2 forest management unit portion of the planning area has been identified as having the potential for multiple use management, providing rangelands for domestic livestock, wildlife habitat and sustained yield forest production. An estimated 64 per cent of the area is forested and 29.5 per cent has potential for timber production.

The emphasis for forest management in most of this resource management area will include the provision of forest products for local residents. This will occur through the issuance of local and commercial timber permits that recognize priority areas for agricultural development. The resource management area will be managed on an integrated basis, providing domestic rangelands, wildlife habitat and forest products for local residents on a sustained yield basis.

Objective

1. To manage forested public lands on a sustained yield basis considering local requirements for forest products and agricultural development.

Guidelines

1. A more detailed assessment of lands capable of forest and forage production will be prepared with the co-operation of Alberta Forestry, Lands and Wildlife and the grazing disposition holders within the area. Forested public lands will be managed on a sustained yield basis to provide forest products for local residents, forage for domestic livestock and habitat for wildlife.

2. A portion of the South Ghost MTU area is located in this RMA. It will be managed as a contiguous unit of that portion of the MTU located in the Little Red Deer RMA.

Water Valley RMA

Range

The RMA covers approximately 62 600 ha (154 700 ac.) of which about 11 330 ha (28 000 ac.) are public land. The majority of the public land is leased for grazing on which 6648 AUMs are provided. The grazing dispositions are divided into 37 grazing leases and seven grazing permits.

Objective

1. To maintain and, where possible, increase the number of animal unit months of grazing from the present 6648 AUMs.

Guidelines

1. The suitability of the land for range improvement will be assessed when applications for range improvement are submitted.

2. Assistance for range improvement will be provided under the Range Improvement Regulations existing at the time the application is submitted.

3. Range condition will be evaluated a maximum of every three years and also at renewal, to ensure that stocking rates are accurate and that the grazing lessees are following the stocking rate.

4. Grazing lessees will be requested to restrict off-highway vehicles to existing trails.

5. Public land will be assessed to identify lands capable of sustained yield forest production, tame forage production and wildlife habitat. These lands will be reserved from sale. This will allow continued rangeland use and sustained yield forest management to occur. An integrated approach to land and resource management will be employed. Approximately 40 per cent of the suitable area on each grazing lease will be designated for long-term tame forage production, while 60 per cent of the suitable area of each grazing lease will be designated for sustained yield forest management. The

designated acreage calculated from the percentage split will be based on those portions of the grazing lease which are suitable for sustaining either resource.

Minerals

Parts of the Winchell Coulee, Bottrel, Jumpingpound and Wildcat Hills natural gas fields are found here. Natural gas production in 1984 was 180 million m^3 from 12 wells and reserves were approximately 4.2 billion m^3. One gas plant (which produces gas and small amounts of sulphur from the Wildcat Hills field) and major oil and gas pipelines are located here.

Historical coal production amounting to about 30 000 tonnes was generated from several mines located mainly along the Bow River and at Silver Creek. This indicates that the coal-bearing strata are not restricted to two locations. Coal leases and freehold mineral rights underlie about half the RMA.

Four surface material leases are located in this RMA, three in the Winchell Lake area and one in the Waiparous Creek area.

Objectives

1. To provide opportunities for industry to develop the natural gas reserves of the four existing gas fields and to explore other areas of hydrocarbon potential.

2. To provide opportunities for the exploration and development of coal resources within the RMA.

3. To provide opportunities for development of surface materials where appropriate.

Guideline

1. To provide opportunities for development of surface materials where appropriate.

Guideline

1. The broad minerals guidelines apply.

Water Valley RMA

Historical Resources

Very limited historical resource inventories have been undertaken in the Water Valley RMA. However, several sites have been recorded along the Little Red Deer River and in other locations. These and other data indicate that the area has high potential for additional occurrences. Areas of potential include those suitable for camps and other activities associated with exploitation of seasonally present big game herds, especially bison in prehistoric times. These include flat terraces above rivers and streams, lakeshores, margins of wetlands, glacial outwash channels and exposures of bedrock or cobbles of material suitable for stone tool manufacture. These sites represent the material remains of prehistoric hunters who frequented the area for over 12 000 years.

Objective

1. The broad historical resource management objectives apply.

Guideline

1. The Archaeological Survey of Alberta, Resource Management Section, will participate in the land use referral process to review any proposed developments in the following areas of the RMA considered to be of high historical resource potential.

   - Lands adjacent to Fallentimber Creek, its tributaries and associated unnamed lakes, Big Prairie Creek and its tributaries, the Little Red Deer River and its tributaries, Silver Creek, Stoney Creek and its tributaries, Winchell Coulee and Winchell Lake, Lost Lake, Dogpound Creek and its tributaries, Fricke Creek, Swanson Creek and its tributaries and associated lakes, Grand Valley Creek and its tributaries, Rhodes Creek, Kerfoot Creek, Beaupre Creek and its tributaries, Spencer Creek, Horse Creek and an associated unnamed lake (NW 35-27-5 W5).

   - Any major project outside the above areas involving large areas of land surface disturbance (i.e., coal mines, major roadways, etc.).

Water Valley RMA

Ecological Resources

Ole Buck Mountain Natural Area (Section 5, pt. Section 7-25-6 W5) is located in the Westover Lake area south of Indian Reserves 142, 143 and 144 and Wildcat Island Natural Area (SW 15-26-3 W5, the island only) is located in the Bow River near Beaupre 753
Creek. One ecologically significant area is located near Winchell Lake south of Water Valley (Winchell Creek, NW 2-29-5 W5).

Objective

1. To protect unique or important ecological resources.

Guidelines

1. The natural resources of the Ole Buck Mountain Natural Area will be managed according to the Wilderness Areas, Ecological Reserves and Natural Areas Act.

2. Appropriate land use reservations or notations will be maintained or applied within potential Natural Areas to protect ecological resources.

4. IMPLICATIONS

Implications are major components of the plan which should be considered by decision-makers responsible for approving the plan, and by others who will use the plan or who are interested in its major effects. Implications can be negative or positive. This chapter also outlines private and public resource management and development opportunities.

4.1 General Implications

The Ghost River Sub-Regional Integrated Resource Plan provides a framework for resource management agencies, industry and the public to pursue opportunities for resource use in the planning area. In this manner, legitimate opportunities identified by the private or public sector will be accommodated where suitable.

The plan addresses a broad spectrum of natural resource management concerns. The refined Eastern Slopes zoning contributes to the geographic location of resource management objectives. The plan also contains positive future-oriented resource management objectives for each resource sector. These objectives provide targets toward which resource management agencies will work. The attainment of objectives will provide a net increase in social and economic benefits to users of the area. Eastern Slopes zoning, along with the general and specific objectives and guidelines in the plan, address watershed protection as a priority throughout the planning area.

The plan addresses the issue of recreational off-highway vehicle use and identifies the need for an access management plan to provide further direction for this activity. The conflict between off-highway vehicle users and other resource users will be addressed in the access management plan. Opportunities for additional off-highway vehicle trails will also be addressed.

Domestic grazing will be maintained at 1977 levels and there are opportunities for range improvements over the long term.

A forest land base is identified for sustained yield management purposes to satisfy present and/or future commercial and local demands for forest production and management to maintain healthy and stable forest conditions throughout the planning area. Forest protection services will also be maintained in the planning area. Proposed reclamation projects will be undertaken in the Upper Ghost, Fallentimber and Waiparous RMAs to protect watershed values subject to reclamation policies and funding according to availability, provincial priorities and an approved access management plan. Opportunities to increase coniferous timber use through quota allocation and an opportunity to use an estimated deciduous annual allowable cut of 6200 m^3 (1445 mFbm) are also identified.

This integrated resource plan provides an opportunity for the Archaeological Survey of Alberta, Resource Management Section, to participate in the referral system to review proposed developments involving land surface disturbances.

A range of recreational and tourism opportunities are accommodated in the plan which identifies potential areas for such activities by RMA. These opportunities include commercial trail riding, backcountry lodges and youth hostels, outfitting and guiding for hunting and hiking, snowmobiling, cross-country skiing and auto touring.

The plan provides an avenue for the inclusion of public and private sector tourism interests in an overall framework of public land management. This enables the Alberta government to better assist the tourism industry by focusing their efforts on identified areas of potential opportunity while minimizing possible conflict.

This plan provides the means to ensure that high fish and wildlife resource values are recognized during the development and management of resources. Co-operative planning of timber management and harvesting to incorporate wildlife requirements will help to increase overall benefits while minimizing any negative impacts on wildlife populations. Input into the management of rangelands will help minimize negative impacts on wildlife populations caused by conversion of aspen and shrublands to grassland and by concentrating cattle on primary

rangeland. Increases in forage availability may be restricted by adherence to 1977 grazing levels and by limitations placed on converting coniferous vegetation to range. Forage availability may also be reduced if escaped or abandoned horse populations are not controlled. Input into access management will help ensure that reasonable access is provided to use wildlife resources in an acceptable manner. Input into other resource developments and activities will help protect fish and wildlife resources while providing for use of the area.

The increased economic opportunities to Albertans and non-residents from the proposed increases in fish and wildlife resources cannot be easily quantified. However, projected increases in fish and wildlife resources can promote economic opportunities for guides, outfitters, sporting goods businesses, guest ranches and communities that can provide accommodations, food and/or gas. Increased economic benefits to taxidermists and local butchers can be realized if more game is available for hunting. There also can be direct economic benefits to trappers and the fur industry if desirable furbearing populations can be increased to meet demands. Increases in wildlife will take into consideration 1977 domestic grazing levels; however, increases in domestic grazing above these levels could have a negative impact on wild ungulate populations, depending on the species in the area.

The economic implications of the plan for mineral exploration and development can be discussed in terms of general and specific influences. It is difficult, however, to quantify impacts. Mineral activity within the Ghost River area primarily involves the production of natural gas from existing wells. Currently there are no indications that significant expansion or intensification of activity will take place. While the plan does propose certain restrictions on mineral exploration and development, the overall impact would likely be limited. If a development application (subsequent to exploration on existing agreements) was rejected, applications pursuant to the Mineral Rights Compensation Regulations would be accepted. It is highly unlikely that the plan's implementation would have any effect on the pattern of employment generated by the minerals industry within the region. No new jobs would be directly created, and indirect employment would reflect the industry as a whole rather than any specific local influence.

4.2 Ghost Wilderness RMA

There are no zoning changes or changes in resource management direction in the area. Resource management will continue to adhere to the Wilderness Areas, Ecological Reserves and Natural Areas Act with the result that land and resource management are not anticipated to change in this RMA.

Fishing and hunting opportunities are not provided in this RMA. Fish populations and habitat will therefore not be inventoried. Wildlife populations will continue to be monitored, however.

The wilderness area status of the RMA precludes any tourism facility development. However, the wildland nature and scenery may be enjoyed through hiking. Motorized recreation and horse travel are not permitted in the RMA.

4.3 Upper Ghost RMA

This RMA is almost entirely Zone 1, Prime Protection. There is an area of Zone 5 east of Mt. Laurie and small areas of Zone 2 near Jura Creek and northeast of Harvie Heights. There are also Zone 4, General Recreation, corridors in the North Burnt Timber area along Waiparous Creek, the Ghost and South Ghost valleys and the Blackrock Mountain area. The major zoning changes occur in the most southern portions where land, originally Zone 2 in the Eastern Slopes Policy, has been changed to Zone 1 with the result that there is an overall increase in the area of Zone 1 in the RMA and planning area. Smaller Zone 1 changes have been undertaken in the Blackrock Mountain and Ghost River areas near Devil's Gap.

Opportunities for continued operation and development of the Kamenka, Canada Cement Lafarge and Genstar quarriable mineral leases are preserved by retaining these areas in Zone 2 and Zone 5. Additional leases may be considered in these zones. Surface access will be granted to develop the existing quarriable mineral leases. The expansion of Zone 1 in the RMA will result in the sterilization of some other quarriable resources. Petroleum and natural gas opportunities are also affected.

Zoning changes along the southern edge of the Upper Ghost RMA and on both sides of the border with Fallentimber and Waiparous RMAs will result in some areas of Prime Protection being expanded or reduced, depending on the area. Where Prime Protection has been reduced, there is added opportunity for access to explore for hydrocarbons, but in areas of expanded Prime Protection, access which is possible now may be refused. Areas of Prime Protection on top of petroleum and natural gas dispositions occur near the Panther River gas field. Dispositions here have approximately 2.5 sections of expanded Prime Protection in four separate areas, and approximately 0.5 sections removed from Prime Protection. All the zoning changes on top of petroleum and natural gas dispositions are areas of potential step-out activity. Further south in Townships 27 and 28, prime protection zoning has been expanded eastward into prospective natural gas areas which are not leased and which do not have step-out potential (as there are no producing wells nearby).

The plan provides for extensive non-motorized recreational opportunities throughout the RMA. Motorized recreational vehicle opportunities are provided in the Zone 4 corridors. Provisions for sanitation/salvage will allow for healthy and stable forest conditions with respect to long-term forest management. The completion of nine reclamation projects involving 31.6 km of seismic lines and trails will be subject to reclamation policies, an approved access management plan, funding availability and provincial priorities. Protection of watershed, wildlife and fisheries resources will be afforded following project completion.

The small expansion of Zone 1 has eliminated two recreational opportunities often associated with tourism (off-highway vehicle use and serviced camping) in the Upper Ghost RMA. Apart from outfitting, guiding and trail riding, private sector tourism opportunities are severely limited. This is particularly important considering the proximity of Canmore to the southwest part of the zone as it will limit Canmore's potential to expand its regional tourism opportunities.

Co-operative planning of access management will help ensure that wildlife populations can increase through increased security of highly sensitive ranges from disturbance. Initiation of projects to increase forage availability and forest diversity to enhance certain wildlife populations could provide additional benefits to the timber industry.

4.4 Fallentimber RMA

This area was zoned entirely as Zone 5, Multiple Use, with one section of Zone 7, Industrial, by the Eastern Slopes Policy. Numerous changes from Zone 5 to Zone 2 have been made by the Ghost River Sub-Regional Integrated Resource Plan. Zone 2, Critical Wildlife, now occurs along the North Burnt Timber, Burnt Timber and Fallentimber creeks and in the Olson Ridge-Harold Creek Area.

The recognition of tourism development opportunities along the Forestry Trunk Road may stimulate the private sector to develop the needed facilities on this potential auto touring route.

Fourteen reclamation projects involving 45 km of seismic lines and trails are proposed subject to reclamation policies, an approved access management plan, funding availability and provincial priorities. Some of these projects continue from those in the Upper Ghost RMA. Protection of watershed, wildlife and fisheries resources will be afforded upon completion.

Opportunities for commercial trail riding are identified. There is an opportunity for two Class II trail riding areas to be established. Management intent, objectives and guidelines allow for a full range of recreational activities.

Timber resource development and domestic grazing are accommodated through RMA objectives, guidelines and zoning. Both activities are compatible with the intent of this RMA.

A major implication of the change in zoning is the increased recognition of habitats crucial to fish and wildlife populations in this RMA. Plans for access management may be insufficient to protect fish and wildlife populations. Uncontrolled access in the Harold Creek area will continue to hamper efforts to minimize disturbance to deer and moose populations which use this crucial winter range. Until access can be controlled in areas required to maintain or enhance wildlife populations, hunting opportunities may have to be reduced.

Co-operative planning for reclamation projects will help restore lost productivity of wildlife habitat particularly if combined with appropriate access management measures. Reclamation projects proposed for this RMA will also help reduce sediment loads to streams and rivers, thereby enhancing fish habitat and productivity. This is especially so if they are combined with appropriate access management measures.

4.5 Waiparous RMA

The majority of this area was Zone 5 under the Eastern Slopes Policy, and most of the RMA remains Zone 5, Multiple Use. The plan increases Zone 2 in the Lesueur, Meadow, Waiparous and Aura Creek areas. In addition, areas of Zone 8, Facility, in the Waiparous Creek/Forestry Trunk Road area are changed to Zone 4, General Recreation.

The change in zoning in the Waiparous Creek/Forestry Trunk Road area from Zone 8 to Zone 4 may limit any tourism facility development in this area, but opportunities for private sector development of tourism and recreational facilities are identified in other portions of the RMA.

A full range of recreational opportunities is addressed in this RMA. Two water access points along Waiparous Creek and a group camp will be considered for development according to long-range recreational development plans.

Reclamation projects involving about 6 km of seismic lines and trails are proposed subject to reclamation policies, an approved access management plan, funding availability and provincial priorities. Projects are continuations of those in the Upper Ghost RMA. Protection of watershed, wildlife and fisheries will be afforded following the completion of these projects.

Timber resource development and domestic grazing are accommodated through objectives, guidelines and zoning. Both activities are compatible with the intent of the RMA.

The overall implication of the increase of Zone 2, Critical Wildlife, is the increased recognition of crucial habitats to wildlife populations in this RMA. Co-operative planning of access management and reclamation projects, and controlled development of tourist and recreation facilities will help ensure increased protection of fish and wildlife habitats, reduction in disturbance to wildlife populations and adequate provision for public access to view wildlife, hunt and/or fish.

4.6 Little Red Deer RMA

Most of this area was Zone 5 under the Eastern Slopes Policy, and most of the area remains Zone 5. Changes from Zone 5 to Zone 2 occur in the Salter Creek area north of the Stoney Indian Reserve. Land originally Zone 2 along the Ghost River and Waiparous Creek is changed to Zone 5. A section of land north of Stoney Indian Reserve 142B (originally Zone 3) is changed to Zone 5.

Motorized recreational vehicle access will be managed through the development of an access management plan to alleviate existing and potential problems, including conflicts with other resource uses.

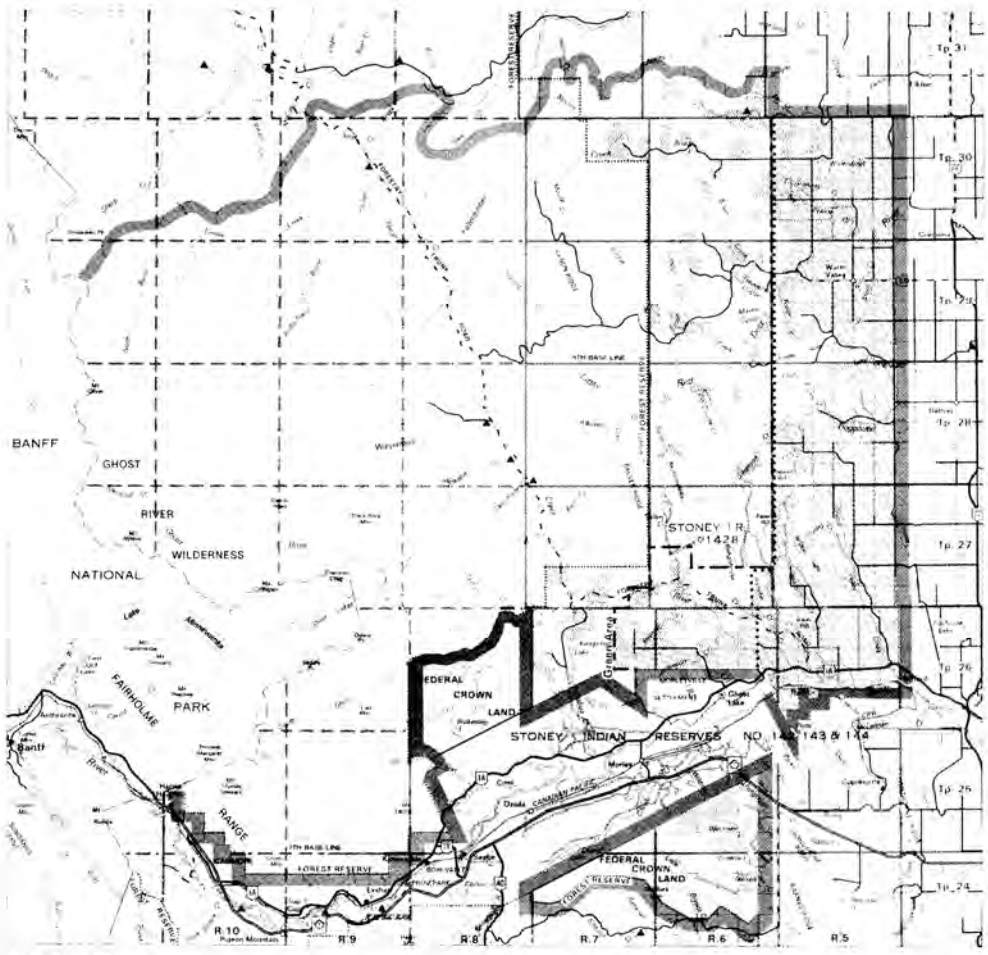
Commercial and local demand for forest products will be accommodated through quota and MTU areas in this RMA.

Co-operative planning with government agencies, industry, lessees and landowners regarding land use development and activities will help ensure that conflicts with fish and wildlife resource management and use are resolved and maximum public benefits obtained.

The increase in Zone 5 will allow for a wider spectrum of recreational and tourism opportunities previously limited by Zone 2, such as facility development, serviced camping and off-highway vehicle use. Commercial trail riding opportunities will be encouraged.

4.7 Water Valley RMA

This RMA is zoned entirely as Zone 5, Multiple Use. This zoning emphasizes multiple resource use rather than single resource use. No lands were considered to have a priority for agricultural use (i.e., Zone 6). The White Area/Green Area boundary change (Figure 9) will add about 34 sections to the White Area of which nine sections are public land. This is equal to about 20 per cent of the public land base in the RMA. Five grazing leases covering 2312 ha (5713 ac.) and providing 1809 AUMs



GHOST RIVER
INTEGRATED RESOURCE PLAN

REVISED GREEN AREA BOUNDARY

SCALE 1:300 000

West of the Fifth Meridian

Planning Area Boundary
Forest Reserve Boundary
Revised Green Area Boundary
Patent Land

Fig. 9 Revised Green Area Boundary

and one farm development lease will be transferred to the White Area (NW 17-27-6 W5).

The South Ghost MTU will be managed as a contiguous unit with that portion of the MTU area located in the Little Red Deer RMA.

Maintaining the area as Zone 5 will allow for some development of tourist facilities and services in and around the resource management area. As a result, private sector opportunities will be given serious consideration by the regulatory agencies. One specific site (SW 2-29-5 W5) has been identified as having potential for cottage subdivision by private developers, but the County of Mountain View opposes subdivision of land in this area.

The identification of lands capable of sustained yield forest production, tame forage and wildlife production, combined with resource management plans and a no-sale reservation, will result in improved management of timber, range and wildlife resources over the long term. Increased livestock production and income to grazing lessees will occur through range improvement.

5. PLAN MANAGEMENT

General administrative procedures and mechanisms required for plan implementation, monitoring and amendment are outlined in this section. Detailed program and project implications resulting from this plan will be contained in an implementation document which will complement the plan.

5.1 General Administration

The Ghost River Sub-Regional Integrated Resource Plan will be implemented within the terms of appropriate legislation, regular programs and activities of the government, operational plans, specific developed projects, referral processes and administrative bodies. The revised zoning provides a means of processing applications for new public land dispositions within the planning area. Existing systems for referral and interdepartmental review will apply to the plan. Resources will continue to be administered by the departments responsible, in line with the approved zoning, resource management guidelines and any operational plans.

Government management agencies participating in the Ghost River Sub-Regional Integrated Resource Plan will have several responsibilities to ensure the effective delivery of this plan. It will be their responsibility to deal with conflicts or concerns with respect to implementation or interpretation of any of the plan's provisions. These responsibilities are outlined by subject area below.

Referral Systems: Participating government management agencies will ensure that existing referral systems of the Alberta government are adequate to encompass all affected or concerned agencies.

Plan Monitoring: The Ghost River Sub-Regional Integrated Resource Plan will be reviewed annually by the Eastern Slopes Regional Resource Management Committee to:

- assess the relevancy of the stated resource objectives in light of changing conditions;
- assess the resource management guidelines and referral procedures;
- assess agency operational plans to ensure their consistency with the Ghost River resource management area intents, objectives and guidelines; and
- recommend amendments to the Ghost River Sub-Regional Integrated Resource Plan and future actions required to maintain or promote government resource management activities in the planning area.

An annual report will be prepared by the Eastern Slopes Regional Resource Management Committee and will highlight the previous year's activity in the planning area. It will also indicate what accomplishments are anticipated in the planning area during the next year. The report may be deferred if there is a lack of activity or progress on government resource management objectives within the planning area.

A major plan review by the Eastern Slopes Region Regional Resource Management Committee will occur when the plan becomes outdated due to significant changes and new priorities including:

- a comprehensive assessment of all aspects of the plan, including but not limited to broad resource management objectives, land-use zoning, and resource management area boundaries and intents;
- a public review on the same basis as the public is involved in the development of new integrated resource plans; and
- a statement recommending amendments to the plan and future actions required to maintain or promote government resource management activities in the planning area.

5.2 Amendment Procedures

Changes to the planning area boundary, broad planning area resource management objectives, land-use zoning, and the resource management area boundaries and intents that would result in

significant changes to the allowed resource uses or to priorities will require major amendment to the Ghost River Sub-Regional Integrated Resource Plan. An amendment to the plan may be required as a result of an annual review, government requests or a request from an individual, group or organization outside the government. Proposed amendments to the Ghost River Sub-Regional Integrated Resource Plan from outside the government should be made by formal application to the Assistant Deputy Minister of the Public Lands Division, Alberta Forestry, Lands and Wildlife*.

Opportunities for public review of proposed amendments to the Ghost River Sub-Regional Integrated Resource Plan will be provided before changes are approved by the government. A decision on requests to amend an integrated resource plan will be endorsed by the Minister of Forestry, Lands and Wildlife or his designate. Amendments which entail a major policy decision or a change to the basic intent of the plan may be forwarded by the Minister to Cabinet Committee for approval.

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*Guidelines for preparing requests for amendments to integrated resource plans are available upon request.

APPENDIX A

LEGISLATION AND ASSOCIATED DIRECTION

Numerous government directives must be considered while developing an integrated resource plan. The most significant directions to the Ghost River plan are discussed below.

A.1 A Policy for Resource Management of the Eastern Slopes Revised 1984

A Policy for Resource Management of the Eastern Slopes Revised 1984 (often cited as The Eastern Slope Policy) provides guidelines and objectives for integrated resource management and planning for the entire Eastern Slopes region including the Ghost River Planning Area. The Eastern Slopes Policy relies on regional land use zoning to designate large areas of land for varying degrees of protection, resource management and development. Table 1 lists the general intent for each of the following eight land use zones: 1) Prime Protection; 2) Critical Wildlife; 3) Special Use; 4) General Recreation; 5) Multiple Use; 6) Agriculture; 7) Industrial; and 8) Facility. The overriding principle for all the zones under A Policy for Resource Management of the Eastern Slopes Revised 1984 is to protect the valuable water resources of the Eastern Slopes and provide for public land and resource use in a manner consistent with the principles of conservation and environmental protection. The zoning does not apply to privately owned lands in the planning area. Table 2 defines a range of compatible activities to enact the intent of the eight land use zones. The compatible activities matrix and regional zoning found in the Eastern Slopes Policy provide interim direction until sub-regional integrated resource plans are completed.

The Ghost River Sub-Regional Integrated Resource Plan supersedes the zoning configuration set down in the Eastern Slopes Policy. As a result, the zones have been refined and the regional zoning found in the Eastern Slopes Policy no longer apply in the planning area. Figure 2 shows the revised zoning.

A.2 A Coal Development Policy for Alberta

A Coal Development Policy for Alberta, released in 1976, guides the exploration and development of coal resources throughout the province. Under the Coal Policy, exploration and development of coal deposits are permitted only under strict control to ensure environmental protection and satisfactory reclamation of any disturbed land. It classifies the province into four categories of suitability for different levels of exploration and development. The western portion of the planning area is Category 1 where no exploration or development is permitted. The north-central area is Category 2, where "limited exploration is desirable and may be permitted under strict control". Commercial development by surface mining "will not normally be considered at the present time" because "the preferred land or resource use remains to be determined". The eastern portion of the planning area is mostly Category 4 where "exploration may be permitted under strict control" and where commercial development "may be considered subject to proper assurances respecting protection of the environment and reclamation of disturbed land".

A.3 Fish and Wildlife Policy for Alberta

The Fish and Wildlife Policy for Alberta was approved by Cabinet and released in October 1982. This policy provides general direction regarding outdoor recreation, wildlife resources, fisheries resources and regulatory aspects of fish and wildlife use. The Fish and Wildlife Policy calls for preparation of comprehensive 10-year fish and wildlife resource plans. Meeting the objectives stated in this plan will achieve a portion of the overall fish and wildlife projected demand targets identified in the Status of the Fish and Wildlife Resource in Alberta (1984).

A.4 Commercial Trail Riding Policy

As an outcome of the Commercial Trail Riding Policy, "Commercial Trail Riding Regulations" were established for the Green Area in 1979 under the Public Lands Act. In part, these regulations establish three classes of trail ride management areas: single operator (class I), multiple operator (class II) and multiple operator day-use (class III).

A.5 Wilderness Areas, Ecological Reserves and Natural Areas Act

The Wilderness Areas, Ecological Reserves and Natural Areas Act (1984) consolidated the policy context for these three separate programs under one act. The Ghost River Wilderness Area, designated under the previous Wilderness Areas Act (1971), has been retained under the new legislation.

Ecological reserves are to be designated to protect representative landscapes of the province. The act provides the public with the opportunity to submit recommendations regarding wilderness areas and ecological reserves.

Natural areas, which are scattered throughout the province, were previously established under the Public Lands Act or were simply under reservation. These areas have a broader set of acceptable uses than ecological reserves or wilderness areas, including recreation, education and conservation.

APPENDIX B

GLOSSARY

Access Management Plan	A plan to manage recreational off-highway vehicle access in the entire planning area outside of the Ghost River Wilderness Area will be co-ordinated by the Bow Crow Forest, Alberta Forest Service, with participation from concerned government agencies, local authorities and the public. The plan will consist of a network of selected routes and trails suitable for recreational off-highway vehicle use. The access management plan will maintain a range of recreational OHV trails and address such items as types of vehicles, seasonal use of routes and trails, and limits to motorized recreational access in the area.
Animal Unit Month (AUM)	Measure of forage or feed required to maintain one (AUM) animal unit (a mature cow of 455 kg [1000 lbs]/ or equivalent) for 30 days (Resource Conservation Glossary, Soil Conservation Society of America, 1976).
Annual Allowable Cut (AAC)	Total volume of timber that may be harvested yearly under sustained yield management.
Auto Touring Route	Existing roads in the planning area which are either major travel corridors or travel through cultural or aesthetic features of sufficient significance to warrant greater visitor awareness, education and enjoyment. The development of suitable visitor information (e.g., interpretive brochures, road signage) and non-serviced road facilities such as pull-off areas and viewpoints are appropriate on these roadways.
Archaeological Resource	"...a work of man that (i) is primarily of value for its prehistoric, historic, cultural or scientific significance, and (ii) is or was buried or partially buried in land in Alberta or submerged beneath the surface of any watercourse or permanent body of water in Alberta". (Historic Resources Act, Revised Statute of Alberta [henceforth abbreviated RSA] 1978, H-8).
Commercial Development	All activities and infrastructure associated with the development of facilities for the use of the general public, including fixed-roof recreation accommodation, such as hunting, fishing, skiing and backcountry lodges; hotels, motels, apartments, townhouses and cottages; and commercial recreational activities involving facilities such as ski hills and golf courses, whether owned and/or operated by the private or public sector.
Commercial Timber Permit	Authorization for the permittee to harvest timber and which identifies lands on which timber may be harvested, the period of time within which the timber may be harvested, the actual timber to be harvested and the terms and conditions on which the permit is issued (Forest Act, RSA 1980, c. F-16).
Consumptive Use	Those uses of resources that reduce the supply such as hunting, logging and mining (Wildland Planning Glossary, USDA Forest Service).

	Conversely, non-consumptive use does not reduce the supply (e.g., wildlife viewing.)
Country Vacation Farm or Vacation Ranch	A working farm or ranch which provides overnight accommodation for a minimum of four guests and offers organized participation in, and/or observation of, actual farm/ranch activities as part of the vacation experience.
Crown Land	Land titled to her Majesty the Queen in the right of the Province of Alberta.
Domestic Grazing	All activities associated with the production and use of forage for domestic livestock.
Extirpated Species	Wildlife species no longer found in their historical ranges but are not extinct.
Eastern Slopes Zones	The Eastern Slopes Policy document, first issued in 1977, identified three policy areas and eight corresponding regional land use zones: **A. Protection** - 1) Prime Protection, 2) Critical Wildlife and 3) Special Use; **B. Resource Management** - 4) General Recreation, 5) Multiple Use and 6) Agriculture; **C. Development** - 7) Industrial and 8) Facility. The primary objectives of regional zoning are: a) to provide resource management intents for broad units of land; b) to recognize opportunities and allocate resources at a broader regional scale; c) to provide background and direction for more detailed integrated resource planning; and d) as a consequence of the latter, to resolve land use conflicts (A Policy for Resource Management of the Eastern Slopes Revised 1984, Alberta 1984).
Fixed Roof Accommodation	Permanent accommodation other than campgrounds (e.g., hotels, motels, backcountry lodges or rental cabins).
Flow Regime	Distribution of streamflow over time (usually one year).
Forest Land Base	Land considered to be capable of contributing to the social and economic welfare of the province if it is predominantly maintained under forest management. Includes provisions for production of wood and wood products on a sustained yield basis, wildlife, grazing, recreation, and protection and production of water supplies.
Forest Management Unit (FMU)	An area of forest land designated by the minister for the purposes of administration (Forest Act, RSA 1980, c. F-16). The annual allowable cut of timber is determined with respect to forest management unit boundaries.
Forest Reserve	Approximately two-thirds of the Ghost River Planning Area is within the Rocky Mountain Forest Reserve. It includes lands in the Province of Alberta set aside by the Forest Reserves Act (1964) primarily to maintain good watershed conditions and obtain high water yields. This is done through the management of vegetative cover as an insurance against soil erosion and to minimize the danger of flash floods. Other

benefits of the forest reserve are timber production, grazing, recreational use and use of fish and wildlife (Alberta's Forests, Alberta 1971).

Grazing Allotment

Synonymous with range allotment. A rangeland area based on natural or watershed boundaries designated for use by a prescribed number of cattle, managed by permittee(s) and directed by a range management plan prepared by the Alberta Forest Service (Range Management Section, Forest Land Use Branch).

Grazing Lease

Crown grazing-land disposition issued on an area of land which is suitable for supporting livestock. Leases are legislated under the Public Lands Act (RSA 1980, P-30) and are issued for public lands in the Green Area and White Area, outside the Rocky Mountain Forest Reserve, usually for a term of five or 10 years. The lease allows the lessee exclusive use of the land for grazing (Range Management Section, Forest Land Use Branch, Alberta Forest Service).

Grazing Permit

Official written permission to graze a specific number, kind and class of livestock for a specific period on a defined range allotment (Wildland Planning Glossary, USDA, Forest Service, 1976).

Green Area:
Permits are issued on an annual basis by the forest superintendent for the Green Area, pending the preference quota for each permittee and the available animal unit months (AUM) in each allotment. Grazing permits are legislated pursuant to the Forest Reserves Act (RSA 1980, F-15) (Range Management Section, Forest Land Use Branch, Alberta Forest Service).

White Area:
Grazing permits are issued on an annual basis, frequently on lands under reservation for another purpose or on lands for which it is not considered in the public interest to grant long-term dispositions. Grazing permits are legislated through Alberta Regulation 64/70 found under the Public Lands Act (RSA 1980, P-30).

Green Area

The Green Area, established in 1948 by Alberta Order-in-Council 213/48, consists of the non-settled forest lands and covers 53 per cent of the total area of the Province of Alberta. Public lands in the Green Area are managed primarily for forest production, watershed protection, fish and wildlife management, recreation and other multiple uses. Permanent settlement, except on legally subdivided lands, as well as agricultural uses other than grazing, have been excluded (Alberta Public Lands, Alberta, 1981a).

Historical Resource

Any work of nature or of man that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest (Historical Resource Act, RSA 1979, H-8).

Historical Resource Impact Assessment

Projects normally conducted when development programs are anticipated to cause ground surface disturbance within the Province of Alberta. The purposes of such projects are to locate all historical resource sites to be affected by the development, evaluate the worth

	of such sites relative to Alberta historical resources as a whole, determine the nature of the impact of the development on individual sites and propose conservation procedures for those sites to be affected by the development. (Archaeological Survey of Alberta).
Historic Site	"...any site which includes or is comprised of an historical resource of an immovable nature or which cannot be disassociated from its context without destroying some or all of its value as an historical resource and includes a prehistoric, historic or natural site or structure." (Historic Resources Act, RSA 1979, H-8).
Integrated Resource Management (IRM)	Co-ordinated, interagency approach to comprehensive planning and shared decision-making in the overall management of diverse natural resources and their use. A basic principle of IRM is consultation before action; concerned agencies consult and discuss implications of possible courses of action so mutually acceptable solutions can be determined. Integrated resource management is a comprehensive, co-ordinated approach to planning and administering Alberta's resources as efficiently as possible, with the goal of producing the greatest benefits for present and future Albertans (Resource Planning Branch; Alberta Forestry, Lands and Wildlife).
Miscellaneous Timber Unit Area	Land set aside within a forest management unit to provide timber for local use. The area represents a portion of the annual allowable cut for the total forest management unit. Timber is allocated for local use through Local Timber or Commercial Timber permits.
Multiple Use	The use of land for more than one purpose (e.g., watershed management, timber production, domestic livestock grazing, wildlife production and recreational and industrial uses). A combination of uses may not necessarily yield the highest economic return or the greatest unit output considering the optimal use of available resources (adapted from Resource Conservation Glossary, 3rd Edition. Soil Conservation Society of America, 1976).
Off-Highway Vehicle	Motorized vehicle used for cross-country travel on land, water or snow, including four-wheel-drive vehicles, motorcycles, track vehicles and snow vehicles, but not motorboats (Off-Highway Vehicle Act, RSA 1980, c. 0-4). In the context of this plan, off-highway vehicles do not include helicopters.
Operational Plans	Provincial government resource management agencies prepare long- and short-range plans for the management of resources under their jurisdiction. These specific resource management plans generally deal exclusively with the resource(s) for which a management responsibility has been delegated. Wildlife management plans, timber management plans, range management plans and recreational management plans are examples.
Palaeontological Resource	"...a work of nature consisting of or containing evidence of extinct multicellular beings and includes those works or classes of works of nature designated by the regulations as palaeontological resources." (Historic Resources Act, RSA 1979, H-8).

Point Source Of Sedimentation	Term used to denote where sedimentation occurs as a result of land use which is in direct contact with the stream (e.g., road crossings). Conversely, a non-point source of sedimentation is used to denote sedimentation arising from a land use within the watershed but not adjacent to the stream (e.g., timber harvest cutblocks may change the quantity and timing of run-off which may lead to higher flows and erosion of stream banks downstream).
Preliminary Disclosure	Means by which both the private and public sectors may make major development proposals, on a confidential basis, to government. Through preliminary review, the government may indicate whether it has objections "in principle" to a proposal's form, timing, location or any other essential feature. No objection in principle of a major development proposal (resulting from preliminary disclosure) constitutes approval for the filing of necessary applications and documents as required under controlling legislation (A Policy for Resource Management of the Eastern Slopes Revised 1984 [Alberta, 1984]).
Primary Range	An area which animals prefer to use and over which they will graze when management is limited (Wildland Planning Glossary, USDA, Forest Service). The primary range will be overused before the secondary range is used when animals are allowed to shift for themselves (A Glossary of Terms Used in Range Management, Society for Range Management, 1974).
Productive Geological Structure	Types of geological situations which contain economically viable amounts of naturally occurring minerals such as petroleum and natural gas (e.g., traps), coal (e.g., seam formations) and metals (e.g., igneous intrusives).
Program	Plan of procedure; a schedule or system under which action may be taken toward a desired goal.
Project	Specific plan or design intended to meet desired program goals. A work item definable in terms of plans and specifications.
Public Land	Land which is under the administration of the Minister of Forestry, Lands and Wildlife. Title to the beds and shores of all rivers, streams, water- courses, lakes and other bodies of water is declared to be vested in the Crown in right of Alberta and under the administration of the Minister of Forestry, Lands and Wildlife (Public Lands Act, RSA 1980, P-30) unless the title specifies otherwise.
Rangeland	Land on which the (climax or natural potential) plant community is dominated by grasses, grass-like plants, forbs or shrubs suitable for grazing or browsing and present in sufficient quantity to justify grazing or browsing use. Land on which the native vegetation (climax or natural potential) is predominantly grasses, grass-like plants, forbs or shrubs suitable for grazing or browsing use. This includes lands revegetated naturally or artificially to provide a forage cover that is managed like native vegetation. Rangelands include natural grasslands, savannahs, shrublands, most deserts, tundra, alpine, communities, coastal marshes

	and wet meadows (A Glossary of Terms Used in Range Management, Society for Range Management, 1974).
Recreation	Extensive Recreation: The recreational use of trails, natural lakes, rivers, streams and generally undeveloped or minimally developed areas. The term includes such activities as off-highway vehicle use, random camping, hiking, backpacking, hunting, fishing, snowmobiling, horseback riding and cross-country skiing. Intensive Recreation: High-density recreational use such as developed staging areas and camp and picnic grounds, and other sites or areas requiring continuous recreational management and services to maintain recreational opportunities.
Referral Systems	The Alberta government has established formal mechanisms for the internal review of land-use applications originating from within itself and the private sector. Government management agencies concerned or affected by the provisions of an application participate in its review. Each management agency subsequent to the review files its recommendation for the approval or rejection of the application. These positions are co-ordinated by a lead agency (i.e., "one window" approach) which, in turn, provides the proponent with a comprehensive decision.
Regional Resource Management Committee (RRMC)	A group of regional directors representing each of the involved divisions of Alberta Forestry, Lands and Wildlife and other agency representatives on an occasional and "as needed" basis. The RRMC reviews planning documents and has the primary responsibility for the implementation stage of the planning process.
Reserve Block	Area of timber exempted from harvest. The coniferous reserve block is usually harvested after the initial cut area has been reforested with coniferous regeneration to a height of 1.8 m (6 ft.) to 2.4 m (8 ft.). It is expected that coniferous regeneration will reach a height of 2.0 m (7 ft.) within 20 years.
Residential Subdivisions	All activities and infrastructure associated with permanent housing subdivisions for residents.
Resource	Any part of the natural environment which society perceives as having value.
Resource Integration Committee (RIC)	An approvals body responsible for supervising and monitoring the integrated resource planning program.
Resource Management Area	A geographical unit which has a common resource management intent (e.g., wildlife habitat protection, multiple use, extensive and intensive recreation).
Resource Management Guidelines	Measures which prescribe or define: a) conditions, requirements or standards which may be imposed upon those activities which have a direct or indirect effect on resources or resource uses; b) information collection activities and responsibilities;

c) decision-making activities and responsibilities; and
d) procedures for making decisions about activities.

Resource Management Implication

A statement in an integrated resource plan that attempts to outline:
a) benefits to accrue to the public as a result of the policy decisions made through the plan's resource management objectives, guidelines and zoning;
b) resource management costs incurred (generally in qualitative terms) to implement the proposed resource management actions; and
c) potential trade-offs between mutually exclusive resource uses.

Resource Management Objective

A frame of reference that provides a degree of measure in reaching designated goals. Specifically, resource management objectives:
a) document desired conditions that spell out ends rather than means;
b) are cast as infinitives rather than in the imperative mood or future tense;
c) are presented in a general to specific fashion which demonstrates continuity in detail; and
d) are quantifiable and can be achieved with existing technology or knowledge.

Restricted

Any activity which will not be permitted until stricter than normal conditions are defined through an integrated decision-making process such as integrated resource planning and referrals.

Route

Usually a mapped but unsigned primitive travel way for motorized or non-motorized use which has a low standard of maintenance. Summer routes may not have an evident tread.

Salvage Cutting

A cutting to remove dead, downed and injured trees before the timber becomes unmerchantable.

Sanitation Cutting

A cutting made to remove dead, diseased, infested, damaged or susceptible trees to reduce or prevent the spread of insects or pathogens.

Secondary Range

An area which is unused or lightly used by livestock under minimal management and will ordinarily not be fully used until the primary range has been overused (Wildland Planning Glossary, USDA, Forest Service, 1976).

Staging Area

A site developed to provide access to trails.

Step-Out Well

A proposed well that, in the judgment of the Mineral Resources Division, Alberta Department of Energy (based on geophysical, geological or engineering technical data), has a reasonable chance of penetrating the same hydrocarbon-bearing structure discovered by a well drilled prior to July 1977 (Mineral Resources Division, Alberta Energy).

Surface Disturbance

Because historical resources generally exist on the surface or are shallowly buried in the upper components of the soil horizon, surface disturbance can include any mechanical activity that affects the distribution of near-surface or buried sediments. In the case of open prairie, even extensive vehicular activity over the surface is considered

	disturbance. In the case of forested conditions, any activity that displaces soil horizons immediately below forest litter or deeper is considered surface disturbance. In the case of a significant known historical resource containing stratified or layered occupations, compaction of sediments as a result of heavy vehicular activity is considered disturbance (Archaeological Survey of Alberta).
Sustained Yield	The yield that a forest can produce continuously at a given intensity of management without impairment of the productivity of the land. Sustained yield timber management therefore implies continuous production of timber so planned that at the earliest practical time there is a balance between timber growth and cutting (Wildland Planning Glossary, USDA, Forest Service, 1976).
Timber Quota	Coniferous Timber Quota: A percentage of the volume of the annual allowable cut, as it relates to coniferous timber, that a quota holder may harvest. Deciduous Timber Quota: The volume or area of deciduous timber that a quota holder may harvest. (Forests Act, RSA 1980, c. F-16).
Trail	A signed, mapped travel way for motorized or non-motorized use that has an evident tread (in summer) and is developed and maintained to a prescribed standard.
Tourism	The action and activities of people taking trips to places outside their home communities for any purpose except daily commuting to and from work.
Tourism Attractions	A physical feature of interest or significance which can either be natural or man-made. There may or may not be facilities constructed in conjunction with it to increase the enjoyment of visitors. The attraction can be of international, national, provincial, regional or local significance, depending upon the degree of market appeal.
Tourism Facility	A man-made development whose purpose is to offer or enhance a particular service or recreational activity to the tourist.
Water Quality	Quantity of solid and dissolving material carried out by a stream (Resource Conservation Glossary, Soil Conservation Society of America, 1976).
White Area	The White Area is the region of the province settled initially and includes nearly 40 per cent of the total area of Alberta. Available public lands in this region, suitable for settlement and agriculture and not required for conservation, watershed, forestry, recreational uses or wildlife habitat, for example, may be applied for pursuant to the Public Lands Act (RSA 1980, P-30).
Wildland Recreation	In relative terms, extensive recreation occurring on lands that are on the less used and less altered side of a continuum from totally developed to completely untouched lands. The term is not exact in that the land may be under a low level of management for several land uses and is therefore not truly wild.

Wildlife Depredation	Use of lands and/or land products by wildlife for their survival which is determined by human land occupants to be in direct competition with a proposed or existing use. Examples include wildlife use of agricultural crops, hay stacks and domestic livestock ranges.
Wildlife Management Unit	An area of Alberta designated in the Wildlife Act (RSA, 1980) for the purpose of administration.

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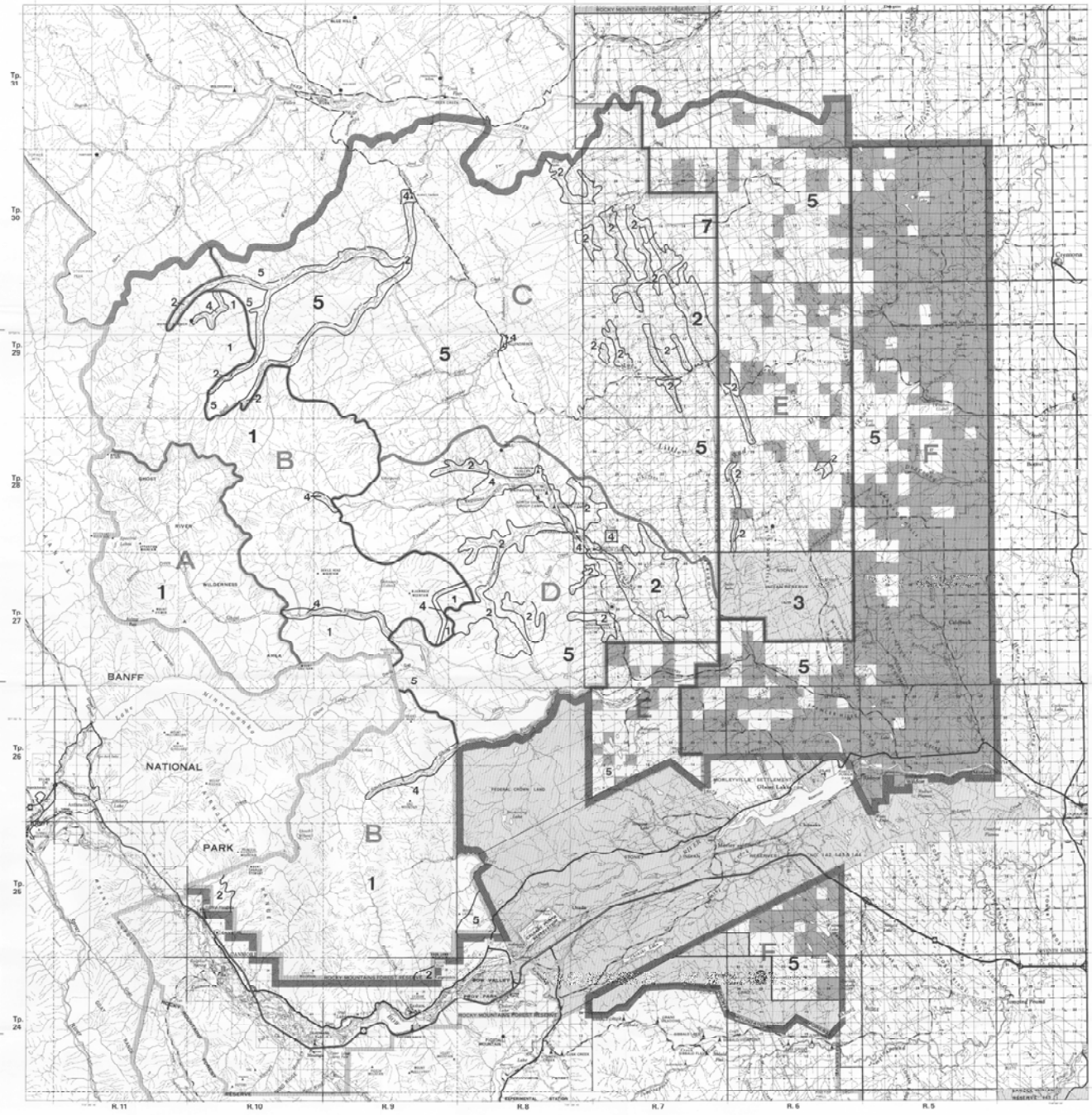
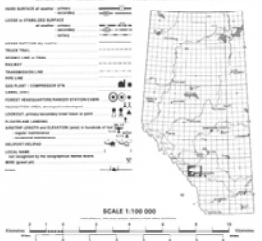


GHOST RIVER
INTEGRATED RESOURCE PLAN



JANUARY 1989

Alberta

Planning Area Boundary
Proposed Green Area Boundary
Forest Reserve Boundary
Patent Land

RESOURCE MANAGEMENT AREAS

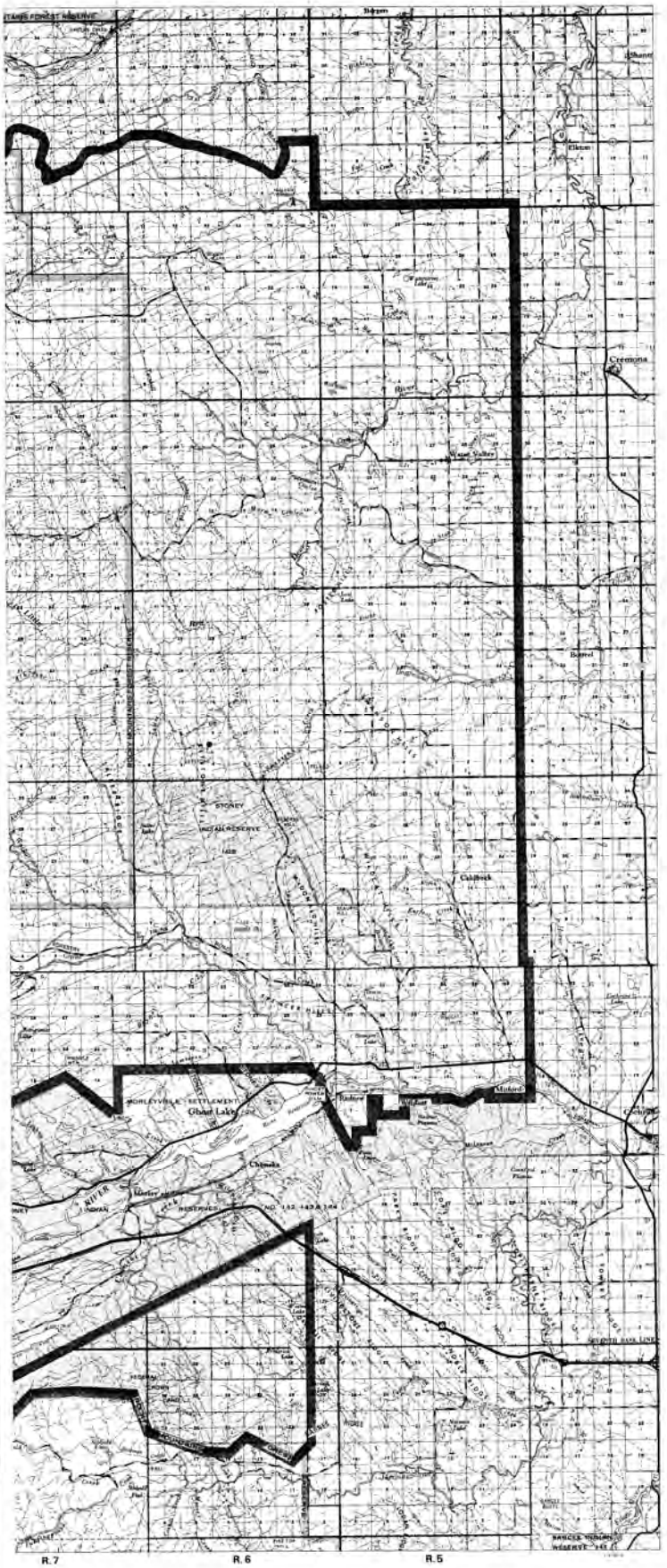
- A Ghost Wilderness
- B Upper Ghost
- C Fallentimber
- D Waiparous
- E Little Red Deer
- F Water Valley

Resource Management Area Boundary

REVISED EASTERN SLOPES ZONING

1. Prime Protection
2. Critical Wildlife
3. Special Use
4. General Recreation
5. Multiple Use
6. Agriculture (not applied)
7. Industrial
8. Facility (not applied)

GHOST RIVER
INTEGRATED RESOURCE PLAN



BASE MAP LEGEND

PROVINCIAL LOCATION KEY MAP

SCALE 1:100 000

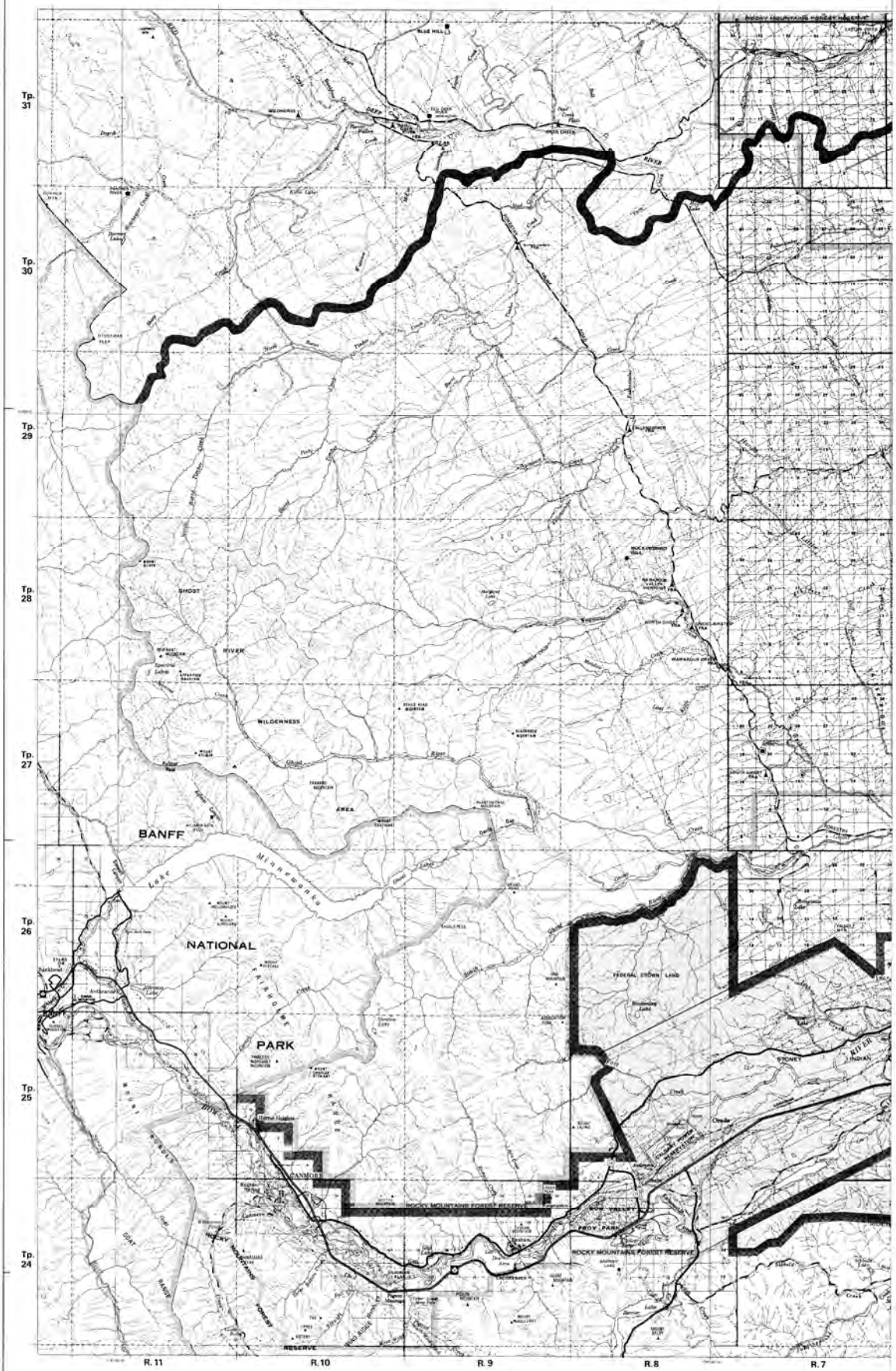
UNIVERSAL TRANSVERSE MERCATOR PROJECTION

WEST OF THE FIFTH MERIDIAN

Alberta

Planning Area Boundary

Forest Reserve Boundary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BANFF
NATIONAL
PARK
WILDERNESS
AREA
GHOST
RIVER
Lake Minnewanka
FEDERAL CROWN LAND
BANFF
CANMORE
ROCKY MOUNTAINS FOREST RESERVE
PROV. PARK
RESERVE

TAB 63

Province of Alberta

The 27th Legislature
Fourth Session

Alberta Hansard

Tuesday, March 8, 2011

Issue 9

The Honourable Kenneth R. Kowalski, Speaker

Legislative Assembly of Alberta
The 27th Legislature
Fourth Session

Kowalski, Hon. Ken, Barrhead-Morinville-Westlock, Speaker
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Mitzel, Len, Cypress-Medicine Hat, Deputy Chair of Committees

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Benito, Carl, Edmonton-Mill Woods (PC)
Berger, Evan, Livingstone-Macleod (PC)
Bhardwaj, Naresh, Edmonton-Ellerslie (PC)
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Blakeman, Laurie, Edmonton-Centre (AL), Official Opposition House Leader
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Chase, Harry B., Calgary-Varsity (AL), Official Opposition Whip
Dallas, Cal, Red Deer-South (PC)
Danyluk, Hon. Ray, Lac La Biche-St. Paul (PC)
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Denis, Hon. Jonathan, QC, Calgary-Egmont (PC), Deputy Government House Leader
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Fritz, Hon. Yvonne, Calgary-Cross (PC)
Goudreau, Hon. Hector G., Dunvegan-Central Peace (PC)
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Horne, Fred, Edmonton-Rutherford (PC)
Horner, Doug, Spruce Grove-Sturgeon-St. Albert (PC)
Jablonski, Hon. Mary Anne, Red Deer-North (PC)
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Johnson, Jeff, Athabasca-Redwater (PC)
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Klimchuk, Hon. Heather, Edmonton-Glenora (PC)
Knight, Hon. Mel, Grande Prairie-Smoky (PC)
Leskiw, Genia, Bonnyville-Cold Lake (PC)
Liepert, Hon. Ron, Calgary-West (PC)
Lindsay, Fred, Stony Plain (PC)
Lukaszuk, Hon. Thomas A., Edmonton-Castle Downs (PC), Deputy Government House Leader
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MacDonald, Hugh, Edmonton-Gold Bar (AL)
Marz, Richard, Olds-Didsbury-Three Hills (PC)
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Morton, F.L., Foothills-Rocky View (PC)
Notley, Rachel, Edmonton-Strathcona (ND), ND Opposition House Leader
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Olson, Hon. Verlyn, QC, Wetaskiwin-Camrose (PC), Deputy Government House Leader
Ouellette, Hon. Luke, Innisfail-Sylvan Lake (PC)
Pastoor, Bridget Brennan, Lethbridge-East (AL), Official Opposition Deputy Whip, Official Opposition Deputy Leader
Prins, Ray, Lacombe-Ponoka (PC)
Quest, Dave, Strathcona (PC)
Redford, Alison M., QC, Calgary-Elbow (PC)
Renner, Hon. Rob, Medicine Hat (PC), Deputy Government House Leader
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Sandhu, Peter, Edmonton-Manning (PC)
Sarich, Janice, Edmonton-Decore (PC)
Sherman, Dr. Raj, Edmonton-Meadowlark (Ind)
Snelgrove, Hon. Lloyd, Vermilion-Lloydminster (PC)
Stelmach, Hon. Ed, Fort Saskatchewan-Vegreville (PC), Premier
Swann, Dr. David, Calgary-Mountain View (AL), Leader of the Official Opposition
Taft, Dr. Kevin, Edmonton-Riverview (AL)
Tarchuk, Janis, Banff-Cochrane (PC)
Taylor, Dave, Calgary-Currie (AB)
VanderBurg, George, Whitecourt-Ste. Anne (PC)
Vandermeer, Tony, Edmonton-Beverly-Clareview (PC)
Weadick, Hon. Greg, Lethbridge-West (PC)
Webber, Hon. Len, Calgary-Foothills (PC)
Woo-Paw, Teresa, Calgary-Mackay (PC)
Xiao, David H., Edmonton-McClung (PC)
Zwozdesky, Hon. Gene, Edmonton-Mill Creek (PC), Deputy Government House Leader

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Managing Editor of *Alberta Hansard*	Liz Sim

Party standings:
Progressive Conservative: 67 Alberta Liberal: 8 Wildrose Alliance: 4 New Democrat: 2 Alberta: 1 Independent: 1

The Chair: Now the committee shall rise and report progress.

[The Deputy Speaker in the chair]

Dr. Brown: Mr. Speaker, the Committee of the Whole has had under consideration a certain bill. The committee reports progress on the following bill: Bill 9.

[The voice vote indicated that the committee report was concurred in]

[Several members rose calling for a division. The division bell was rung at 3:56 p.m.]

[Ten minutes having elapsed, the Assembly divided]

[The Deputy Speaker in the chair]

For the motion:

Allred	Griffiths	Oberle
Amery	Groeneveld	Olson
Berger	Hancock	Ouellette
Blakeman	Horne	Quest
Brown	Jacobs	Redford
Calahasen	Kang	Rogers
Campbell	Klimchuk	Sandhu
Chase	Knight	Snelgrove
DeLong	Leskiw	Vandermeer
Drysdale	Lindsay	Webber
Fawcett	McFarland	Zwozdesky
Fritz		

Against the motion:

Anderson	Hinman	Taylor
Boutilier	Mason	

Totals: For – 34 Against – 5

[The committee report was concurred in]

4:10

Government Bills and Orders
Second Reading

Bill 10
Alberta Land Stewardship Amendment Act, 2011

The Deputy Speaker: The hon. Minister of Sustainable Resource Development.

Mr. Knight: Well, thank you, Mr. Speaker. I rise to move second reading of Bill 10, the Alberta Land Stewardship Amendment Act, 2011.

Mr. Speaker, there is in the province of Alberta, I believe, a pressing need for land-use planning. In the period of time of 2001 to 2006 the province of Alberta gained a population that was almost four times the size of the population of the city of Red Deer. We have, indeed, got a population growth that also includes a growing economy and a fast-paced economy; industrial, residential, and community pressure on the land base in the province of Alberta; and concerns around the quality of our airshed and the quantity and quality of water resources. All of these things need to be taken into consideration with regional plans.

We need to remember, you know, the issues that we had. Some of the members of the House, in certain ridings in the province, would remember the issues that we had around providing adequate housing and services for the people that had come to the province to work and the issue around infrastructure that was felt to be lacking with respect to that pressure. People were very worried at that point in time about the impact of development on air, land, and water in the province and the impact also on critical habitat for wildlife, on habitat for recreational areas, and the like. So, Mr. Speaker, we needed to manage multiple pressures on the landscape.

Out of that was born the land-use framework and nearly three years of consultation with Albertans with respect to land-use planning. There were always questions when we did the planning that we had initiated in the land-use framework – where is the plan? what is going to be the outcome of the land-use framework? what is this government's commitment to co-ordinated regional planning? – and the differences across the province, southern Alberta being completely different from areas in the oil sands or the forestry-intensive northwest parts of the province, and each region's unique needs and the challenges that each region had. We wanted to make sure that we considered the combined impact of all of the activities that were occurring on the land base, considered the needs for conservation, the needs for more balanced development over the long term.

From these questions that Albertans were posing to us came the Alberta Land Stewardship Act. We created the Land Stewardship Act to support regional planning, Mr. Speaker. It gives the authority to establish seven planning regions in the province based on watersheds. It will define, and has defined, what a regional plan may address.

Some examples, Mr. Speaker, would be the environmental impact and the identification of lands for conservation. We have established a role for regional advisory councils to take a look at each of the regions and provide government with their advice and a vision for a plan for each of the regions. The act would help us to establish that we can look at conservation tools that might do things like help reduce agricultural fragmentation. There are opportunities there for making sure that the eco stewardship of the land and the opportunity for eco goods and services, the benefits of that, could perhaps be enjoyed by the agricultural community.

We have respected local decision-making and people's property rights in the legislation. I can't express strongly enough, Mr. Speaker, that when we're looking at these amendments, we cannot cancel or take away, remove, or rescind somebody's land title or their freehold mineral rights or a number of other issues that, you know, had been discussed in our opportunities to be around the province talking to individuals and groups of people relative to what happens when you put a regional plan in place.

Mr. Speaker, we've also in this particular amendment made sure that we provided for compensation if private land that is identified for conservation is indeed put into things like a conservation directive. We've defined that there are statutory consents that, indeed, may require us to look at compensation. We have also defined that statutory consents do not include things like land title. Also, it's very clear that the existing provisions for compensation and appeal remain for any individual that is directly or adversely affected by what might happen in a regional plan.

I think that there have been some, probably deliberate, interpretations of the original act that were never intended. I believe that in certain circumstances as I've gone around and talked to Albertans, they in some cases were fearful, in most cases anxious. In some cases, most certainly, landowners were angry.

The Premier asked me to review the original act and to be sure that I could clarify for Albertans what the intent of this act is, and where there was necessity for change, we should look at the requirement for change and put the changes in place that would give Albertans a feeling of some comfort with respect to what the plans were intended to do. Also, Mr. Speaker, a thing that happened at that point in time was that there is now an indication that none of these regional plans will actually be enforced or approved until this review is completed and until we've had the opportunity to come here to the Legislature, look at the outcomes of Bill 10, the

Alberta Land Stewardship Amendment Act, 2011, and be sure that we've had a good, open, and frank debate and discussion about this situation, again, on the floor of the Legislature.

Mr. Speaker, the changes, I think, most certainly clearly define the scope of regional plans and the focus on land and land-related activities. We do have as an intent here to be sure that we look at the pressure on the land base and to be sure that we have an opportunity for species, human settlement, natural resources, and the environment to all be considered as we move forward and design the plans that we have thoughts on for Albertans in the future.

I've got to comment a bit on property rights and compensation. We have a respect for property rights clearly stated in the front end of the legislation now, and we have also indicated that the right to all existing compensation and appeals to any other compensation issues are clearly stated. Land titles, of course, Mr. Speaker, as I've said, were never included in the definition of statutory consent, and we've clarified that. The amendment act very clearly excludes land titles from any definitions that we have, and it also excludes freehold mineral rights and a range of other personal matters. A regional plan cannot cancel a land title, and it cannot affect freehold mineral rights.

The issue of compensation, of course, you know, has been hotly debated by groups and individuals across the province, and we have clarified that nothing in this act takes away any existing right to compensation. With compensation and compensable taking of property interest under the act or under a plan, there is an opportunity for compensation, an opportunity for appeal, and an opportunity to get to the courts if you're not satisfied with what you may see at the appeal process and with the Land Compensation Board. You can apply to the Crown if you're not satisfied. If your rights are affected and you're entitled to compensation, you're certainly allowed to appeal and to go before the board, and if you're not satisfied with that, Mr. Speaker, you can indeed go to the courts with respect to your compensation.

4:20

The consultation that we've gone through, Mr. Speaker, commits the government and the province of Alberta to openness, transparency, and fairness. There was, I think, an original concern that there might be an ability for a regional plan to be established without consultation, but clearly in the amendment consultation is required. We're committed to regional plans and the advice that we get from consultation, and as we've done already, we've laid out a way for this consultation to occur through the lower Athabasca and South Saskatchewan. We've received from the lower Athabasca a vision and advice to government, and of course we continue to move forward. The consultation on the lower Athabasca regional plan will take place over the next number of months, and we would continue with the amendment indicating that consultation is required. We'd continue with that framework that we have laid out. Before a plan or an amendment is made, it's clear now in the amendments that consultation is most certainly required. So there's a legal requirement for consultation.

The act would also now be amended to address unintended direct and adverse impact. Anyone that is directly and adversely affected can ask for a review. That, of course, is a new piece that is in the amendments that we're putting forward. The persons could apply to the minister for a review of a plan.

Mr. Speaker, another thing that I think would give a lot of comfort, particularly to titleholders, landowners who may have issues, is that you can actually request at any point along the progression of a regional plan that a variance be granted to you with respect to a plan. You know, you might not realize when the plan is initially incorporated that something could affect you, so you have a bit of breathing space there to look and see how the plan is going to work. If there was some suggestion that something that was happening in a plan might affect you, you can actually apply for a variance. There's a process set out for listening with respect to variances and hearing the variances, and under most circumstances I think we would be able to grant variances and avoid any unreasonable hardship that individual might be facing with respect to regional plans.

Mr. Speaker, our opportunity here to work with local governments again is very clearly defined. We want to be sure that we co-ordinate the decisions and not override decisions that are made by regional governments and municipalities. We put an amendment here that would ensure that prior to the incorporation of a regional plan municipal development that's under way, municipal bylaws that operate relative to their land use, et cetera, would be maintained, and if there is development that is under way, that would be allowed to be completed. So there's no intention to take away the opportunity for municipal governments to do what they need to do and continue to do what they have always done with respect to regional planning in their own municipalities.

The amendments that we've made will help us, I think, to sit down and work with municipal governments across the province to be sure that there's no intention here that we would make laws in the province of Alberta that, you know, would override or change the intent of municipal bylaws. We've actually removed part of the original act, taken away a piece that actually indicated that that, in fact, could have happened.

In conclusion, Mr. Speaker, I think there is a democratic tradition here of elected representatives determining policy for Albertans, and one of the policy areas that we do determine is the area around land use. I think it's very important that as we move forward, we have cumulative-effect management that takes into consideration the pressures on the air, water, land use, the environment, and social aspects of the province of Alberta and that we continue as elected representatives to determine that policy and make good policy that works for all Albertans.

The amended act, Mr. Speaker, most certainly creates some new checks and balances for cabinet, and it starts with the requirement to consult. It moves into an era, I think, where we'll be placing draft plans before the Legislative Assembly before they can be approved by the cabinet. New processes for review, new avenues for appeal, and I think that the result is a much more transparent regional planning process. I think that the regional plans respond to the needs and the interests of all Albertans.

As we debate, I hope we keep in mind that land-use planning is a requirement, I think, for ongoing proper development of the province of Alberta. I hope that we can also recognize that the amendments that we have put forward recognize and protect the rights and compensation of individuals and, most certainly, protect the opportunity for local decision with respect to development.

With that, Mr. Speaker, I thank you.

The Deputy Speaker: The hon. Member for Edmonton-Centre.

Ms Blakeman: Thank you very much. Well, this has been a long time in coming. I'm glad to get the opportunity to get up and get some observations on the record in the second reading portion of Bill 10, the Alberta Land Stewardship Amendment Act, 2011. This is a singularly important bill because it has significance in so many different arenas. There's no question that it has considerable significance and opportunity for political parties to further a particular cause. I know that one of the opposition parties, my colleagues to the . . .

somebody else doesn't want you to have it? Is there notification for other people?

If you've got a land-use plan and someone applies for a variance on it, that's going to have consequences down the line. Who manages and foresees those consequences? Who is the decision-maker about whether that variance is going to be granted and allowing anybody else to have their say on that, or is this just cut off at a certain point? You can apply for your variance. Nobody else has anything to say about it, and either they grant it or they don't. So that's the second question that I have.

4:40

Section 14, which is amending section 19 of the act, was the one where the burden was put on the landowner to apply for compensation within a specific period of time. By going back and forth, I was able to answer my own question there, which is: how did they get notification that this was going to happen? There is another section that actually deals with the notification. They don't just have to be constantly monitoring the *Alberta Gazette*, which, I'm sure, we all do every day. No, we don't, obviously. There was an official notification section to landowners that something would happen with the regional plan or would happen with their property so that they would know and be able to deal with that. So I answered one of my own questions there.

An Hon. Member: That's efficient.

Ms Blakeman: Yeah, I know.

I'm also curious that there was no change to section 20. I'm pretty sure that section 20 was one of the ones that was being talked about as a Henry VIII clause, in which the minister or the cabinet is able to change legislation without coming back to the House. At the time the government defended these clauses very strongly, and I argued against them, and I still am. You know, as much as this place has been diminished, it's a bit of an echo chamber today, so I suppose that's proving my point. There's a lot of legislation now that can be dealt with by the minister away from this Chamber, and we never know about it unless we're reading the *Alberta Gazette*.

I don't see that there was a change in section 20 from the main bill, and I also question what was going on in section 19.

Mr. Knight: You have to look at section 21 as well when you're looking at section 20. All that's suggesting, of course, is that for all decision-making, municipal and provincial decision-making, the same rule applies.

Ms Blakeman: The minister is coaching me on the side that if I look at section 21, I will find out that everybody is treated the same, but I don't think that's quite answering my question.

When I look under – sorry; I have to go backwards and find out where I started here – section 14, which is changing section 19 of the original bill, by the time you get down to the bottom of page 10 in the paper bill, it's talking about, again, 19.1(10), that the Lieutenant Governor in Council, which is cabinet, may make regulations – that's regulations – "respecting the form and manner of making applications to the Crown, the Compensation Board or the Court of Queen's Bench under this section." I don't like it, but I understand what that's about. Then it talks about "respecting the application or modification of Part 3, Division 3, and the regulations made under that Division, in respect of applications to the Compensation Board or the Court of Queen's Bench under this section."

Part 3, division 3, of the main bill is that compensation section. The whole thing is conservation directives. That says that this can be changed without coming back here because it's empowering cabinet to change that part 3, division 3. I'm still questioning that, so I'd like to hear the minister talk about that one.

Now, what I would expect to see, what I would hope to see from this bill, what the Official Opposition really wanted to see, was a fair and transparent expropriation process. First of all, it needs to be a transparent process for determining the need of a given project, and this is referencing other bills that have come through at the same time, in particular the big electrical one.

An Hon. Member: Bill 50.

Ms Blakeman: Bill 50.

There does need to be a transparent process about the need for something. If the government, you know, believes that it's right to proceed with that, then it shouldn't be worried about a process in which it explains itself to the public. So demonstrating the need; two, the transparent expropriation process; three, a fair compensation process; and four, a clear appeals process. You always have to have an appeals process built in. Any of us that work in our constituency offices are often dealing with that appeals process that's built into almost everything that we have in provincial government rule. So with this bill in my portfolio, that's what I as critic for Sustainable Resource Development wanted to see out of this. I'm not entirely convinced that that's what we got.

The whole issue of a land-use framework and the ability to make that plan is critically important, and trying to get that concept of public good is really important. When I talk to my constituents in downtown Edmonton, they say to me: "What? Land use? What are you talking about? I don't know it. What is this stuff?" It's true that for many urban dwellers this stuff doesn't touch their lives. But you talk about public good, you know: are my people interested in a high-speed rail link between Edmonton and Calgary? Now their eyes light up. Yes. Now they get it. When you say that the government would need to be able to assemble the land in order for that track to run on it – okay? – now they've got it. When you say, "We're talking about not having urban sprawl decimate agricultural land," that's about the plan.

Those are some of the questions I'd like the minister to answer. I look forward to continued debate.

The Deputy Speaker: From my list here the next hon. member I recognize is the hon. Member for Livingstone-Macleod.

Mr. Berger: Thank you, Mr. Speaker. I'm pleased to rise today to speak to Bill 10, the Alberta Land Stewardship Amendment Act, 2011. The amendments in this act explicitly protect and enshrine landowner rights and make them front and centre in Alberta's land-use planning. The freedom to own and enjoy private property is a fundamental right that Albertans have had since Alberta became a province.

I would like to speak today on the importance of land-use planning in the protection of property rights. Mr. Speaker, the connection that Albertans have with the land is something that this government respects and will always protect. Land is unlike any other asset on a number of grounds. Every parcel is unique, it is fixed in place, it is finite in quantity, it will outlast any of its possessors, and it is necessary for virtually every human activity.

As a landowner myself my own family's livelihood has been dependent on the land for generations. As a rancher property rights are not only fundamental to my way of life but to all Albertans. This is why I strongly support the land-use framework and Bill 10, which will enhance the rights of rural landowners.

Mr. Speaker, the necessity of land-use planning is essential for Alberta's future prosperity. With 5 million people projected to reside in Alberta within the next 10 to 20 years, it is of paramount

importance that we have planning legislation in place that will coordinate in an organized fashion the goals and objectives of Albertans. It should be Albertans, not the courts or foreign environmental groups, that provide input and decide on Alberta's future.

While some in opposition suggest they would rather have land-use decisions decided in the courts, I believe Albertans know what is at stake and that Albertans should have the final say on land-use planning. So I have to ask myself: what is behind the motives of the opposition when they throw out wild accusations about the Alberta Land Stewardship Act, or ALSA? I've had friends call me up and ask questions like: "Why did the government pass legislation that will take away my land? Why did the government pass legislation that will turn Alberta into a Soviet-style communist state?" There are many other wild accusations that are so far out there, it's almost laughable. All I can guess is that they are telegraphing their innermost thoughts to Albertans on how they would use such legislation if they were ever in power.

4:50

However, Alberta's future is a very serious matter. We need to get it right, and, Mr. Speaker, we have got it right. Bill 10 will it make it absolutely clear that ALSA must respect the rights of individual property holders, that Albertans will continue to have a right to compensation, and that public consultation and transparency in the development of regional plans will be required.

These amendments make it so plain that this government supports landowner rights and their right to compensation that even the Member for Airdrie-Chestermere should be clear on the matter. Once a supporter of property rights, the Member for Airdrie-Chestermere previously stated about the Alberta Land Stewardship Act that "at first glance much of this legislation may be interpreted as a regression on property rights, but it would be a very large mistake to think so as this bill, in my view, does the exact opposite. It strengthens landowner rights." He also stated that the former Bill 36 "is an unprecedented victory for the rights of landowners in this province." Mr. Speaker, the member's analysis of this legislation was as correct then as it is today. Albertans who earn their living from the land know how important land-use planning is for their livelihoods.

Long-time rancher Harvey Buckley recently stated to the *Cochrane Eagle* that "ALSA is the best piece of legislation this province has done in 60 years" and that "it does not infringe on your property rights."

Mr. Speaker, I believe that there is a direct correlation between land-use planning and property rights. Albertans enjoy their property entirely based on previous land-use initiatives. To see this, we can go back all the way to the pioneers that settled our land in accordance with the Dominion Lands Act. The Dominion Lands Act encouraged the orderly settlement of western Canada, which included numerous land-use regulations. For example, prospective landowners were required to be at least 21 years old. They were required to occupy the land for a set period of time, to build improvements on the land, and to cultivate a portion of the land, usually around 30 acres.

The Dominion Lands Act also set out how land should be divided; for example, into townships each containing 36 sections and for each section to be divided into quarter sections. It provided for public road allowances every mile by two miles to enable the travel and transportation of people and produce with minimal use of private land.

Mr. Speaker, these were land-use initiatives needed at that time to establish private property. It was through this planning process that Albertans gained proprietary interest in property. This is because the value of property comes largely from factors that are beyond one's property line. External qualities like infrastructure improvements, road access, water quality, and viewscapes are examples of external elements which can quantify the value of property. That is why I would suggest that property rights go beyond the four quadrants of a piece of real estate in that effective land-use planning as provided in ALSA would strengthen property rights, not diminish them. Essentially, proper land-use planning is an effective method to optimize property values of landowners.

However, there are also rights protecting what lies within your property, which is why it is essential that any land-use plan find an acceptable balance respecting both public and private property rights. That is why fair compensation is a key element of the Alberta Land Stewardship Act, and Bill 10 makes this abundantly clear.

Mr. Speaker, I would like to quote a long-time friend of mine, Mr. Neil Wilson, the immediate past president of the Alberta property rights initiative, who stated last week on CBC radio in relation to the Alberta Land Stewardship Act that if in any way proprietary interest is diminished, compensation should be available. When asked if ALSA achieves that, he replied: I think this government has tried its very best to take legislation in the interest of public and make it compensatory, certainly.

The Alberta Land Stewardship Act creatively found a balance which protects and enhances both external and internal properly rights, and Bill 10 makes this even clearer. Albertans have told us they want leadership in provincial planning, and I believe that our economy is dependent upon ensuring we have the proper land-use plans in place. Property rights, economic growth in Alberta's future are all tied together in this important piece of legislation. We need to ensure investors that their rights are protected, and this bill does that. We need to ensure property owners that their property rights, whether it be surface, subsurface, or public, are respected, and this bill does that. We also need to assure Albertans that our province will continue to be a beacon of prosperity, freedom, and democracy, and I believe Bill 10 is a shining example of this Alberta tradition.

Mr. Speaker, I support Bill 10, the Alberta Land Stewardship Amendment Act, 2011, and I would suggest all members stand in support of this legislation. Thank you.

The Deputy Speaker: Standing Order 29(2)(a) allows for five minutes of comment or questions. The hon. Member for Edmonton-Highlands-Norwood.

Mr. Mason: Yes. Thank you very much, Mr. Speaker. I'd like to ask the hon. member if he can clarify comments which he attributed the hon. Member for Airdrie-Chestermere. I was shocked, frankly – shocked – to hear those comments, and I would like it if he would please identify his source.

Mr. Berger: Thank you, hon. member. I would clearly identify the source. It is *Hansard*, May 13, 2009.

An Hon. Member: Say it isn't so.

Mr. Berger: It's so. It's a page and a half, pages 1137 through to 1138, if that clarifies that for you. It's quite a lengthy speech on that.

The Deputy Speaker: The hon. Member for Fort McMurray-Wood Buffalo.

Mr. Boutilier: Yes. To follow up on the question to the hon. Member for Livingstone-Macleod on the comments that were made, I have not met anyone more knowledgeable in terms of

property rights than the hon. Member for Airdrie-Chestermere. It's clear to me that the understanding of the hon. member is something that he needs to review because, quite simply, what was said in *Hansard* is not the rest of the story.

Clearly, the Wildrose caucus supports the infinite rights of landowners. In fact, in some recent town hall meetings in many of your constituencies I understood that a gentleman by the name of Keith Wilson had presented some very, very interesting facts impartially, Mr. Speaker. I'd be really interested in the hon. Member for Livingstone-Macleod – he heard the comments that were made. In fact, it's my understanding that the Minister of SRD invited Mr. Wilson to meet with him, and I understand he had a very clear understanding of the facts. I'd be really interested: is he saying that what Mr. Wilson is saying is not accurate relative to the issue of the assault on property rights of Albertans?

The Deputy Speaker: The hon. member.

Mr. Berger: Thank you, Mr. Speaker. I kind of got lost in the preamble there, but I think what he was really asking is: was this the Member for Airdrie-Chestermere's actual speech? I would submit it, table it, if he would like or give you copies. There are lots of them.

Mr. Boutilier: Keith Wilson is what I'm asking about now.

5:00

Mr. Berger: Mr. Wilson's comments at those meetings: I would like to comment that it would be nice if he would put the whole line of the act in when he quotes a line. Dot, dot, dot doesn't really extend to the content of it.

To go a little further on that whole issue here, when we go through this, there was a point here where the hon. Member for Airdrie-Chestermere had claimed that he was given a speech to read. I think he also claimed something similar to the 1974 or '75 abduction of Patty Hearst, where she'd been kidnapped, and then she went and robbed a bank and just acted like her kidnappers. So that was why he read this speech, because he had been kidnapped by our party and then read this speech.

Well, Mr. Speaker, I'd like to submit that when you go through the content of this speech, the content of this speech has a lot of local content on the area of Airdrie-Chestermere, and I think the member did a wonderful job of putting forward his points in this exact speech and on the members of his community that he brought up and talked about freely here. He quoted Doc Seaman's generous donation of conservation easements on the OH Ranch. He spoke of a fellow here, Jim Hole, who would have really liked this legislation because it would have enabled him to continue on with his operation and gain some value out of it without actually selling it. And it goes on for the next page, basically discussing these different things.

I think the member, being a trained legal fellow, four years of postsecondary, three years of legal training, knew what he was reading here and was very impressed with it. I have to say that that was one legal opinion, now we have another legal opinion, and I'm sure we'll have more legal opinions to come forward. But I have to say that I think he was bang on on this one. He did a wonderful job of conveying it. Now I'm surprised that he's not in here this afternoon to discuss it further.

Mr. Boutilier: Excuse me. Point of order, Mr. Speaker.

The Deputy Speaker: You should not mention the presence or absence of a member.

Mr. Berger: Oh, okay. I apologize. Point well taken. Thank you.

The Deputy Speaker: The point of order has been retracted. He has apologized for that.

On my list here, the hon. Member for Edmonton-Highlands-Norwood. Do you wish to speak?

Mr. Mason: Yes. Thank you very much, Mr. Speaker. You know, I'm pleased to rise to speak to Bill 10. I think that some context is valuable here, and I think also some history is valuable here. The context of this is the fact that there is widespread discontent in the province, in rural areas in particular, with a suite of Tory legislation, and that's not just Bill 36, but it is also Bill 19, and it is also Bill 50. The three of them have to be taken together, in my view, in order to get the entire picture of what this government is actually attempting to do.

Some of the history is attempts to site a north-south transmission line in this province a few years ago which fell afoul of landowners in rural Alberta, particularly in the Rimbey area where a group of landowners got together and actively challenged what was actually being proposed. The whole process was compromised when the ERCB was caught spying on this group. That created quite a firestorm of conflict. So the government decided that they were going to basically legislate a sledgehammer in order to crush the flea that had thwarted their attempts. But it wouldn't have been thwarted had there been more openness about the proposal and if the ERCB had not resorted to illegal tactics in its attempt to overcome opposition. Keep in mind, Mr. Speaker, the ERCB is supposed to be a neutral body that adjudicates these sorts of things and does not take sides or advocate one side or the other. So it was kind of a dark day, I think, in terms of privacy and basic civil rights of Alberta citizens.

The government, having gone ahead with its deregulation of electricity in the area of transmission, decided that a massive set of projects was required. Now, we have about $2 billion worth of infrastructure for transmission currently in the province, and it serves the province well and has for a long time. It's getting older, but it's by no means going to fall apart. The government wants to initiate a whole series of new projects that would be worth $16 billion when you add everything in; in other words, an eightfold increase in value over what we have today.

No adequate explanation has ever been provided for this massive increase in transmission infrastructure. But the one explanation that presents itself is that they want to create a huge market for the buying and selling of electricity, the generation of electricity in Alberta for export purposes to the United States because domestic consumption cannot explain the massive scale of infrastructure that's being proposed.

In order to ram this through, the government passed a series of laws to give them the power that they needed to do this. I know that Bill 36, which this is supposed to amend, gave the cabinet a huge amount of power. It gave them overwhelming control over every aspect of regional plans, and it doesn't reflect the land-use framework's commitment to public input and community involvement. The government can create regional plans, regional advisory councils, and so on.

I think that you also have to take a look at Bill 19, which preceded it, and that allows for an area of land to be designated as a land assembly project. The minister has to publish a plan of the project to create a project area, but once it has been declared, the cabinet can make regulation about how that land can be used, developed, or occupied. Some amendments were made to that legislation, but it gives an enormous amount of power to the cabinet in order to essentially designate any land that they wish and to

control any sort of development on that in a long-term sense. So if they are going to build a project 10 years down the road, they can effectively sterilize that land.

So Bill 19 was a key piece of this. With Bill 36, again the same thing. Bill 50 took away the authority from the Alberta Utilities Commission, the power to approve the need for transmission lines. It eliminates that the public interest needs to be shown before the project is approved, and it is paving the way for the construction of this massive infrastructure for transmission for profit, all of which, by the way, will now be paid for by all electricity consumers in the province. These pieces of legislation need to be taken together as a way of taking away traditional rights of landowners and taking away regulatory oversight of major projects in our electrical system in this province. That is really, I think, what has to be seen.

Now, it is true that some members of the Wildrose caucus, who were then members of the Progressive Conservative caucus, did support these bills. We made a motion, for example, to try and stop Bill 50, and that was opposed as well. Mr. Speaker, I'm very proud of the role that the NDP played as the only party at the time leading the fight against these three bills and trying to connect the bills to the root source of this problem, which is electricity deregulation, which has created a situation where in order to allow big electricity companies to make more profits, the very ratepayers who are supposed to be served by them are going to be shaken down dramatically to pay for all of this unnecessary infrastructure.

5:10

It's interesting that in recent weeks the Minister of Infrastructure has gone on the record in his community newspaper indicating that some of this infrastructure is required in order to facilitate the development of nuclear power in our province. That is a startling admission which flies in the face of other statements that we've had from the government.

Mr. Speaker, I just want to indicate one more point, and that is the distinction between the position of the NDP on this legislation and the present position of the Wildrose Alliance. Both parties are opposing these pieces of legislation, but the Wildrose Alliance is taking the position of property rights as an absolute, and that's not the position that we take. They would like to protect property rights absolutely, and we would like to protect the public interest.

Where we draw the line with the government is that we think you should never be able to take peoples' property unless there's an urgent public necessity to do so, there is full consultation, and there is full and adequate compensation. These bills violated those principles, and that's why we were so strongly not in favour of them. There is a risk that in the reaction against these bills that the government has created, there may actually be changes that take away the legitimate role of land-use planning by municipalities and by the provincial government, so it's important to us that the ability to plan land use and the ability of the public interest to trump property rights when that's necessary should be retained. We don't want to throw the baby out with the bathwater, as do our friends in the Wildrose Alliance.

The point that I think is most important is that there is a drive towards centralizing power that's inherent in each of these pieces of legislation that I find very disturbing. In other words, the government has decided that because of some problems down the road, largely of its own making and of the ERCB's own making, they're going to abandon the democratic process when it comes to approval of these projects and push ahead with centralized decision-making, and that goes too far in our view. For those reasons I think we are going to draw the line here.

Bill 10 does not remove all of the egregious elements of Bill 36, and I think that it's certainly insufficient as far as I can see. For example, the minister will be able to issue directives to the stewardship commissioner and staff. The minister will still maintain, in our view, an undue amount of political control in the regional plan process, in their implementations. Some of the changes are cosmetic. It replaces the word "extinguish" with "rescind" in reference to statutory consent in section 8. Instead of saying, "No person has a right to compensation by reason of this Act" and then listing the exceptions to the rule, the act will now state, "A person has a right to compensation by reason of this Act" and then list the avenues available for compensation.

I think, Mr. Speaker, that the bill fails to adequately address the problems in Bill 36, and it certainly does nothing to address the significant problems that the other two companion pieces of legislation provide: overriding the rights of property owners, overriding proper regulatory oversight of the construction of major infrastructure projects that would be paid for by ratepayers.

For those reasons we cannot support the bill. Thank you.

The Deputy Speaker: Standing Order 29(2)(a) allows for five minutes of questions and comments. The hon. Member for Calgary-Glenmore.

Mr. Hinman: Thank you, Mr. Speaker. I listened intently to the hon. Member for Edmonton-Highlands-Norwood. I have a couple of clarification questions, I guess, that I'd like to ask him. He made reference to the Wildrose several times, wanting to make distinctions. I do not believe that at any time the Wildrose has ever said that the Expropriation Act isn't valid or shouldn't be in place. There is actually a long tradition since, you know, the BNA Act where expropriation can and should be allowed for public good. What we have been referring to over and over again and have declared is that we need to entrench property rights in the Constitution because if those were in fact entrenched in the Constitution, bills 19, 36, and 50 could have been challenged in the courts. Again, the Member for Livingstone-Macleod says: oh, we don't ever want to be in the courts. This certainly sounds like a monarchy, that they will control the courts.

I guess I would take issue and ask for your clarification on why you feel that we do not think the Expropriation Act is applicable in developing, whether it's power lines, pipelines, roads, transportation, and in having that process if, in fact, someone has been challenged by the government.

You've eloquently talked about Bill 50 and how they can push these power lines through, and it's not in the public good. In the old act, where they had to have proof of need, that was critical. Now, like I say, with Bill 50 they've wiped that aside and said: "Oh, no. This is essential." Again, it's a policy that the government has put out, thereby not allowing us to challenge it in the courts because they can just dictate it. It's a government policy. It goes forward.

Perhaps you could clarify why you feel that we do not think the public good is ever addressed through the Expropriation Act and that property rights are paramount, and therefore there would be an absolute juggernaut of any movement forward.

The Deputy Speaker: The hon. Member for Edmonton-Highlands-Norwood.

Mr. Mason: Thanks very much, Mr. Speaker. Well, you know, I'm surprised that the hon. Member for Calgary-Glenmore would want us to be making legislation in the courts. I didn't think that was a conservative principle.

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The Honourable Kenneth R. Kowalski, Speaker

internationally. We don't have enough elk meat. What's happened is that the price was down for so long, yet we were developing markets. Now the markets are developed, but we don't have enough animals. So we want to grow this business back up to supply the international market. There is a huge market for venison and elk and deer meat in other countries, so this is actually a prime time to get going.

We might be a little bit late on the numbers of animals because too many animals have been lost due to farmers quitting and selling off their breeding stock and maybe not breeding animals in the last couple of years because of the low prices. This is a cyclical thing that happens in all industries. It happens in the beef industry. It happens in the pork industry. It's just part of agriculture that you go through these cycles. People make decisions to get in or get out, and it's just business. It's a business decision that people will make, to stay in or get out or to supply the market or not to.

It's much the same in the bison market today. The bison market has probably doubled in value. The animals themselves have doubled in value in the last year because people have acquired a taste for this type of meat. It's healthy meat. They say it has ZIP: zinc, iron, and protein. It's very, very healthy, and this is what people want. Peoples' diets are changing, and they're going to this type of meat.

We want to have a strong industry that is regulated under Agriculture, and we want to protect consumers in the health of the product. We don't want to cut corners. We want this industry to survive and prosper.

Mr. Hinman: I appreciate those answers. Just to clarify, then, when you're allowing family to come in, you're not allowed to receive any money for that? And did you say that you'd bring them into a chute, and then you'd possibly shoot them through the lungs or the heart, or is it just an area that you don't have enough experience in so you won't comment on it? How do they process these five animals that we allow? Again, can we actually sell them to family, or do we have to give them to them under this legislation?

The Chair: The hon. Member for Lacombe-Ponoka.

Mr. Prins: Thank you, Mr. Chairman. I don't think the legislation addresses on-farm slaughter. I think that's probably regulated under a different act. How they do it is entirely up to the operator. If I were to kill five animals, I'd bring them into a squeeze, and I would humanely euthanize them and have them slaughtered. I think that every operator would have their own way of doing it. But if I didn't do it on a farm, I would bring them into a provincially inspected abattoir and have them kill them in the normal way that they would do cattle and pigs and any other animal.

The Chair: Any other hon. members wishing to speak on amendment A1?

Seeing none, the chair shall now call the question on amendment A1.

[Motion on amendment A1 carried]

The Chair: The committee shall now get back on the bill as amended. The hon. Member for Airdrie-Chestermere on the bill as amended.

Mr. Anderson: Okay. The other questions I've been getting regarding Bill 11 surround section 10 of the bill. It says there in 10.1(1), "The Minister may issue a permit authorizing a prescribed activity." [interjections] Never mind. Question answered.

The Chair: On the bill as amended?

All right. Seeing no other hon. member wishing to speak on the bill as amended, the chair shall now call the question.

[The clauses of Bill 11 as amended agreed to]

[Title and preamble agreed to]

The Chair: Shall the bill be reported? Are you agreed?

Hon. Members: Agreed.

The Chair: Opposed? Carried.

Bill 10
Alberta Land Stewardship Amendment Act, 2011

The Chair: The hon. Minister of Sustainable Resource Development.

Mr. Knight: Thank you, Mr. Chair. It is a pleasure for me to stand here tonight and open debate in committee with respect to Bill 10, amendments to the Alberta Land Stewardship Act. The bill, of course, is entitled the Alberta Land Stewardship Amendment Act, 2011.

A little bit of background if I might. I think that everybody understands that the province of Alberta has had a period of time when there was a tremendous amount of growth in the province. In fact, if we look back in 2006, '07, and '08, that growth in certain areas of the province, particularly in Wood Buffalo, was at a point where many Albertans were indicating to the government that something needed to be done in order to be sure that we had the proper type of facilities in place and the proper infrastructure in place in order for us to continue to develop our resources in the province. And it wasn't just there. As a matter of fact, Mr. Chair, if you look at Fort McMurray, Grande Prairie, Red Deer, Medicine Hat, Lethbridge, Edmonton, areas around Fort Saskatchewan, the city of Calgary, the growth was tremendous, and the pressure was also tremendous.

We have to realize that the economic engine of Alberta and Canada is the investment in the energy industry and particularly the energy industry in Alberta. There was $172 billion invested, capital deployed in the province of Alberta in five years, from 2005 to 2010, and this is in conventional oil and gas plus the oil sands. That's a tremendous amount of capital for an area that has a population of about three and a half million people.

What happened along with this is that the economic engine also fuelled population growth. The population growth in the province of Alberta over the five-year period of time from '01 to '06 was about 315,000 new Albertans, and we're now attracting about 60,000 people to the province of Alberta per year. So you can see that I think in 13 or 14 years we've increased the population in Alberta by about a million people.

This is a busy place. It's a busy landscape. There was economic and human pressure on the land. There was a need to manage our land and multiple land uses. There was also a need to manage the combined impact of all of the work that was going on, whether it was development of resources, building homes, building highways: all of the kinds of combined impacts that we needed to have managed. We needed a new planning concept.

10:10

Mr. Chair, this new concept is the land-use framework. We started consultation with Albertans in 2008, working on the land-use framework. It came with a number of, I think, very good and solid potential planning tools. First of all, a need and a require-

ment to balance our economy, the environment, and social objectives that people in the province of Alberta need and desire, want, I think have been provided with respect to social requirements for living and working, raising their families in the province of Alberta. Social requirements like health care, education, social services programs, the opportunities for recreation, the opportunities for touring and tourism: the land-use framework was laid out to provide these types of things.

We also have there the development in the framework of seven regional planning areas, the seven regions based on major watersheds in the province. Each region had unique challenges and unique needs. So we divided this into seven areas and started the work on the lower Athabasca region first. Of course, as I said, the majority of the pressure that Albertans were feeling was because of a tremendous amount of activity, probably in the neighbourhood of $40 billion to $50 billion worth over a couple of years there, development that was taking place in the Wood Buffalo region.

We have regional land-use plans that were spawned from the land-use framework. Regional land-use plans, Mr. Chair. They're regional in their concept, regional in their development. They're regional in the strategies that were deployed to put them together, and they will be regional in their implementation. There's nothing centralized about this issue at all. The regional plans start with regional advisory councils, individuals from the areas that they represent, bringing forward an opportunity for them to give government their vision and their advice with respect to how a regional plan for their particular unique area should roll out and should look for the future of Alberta. These plans will be tailored to regional needs.

There was a requirement, when we started into this, for legislation to enable regional planning, and we needed legal support to implement regional plans, and we needed certainty of regulation. We have the Alberta Land Stewardship Act. The intent of the legislation – the intent of the legislation – is very clear. We intend to respect private property rights. We intend to respect statutory consent holders. We intend to respect existing compensation and the appeal mechanisms that people have toward compensation. We have respect for local governments and the work that they continue to do and are responsible for. Many rights are defined in other Alberta statutes. ALSA doesn't provide these rights, Mr. Chair, and ALSA does not take them away. They exist in other legislation.

But there was a need to clarify this intent. ALSA and this government and this Premier required clarity. I was asked by the Premier to go out and listen to Albertans. While we were doing the consultation around the first couple of regional plans that we were working on, particularly lower Athabasca, I heard a lot from Albertans. The Premier asked me to go back and listen, and if necessary, to make adjustments. The result of that listening and the adjustment is Bill 10.

Bill 10 clarifies the respect for existing rights that Albertans have, and it creates some new processes. There is a commitment in Bill 10, right in the front end of it, to property rights. There is a refined scope to the regional plans. There is a very solid and firm explanation that statutory consents exclude land title, and there are no changes to the right to compensation of any entity or person in the province of Alberta relative to something that may be put in place with a regional plan. All of the rights to compensation that existed previously are maintained and clearly spelled out in Bill 10.

Local decision-making by municipal governments and coordinated planning with municipal governments is another one of the things that Bill 10 very clearly spells out. We as a government cannot make laws under municipal authority. Mr. Chairman, the municipalities are great partners for the province of Alberta and for the Alberta government. We respect them, and we have no intention of interfering with municipal authority. Municipal development permits, for instance, cannot be cancelled or changed once work has commenced on new projects. Bill 10 very clearly respects all existing rights.

Statutory consent holders: if there is any impact on statutory consent holders, they must be provided with notice of compensation, under what laws compensation applies to them, and how that compensation will be determined.

With respect to private landowners, Mr. Chairman, the regional plan cannot – cannot – remove a title. It can affect an interest in property – that's very true – but if it does, it would be very limited and in cases where you might have something like a conservation directive. In the case of a conservation directive it would be very likely that the landowner would agree. In most cases landowners already understand what special pieces of real estate they actually own. Conservation directives do not include your title and would not remove title from the land. All it would ask is to put a directive in place. By the way, compensation is paid if that directive has any negative effect on the value of the owner's real estate.

Where there is a right to compensation, compensation is paid. The legal term "compensable taking" was included in Bill 10 to make it very, very clear that the right that we're now giving titleholders in the province of Alberta goes well beyond the right in almost any other jurisdiction in North America. It is a very, very solid addition to the Alberta Land Stewardship Act. Landowners also for other reasons can apply for compensation, and they can appeal the compensation to the Land Compensation Board and, Mr. Chairman, also to the courts if that is their desire.

There are some new provisions in Bill 10 that would be added to ALSA as we move forward. Of course, these plans are region-wide. There is a tremendous amount of work that goes into this, but these plans on purpose, Mr. Chairman, have a five-year review and a 10-year renewal. You could not foresee every circumstance and every situation when you start developing a regional plan. There are cases where this could affect someone's existing use. What we've done with this is said: "Okay. This could be a case. This is possible. Let's give people an opportunity." So they can apply for a variance. They can apply for a variance to land-use designation in a regional plan. Titleholders and leaseholders can apply to avoid unreasonable hardship on themselves and still honour the intent of the regional plan. I think these are very, very solid movements forward with respect to planning in Alberta.

Also, you can apply for a review. Anyone directly and adversely affected can apply for a review to a regional plan. They would apply to an appointed panel. The results of such a review would be made completely public in a transparent process. These, I believe, are new checks and balances that add to the strength of land-use planning in Alberta.

10:20

We also have as checks and balances in the amendments a public consultation requirement. Previously that was not the case. I heard very strongly from Albertans that they wanted public consultation. There is now consultation required. The consultation report would go to cabinet, and the draft regional plans, also another check in the system, will be filed at the Legislature.

Mr. Chairman, I think that there's some very solid meat in the amendments that we're bringing forward in Bill 10, and I am going to encourage that, again, people take a good look at this. I hope that all Albertans take a look at what we're doing with respect to land-use planning for the future in Alberta. Again, it

respects, I think, the existing rights and all rights of Albertans, it respects existing compensation, and of course it respects our existing methods of appeal.

There are new provisions to review regional plans, new provisions that make it more transparent in a more transparent planning process. There is very strong support for regional planning across the province. I found almost no people that did not feel we needed to move forward with regional plans. I think it's very essential that we do this with respect to multiple land use that is going on and will continue in the province.

Mr. Chairman, I will end by saying: it's your land, it's your plan, and it's your future. Thank you.

The Chair: The hon. Member for Edmonton-Gold Bar on the bill.

Mr. MacDonald: Yes. Thank you very much, Mr. Chairman. That was an interesting speech from the hon. minister, and I listened intently to it.

Certainly, it's only two years since we dealt with Bill 36 in the Assembly, and of course it was quite a comprehensive piece of legislation. It was viewed by many different people across the province with suspicion, and certainly I wasn't confident enough to support it at third reading. Here we are two years later, after the public is beginning to figure out this government and this government's habit of wanting to do so much without public consultation, behind closed doors. It's a cabinet decision. "The cabinet is benevolent. It knows what's best for the citizens. Don't worry. We will look after your interests." That theme is, unfortunately, quite popular with this government, Bill 36, and now we see the companion piece of legislation two years later, Bill 10, and we see the problems.

It's interesting to listen to the hon. minister talk about the need for land-use planning and a land-use framework, and the hon. minister would be right. But when this government was cheered on wildly by the Deep Six, a group of MLAs, one of whom is in the Premier's chair at the moment, whenever cuts were made and programs were dismantled, well, I would remind hon. members of this House that the regional planning commissions in the term between 1993 and 1997 were abolished: we didn't need any regional planning commissions; it was a waste of time; it was a bureaucratic exercise; let's get rid of them. Look what happened. Look what happened.

Now, I know the hon. Minister of Sustainable Resource Development is too young to remember all this, but when Steve West was here and cut and slash was the theme, the regional planning commissions went. They disappeared, and we have the same party now indicating that we need them.

I couldn't help but notice at the AAMD and C just how defensive the Premier was in his lunchtime remarks. He was talking about silk-suited lawyers running around the province spreading misinformation, causing trouble. I wondered: who is the gentleman talking about? [interjection] Well, I had the opportunity, hon. member, of attending the ag society and the Eckville Chamber of Commerce debate that they hosted between this very silk-suited lawyer, Keith Wilson, and two of your distinguished seatmates. There was a rumour circulating in that community hall before the meeting started that you, hon. minister, were going to arrive by plane. It was a large meeting. I didn't see you there, and I didn't hear the buzz of an airplane over the community, but that possibly could have happened.

The government is certainly very defensive about these issues around planning, land use, and they're very defensive now about Bill 19, Bill 36, and, of course, Bill 50. They're all related. They all have the same issues. This is a government that has a tendency to want to make decisions behind closed doors: don't ask us any questions; we're doing what's in your interests. But the public knows, clearly, that it's not in their interests.

Now, Mr. Chairman, one of the things I would suggest we need to do in committee is . . .

Mr. Knight: If you're not going to make sense, I'm going home.

Mr. MacDonald: Well, before you go home, I would like you to consider giving Bill 10 some public consultation, a round of public consultation. We could send it to a policy field committee, the Resources and Environment Committee. The hon. Member for Lacombe-Ponoka was at the meeting on Thursday night in Eckville. Let's let that committee have a series of public meetings and public hearings across the province in central Alberta, northern Alberta, southwestern Alberta.

Citizens have a lot of issues about the direction you're going in with Bill 10. If Bill 36 was so well drafted, we wouldn't have it here less than two years later, amending the thing, trying to make it sellable to the citizens. That's why I think we would be better off with the policy field committee going around and having a public hearing in a place like – oh, dear. I'll say: let's just stop in Red Deer. We could go to the Legion in Rimbey. There are a number of places we could go if we would not want to go to the ag society, where the meeting occurred on Thursday night. That's one thing we could do. We could ask the people. We could ask the citizens how they feel about regional planning and regional planning commissions and what role they should play. We could also ask the citizens, the property owners, if they're comfortable with the explanations that this government is providing regarding these companion pieces of legislation.

No one denies that we need a form of planning. We had a perfectly good one, but we decided: "Hey, we don't need it. What's that doing?" Then we realized that we've got problems, and we've got no one to blame but ourselves, and ourselves in this case is the Progressive Conservative caucus.

10:30

Now, also with Bill 10 there are a few other individuals that indicate – one is a citizen acting on his own, Mr. Sam Gunsch. He has a publication dated April 20, 2011, and he indicates that Albertans deserve a public hearing on the Bill 10 amendment act before the provincial government proclaims it into law. Well, let's give it to the hon. Member for Lacombe-Ponoka and let him go across the province and hear directly from citizens.

Mr. Gunsch goes on to say:

> Albertans deserve to have [a] public review in plain language of proposed Bill 10 Amendments Act before it becomes law so they can participate on an informed basis in the making of law in Alberta. Albertans have a democratic right to know whether this proposed Bill 10 law is an American-style law, a type of takings legislation which could insulate, by threat of lawsuits, the industrial corporations using Alberta's public lands and forests from enforcement of environmental regulations. Albertans deserve a hearing to determine whether Bill 10 is American-style takings legislation, before the Alberta government proclaims it as law. As citizens, our ability to have control of our democracy, to serve the common good and potentially millions of dollars in lawsuits and payouts to corporations are all at stake.

That's one gentleman. That's one gentleman's request.

I heard many requests in Eckville on Thursday night. The Minister of Education heard many requests there. What is the response of this government? What is their response? It's not to have a committee of this Legislative Assembly have public hear-

to see. I absolutely spoke in favour of it, and I did so of my own free will and choice. I could sit here in this Assembly and say: "You know what? I didn't have enough time." And there's truth in that. I didn't have enough time to look over the bill. I don't think any of us did over there. It was rammed through very quickly, very short time period, very thick bill, and I don't think we had anywhere near the time we needed to consult with our constituents, et cetera, et cetera, et cetera. I could say that. That is an excuse. [A cellphone rang] That's not me, by the way.

I could also say that I trusted the opinion of the minister and the Justice minister at the time as well as the Premier. I thought that they had more thoroughly reviewed the bill and gotten expert legal opinion on it, et cetera, et cetera, et cetera, and I trusted them. I could use that as an excuse, but I'm not going to use that as an excuse.

I could also say that when I was over on that side of the House, all votes were whipped. We all know that that's the case, especially for any kind of important legislation or any kind of government legislation.

An Hon. Member: No.

Mr. Anderson: Yeah, I know. It's hard to believe. It's hard to believe.

I could say that that's why I voted for the bill, but I'm not going to say that.

I voted for the bill because I made a mistake, and I want to apologize to the people of Alberta for standing up in this Assembly and speaking in favour of a bill that absolutely is a harmful bill, is not what Albertans want. I made a mistake. I fess up to it fully. No questions asked, no excuses.

Our former Premier, Ralph Klein, taught Albertans, I think, a lot of things. One of the things he taught us, one of his lasting legacies – and he'll have a lot as opposed to the current Premier – is that when he made a mistake, he acknowledged it. Whether it was a personal issue or whether it was a policy issue, he'd say, "I made a mistake," and he would back away. He would say "Sorry," correct it, and move on. That is what made that man so popular in this province. Even though no doubt everyone agrees that he made quite a few mistakes, by and large he stepped back when he made a mistake. He listened to the people of Alberta. He would step away, and he would say: "You know what? I made a mistake there." Obviously, you can't make up for all your mistakes, but he would sure try, and that made him popular and beloved by most people in this province. There is a lesson to be learned from that politically. There was a reason he was able to be so popular for so long, because when he made a mistake, he was willing to say sorry and make up for it and make restitution.

In contrast we have this government, which is absolutely unable to admit when they have stepped on a snake and made a mistake. They just physically cannot seem to be able to do it. It's like it's beyond their capacity. I don't know where that started, but for some reason it's the case. We saw that with the royalty framework. We saw that, clearly, it was an absolute disaster. It was a botched policy that cratered thousands of jobs in this province, sent billions of dollars fleeing to Saskatchewan and British Columbia and the United States. It did so at the beginning of a recession, when we needed all hands on deck and all the economic stimulus possible. They had every excuse in the book to say: "You know what? We made a mistake to jump on this too quickly. We're entering a recession. We need to stabilize things. We need to take another look." No. Full steam ahead, no questions asked, and Albertans suffered because of it.

I don't care what the bloody intentions of the government opposite were in that regard. Yeah, there were a few of us in that caucus that spoke out against that royalty framework, but every single time we did, we were shouted down, belittled, told to just relax, et cetera, et cetera, ignored, ignored, ignored. They went forward with that new royalty framework, and it was an absolute mistake. They started to back away from it slowly but surely, step by step, eight different changes, and they still wouldn't admit that they had made a mistake, and they still don't today. They blame it on the former finance minister, Dr. Oberg, or whatever. I mean, it's just incredible. Just admit that a mistake was made and move on. Make up for the mistake. So there was the royalty disaster.

There was the health care disaster. I mean, the centralization of health care delivery and the superboard has been a total train wreck, and everybody can see that. I mean, costs have escalated out of control, double-digit increases in less than two years. There have been virtually no efficiencies made in health care due to this superboard amalgamation. It hasn't worked, but has there been a mistake? Did Mr. Iron Hands over there, you know, Energy Minister Iron Hands make a mistake? No, he didn't make any mistakes. Absolutely not. Good grief. Of course he made a mistake. Government made a mistake. They should back away from that and realize that the centralization of health care did not work.

We see this with the public inquiry. Mistakes have been made. Mistakes have been made with regard to the public inquiry. Clearly, people have been bullied. They've been intimated. Doctors, nurses, physicians, specialists, health care workers have been bullied time and time again, and there has been no admission of a mistake by this government. They're not even necessarily involved in it. We don't know. It would be nice to know. It would be nice to have a public inquiry on it. Then they could absolve their names. But no. Here we are. No mistakes. Full steam ahead. First it was: "No. We don't need the Health Quality Council." Then it was: "Okay. Yeah. We need the Health Quality Council but not a public inquiry." I mean, they just don't seem to understand what Albertans want, and then they don't react to it accordingly. They don't respect the will of the people in this regard.

And here we are with these property bills: Bill 50, a brutal bill. Absolutely no question that the Energy minister at the time, now the SRD minister, made a huge mistake with Bill 50. There's no doubt. I know the debate that went on in caucus there. That was one of the few bills that there actually was a debate on in caucus. It was blasted through, and every single person in this Legislative Assembly except for a few who abstained from the vote voted for it. You know it's a bad bill. You know we shouldn't have usurped the role of the Alberta Utilities Commission. Everyone here knows that. Everyone knows the mistake that was made. Everyone knows these lines are probably not needed. We all know that, yet we barrel ahead with it.

10:50

We had a chance to repeal the bill here with a motion just the other day, the motion that I brought forward to the House. No, we're not going to do anything. We had people here that I know voted against it in caucus standing up to vote for it here. What a joke. What an absolute joke that is, so dishonest with people's constituents that they would vote for it in the House and against it in caucus. It's worse than the people that are voting for it in caucus and in the House. Anyway, it's just unbelievable.

Bill 36 is the next example. That was a mistake. I was part of that mistake. I voted for it. I spoke to it. It was wrong. Everywhere we go in this province – take it to the bank, guys – you're going to lose dozens of seats in rural Alberta because of this bill. Take it to

the bank. I mean, we could start naming names. We won't, but I guarantee it's going to happen because you won't admit that a mistake has been made and that you need to correct course. Your constituents are not going to put up with it. You have a chance here to put this to a committee, do the right thing, and regain some of that lost support. Just do the right thing.

We were in Eckville the other night, as the Member for Edmonton-Gold Bar put it. It was an incredible night, and 400 or 500 people showed up. It was a healthy, good debate. There was no doubt in my mind who won the crowd that night. Then all the comments I heard from the ministers after, from the Minister of Education and others: "The fact was that it was a Wildrose crowd. You know, they put a whole bunch of Wildrose people in." Come on. Good grief. You guys have been the government for 40 years, for Pete's sake. You can't fill a room? Holy smokes.

We didn't put out any call or anything. We knew about this about 10 days ago and decided that, well, we'd better go see that; that sounds interesting. So we went. And guess what? So did 400 to 500 Albertans. And guess what? Frankly, the former Minister of SRD was booed out of the room by 500 rural Albertans. You know what? I guarantee that of those 500 rural Albertans – guarantee – 90 per cent of them voted Progressive Conservative the last election. I guarantee you that 90 per cent of the people in that room will not be voting Progressive Conservative in the next election. Take that to the bank. And their families and their friends and their neighbours won't be either because this government won't listen.

So I would ask the government again to learn from that very noble man Premier Klein, who came before the current Premier. When you make a mistake, admit it, back away from it, and do what your constituents want. That's why we absolutely need to reexamine this bill, take it back to the drawing board and see how we want to proceed going forward.

One thing the Minister of SRD and the government is right on is this. Everybody wants good regional planning. No one is arguing against good regional planning, good conservation practices, making sure we take into account cumulative effects when we're approving new projects, making sure we have enough water in the South Saskatchewan basin: all that stuff. We all agree on that. But Bill 36 and Bill 10 as an amendment to Bill 36 do not do that.

It is a central planning document; it is not a regional planning document. I don't care. In the bill itself it specifically says that these regional commissions, that the government appoints, by the way, these RACs – what are they called? – regional advisory panels, commissions, whatever they are, are appointed by the government, so that's not democratic to start. Aside from all that – say that it was democratic and that these were locally elected officials – they don't have to take into account anything that these people talk about, anything that they advise, anything where they say: here's what we advise the government to do. They don't have to listen. The government doesn't have to listen to a word they say.

You know, it's great that they say, "Oh, we'll take it under advisement," and "We're doing consultation." No. That just means that the central planning government is going to talk to local people, a few people that they appoint, about what they think should be in the plan. That's not democracy. That's not regional planning and decentralized decision-making. That is socialistic central planning, and it's wrong. It's not what we should be doing. There's no doubt we should be giving these folks tools. One of the reasons I voted for the bill in the first place was, quite frankly, because I like the idea of transferable development credits and these types of things, but I like them as tools. They should be tools that municipalities and regional authorities have to use in order to compensate landowners. It should be a tool in the tool box, et cetera, and those are good. Let's talk about giving the municipalities and giving these local authorities those tools in their tool box. That's a good part of the bill.

Where we went way wrong on this, where the big mistake was made, clearly, was by enshrining all power to plan land use in this province in the hands of cabinet ministers behind closed doors. We have 13 individuals that, essentially, have dictatorial power over every land-use planning decision in this province. They can do whatever. Shake your head, Minister of Education, but every single decision has to comply with the regional plan. Whatever you say from cabinet, you may allow them to do stuff, you know, by your good graces, allow the municipalities to have some autonomy and do some things, but it's completely at your discretion. If you want to come down with the hammer and plan, you can do it. You're allowed to do it, and they have to comply. That's just the way it is. Every landowner, every company, every individual, every municipality has to comply with what the government says the planning should be in that area.

Everyone should know that intentions don't matter in this case. Do you honestly think that I think or that any of us over here think that the master plan of the former Minister of SRD, the Member for Foothills-Rocky View, who's running for leader right now, is to take and expropriate people's land and not give them any compensation? Clearly, it's not. There's no way I believe that, and I won't ever believe it, but the problem is that he's not always going to be SRD minister – clearly, he's not right now – and neither is the current SRD minister.

When you give people power, politicians will abuse the power. When you create a position of power, it can be abused, and we have given the cabinet unfettered power to plan every piece of land in this province. It's ridiculous. There's no check or balance. They say that you can appeal these decisions of the cabinet. No, you can't if the cabinet will say what you can and what you can't appeal, and they appoint the committee that's going to hear your appeal. I mean, it's just asinine to say that the cabinet doesn't have total power in this case.

Anyway, it's very frustrating to watch. If Eckville taught us anything – and it's not just been Eckville. Look, 300 people came out to Crossfield, for crying out loud. I went to a meeting in Trochu. There were 250 people in Trochu. I went out to Beiseker as well for a different meeting that Joe Anglin, the former Green Party leader, put on. He put on something, and it was a little different. It was on the power lines, but this was in the middle of the day in Beiseker. There were over a hundred people there. It was incredible.

I mean, how can you deny those numbers? The people don't want these bills. They don't want them. Your intentions could be good and wonderful and all that, but they don't want them. They've looked at them. They've had time to look at them. They don't want them. This will be your Achilles heel for the next year until the next election. I guarantee it. But it doesn't have to be that way. All you have to do is stand up and say: "Look, you know what? We're going to do some more consulting with the people of Alberta. We're going to put this thing to a committee, and we're going to have all kinds of experts through to talk to the committee to thoroughly vet this bill, to thoroughly vet Bill 36, and see if it needs to be repealed or if it needs to be taken back to the drawing board or what have you."

The other thing that's amazing to me has been the arguments that I've heard from the SRD minister regarding the original Bill 36 and then its changes regarding section 11 of Bill 36. I'm just going to read the bill with regard to this. Section 11 says that "a regional plan may, by express reference to a statutory consent or

type or class of statutory consent, affect, amend or extinguish the statutory consent or the terms or conditions of the statutory consent." Okay? It's in Bill 36.

11:00

Now Bill 10 changes Bill 36, and instead of "extinguish" the statutory consent, it's "rescind." They changed the word to "rescind." So now it reads: a regional plan may, by express reference to a statutory consent or type of class of statutory consent, affect, amend, or rescind the statutory consent or the terms or conditions of the statutory consent.

Okay. Now, what is a statutory consent? There's this argument that I keep hearing from the SRD minister, who says: well, statutory consent doesn't apply to a land title. It doesn't apply to any kind of land title or interest in land in that regard. Well, that's malarkey. Look at what statutory consent means. It's in the definition of Bill 36.

I'll come back to this point many times.

The Chair: The hon. Member for Calgary-Currie.

Mr. Taylor: Thank you very much, Mr. Chair. Some interesting comments by the Member for Airdrie-Chestermere.

An Hon. Member: Really?

Mr. Taylor: Yes, really, hon. member. There were some interesting comments there.

One of the most interesting comments, I think, touched on this whole notion that the government for whatever reason is refusing to acknowledge, refusing to listen, refusing to understand what's going on out there in the hinterland. The Member for Airdrie-Chestermere was right. It does so at its peril. There's something going on out there that is big, really big. You don't get hundreds upon hundreds upon hundreds of people out to meeting after meeting after meeting and have nothing happening. You don't get those numbers out to these sorts of meetings and be able to completely dismiss it as just: well, you know, that's all the people who are interested in the subject. People talk to people, and as they talk to people, they're going to be telling people how the government has treated them on these issues. The word is going to spread that you guys on the other side have done really a horrendous job of wrapping your heads around and understanding and comprehending the depth of the opposition to Bill 36, and that opposition continues with Bill 10, I'm afraid.

Alberta's land-use framework was visionary, in my opinion. I think I can say that with some credibility, hoping now that I don't have to go down the same road as Airdrie-Chestermere and apologize for a mistake that I made in the past. I did in 2007 bring forward a private member's bill, Bill 211, the Planning for the Future of Communities Act. That was not my title. That was the title that Parliamentary Counsel gave the bill for whatever reason. We brought this forward, and it was, in fact, a first attempt at a land-use and regional planning bill for the province of Alberta. Of course, it was defeated because that's what the government did at the time to Official Opposition private member's bills. They defeat them, and then they look at them and go: but, you know, there were a lot of good ideas in there, so we better get on with doing something of our own.

Well, out of that came the land-use framework. As I said, Mr. Chair, it was a visionary document. It was full of ideals and principles and, more specifically than that, I think, real clear directions in terms of what we needed to do around land use and regional planning in the province of Alberta. Then the government took those visionary principles of the land-use framework, ran them through a sausage machine, and turned them into Bill 36, a law that, in my opinion – but it's an opinion shared by very many Albertans – is fundamentally undemocratic.

It gave too much power to cabinet: complete plan-making authority; the ability to override plans; the ability and the power to make decisions, to ignore a plan, to ignore a regional advisory council, to ignore the secretariat; no checks or balances; a lack of compensation for landowners; a lack of consultation requirements; no appeals to the court; the extinguishing of statutory consent in section 11, which the Member for Airdrie-Chestermere touched on a few moments ago; all kinds of things like that. I guess the government did hear the groundswell of opposition, primarily in rural Alberta but I think to a much lesser extent but to some extent in urban Alberta as well, to the extent that they went: "Oh my gosh. We have to amend Bill 36. Let's bring in Bill 10."

Well, can Bill 10 be repaired? I have my doubts, but I think we have a duty to try to the extent that the government is going to allow us to try by bringing in time allocation and limiting debate at committee on Bill 10. I think we have to try and amend this bill because I think Bill 10, as introduced by the government, is a flawed attempt to amend a seriously flawed act that was based on, in my opinion, quite a remarkable land-use framework.

In my opinion, where it all went off the rails and into the rhubarb where Bill 36 was concerned is in applying those principles in a way that gave cabinet virtually all the say in how this should be done. That certainly wasn't my intention in Bill 211. My intention and the intention that I think existed in the land-use framework and that I would even go so far as to suggest or assume was probably the intention – and we all know the road to hell is paved with good intentions – of the former Minister of Sustainable Resource Development was to give local decision-makers the authority to make their regional plans.

If this had been done right, I would submit, Mr. Chair, the regional advisory councils would have been constructed and comprised in such a way and the contents of the growth plans of the regional plans would have been spelled out in such a way and the principles and process around consultation, real public consultation as opposed to sham public consultation, would have been spelled out in such a way that the regional advisory councils would have done a proper job of consulting with the public and would have designed the regional plans on that basis and, quite frankly, would have brought the regional plans forward to cabinet pretty much to be rubber-stamped.

If cabinet said, "Hey. We've got a problem with this. We've got a problem with this section and this section. We're sending it back to you" then the regional advisory councils would have had the authority to say: "Well, okay, cabinet. We'll go through the hearing process again. We'll go through the submission process again. We'll hear from the public again, and now that we've done that," jumping forward 90 days or whatever the consultation period would be, "we've found out that the public really thinks that you should go pound salt. You're sitting in Edmonton, sitting in judgment of what the regional plans should be in this area or that area. We actually live in that area. We have to live with this every day. Our plan respects the principles, and now you're niggling over the details, so we've decided, based on putting this out to the public again, that you're wrong and we're right. We're going to sing the 'I was right' song, so here's the original plan back to you for ratification. This time ratify it."

That's how it should have been done. That would be true regional planning. The current Minister of Sustainable Resource Development, when he started debate tonight, made quite a speech where he tried to convince this House that this is not about centralized planning; this is all about regional planning. Well, the land-

use framework, Mr. Chair, was, I believe, all about good, responsible land-use principles and establishing a process or establishing a context within which good regional planning could be done. But by the time it went through the Bill 36 sausage machine, it came out the other end looking like something that the Kremlin could have come up with, not to put too much torque on the story. But it's like: really? We've got cabinet deciding what can go where?

11:10

Mr. Hehr: Not the Kremlin, the politburo.

Mr. Taylor: Okay. The politburo. The Member for Calgary-Buffalo says it was the politburo. I'm not up enough on my Soviet politics to know whether he's right or I'm right, but you get the basic message.

Bill 10 attempts to address the need for further public consultation on regional plans before those plans are approved by cabinet and to enhance the compensation scheme for land expropriation, but in my view those attempts fall well short of the mark. What are we going to do about it? Well, I don't know. Part of that depends on how long we go tonight, I suppose, because we know that tomorrow the government will use its majority to pass the time allocation motion, the notice of which the Government House Leader gave this Assembly this afternoon. He's required to provide 24 hours' notice of that motion, so in about 16 hours from now or a little bit less that time allocation motion will click in, and from that point on the meter is running, and we've got five more hours in committee to debate this bill.

That's significant, Mr. Chairman, because the committee stage is the stage at which we can propose amendments. We can't really do that except in terms of bringing forward amendments that would seek in one way or another to kill the bill altogether in third reading, nor could we have done it in second reading. What we really have to do if we want to amend the content of Bill 10 in whole or in part is to propose amendments and have a full and fair debate on those amendments in committee stage. You limit debate to five hours, it clearly limits the number of amendments that can be brought forward, and that does limit debate and democracy as concerns, well, certainly one of the most unpopular bills that this government has brought forward in recent years, certainly not the only one but one of the most unpopular bills. It limits not only our ability but the government's ability to try and improve a flawed bill.

I think what's going to happen, Mr. Chairman, over the next however long we have in committee to debate this bill is that various members of this House will put forward or will attempt to put forward some amendments to Bill 10 to at least try and make it a more worthwhile piece of legislation than I think it currently is. I know that if I have the opportunity, I would like to bring forward amendments, if I have the time, that will seek to include rangeland and agricultural land within the definition of land to be considered in a regional plan to make it a little more specific there, to further clarify the proposed public consultation process, to create a process for appealing ministerial decisions so that cabinet no longer has absolute power over land-use planning in our province, to ensure or to try and ensure that fair principles guide the compensation process.

I hope to ensure as well that all regional plans are developed and approved in sync with one another. I'm not sure how I'm going to do that one yet, but I think that there's a need not only for seven regional plans to be approved individually; there's a need for a cumulative final ratification of the seven plans together to ensure that the last regions to go through the regional planning process are not negatively impacted or in some way held hostage, if you will, by decisions made in earlier regional plans. It's entirely possible that the seventh region to develop its plan will be – maybe held hostage is the wrong way to put it – in a sense held captive by decisions made in the previous six plans. I believe that needs to be addressed.

Well, because the government is bringing in closure to limit debate on Bill 10 in Committee of the Whole, we don't know if we'll run out of time to present all our amendments. I don't think any of us who may be proposing amendments do know that. If time runs out or our amendments are defeated, well, then we'll have a decision to make in third reading as to whether we're going to support Bill 10 as a flawed piece of legislation or whether we're going to vote against it because it just doesn't do the job that it's supposed to do. I believe as it sits now it doesn't do the job that it's supposed to do.

There is, of course, a way to avoid all of this. There's a way to avoid bringing in the closure motion, going through five hours of very limited debate, a way to avoid partisan contentiousness, if you will, around some of the amendments that may be proposed. That way is that the government – and at this stage I believe it can only be the government that can do this because at this stage we can amend sections of the bill, but we can't propose an amendment, really, about the whole bill – could decide, the minister could decide to refer Bill 10 to the Standing Committee on Resources and Environment.

According to the standing orders there is a process which that standing policy committee will follow to put this through another round of public hearings, of appropriate and worthy public consultation. It's one thing to consult with the public. It's another thing to consider what the public has told you and to consider it thoroughly and honestly and openly and to take those consultations into consideration in a meaningful way as you're developing a regional plan or anything else that you consult with the public on. There is no point, Mr. Chair, in consulting with the public if you have no intention of listening to what they say in the first place. There is no point in consulting with the public if you're only consulting with the public so that you can listen to those members of the public who happen to agree with your point of view and discount everybody else's. That is sham public consultation.

You put it before the all-party, by nature at least somewhat bipartisan or multipartisan policy field committee, the standing policy committee. The process of inviting and taking in public submissions, the process of holding public hearings, is not an ironclad guarantee by any stretch of the imagination, but it certainly has at least as much of a shot at getting to the truth of how people feel about Bill 10 and Bill 36, what they feel is right and what they feel is wrong about the bill and how to improve it, really improve it as, for instance, the Health Quality Council has of getting to the bottom of the allegations of fear and intimidation around health care professionals in this province. It's not a guarantee, but it's at least as good a shot as the health minister's Health Quality Council investigation into fear and intimidation.

That's what the government should do, Mr. Chair. They should – I'll be nonsexist about this – person-up tonight or tomorrow at the very latest and refer Bill 10 to the Standing Committee on Resources and Environment and let the standing policy committee do its job, do the job that those standing policy committees were designed to do, which is to take proposed legislation, whether it's government or private members' legislation, that we all know misses the mark as written right now and fix it and come up with something better.

I know that it's very important to some members of the government – I don't know to how many, but I know to some – to get this bill passed. Maybe it's a legacy for the outgoing Premier. I

Province of Alberta

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Issue 29a

The Honourable Kenneth R. Kowalski, Speaker

tracts, I was called before the superintendent of the Calgary public board and had to explain why I was communicating with the Minister of Education. That's the type of intimidation that happens far too frequently in a variety of professions. That is not a good investment.

We need to be working for a sustainable vision in this province, and we need to get rid of our dependency on externally set global prices. We have to diversify our economy within this province, and the route to diversification comes back to education, Mr. Chair.

I appreciate this opportunity to speak about where we could save money and where we could better invest money. This should be a collaborative, collegial process. I'm glad that time allocation is not being set on this particular Bill 17, the appropriation bill, although time allocation was certainly the case in each of our budget debates. There was very limited opportunity to ask the questions, and I received no sense of commitment that for the numerous questions I asked in Tourism, Parks and Recreation and in Children and Youth Services and in Employment and Immigration I would receive the written answers that I have requested. Of course, we will soon recess, and I don't have those answers. I could have been asking more directed questions today, for example, during this debate, but without that feedback it's very hard to do so.

Thank you for this opportunity, Mr. Chair. I'll allow other members to participate and look forward to again rising.

Thank you.

The Chair: The hon. Minister of Housing and Urban Affairs.

Mr. Denis: Thank you, Mr. Chair. At this juncture I would move that we adjourn debate on this bill.

[The voice vote indicated that the motion to adjourn debate carried]

[Several members rose calling for a division. The division bell was rung at 4:40 p.m.]

[Ten minutes having elapsed, the committee divided]

[Mr. Cao in the chair]

For the motion:

Ady	Elniski	Marz
Allred	Fritz	McQueen
Benito	Goudreau	Prins
Berger	Groeneveld	Renner
Bhullar	Hayden	Rodney
Danyluk	Johnston	Rogers
Denis	Knight	Sarich
Doerksen	Liepert	VanderBurg
Drysdale	Lukaszuk	

Against the motion:

Chase	Hinman	Notley
Forsyth	MacDonald	Swann

Totals: For – 26 Against – 6

[Motion to adjourn debate carried]

Bill 10
Alberta Land Stewardship Amendment Act, 2011

The Chair: The hon. Minister of Infrastructure.

Mr. Danyluk: Thank you very much, Mr. Chairman. I am pleased to speak today to Bill 10, the Alberta Land Stewardship Amendment Act, 2011. As a former Minister of Municipal Affairs and a local councillor and a reeve I would like to address some specific aspects of this bill that pertain to municipal powers and responsibilities. But first, as a current rural landowner I would to make some general comments about the importance of this legislation.

Agriculture has been the backbone industry of our province and still is, only now it is reinforced by the energy sector, making Alberta an economic powerhouse on a scale we never could have predicted. Because of this, there has never been a more important time to put the necessary plan in place to accommodate the impending growth. Albertans recognize this and have clearly told us that they support and expect long-term planning. They have told us to make plans to help preserve our air, our land, our water, and the rural Alberta way of life for future generations.

As growth continues, our major cities will continue to expand and industrial activity on our landscape will increase. Our government is working hard to make sure that this happens in a strategic, well-planned way. As this planning occurs, our government is committed to ensuring that the landowners who are affected are being treated fairly and that as few of them are being impacted as possible. That is what the Alberta Land Stewardship Amendment Act and other planning legislation is about.

The need for co-ordinated land-use planning makes ALSA a very valuable legislative tool. Economic and population growth are putting pressure on the landscape. Albertans have told us that they want a more co-ordinated approach to managing growth in our province. ALSA provides the authority to develop regional plans that will help guide local and regional land-use decisions to balance economic, environmental, and community objectives. We need to plan now to manage future growth, and ALSA lets us do this. This legislation is about ensuring that the land Albertans have a deep attachment to is preserved for future generations.

Mr. Chairman, my family has farmed land in Alberta since 1896. My land is not only my livelihood; it is my legacy for my children and my grandchildren. I need to say to you that it wasn't very long ago when I wanted to purchase some extra land, and my family said, "Do we really need it?" I answered them, "Well, the value of land will not decrease and will maintain its value." The comments from my family were, "You would never ever sell it, so maintaining value really means nothing." In fact, one of them said that I would possibly be in the grave still holding on to the last piece of grass, making sure that that land stayed in the family.

That is the attachment that I have for the land. That is the attachment that landowners have for the land in Alberta. That is why I believe strongly that we must be good stewards of the land and we must always protect the rights of landowners. I have always worked to protect these rights, and so has this government. In fact, Mr. Chairman, I have worked as a surface rights advocate to deal with well spacing, soil protection and compensation, and the need for regulators to work together. I have worked to protect the land that my family has farmed all of my life. This is why I support the land-use framework and why I support Bill 10, which strengthens and enhances landowners' protections.

Unfortunately, there has been a lot of misinformation circulating about this law and other legislation. Bill 10 is intended to clarify that the government will respect the property and other rights of individuals and that it must not unfairly infringe on those rights. The amendments in Bill 10 make it clear that nothing in the act or regional plan takes away an individual's existing rights to compensation under Alberta law, and the amendments further ensure that the landowners are treated fairly.

Section 1(1) emphasizes that government must respect property rights and other rights of individuals and must not infringe on

these rights except with due process of law and to the extent necessary for the overall public interest. New sections outline mandatory consultation requirements before regional plans are adopted. In addition, new sections 15.1 and 19.2 strengthen and clarify rights to request variances and reviews of plans. Mr. Chairman, these are meaningful clarifications and improvements to the landowner protections already present in the Alberta Land Stewardship Act.

5:00

I would now like to discuss in greater detail some of the other provisions of Bill 10 that relate to municipal government. Municipalities are key partners in land stewardship along with the province, private landowners, and other stakeholders. They have a long record of working co-operatively to protect our air, our water, and our land. I would like to discuss how that partnership will continue under ALSA as strengthened by Bill 10.

Mr. Chairman, this government recognizes the critical importance of municipalities through the development of the land-use framework. Government held consultations with municipalities from the start of the process in 2006. A total of 237 municipal decision-makers participated in consultation sessions that year. I need to repeat: a total of 237 municipal decision-makers participated in consultation sessions that year. Nearly 30 municipal representatives were involved in stakeholder working groups in 2007 and 2008. We have continued to value municipal contributions during work on the regional plans.

The two regional advisory councils so far have each had three members with a municipal perspective. In the lower Athabasca region these representatives included the mayor of Wood Buffalo, the deputy mayor of Lac La Biche county, and the director of planning for the city of Cold Lake. The South Saskatchewan representatives include the mayor of Airdrie, councillors from the town of Nanton and from the municipal districts of Foothills and Taber, and the director of water resources for the city of Calgary.

Last September the government held three sessions that included all municipalities in the lower Athabasca region. This was on top of nearly 60 municipal representatives who had been part of the previous consultations on the South Saskatchewan region. These ongoing discussions demonstrate the value this government places on our relationships with municipal leaders.

Respect for municipalities is also demonstrated in specific amendments contained in Bill 10. Bill 10 proposes changes to the Alberta Land Stewardship Act that will strengthen the relationship between provincial and local governments and will provide better planning in Alberta for present and future generations. This relationship is important when you look at the goals of long-term planning and the purposes of the Alberta Land Stewardship Act.

When the government started work on this planning process, we heard from Albertans about the need for decisions made by different groups to be better co-ordinated. I draw your attention to section 1(1)(c), which states the purpose of the act. The purpose includes "to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment." I'm pleased to see this clarification. It is important that the legislation encourage provincial government and local bodies, including municipalities, to co-ordinate decisions about the land and land use-related planning and decision-making.

The proposed change recognizes that all decision-makers need to work together to achieve these purposes. While there is a need for co-ordination, this does not mean that the provincial government is taking away the authority of the municipal government over local decisions and resources. The success of this process depends on municipal governments' detailed knowledge of their local areas' challenges, attributes, and priorities. For example, Bill 10 repeals section 9(2)(f), an earlier provision in the legislation that allowed a regional plan to make laws about matters that municipalities are authorized to do. Section 11(3) also makes it clear that a regional plan cannot change or rescind a development permit or approval granted by a municipality. I need to say this again, Mr. Chairman. In section 11(3) it also makes it clear that a regional plan cannot change or rescind a development permit or approval granted by a municipality if the project has already progressed to a point of actual improvements on the land. These changes emphasize our respect for the existing role of municipalities and our support for the authority of local governments.

We also have been responsive to municipalities' need for time to co-ordinate their planning with the regional plan. They asked for a five-year window to do that, and we have agreed.

Finally, the proposed amendments in Bill 10 give municipalities the ability to request a review of a regional plan. Mr. Chairman, that gives municipalities a say in the future. Bill 10 makes it clear that the provincial government respects the authority of municipalities. The Alberta Land Stewardship Act will ensure that regional plans become a way to align decision-making and provincial policies. The act will ensure that all provincial ministries and agencies and local governments work together towards a common vision and common objectives within each region. Local governments will retain decision-making authority but will need to ensure that their plans, bylaws, and policies align with the regional plans. This reflects what Albertans have said they wanted from regional planning. This is what this bill does. Albertans said that they wanted everyone to work together to manage the pressures of the present and future growth. The government is committed to working with municipalities and other decision-makers to create that alignment.

Mr. Chairman, we all live in this province. We all work here. We all drive on the highways. We rely on power to be there when we turn on the switch and on water to be there when we turn on our tap. It is important that we work together for the preservation of this province as we see it and as we know it today. We need to work together, all forms of government. We all want our natural heritage and our rural way of life maintained and strengthened for future generations.

I think, Mr. Chairman, I've made it very clear that I don't have any intention of selling my land. My land is to be passed on to my children and to my grandchildren. It is important that we are stewards. There are 30 members in this caucus who have and own land. If we look to my left, the hon. Minister of Agriculture and Rural Development has been on his farm for over a hundred years.

5:10

An Hon. Member: How long?

Mr. Hayden: No wonder I'm tired.

Mr. Danyluk: He was. He may have not been physically there, but he was a twinkle.

This is just as critical to our future as infrastructure and public services, and we have a responsibility to plan for it. As we do so, we are committed to maintaining our long-standing respect for property rights and for those who own them. As a government we have understood and protected Alberta's rural way of life for the past 40 years, and we will continue to do so. That is our responsibility not only as members of this Assembly but as landowners, as parents, as grandparents.

Thank you very much, Mr. Chairman, for giving me the oppor-

tunity to say a few words about how precious and passionate I am about the land that I farm. If you went around to landowners, you would not find many that look at that land as an opportunity for an investment for the future that is monetary. It is an investment for the future of their children and their grandchildren. We need to keep in mind that this country is very young, this province is very young, and land is our most precious commodity.

Thank you.

The Chair: The hon. Leader of the Official Opposition.

Dr. Swann: Thank you very much, Mr. Chairman. A pleasure to rise in committee on Bill 10, Alberta Land Stewardship Amendment Act, 2011. Thank you to the minister for his heartfelt message and his acknowledgement that he is precious. I concur that all of us are precious, and the future is precious. We need good leadership, and we need to rebuild a sense of trust and integrity and relationship with those in the province that have carefully placed their trust in us and given us the responsibility to plan well into the future.

A famous Liberal once said that trust is the only currency in politics. Indeed, it is the element that allows for relationships, for authentic communication, for decisions to be made, and for collective actions to be taken in the public interest. Trust is the foundation of all that we do in our lives and particularly relates to public policy and the role of representatives in the Legislature. The foundation of trust is respect, integrity of purpose, and honesty in dealing with all people regardless of their position and place in society. Trust is not only the glue of civilization; it is the essence of business, education, health care, environmental stewardship, and indeed progress, all progress, Mr. Chairman.

This government has squandered its capital in trust over this past decade with poor planning and consulting, marginalizing, dismissing, and ignoring science, intimidating dissenters, and weakening the institutions that hold elected people accountable. This government's sense of entitlement and arrogance, its stifling of dissent have created a climate of fear and silence even in the last election, where only 40 per cent of people felt their vote was significant enough to turn up. This government has become the butt of jokes in Canada with its disrespect for democratic process. Average citizens are alienated and cynical. Even our esteemed health professionals have disengaged and are fearful of retaliation in this one-party state, this one-party health system. Such is the loss of trust in Alberta that we now see our most revered professionals cowed into frustrated silence as they attempt to restore some semblance of confidence and competence in our health care system.

Similarly, the good citizens of Alberta are attempting to address this gross attempt to correct inadequacies in land stewardship, Bill 10. Let me be clear, Mr. Chairman. The Alberta Liberals do not support expropriation of land without due process, including a public process, a formal appeals process, and an appropriate compensation mechanism. The bill does not address these issues in a comprehensive way. While the Land Stewardship Act does offer some positive mechanisms for long-term planning in the development of our key resources and our land, this must be done with a transparent public process. The power should not be exclusively held in the hands of cabinet and decisions made behind closed doors.

The Alberta Liberals believe in the protection of Alberta's Crown land, sustainable development of our resources, and growth of our urban and rural communities. Bill 36 is one of the most important bills passed in this House in the last decade, the Alberta Land Stewardship Act. It put land stewardship – that is, proper land-use planning – at the forefront of government responsibility, a responsibility ignored for over a decade. I acknowledge this attempt. It is a positive if inadequate beginning in a province with the largest growth in population and industry yet with low freshwater supplies. This kind of planning document is long overdue, and this opposition party has been pressing for land-use planning throughout that decade.

Government is charged with setting priorities ensuring protection for the long term of our natural places, food production, and efficient transportation as well as protecting property rights and freedom of citizens and business to operate. Without a thoughtful plan based on our water systems, the continuing free-for-all land scramble would continue since the Klein-era dissolution of regional planning commissions. Instead of bringing in the best evidence from around the world, including Europe, where they're right up against limits of growth and land and water, we ignored the experience of other jurisdictions and charged ahead without ensuring Albertans were meaningfully consulted in establishing their values in terms of land stewardship, sound economic development, and property rights.

Let me be clear. Bill 19, the land assembly act, and Bill 50, the Electric Statutes Amendment Act, or what I like to call the Transmission Lines White Elephant Act, are not the same category as land stewardship. We must be careful not to throw out the baby – that is, the land stewardship – with the bathwater, Bill 10, which is inadequate in dealing with the land stewardship shortcomings. We need to retain Bill 36 with proper amendments, not these poor excuses for public accountability and landowner rights.

I supported Bill 36 as a beginning. It needs amendments to ensure a proper appeal process, open consultation before final decisions, and a compensation process that is not going to tie everything up in courts indefinitely. Bill 10 does not provide this assurance.

I'd like to quote someone who has been very thoughtful in analyzing this bill and has no axe to grind, University of Calgary professor Nigel Bankes, an environmental lawyer.

> The Bill will encourage the adoption of timid plans that will not achieve the noble purpose of the legislation. I [believe] the amendments will create significant uncertainty and encourage litigation. The big winners from this Bill will be lawyers; the environment will be the loser.

We can do better than this, Mr. Chairman, and we must do better than this in the interests not only of our citizens but, as the hon. minister has said, our children and our grandchildren.

5:20

After 40 years of rule by the PCs, however, there is such a sense of entitlement and transparent self-interest along with a lack of objective scientific analysis of key issues that the result of the Land Stewardship Act is not better land stewardship but confusion and mistrust now in the land. The government's effort to stem this distrust by following with Bill 10, this amendment act, is inadequate. It purports to deal with the lack of an appeal mechanism, lack of respect for landowners and those affected, and fails to address the government's growing appetite to control all decisions irrespective of the will of the people living in these regions, and so it fails. This government cannot hide the fact that they have lost the confidence of the people, and these frantic efforts to fix land stewardship are one misguided push.

Now, in addition, we see the limiting of debate with closure to these debates, and the government demonstrates its arrogance again for proper democratic process and the intimidation and silencing of opposition views. This is not acceptable. It's not adequate. It's hardly believable in 21st century Alberta. Once

case of grazing lease holders this means section 82 of the Public Lands Act.

To summarize, then, the Alberta Land Stewardship Act always protected grazing lease holders' rights to compensation under the Public Lands Act and added new procedural protections. These procedural protections are now further strengthened by the Bill 10 amendments that shift legal responsibility to the government to notify the affected cattlemen of the compensation provided under the Public Lands Act.

Mr. Chairman, with the clarifications and the amendments described above, I am confident that fair-minded Albertans will agree that both landowners and grazing lease holders are now better protected by the Alberta Land Stewardship Act and Bill 10 than they were before.

Further proof of this is found in the recently released South Saskatchewan Regional Advisory Council report, with its call for enhanced protection of Alberta's remaining grasslands, continued use of stock grazing as the best way to manage these grasslands, and a repeated emphasis on the protection of property rights as a guiding principle. In there they also suggest that for water protection, purity, quality and quantity grazing, those specific native grasslands are the best use, and the statutory consents should be amended to lengthen the tenure. I think that's a very positive thing.

There's no going back to the good old days, Mr. Chairman. Since the Leduc 1947 discovery there have been 50,000 new Albertans per year. That's half a million people every decade. In six decades we've gone from half a million people to 3.7 million people in this province, and 80 per cent of them live along the highway 2 corridor between Edmonton and Fort Macleod. They're going to keep coming at 50,000 to 60,000 people per year and keep settling along the highway 2 corridor in Foothills, Rocky View, Willow Creek, Mountain View, all the way up and down the line. We project to be at 4 million by 2015 and 5 million by 2030. That means more subdivisions, more acreages, more cars, more trucks, more roads, more quads, more OHVs, more hikers and campers, more transmission lines, more drilling rigs and pipelines, more gas plants and tank farms.

Do we really want no plan to deal with another 2 million new Albertans in the next 20 years? No. Mr. Chairman, failure to plan is planning to fail, and this is way too important to allow to fail. Do we have a plan? Yes. We're getting there. We have the Alberta Land Stewardship Act, supplemented by the clarifications and amendments in Bill 10, a plan that supports the development of seven regional plans based on our major watersheds and incorporating the most expansive and generous protection of property rights of any Canadian province or U.S. state.

To close off, Mr. Chairman, I'd just like to quote from a printout from Fraser Milner Casgrain LLP, who have reviewed Bill 10 and put forward their opinion, their concluding paragraph.

> In conclusion, Bill 10 and the Proposed Regulations have written a new chorus of property and procedural rights protections into the revisited [Alberta Land Stewardship Act]. How these changes will play will, of course, depend on the interpretation given to the new lyrics by critics and the reaction of folk fans.

With that, Mr. Chairman, I'll take my seat. I appreciated the opportunity to address the Legislature this afternoon.

Thank you.

The Chair: The hon. Member for Calgary-Glenmore.

Mr. Hinman: Thank you, Mr. Chair. Once again it's an honour to be able to have a few minutes to get up and speak to this because of what this government has done, invoking closure on the discussion of the most important bill that we have before the Legislature. They seem to think that five hours is ample time. But what's most remarkable is that we're going to see the government members pop up now and speak and take two and a half hours of that time to not allow us to be able to address the concerns of this bill. The concerns are really deep.

You know, to listen to the Minister of Infrastructure get up and say that he'll never sell land: well, never is a long time. If you go bankrupt, you won't have a choice, Mr. Minister, so hang on to that grass. It's just pathetic to listen to the gibberish that's coming out of these government members saying that there's nothing to worry about. It's amazing to listen to them speak of property rights when they have absolutely no respect for them.

The minister talked about the importance of protecting property rights. I ask you: how do you protect property rights? It's interesting, Mr. Chairman, when we look around the world and we see where there's real peace, where there's real prosperity. It's where there is rule of law. It's where property is protected. It's also interesting because, again, there are areas in here where they're well meaning – there's no question about it – but they don't understand the intent, or they have the intent, but they don't understand the wording and what it is doing to property rights with Bill 36 and, again, the lack of proper amendments coming in.

The Premier and the Minister of Education want to accuse us. "Well, where are the amendments? Where are the amendments?" Let's first talk about the problems. But, again, we won't be able to bring forward very many amendments because of the time allocation, the closure, that this government voted on. Again, it's just truly sad that they think that this is the democratic way. They have a majority, and they say: "Oh, we don't want to listen to the opposition. They're just full of gibberish."

Well, I would say, Mr. Chair, that there isn't a better judge of what we have to stand up and speak to in here than the people of Alberta. To allow us to stand up and to speak and to disgrace ourselves, as the government wants to say: that is just absolutely wonderful. Give us the rope to hang ourselves. If you're so bold and you think that you know what you're talking about, give us the time to speak, and let Albertans judge us rather than the House leader or this caucus saying: "We don't want to listen to these individuals here anymore. We know what's best."

To listen to the Member for Livingstone-Macleod talk, if I didn't know where I was at, I would think I was dreaming and living in a communist country as we listen to central planners say: "We're going to look after everything. How many people are going to be here by 2050? How many more oil rigs and how many more wells?" These great, great central planners are going to fix the world. If you look anywhere in the world where central planning has taken place, that's where they looked after the environment the worst, did the poorest job. Central planning has never worked. Even with a benevolent dictator they're not going to say: "This is what's best for your land. This native grass may not be touched. This wonderful woodland may not be touched."

It's amazing how opportunities change. We can just look at the oil sands and realize what wonderful potential has changed in the last 50 years, where people have been up there. They've tried to be innovative. They've tried to extract the oil from the sands, and it has been a huge challenge. Yet the entrepreneurs have cracked that challenge. They've got some incredible businesses going up there that are going to again allow the world to continue to prosper and live in peace because of the availability and the entrepreneurs that have developed that.

5:40

Mr. Chair, today we put out the Wildrose caucus's six steps to

regional planning. This isn't an amendment that we can bring forward, but I want to bring the six points for the government to listen to. What's the purpose of this debate? The hope is – and again there's always hope until the judgment day or until the vote – that they'll come to their senses and realize that, you know, this really should go to a committee, that we need to get it right.

The comical thing is that they got Bill 36 right. Wow. What a repercussion once Wildrose got on the scene and said that we will stand up for property rights. Then we have such I want to say patriotic Albertans like Keith Wilson, who has sacrificed so much to go out and educate Albertans on what's really in this bill.

Isn't it interesting that we have the Minister of Transportation laughing and cackling in here like a chicken who just laid an egg? It's pathetic that they have those types of feelings towards a patriotic Albertan sacrificing so much to make sure that this government gets it right. He's their best friend because if they were to listen to the advice that he gave and make those proper amendments – and there's no reason why we couldn't do that with this bill – they could save themselves. But they won't even save themselves. They've been thrown the rope to climb back up, but will they do it? No. Their arrogance doesn't allow them to. They've dug themselves into this hole.

There's a six-step approach, and it isn't about amendments. The first one is that we need to repeal and entrench.

> Immediately repeal the Alberta Land Stewardship Act (Bill 36) and pass an Alberta Property Rights Preservation Act. When private property is used for a genuine public need, there absolutely must be full, fair and timely compensation with full recourse to the courts.

This isn't in the amendment. It's not in the old bill. There isn't recourse to the courts. It's carefully crafted and worded so that the minister can say: "Oh, you can bring a variance to me, the minister. Trust me. I am like justice. I am blind." Boy, they are blind. They don't see it when it's right in front of their eyes.

Step 2, honour existing deals. This government is unbelievable. They seem to think we can just throw one or two under the bus, and it's okay. There's nothing wrong with that because everyone else is okay. It's a very small number. "Grandfather existing leases and licenses and establish conservation areas, or 'no-go zones,' before issuing [these licenses]. Investor confidence in the Alberta economy depends on it."

Yes, they can look at the percentages and say that they are small, and those companies that aren't affected can say: well, it's okay; it didn't affect us. But there's always a risk factor when a government for the third or fourth or fifth time breaches contracts, and there's nothing these companies can really do because they have them over a barrel. We should be honouring those contracts. They haven't. Again, very, very disappointing that in Committee of Supply and in question period we've asked the minister – they spent $1.9 million on the Athabasca plan, the Athabasca draft. Isn't that interesting? In here it's a draft. When they're out there, it's a plan. The only draft is between their ears, Mr. Chair. It's just blowing through, and there's nobody home.

The problem is that they don't even know, and I think they do. Again, it's a cover-up. They're not going to tell Albertans how much. There are 24 leases that have been affected. Just tell us the dollar value of the lease land that is being rescinded. I would expect that they're going to try and save face and at least reimburse the actual lease funds that they received as they leased out those lands. But they won't give it to us. Unbelievable.

Step 3, use what we've got. "Let Alberta Environment perform cumulative effects analysis on impacted areas. They've got the experience and expertise, let's put it to use." What kind of an excuse is it to say: oh, we can't do cumulative effects? That's ridiculous. Put it under the Minister of Environment. He's passionate. He's worked hard on it. They're very capable. The workers that they have, hundreds and hundreds of workers, have been going around the province monitoring, doing all these things. Give them the mandate to do the cumulative effects. There's no reason we couldn't do it under the current Environment minister. But, again, no, we need to create all this new bureaucracy, all of this other area. Very, very disappointing. Let's use the Environment minister. Again, we've heard the government so many times. This is the first government in North America, I believe, for sure in Canada, to have an Environment minister, yet we don't allow him to be capable to do cumulative effects. That's shameful that we don't do that.

Step 4, let the Water Act work. We have a Water Act. It was reworked in 1992 or 1993, yet the government seems to want to step in and do it. This law has allowed for a stable water supply for those with water licences in Alberta for decades. We need to get it out from under ALSA and promote it. It's been thoughtfully put forward. We have a great opportunity. Why don't we use it?

Step 5, cut the red tape, find the best models for a streamlined regulatory framework that is balanced between Alberta Environment's authority over the stewardship of air, land, and water. You know, nobody says that we want to go out and just willy-nilly have these developments pop up and say: oh, we have no plan. We have an extensive environmental protection act – extensive. To say that there is no plan – the point is that they don't use it. I mean, how many times have we heard . . . [interjection] Well, the hon. Leader of the Opposition says that they don't have the resources, that they'll spend it foolishly in other areas. The point is that we've got so much red tape and such a mess that it's not being efficient, effective, and it certainly isn't being environmentally friendly. So we need to cut the red tape.

Step 6, involve the community. This is the most critical point. How many times have I heard this government, the Premier himself, say that if we didn't do something, Ottawa is going to step in and do it to us? Really. Really. We're not going to stand up and fight Ottawa? What we're going to do is rescind licences and contracts here in Alberta so that we can have this facade to say: oh, we're looking after our area. It's a joke, Mr. Chairman. What we need to do is involve local community because if they're going to say – and again, yes, they've put these RAC, regional committees, together for the different areas, but then they just abandon them. They put it in there. This is a total disconnect with the community.

In my own personal experience in business life, back in the early '80s, I found that out. You go to municipal government, and you ask: "Oh, what's the act? What's allowed to be developed here?" Here it is. I took it at face value. They said that no more subdivisions are going to go on in this area. So I thought: "Oh, well. You know, I don't want to buy this land if there's no potential for subdivision." Six years later, two elections later, all of a sudden subdivisions were allowed, and I thought: "Wow. Why didn't I realize that people can change these things, that these laws aren't set in stone." And, again, to think that central government can do it.

So step 6, involve the community. Let's invite locally elected officials, landowners, industry stakeholders, and other regional and government representatives to work together to guide regional development in a sustainable way, and recognize that central planning does not work. If we're going to follow the Premier . . . [interjections] They're just like chickens that have laid their first egg, and they're cackling away. It's quite a sight to see. You hear all those hens cackling, and you go in there, and there's one or two eggs.

Mr. Anderson: Explain how the RACs aren't binding.

Mr. Hinman: They seem to think that these RACs can be put forward and be part of the planning, but it's not binding. The minister can say, "I appreciate that; great work," and then do whatever he wants. There is nothing binding in this bill or the amendment. When the RAC puts forth a recommendation, the minister can say: "Thank you for your time. We're going forward. We appreciate that." It's about locally elected people and the landowners and industry going forward.

Mr. Chairman, there are so many areas in this bill that are so flawed. We need to go back to step 1. We need to repeal it, and we need to entrench the Alberta property rights preservation act. Without doing that, we are on an extremely slippery and steep slope that's all downhill.

5:50

Yes, I was here in Edmonton when the Premier, speaking to the AAMD and C, was so passionate and talked about his heritage and where they came from and not being able to own land. Why? Why, if he understood that, would he pass this bill? To sit there and say, "I am the king, and I wouldn't do that" doesn't matter, because he's gone. In five months he's gone. Who's the next king, and what is that king's agenda? What are they going to do?

I mean, I was astounded when they talked about taking back 30 per cent of the lower Athabasca because this is a great thing to do. Yet the total disregard for those leases that have been put out there is shameful. Again, these contracts are written.

I mean, it's interesting, too, because in 2008 many of the regional areas were saying: "Make this a no-go zone. Do not put this land up for auction." What was this government's response, this very government, this very Premier? Oh, no. We don't know what our regional land plan is yet, so we're not going to – what would we say? – restrict our pocketbooks. If we can sell some of these leases, it's okay.

I truly believe that they had this plan all along, that we will eventually pass a plan because they understood that if they pass a plan and it's a regional plan, it becomes government policy, and it cannot be challenged in the courts. That is the key of this whole LARC and every other plan, that because it's government policy, it's therefore not challengeable in court.

That – that – Mr. Chair, is the biggest dilemma with this problem. To say that, "Oh, we're going to change section 15.1 and allow variances to come to the minister," that's a joke. What good is a variance going to the minister? That's like if a person just beat you up, and then you go in there and say: "I'd like fair compensation, please, for the beating that you just gave me. What are you going to give me?" "Oh, well, here it is." It doesn't work.

Under section 11, cabinet's regional plans can amend or rescind existing rights – they changed extinguish to rescind; that isn't good enough – including development rights, resource extraction rights, mineral rights, water licences, grazing leases, and any dispositions, approvals, or permits issued by the Alberta government.

Section 13(1): "exclusive and final jurisdiction over its contents." It doesn't matter what the big letter giveth; it's the small letter. If it taketh away, it is gone. It's in the contract. So, Mr. Chair, it isn't good enough. "Exclusive and final jurisdiction over its content" is pretty clear, and people cannot go forward.

Section 15(1). It's binding on municipalities and all Albertans. It's binding. It even goes on to explain that municipalities that don't accept this – and, oh, they keep talking about if it's already been started, it gets to continue, one area where they actually grandfather it, which is great to see that they, I guess – what would I say? – thought they could slip this through by saying that we'll grandfather any existing municipal plans. Boy, after this is in there, and they start to bring a new one that doesn't go along with the minister, they can smack him down in a minute and say: "No, you can't do that. Rewrite your bylaws." Even more disgusting is that they can say: "You know what? We're not going to transfer your money back to your municipality. You're not listening to our regional plan. You bad, bad person. Listen up, and if you don't, we're going to strangle you to death economically. No money. We'll get you knuckled down. You'll get down on your knees begging to come onside. We've got all the authority because there's nothing binding."

Sections 15(3) and 15(4): no rights to make a claim against government. The regional plan does not create anything with a cause of action or create any claim exercisable by any person or confer jurisdiction on any court or decision-making body. There's absolutely no recourse for compensation. So when the minister has made his decision, it's done. I do not know of a place in the world where I would want to live where a minister of the government can be the final jurisdiction and no courts can intervene or that you can appeal to. I'll say it again and again: this is the crux of the problem. Jurisdiction has to stay in the courts. Appeals have to be able to have a process to the courts. This bill is so carefully crafted to say and make sure that there is no appeal to the courts. They can shut it down, and the door is slammed shut.

Section 17(4). Bill 36 trumps all other acts. What does that mean? Pretty clear to me. Bill 36, the Alberta Land Stewardship Act, trumps all other acts. So it doesn't matter what it says in the Mines and Minerals Act, it doesn't matter what it says in the Water Act, and it doesn't matter what it says in the environmental protection act because Bill 36, the Alberta Land Stewardship Act, trumps all of those, and there's no amendment coming forward to that.

Section 19: restricted right to compensation if government approvals, water licences, grazing leases, subdivision approvals, mineral leases, timber rights, et cetera are amended or rescinded. I mean, it's very restricted on what they can decide. How can you say that this is protecting property rights when, if someone has something they want to develop, the restriction is: that doesn't go along with the minister's idea of what we're going to have go on in that little region. That isn't good enough, Mr. Chair.

The Chair: The hon. Minister of Transportation.

Mr. Ouellette: Well, thank you, Mr. Chairman. I stand today to speak to Bill 10, Alberta Land Stewardship Amendment Act, 2011. Perhaps one of the most important things to point out about the amendments in Bill 10 is the fact that this legislation is and always has been about protecting landowners' rights and making a better quality of life for Albertans. This is the fundamental reason I got into politics. As I suspect, it is also the reason a lot of my colleagues did as well. This government has heard from Albertans about the need to reinforce the protective mechanisms in the wording of Bill 10. The reason Albertans wanted this is because the previous wording did not sufficiently safeguard against individuals misinterpreting the information and spinning it to advance their own personal or maybe even political interests.

We heard from many Albertans that the language in the legislation was being misinterpreted by some and needed to be clarified, and that is exactly what this government is doing with Bill 10. We have listened, and we are acting. What the wording in the amendment does is safeguard against some wild lawyers creating a culture of fear among Alberta landowners when there is nothing to fear.

Mr. Chairman, what also needs to be clarified is that Alberta is the most compensating jurisdiction in Canada. Albertans need to know that our government understands, perhaps better than most governments, that land-use planning is intended to benefit all Albertans in the province as a whole while making sure that individuals always have a say in the process.

The Premier ordered a review of the legislation to make sure the words clearly reflect the intention of the act. Some key points are: consultation would become a legal requirement before a plan or amendment is made; any person who believes he or she is directly and adversely affected will be able to request a review of a regional plan; titleholders will be able to apply for a variance to a regional plan; the amended act makes it clear that nothing in the act or a regional plan takes away an individual's existing rights to compensation. This supports the intention of government to stay out of the lives of Albertans by giving them as many opportunities as possible to represent their own individual needs and interests in the land-use planning process, and I believe the amendments achieve that, Mr. Chairman.

I would like to also say that when you listen to the other side, they mustn't read the plan because they get a completely different interpretation out of the act than I do when I read it. Mr. Chairman, that's what I guess the law is all about. Some lawyers interpret something one way, another lawyer interprets something another way, and then there's a judge in the middle that makes a decision. When I'm out speaking, there doesn't have to be a judge there that gets to judge me, and when they're out speaking or their great wild lawyer is out speaking, they don't have a judge there to make a judgment either.

Thank you very much, Mr. Chairman.

Mr. Anderson: Well, I have to admit, I do always enjoy watching the hon. Transportation minister speak. It's very entertaining, so thank you for joining the debate. That's for sure.

We don't obviously have much time. We only have about 30 seconds left, most likely, but I thought I would stand and – maybe at this time I can adjourn debate till we get back tonight, and we can pick up where we left off. Can I make a motion for that, a motion that we adjourn for the afternoon?

The Chair: Well, in fact, it's 6 o'clock, so the Chair doesn't need a motion to adjourn.

The committee will be in recess until 7:30 p.m.

[The committee adjourned at 6 p.m.]

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The Honourable Kenneth R. Kowalski, Speaker

Legislative Assembly of Alberta

7:30 p.m. **Wednesday, April 27, 2011**

Government Bills and Orders
Committee of the Whole

[Mr. Mitzel in the chair]

The Deputy Chair: I'd like to call the committee to order. The Committee of the Whole has under consideration Bill 10. Continuing on from this afternoon, the hon. Member for Airdrie-Chestermere.

Bill 10
Alberta Land Stewardship Amendment Act, 2011

Mr. Anderson: Thank you, Mr. Chair. It's good to be back. Obviously, I want to continue on with some of the comments about Bill 10, the Alberta Land Stewardship Amendment Act, 2011. Yesterday I started speaking a little bit about it, and I went through several things on the bill. I talked about one of the important things that we need to realize, that when we make a mistake, it's important to fess up to that mistake and say: "You know, we made a mistake. We need to correct it, and we need to back away." That's what Premier Klein really taught a lot of politicians, that when you do make a mistake, it's important to admit to it, try to make up for that mistake, and make restitution as quickly as possible.

I find myself feeling somewhat like that with regard to Bill 36 and so forth. One of the things that I didn't read or understand, I guess would be a better way of putting it, in the first go-round with Bill 36 was the issue around statutory consent and the power that Bill 36 gives the cabinet to revoke property rights and to extinguish – this is the language used in the act – property rights, things such as land titles. Obviously, Bill 10 works to correct that. The government says clarify, but let's look at what Bill 36 says and then how Bill 10 clarifies, hopefully, what their intent is.

In Bill 36 under section 11 it says: "A regional plan may, by express reference to a statutory consent or type or class of statutory consent, affect, amend or extinguish the statutory consent or the terms or conditions of the statutory consent." Now, there was some argument about whether statutory consent in Bill 36 meant land titles and other forms of licences, and there was quite a debate around that. In Bill 10 there was an effort made to clarify that, but the government continues to say that the original Bill 36 never did allow the government to unilaterally extinguish land titles. Well, this is just simply not the case. This isn't just a matter of one lawyer disagreeing with another lawyer. As any first-year law student would know, when you're trying to look for the definition of something in a bill, the first place you look to – it's not the only place you look to – is the act. You look to the act, right? Isn't that true, hon. members? You look to the act first.

What does the act say about statutory consent? According to section (z) of Bill 36 statutory consent means

> a permit, licence, registration, approval, authorization, disposition, certificate,

as in a certificate of title,

> allocation, agreement or instrument . . .

Titles are instruments.

> . . . issued under or authorized by an enactment

such as the Land Titles Act

> or regulatory instrument.

So there's really little doubt in the definitions section of what statutory consent is and that it can include land titles.

If one looks to what instrument means, we can go further to instrument. They even clarify it further. Instrument means

> (i) a grant, certificate of title, conveyance, assurance, deed, map, plan, will . . .

Et cetera, et cetera, et cetera.

It also includes a judgment of the court, so that could include a maintenance enforcement order or a marriage annulment, or

> (iv) any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title to land.

That's the definition of instrument, okay? So this whole idea that it did not apply to land titles or mortgages or these types of things is garbage. It did.

This government, that is famous for not understanding, you know, the unintentional consequences of its actions, has come and said: "Okay. Well, under Bill 10 we're going to make a difference. We're going to make some exceptions. We're going to make it clear in section 3(2)."

> For greater clarification . . .

This is kind of funny.

> . . . the definition of statutory consent does not include any permit, licence, registration, approval, authorization, disposition, certificate [et cetera, et cetera, et cetera] under or authorized by
> (a) the Land Titles Act,

They put it right in there.

> (b) the Personal Property Security Act,
> (c) the Vital Statistics Act,
> (d) the Wills Act,
> (e) the Cemeteries Act,
> (f) the Marriage Act,

So they can no longer get rid of your marriage. That's good.

> (g) the Traffic Safety Act, or
> (h) any enactment prescribed by the regulations.

It's pretty clear when we look at this clarification that the fear that people had that the government would be able to unilaterally take away their land titles when this bill is passed – that will not be the case. Under the law right now under Bill 36, indeed the government, the cabinet can seize people's land titles. I don't know how you missed that. You obviously did.

Now, let's be very clear. Was it ever your intention to seize people's land titles? I certainly hope not. I don't think it was. But the fact is that that is what the act, Bill 36, clearly authorized or else why would you be passing Bill 10 and one section to clarify that?

That lawyer in a silk suit, as the government always likes to say, that was running around Alberta telling people that the government had just authorized giving itself the power and authority to seize your land title if they felt it was in furtherance of their regional land-use planning, was correct. He was not lying at all. Thankfully, he pointed it out because now it has been dealt with in Bill 10.

There are many things that Bill 10 does not include. For example, it does not specifically exempt the Mines and Minerals Act although it does now exempt the Land Titles Act from extinguishment of a property right. We saw that in action. We saw what happens when you don't have something exempted under this act, that in fact the government can come and seize. It is doing so right now with the lower Athabasca regional plan. It is seizing a couple dozen mineral and mine leases that belong to these companies. It's unilaterally coming in there and seizing them.

Now, there is still a question around what the compensation would be, which is amazing, that the government would allow that kind of uncertainty. But there still is a question. We don't know much the government plans to compensate these companies if at all. We don't know if they plan to give them the value of the lease when they bought it and that's it or if it's going to be the value of

wall. Let's do some more research on this. Let's talk a little bit more about this so that we make sure we get these plans right or we make sure that the amendments to these plans are right, okay?

I mean, I look at some of the members in there: the Member for Drayton Valley-Calmar. I know full well you trust the people's representatives to make a good decision here. I think that it's important that we let them do that. To just say that the government is going to come here and, you know, is just going to plunk the regional plan or the amendment to the regional plan in front of us and say, "Okay; this is what we decided; here you go," is not accountability at all. I don't even know why that's in the act. They would do that without this act, without it saying that they had to lay it before the Legislative Assembly. Of course, they're going to put the plan out there. They've got to give it to somebody to implement.

So that's not really an accountability measure. But having the Assembly have to actually vote on it elevates it and at least makes sure that the people in this House have the final say.

I mean, we have the Speaker of the House, remember, who goes through every month and tells us all the recognized days that come up, you know, like basket weaving awareness day and kiss your lawyer day and all these different days that we . . .

Ms Blakeman: Administrative support day is today.

Mr. Anderson: Administrative support day is today?

Ms Blakeman: Yes.

Mr. Anderson: There you go. Administrative support is important, I'll tell you, especially when you've got the resources and the office that we have. I mean, you really rely on that staff.

The point is that he's making us aware of that. That's all this is saying right here. This is saying that somebody is going to come and make us aware of this report. It's basically at the same level of importance as the Speaker standing up and telling us all these different days and awareness weeks, et cetera, that are out there.

7:50

Now, the difference is that this amendment, if passed, will make sure that the people's representatives have the final say on whether they want to go ahead. I think this is a reasonable amendment. I would like to hear from government the reasons. If they support it, that's great, but if they don't support it, why not? Why is it not important that the people's representatives have the power and authority to make the final decision with regard to one of the seven regional plans in this province? Why wouldn't that be important to you, or why would it be important to you? I'd like to know that.

With that, I'll leave this amendment for some debate.

The Deputy Chair: On the amendment. Do any other members wish to speak? The hon. Member for Edmonton-Centre.

Ms Blakeman: Thanks for the opportunity to speak on amendment A1. I agree with the attempt to remove the reporting in section 5 away from presenting a report of the findings of the consultation to Executive Council, which, of course, is the cabinet, and trying to widen it to a larger group. That I agree with because I think that too much of what's wrong with the amending act, Bill 10, is that it has tried to address some issues, but it didn't address them enough. The original Alberta Land Stewardship Act had concentrated too much power in the hands of cabinet. I think that Bill 10 did not address that enough. So this amendment is trying to take it a step further, but where my problem is with this amendment is in having it come back to the Assembly for the Assembly's approval.

We're in a time of change, I hope, and we have no idea what is coming and how the political structure is going to look, who is actually going to have the balance of power, the majority of it. We have a lot of experience in this Assembly and in this province with a party that gets into power for 40 years and counting and is dictatorial in the way it sets about writing legislation.

We have a number of things that come back to this Assembly for approval. Frankly, Member, look around. So what? Lots of things come here for approval. You still have a government in power that does basically what they want to. I understand that you're trying to protect the integrity of the plans and to involve the elected members, but you could end up with the same thing happening that you've got right now, and that is a majority that just barrel rolls stuff through.

So there are two things that you need to have in place, I think, to make this plan work better. One is – and you always should default to this – more local control, more local input because communities really do understand how to take the one-size-fits-all that you're trying to build as a provincial plan to make sure that we are moving forward and implementing general policies as a province. They understand how to take that overall policy and augment it to make it really work locally. They can't be allowed to say, for example: well, we're not going to have environmental protection in this particular area because we just choose not to. No, no. They have to. There are certain things that are required, but they can say: "You know what? This little bit extra would really make a difference for us because we've got a lot of forestry here or a lot of this." They can fine-tune it to make it work on a local level, but you still need that sort of broad province-wide policy setting that you want everybody to use.

My problem with the way this is put is that we could get exactly what we've got now. It could come to the Assembly, and look how many decisions and how many times – I'm getting into trouble with my dentist for grinding my teeth, which is a relatively new problem for myself, but part of it is from when I hear the Premier stand up and say things like, "Well, it's going to an all-party committee," and, you know, "That will be wonderful because it's an all-party committee."

Well, I was at the negotiating table when these all-party committees were established, and believe you me, the second, third, and fourth parties may have something to say occasionally. I've actually been in the position where those all-party committees have passed, duly debated and passed, a motion I put on the floor only to have at the next meeting a member come forward and basically rescind my motion on the instruction of government. So much for all-party discussion and all-party approval of something. That rarely happens. So you're basically putting back in place what we have now, and that's the problem for me, I think. Yeah.

Additionally, you're not clear on what you're going to do with 5(b). You're going to amend 5(a), but are you leaving 5(b) there? Because that's the same thing again, to "lay before the Legislative Assembly the proposed regional plan or amendment." I think you're right in trying to draw power away from the cabinet. I just think the way it potentially could play out here is problematic for us in that it basically puts into place the same institution that we have now, that's already causing us problems. You'd end up with something that read the same way. You're going to present a report of findings to the Assembly for its approval, and then in 5(b) you're going to lay the plan before the Legislative Assembly, the proposed regional plan or amendment.

I'm not quite sure how that works, but I definitely think you're right to make the point that you need to draw some of that power

straightforward. The hon. Member for Airdrie-Chestermere summarized it and the hon. Member for Edmonton-Centre as well as the hon. Member for Calgary-Fish Creek. What this is about is section 5(a). "Ensure that appropriate public consultation with respect to the proposed regional plan or amendment has been carried out, and present a report of the findings of such consultation to the Executive Council." There is the problem. Again, this is just solely at the minister's discretion, and what we need is to have it reported to the House.

Not only that, the government members always get up and say: oh, we've done all these consultations. We've done this. We've done that. We've had 238, I think, people that they talked about earlier. Present the report to the Assembly so that we can actually see and ask questions about it and verify what they're actually saying rather than just vague comments and commentary on what their so-called consultation is. We need to have the consultation. It needs to come.

I'm looking forward to the vote. We'll see. The government says: what amendments? We have several that we want to bring forward. We feel this is a good and plausible one and hope that the government will vote in favour of this.

Perhaps we can have the question now.

The Deputy Chair: The hon. Member for Calgary-McCall.

Mr. Kang: Thank you, Mr. Chair. I am also standing up in favour of the amendment. I have heard the Member for Edmonton-Centre, the Member for Airdrie-Chestermere, and the Member for Calgary-Fish Creek. I don't think that the Member for Airdrie-Chestermere is asking for much. It's just bringing the process more into the open. I do believe that the decisions or any changes we want to make into regional plans or anything should be done here in the Legislature, not by 23 or 22 or 16 Executive Council members.

Here with Bill 10 the government is trying to address what was not done in bills 36, 19, or 50. I think they should do the right thing. You know, those bills gave the cabinet too much power. Here the government is still trying to keep all the power with the cabinet.

What this amendment is trying to do is take the power away from the Executive Council and have everything come to the Legislature so that we could have reasonable debate in the Assembly and make the right decisions. This amendment may not address what the member intends to do with this, but still I think it will be better to have a decision made by the majority in the Legislature, by the elected representatives of Albertans. Well, I think it still will be better to make the changes here in the Legislative Assembly after a reasonable debate instead of making a decision, you know, behind closed doors. It should be up to the elected representatives to come up with what is good for all Albertans. For those reasons, Mr. Chair, I'm supporting this amendment.

I don't think the Member for Airdrie-Chestermere is asking for much. The government with the majority will still be able to blow through whatever they want, but we want to have everything in the open so that everybody knows what we're going to do. For those reasons I'm supporting the amendment.

Thank you.

8:10

The Deputy Chair: The hon. Member for Calgary-Currie.

Mr. Taylor: Thank you very much, Mr. Chair. I will just add my two cents' worth briefly to this because we have a lot of business to get through in a limited period of time tonight. I would not normally support this amendment. I would not normally say that this is something that the Legislative Assembly needs to consider and vote on in terms of regional plans for each region.

I think that there is a real interest, obviously, on the part of MLAs from that particular region for which the regional plan is being prepared to have a say in this, but as to whether all 83 of us need to weigh in on it or not, under – maybe I shouldn't say normal – ideal circumstances I would say that if we had done all the preparation work properly, this would not be necessary. Unfortunately, Mr. Chair, we haven't done all the preparation work properly, and even the government recognizes this, which is why they brought Bill 10 forward in the first place.

The amendments that are put on the floor tonight, whether we all agree on them or not, I think will all be put on the floor sincerely with the effort to try and improve this bill further. I think absent a whole process that we cannot amend because it's not in Bill 10, you'd have to go back to the ALSA itself, which would change the way in which these regional plans were prepared, change the way in which the regional advisory councils were constructed and put together, and that sort of thing. I think there is a need for elected representatives to weigh in before these plans were approved and vote on each one of them.

To just lay the plans before the Legislative Assembly as it reads in section 5 of Bill 10 right now, which says exactly under 5(b), "lay before the Legislative Assembly the proposed regional plan or amendment" – okay. That says we're tabling the proposed regional plan or amendment for the interest and edification of all Members of the Legislative Assembly, but it does not allow for any input from the MLAs or any decision-making power. That power still rests with cabinet. I think that's a problem. That's a problem because of the way in which we go about under Bill 36 and Bill 10 creating these regional plans without enough democratic participation going into it. I think for that reason rather than leaving the power with cabinet to approve these regional plans, I can support this amendment, which gives that power to the Legislative Assembly.

Thank you.

The Deputy Chair: Do any other members wish to speak? The hon. Member for St. Albert on the amendment.

Mr. Allred: Mr. Chair, just speaking briefly to the amendment, I appreciate the intent of the amendment, but if you look closely, the amendment replaces section 5(a), but by doing so, it makes section 5(b) totally redundant.

For that reason, I don't think we can support the amendment.

The Deputy Chair: Do any other members wish to speak?

I will call the question on amendment A1 as proposed by the hon. Member for Airdrie-Chestermere.

[Motion on amendment A1 lost]

The Deputy Chair: We'll move on to the bill. We're back to Bill 10 and the next speaker. The hon. Member for Edmonton-Centre.

Ms Blakeman: Thank you so much, Mr. Chair. I appreciate being recognized. This is my first opportunity to really speak to this bill given the interesting progression of Bill 10 through this House. What we have is what people commonly call Bill 36, but of course each year we start over in our numbering, so we need to start referring back to the Alberta Land Stewardship Act, which was passed in 2009. It hasn't gone over well. This, what we have before us today called Bill 10, is an amending act to the Alberta Land Stewardship Act.

Let me talk about the intentions of the Alberta Land Stewardship Act and then relate back to that what I think about this amending act. The way I approached the Alberta Land Stewardship Act from the start is that we need a planning tool. We need a planning tool in this province that allows all of the user groups, who are often in conflict with each other – and their activities may conflict with other groups' activities over the use of a piece of land. We need a planning tool to be able to sort this out in the province.

Of course, we're referring to the use of what we call Crown land, or public land, the land that is held in stewardship by the province. How do we determine who gets to use it and how they use it? Here are some of the groups whose activities start to conflict with each other. We've got conventional oil and gas exploration; conventional oil and gas production; mining, including aggregate mining, so gravel mining, in aquifers and river basins and things like that; coal mining. We've got an application right now in the Castle Crown area to mine magnetite I think it's called, which is a product that is used in conjunction with coal.

We have conservationists that are saying: "We have some very precious land here. We should leave it alone. We should not allow anything to happen on it and preserve it." We have people that say that it should be used for recreational purposes by horseback riders, by hikers, by cross-country skiers. There are others that say: "Well, we want to have motorized vehicle access. We want to use ATVs," that my family calls quads. "We want to go in the winter and snowmobile; we want to go heliskiing." How do you put those two groups together, and do they conflict?

We have municipalities that want to expand their boundaries onto prime agricultural land. Well, at what point do we the province, we the people lose our ability to say no? We need to protect prime agricultural land. We need to be able to say: you can't keep building subdivisions, precious little acreage parks for the wealthy, farther and farther out from our cities, which stresses the resources of the cities to put the services in and, of course, the roads to bring everybody, you know, into town to work and all of that stuff. At the same time, they're building it on the very land we need to produce food.

There are immense conflicting groups and activities, and we need a planning mechanism. The Alberta Land Stewardship Act was supposed to be that mechanism.

Now, I agree with many others that have criticized the original act. Actually, in our caucus there are people that were in favour of the Alberta Land Stewardship Act in 2009 who are not in favour now and, the reverse of that, people that have never been in favour of it at all. We've certainly had even some hearty discussions in my own caucus about that particular bill.

The real criticism you've heard quite a bit about was that the government concentrated too much power in the hands of the cabinet and, in particular – and this offended me at the time, and I was, to put it mildly, blown off by members of the government – the use of what they call the Henry VIII clause, which literally said that a minister can change legislation without bringing it before the House. "Oh, this is common," they said. "This is used all the time to fix little things, and we should be able to do this." No, not in conjunction with our land, Crown land. Public land is the other way that that space is referred to. It's public land. It's held in trust by the government, in trust on behalf of the people of the province. So too much power held in the hands of the cabinet.

There was no compensation offered when the Crown indicated that it was going to do something and that it was going to take somebody's land to do it, or in some cases activities that are currently going on on Crown land or expected to go on on Crown land would be curtailed; for example, conventional oil and gas development leases or oil sands leases or forestry. All of that's possible. All of that goes on now on Crown land, and the government makes money from it. It's revenue, and that helps offset the taxes that Albertans pay. It's not that this is particularly new activity here.

8:20

The idea that the government would extinguish somebody's property rights or the money that they were making from their activity without any kind of recognition of compensation just goes against the heart of fairness, of justice, and it really bugs people. When a province gets beyond itself, gets too big for its britches, gets too high on its horse, or flies too close to the sun, you know, the wax melts, the feathers come off, guys, and you plummet to Earth. That's essentially what has happened to the government in this whole process. I'm sure that there will be a master's thesis and maybe a PhD or two based on the process around this Land Stewardship Act and Bill 10. So those of you who are currently pages who tend to be particularly brilliant students: there's your master's thesis because you sat here and watched this happen. It has not gone well for this province and for this government.

The third thing is that there was no right of appeal. So too much power in the hands of government, no recognition of compensation or ability to compensate people, and, three, no avenue of appeal. There is always avenue of appeal; there has to be. Mistakes get made, you know, Friday afternoon screw-ups. People make mistakes: deliberate, benign, whatever. You've got to have the ability to say: "Whoa, whoa, whoa. Something went wrong here, and I need to be heard. I need my day in court. I need to be able to appeal the decision that was made." Not because you don't like it. I mean, you don't get an appeal process just because you don't like the finding. You get an appeal process because something went wrong in the way the process worked, and you need to be heard. Your case needs to be heard and re-examined for a good reason. So those are the three things in this particular bill that really offended the core of the Alberta psyche.

The other interesting thing that developed out of this was public knowledge and public participation. This I actually find very exciting because increasingly Albertans, Canadians have been saying to their politicians: "We want in. We want access to this process. We want to be able to tweet you and tell you what we think of the comments you just made in the House. We disagree. We want input from the beginning on this." That's what happened. People started to get access to real knowledge, to factual knowledge. This is what the bill says. Here is the interpretation from the lawyer. Here is the interpretation from the government. People could go to town hall meetings and hear well-versed people talk about this, and they could learn it, too, and be able to understand it, to hold the bill in their hand and look at what it said and go: "Okay. I understand that. I get it, and I don't like it. I don't agree with the decisions that have been made here."

People got an opportunity to get educated on the process, to get educated on the content of the bill itself, and then to be able to push back with government. So not just, you know, yelling and screaming, not just carrying placards with rhetoric on it, but very specific points being raised in a well-informed manner by the public back to the government saying: you have chosen to use certain words in this language – a word like extinguish is a very, very specific and powerful word, and it carries with it a lot of action that goes behind the word extinguish, especially when that word is held by government: to extinguish your right, to stop it, to put it out. That's a very powerful word, and it was a deliberate choice by government. So we have people that became involved in

"We're revoking your licence" is concerning. The government's response to section 2 in their amendment is to put in, I think, seven areas, seven different acts to say: well, this power doesn't go into the Land Titles Act. This is section 2(2)(a), (b), (c), (d), (e), (f), and (g): the personal property act, the Vital Statistics Act, the Wills Act, the Marriage Act, the traffic act, and the Cemeteries Act.

The problem is, Mr. Chair, that once again this government is trying to rush these things through and is realizing – it has been brought up so many times – that the pressure is growing in Alberta as they understand the latitude that the minister has. They're wanting to rush this through, hopefully thinking: if we get this through and there's nobody talking about it, this will have a quiet death here in the province, and on we can go. It just doesn't happen that way. The problem is that Bill 36 is 18 months going strong and causing problems. Again, when we saw LARP come out, this was exactly the suspect that industry and other people felt was going to happen, where licenses are rescinded. It just isn't good enough.

So we would like to bring in another amendment, and I'll hand this off to the page to bring up to the table.

The Deputy Chair: Hon. members, we'll pause for a moment while the amendment is passed around.

Okay. This is amendment A4.

9:20

Mr. Hinman: Thank you, Mr. Chair. In law there's something that's very important. Once a list is started, it becomes exclusive. We want this to be inclusive. Because it's exclusive, those bills that aren't mentioned are therefore not part of it.

In section 3 in the proposed section 2(2) by adding the following after clause (a):

(a.01) the Water Act,
(a.02) the Mines and Minerals Act,
(a.03) the Forests Act,
(a.04) the Environmental Protection and Enhancement Act,
(a.05) the Public Lands Act,
(a.06) the Fisheries (Alberta) Act,
(a.07) the Agricultural Operation Practices Act,
(a.08) the Oil Sands Conservation Act,
(a.09) the Oil and Gas Conservation Act,
(a.10) the Coal Conservation Act,
(a.11) the Highways Development and Protection Act,
(a.12) the Animal Health Act,
(a.13) the Marketing of Agricultural Products Act,
(a.14) the Livestock Identification and Commerce Act,
(a.15) the Animal Protection Act,
(a.16) the Pipeline Act,
(a.17) the Dairy Industry Act,
(a.18) the Farm Implement Act,
(a.19) the Pharmacy and Drug Act,
(a.20) the Gaming and Liquor Act.

We hope that we've included all of the acts that should be under this bill that have failed to be listed under section 3. We feel that this amendment is critical. We cannot allow these other acts to be in the arbitrary decision of the minister.

In section 3 of Bill 10 statutory consent authorized by a certain act is excluded from those which Bill 10 can rescind. One of the most notable is the Land Titles Act. It is reassuring to know that Albertans will not simply have their land titles extinguished. The Marriage Act is also enumerated. It's reassuring to know that the SRD minister can't decide to annul my marriage when they pass the South Saskatchewan regional plan. There are a number of acts missing from section 3. They say that it's comical, but the fact is that it was put in there. Obviously, there's a reason why they put it in yet missed so many more.

There are a number of acts missing from section 3. Our amendment seeks to add 20 relevant acts, ones that grant various sorts of permits, licences, registrations, approvals, authorizations, dispositions, certificates, allocations, agreements, or instruments upon which people's livelihoods depend.

One of the most basic yet fundamental roles of government is the protection and preservation of property rights. Without such protection our peace and prosperity would be jeopardized. Property rights are the foundation of each individual's and family's financial security and quality of life. For example, farmers and ranchers need to know that their investment in their land and livelihood is protected, that it will not be devalued by others, including government, without just compensation. Those owning residential or commercial properties in urban and rural areas need to feel confident that not only will wrongdoers be criminally prosecuted for trespassing and vandalism but also that the government won't pull the rug out from underneath their investments without fair notice and compensation.

In order for Alberta's economy to prosper, businesses need to know that their investments are stable. They need to trust that the government won't suddenly reverse course and confiscate their land or rescind leases after these companies have spent their time and money developing projects in Alberta. The way to do this is the rule of law, predictable and precedent based, not arbitrary ministerial decisions. Rights which are subject to the discretion of a politician or bureaucrat are not rights at all.

The current government has shown a lack of respect for basic property rights with Bill 19, the Land Assembly Project Area Act of 2009. The government granted itself the authority to freeze large tracts of private land for public purposes without having to compensate landowners for the cost of forgoing development, business interruptions, relocations, or other related damages.

Bill 50, the Electric Statutes Amendment Act, 2009, eliminated the role of the Alberta Utilities Commission to determine Alberta's needs for electrical expansion and allowed the cabinet to declare unilaterally that a 16-fold increase in capacity is urgently needed. Last fall the PC government passed Bill 24, the Carbon Capture and Storage Amendment Act, 2010, which went against the common law understanding of property rights, and simply declared that the government owns all underground pore space, pores that they want to pump CO_2 into. These are two more examples of the current government passing laws that consolidate the decision-making authority in cabinet while undermining your property rights and the rule of law.

Now we have Bill 10, which proposes various amendments to ALSA, the Alberta Land Stewardship Act, 2009. ALSA divides the province into seven land regions and authorizes cabinet to implement sweeping regional plans for each area of the province that override whatever had previously been in place. This means that central planning at the Legislature rather than by locally elected and accountable municipal councils and landowners will ultimately decide what types of activities are going to be permitted or prohibited on private land in every region of the province.

The act allows cabinet to extinguish or rescind, whatever word the government wants to use, rights held under these licenses, permits, leases, and approvals with limited or no compensation. Because they classify the decisions made in the regional plan's policy, there is no right to appeal the decision to the courts.

That is why this amendment is important. These acts are designed to give licences to Albertans to operate businesses. Whether it's the Forests Act or the Public Lands Act or the Water Act, each of them is mandated to distribute their licences for various industries in a sustainable way. The Forests Act, for example, is explained on the SRD website. "This Act establishes an annual

allowable cut in coniferous and deciduous forests. It prohibits persons from damaging the forest in any way and allows the Minister to construct and maintain forest recreation areas." So there are conservation provisions in it, and those who get a tree harvesting licence assume that they are granted the freedom, the right, the licence to harvest certain trees. This would be a reasonable assumption until now.

After LARP came out, the lower Athabasca regional – again, whether it's a plan or a draft, which I always find comical, they want to say that it's a draft. We know that these licences are liable to be extinguished if the minister decides suddenly that for whatever reason, because nobody can appeal or demand the rationale, he wants to extinguish their licences in his regional plan. The point is that all kinds of industries and professionals rely on the acts to plan their business, hire employees, raise capital, and even base their decisions on whether they want to come to Alberta to do business and hire people on the reliability of this framework.

As indicated, there are stewardship provisions already built into these other acts, so there is no need for a huge new act to trump all of this and throw it out and throw everything into doubt, no economic reasons and not environmental ones. We just need to use the acts that we already have. Some of the acts we are talking about even have "conservation" in the title: the Coal Conservation Act, the Oil and Gas Conservation Act, the Oil Sands Conservation Act. If they're not doing their job, Mr. Chair, why not bring each of them in to make the adjustments, like the government is doing with Bill 16, the Energy Statutes Amendment Act?

We need the rule of law, not a superlaw that overrules everything else and gives all kinds of arbitrary powers to the minister and cabinet. There has been an undeniable trend in the current government to concentrate power in the executive and undermine all the checks that exist on their prerogative. This is something that we should all expect when one party has ruled for 40 years. Everyone in that party starts to utterly trust the government and lose the vigilance they owe their constituents as MLAs. They forget the reason why independent commissions, property rights, local governments, and the rule of law are essential.

These checks are in place to ensure that government doesn't go too far, but when you give utter trust to a centralized government, you begin to see these checks and balances as nothing more than a nuisance. Bill 36, or ALSA, undermines, supersedes, or eliminates all these competing authorities and centralizes decision-making authority in cabinet. The amendments in Bill 10 do little to change this fact as the government embarks upon the admittedly difficult task of engineering a new framework for land-use planning. Whenever they encountered attention, they decided: let's just give that power to the stewardship minister.

A government that respected local authorities, independent commissions, existing legislation, and the right of Alberta property owners to have recourse to the law would have come up with a much more balanced land-use framework. ALSA, even as amended, not only pushes municipal authorities aside; it utterly undermines their authority. Not only does it direct municipal councils to rewrite their bylaws to suit the minister's plans; it make provisions for the stewardship minister to withhold transfers to the municipalities or to rewrite the municipal bylaws directly if he's not satisfied with what they have done.

9:30

As with the regional advisory council, that governed land planning from 1955 to 1995, we need to empower local municipalities in the decision-making process in order to have actual democratically based regional planning instead of central planning under Bill 36. The minister does not know how to plan for a region better than the regional authorities. Vague promises of giving the locals a hearing is not good enough.

It's always interesting to me, Mr. Chair, that they start off by having a regional advisory council. This is where they're going to ask advice on what they should do. Why don't we just leave it there, in those regional areas, with the so-called council that they're looking for?

Alberta currently has a number of respected, experienced bodies that regulate growth and development: the Alberta Surface Rights Board, the Energy Resources Conservation Board, the Alberta Utilities Commission, the Land Compensation Board. These independent bodies have been in power to balance economic growth with property rights in the overall interest of Albertans. For the most part they have been doing a reasonable job. Reforms should be made within the existing framework to address problems so that Alberta's regulatory system is open and fair for all.

When ministries override these independent authorities, the results are often disastrous, as we are seeing with Bill 50, where the current government took the power line needs assessment out of the hands of independent experts. The Wildrose caucus believes that government should resist the temptation to overrule and undermine independent bodies. They are there precisely to serve as a nonpolitical check that acts in the public interest while treating individuals fairly, but this government seems incapable of seeing the value of independence. They don't appreciate that there need to be checks and balances to ensure that the government is limited and accountable and does not either trample the rights of the individual or set the whole province back by pursuing misguided ideological projects, with all kinds of dangerous and unforeseen consequences.

We also have a great deal of existing legislation, passed by this House over the years, that has evolved to handle growth and conservation issues. The most troubling act that Bill 36 overrides, in my opinion, is the Water Act. The Water Act is designed to manage this precious resource. We need to work within it rather than let the stewardship minister trample the water rights it bestows. Water licences, especially in southern Alberta, are a valuable piece of property. The first in time, first in right principle has been working well, and it has handled our shortages for decades. All this is threatened to be overturned. The Water Act is predictable, and we know when and how and in which priority the water is going to be allocated.

Organizing our regions along watersheds makes some sense even if they are too big in the current model, but we don't need to generate a whole new provincial department under the sustainability minister to duplicate what it should be doing in the Environment department. Under the Water Act and under the Environmental Protection and Enhancement Act the Environment minister sets overall limits, guided by consideration of cumulative effects. Local authorities are empowered to make decisions for their communities within these broad limits established by the province. This should continue to be the basis of land-use planning. The Wildrose believes that we should let the Water Act work and let the Environment ministry do its job of monitoring specific emitters and setting overall parameters based on cumulative effects.

We also believe that the most offensive aspect of Bill 36 is the utter disregard for individual rights. This concern was not adequately addressed by the window dressing of this Bill 10. The provincial government has a leading role in protecting the environment and establishing the powers of local authorities. It has been doing so for a century. There are many established practices and rights that have been conferred over the last century. It is important that these not all be overturned for the sake of ministeri-

Mr. Campbell: I'll just say again that on April 27, 2009, we announced Bill 36, the Alberta Land Stewardship Act. The news release included a backgrounder that outlined the regional planning process and one that provided a full history of public consultation going all the way back to May of 2006. I bring this up in the interest of showing transparency in a public process that has had wide public participation. That public participation continued and continues today.

Two days after announcing the legislation, we announced province-wide public open house information sessions on Bill 36. Eleven sessions brought Bill 36 to public attention and discussion from Grande Prairie to Wainwright to Pincher Creek. Sessions were added for Edmonton, Calgary, and Medicine Hat. These were followed with community sessions in the lower Athabasca and neighbouring communities on the lower Athabasca regional planning process and Bill 36.

Over the course of May and June of 2009 government officials were in 26 communities discussing Bill 36. This was all fully transparent. It was publicly announced, posted, advertised, and promoted, and it was all done in the spirit of and commitment to accountability. In the meantime the bill was going through debate in this Assembly, during which every MLA, including those now on the other side of the House, had full opportunity to participate.

In fact, a number of amendments were made to Bill 36 before this Assembly voted to pass the legislation. Those amendments defined the term compensation board for appeal to the amounts of compensation. They clarified how regional plans would apply to Métis settlements. Changes were made to ensure that any tax-based conservation and stewardship tools developed under the act are not implemented without the approval of the Minister of Finance and Enterprise. Another amendment required that the Minister of Infrastructure and the Minister of Transportation receive prior notice of plans to register a conservation easement. To my recollection property rights were not raised as an issue to be amended during that original debate, and there's no reason why it should have been because property rights were always protected under Bill 36.

I note that the news release, when we tabled Bill 36, was titled Bill 36, the Alberta Land Stewardship Act, Sets the Bar for Responsible Regional Planning. The news release was subtitled Proposed Act Respects Property Rights and Local Decision-making. That is important because it shows that right from the start this government was committed to property rights and was acting to protect them.

Land titles were always excluded from the definition of statutory consent, so it would be very clear that although both are instruments of an enactment, they are very different instruments. A statutory consent is permission to access a public resource. A land title indicates private ownership. Owned by the public or owned privately: very different.

It is true that Bill 36 did not provide for compensation if a statutory consent is rescinded under a regional plan. That's because those provisions already exist in other legislation; for example, in the Mines and Minerals Act, the Forests Act, and the Expropriation Act. Bill 36 respected those provisions and took nothing away from them. Bill 36 actually created a new market-based compensation provision if a landowner retained title but a portion of the land was subject to a conservation directive under a regional plan.

10:20

The Alberta government has good reason to be committed to property rights. First, this is a Conservative government. The rights of the individual is a basic principle of Conservative ideology. Second, many MLAs in this government are landowners. Some, including the Premier, are landowners for the third or fourth generation. We have a personal interest in seeing property rights protected.

In spite of the protections in the act and the government's reasons for protecting property rights, critics with an agenda succeeded in scaring or angering a lot of people over a situation that never existed, and they claimed that we did all of it behind closed doors in spite of a history of consultation going back to 2006, in spite of a populated and accessible website, in spite of public advertising and open houses and information sessions.

The Premier responded. He ordered a review of the Alberta Land Stewardship Act because the intent and the language clearly were being misinterpreted. He made a promise. No regional plan would be approved until the act was clarified to show full respect for property rights, including compensation and appeal and respect for the right of Albertans to be consulted on decisions that affect them.

That brings us to Bill 10, the Alberta Land Stewardship Amendment Act, 2011. The wording of Bill 10 has been clarified specifically to show that all existing rights under other legislations are respected.

In particular, I wish to speak to section 5, entitled Consultation Required. This section creates new checks and balances to ensure a transparent consultation process. As a result, regional plans under the land-use framework must be developed through a transparent and accountable process that requires public consultation. We were already doing that, but we weren't required to do it under the law. Now the law is being changed to require what we were doing anyway as a good practice and out of respect for the opinions of Albertans.

Government recognizes that regional planning needs to be informed by regional representatives and by people who live in the planning region. Regional advisory councils of Alberta have provided advice to the government in the development of the first two regional plans, for the lower Athabasca and the South Saskatchewan regions. Many of the people on these councils live and work in their region, representing a broad cross-section of experience and expertise. They generously provide local perspective and wisdom.

In the lower Athabasca the government conducted three rounds of consultation with the public, stakeholders, and municipalities. The first round was the sessions I already mentioned, in May and June of 2009. Those awareness sessions were held in a number of communities in the lower Athabasca and the adjacent upper Athabasca and North Saskatchewan regions. More than 250 people were involved in 13 public and stakeholder sessions, including two in Fort McMurray. The other communities were Lac La Biche, Bonnyville, Cold Lake, Vermilion, St. Paul, Fort Chipewyan, Fort Smith, Athabasca, Smoky Lake, Wabasca, and Fort Vermilion.

For the second round, in September of 2010, the government sought input on the regional advisory council advice in lower Athabasca and in nearby communities in the adjacent regions and in Edmonton and Calgary. Just under 800 people participated in public open houses and stakeholder sessions in the following communities: Bonnyville, Cold Lake, Fort Smith, Fort Chipewyan, Fort McMurray, Lac La Biche, Elk Point, St. Paul, Athabasca, Edmonton, and Calgary.

At this very moment the government is once again consulting with Albertans on the third phase of consultation, this time on the draft lower Athabasca regional plan.

In the South Saskatchewan region the government conducted awareness sessions in 16 communities in the fall of 2009. More than 850 people participated in the stakeholder and public sessions

throughout the South Saskatchewan. Sessions were held in the following communities: Calgary, Vulcan, Strathmore, Claresholm, Cochrane, Okotoks, Airdrie, Canmore, Lethbridge, Brooks, Fort Macleod, Pincher Creek, Medicine Hat, Taber, Cardston, and Milk River. The advice to government from the South Saskatchewan regional advisory council has been recently released for public scrutiny, and consultation with the public will occur through an online workbook.

[Mr. Marz in the chair]

Aboriginal consultation is also critical and has being conducted in an ongoing and continuous fashion throughout the planning process. For example, aboriginal consultation for the lower Athabasca regional planning has been very extensive and inclusive. Since the regional process began in January of 2009, a total of 79 meetings have been held with aboriginal groups. Twenty-five different First Nations aboriginal groups have been contacted, and an additional 16 meetings will be held this April and June with aboriginal groups to discuss the draft plan.

We are doing all this without the law saying we had to. Now under Bill 10 we have a legal requirement to do what we are committed to doing anyway, consulting with Albertans in developing a regional plan. Furthermore, section 5 of Bill 10 requires that the findings of these public consultations must be presented to cabinet. That's accountability. This ensures that the thoughts, concerns, local wisdom, and the special knowledge of regional residents and other Albertans are brought to the cabinet to assist them with responsive decision-making.

Proposed regional plans or amendments will now be required under the amended section 5 in Bill 10 to be laid before the Legislative Assembly. This is all before cabinet can make a final decision about any plan. This gives all members of the Assembly an opportunity to review a regional plan, the same opportunity they had to review the original Bill 36.

All these aspects of section 5 of Bill 10 contribute to a more open, transparent, and accountable process that engages and involves Albertans. It's what we were doing anyway. Bill 10 makes it the law. By doing so, Bill 10 responds to concerns about accountability and strengthens that commitment to Albertans.

For the sake of increased transparency and accountability I ask you to support Bill 10, the Alberta Land Stewardship Amendment Act, 2011.

Thank you, Mr. Chair.

The Acting Chair: The hon. Member for Edmonton-Strathcona.

Ms Notley: Thank you, Mr. Chair. It's a pleasure to be able to rise to speak to Bill 10, an act to amend the Alberta Land Stewardship Amendment Act. This, of course, is a bill that has received a great deal of political attention over the last few weeks arising from a fairly animated debate within the public about what the implications of the bill are to all Albertans and, in particular, to those who are concerned about property rights. This is something that has been discussed at some length throughout communities in the province, and it raises some legitimate concerns.

Probably the key thing to point out at this point, however, is that those concerns that have been expressed throughout Alberta relate not solely to the Alberta Land Stewardship Amendment Act but really relate as much or, I would suggest, more to the former Bill 19, the land assembly act, and Bill 50, which is related to issues of transmission lines. If any two acts were actually directed at undermining the rights of property owners, particularly in rural Alberta, then it was really those two acts.

It's very disappointing to see the government come here today, in this session, claiming to address concerns but not actually addressing the two acts, which had much more wrong with them in many respects than the third act which has been lumped into this so-called property rights discussion and concern that has been generated in parts of rural Alberta. So it's really quite disappointing to see that neither Bill 19 nor Bill 50 has been addressed.

Just briefly to identify, to go back to that. With respect to Bill 19 we saw situations where we had the ability of the government to designate certain project areas that could easily overlap on private land and put land under a project area order for an indefinite period of time and, thus, substantially impact the rights of the people who own that land. That was a significant concern, and that continues to be a concern that remains entirely unaddressed by any of the efforts that we see reflected in Bill 10.

Bill 50, of course, we talked quite a bit about. That was a key bill that limited transparency and limited public accountability and limited the opportunity for property owners and other members of the public who have an equal interest in many of these decisions, property owners or not property owners, to engage in a discussion about the merits and the degree to which a particular initiative actually met the public interest through the AUC process. That was clearly more evidence of this government's trend towards moving everything behind closed doors and making all their decisions amongst their little group of friends and excluding Albertans from the major decision-making processes in this province.

Bill 19 and Bill 50 were probably the most critical bills, quite frankly, that generated or sparked off a lot of the controversy. Those are the ones that the government is absolutely unwilling to touch because those are the ones that are so important to folks in industry, so the government won't touch them.

10:30

Well, what was Bill 36? What was the Alberta Land Stewardship Act? What was it supposed to do, this bill that the government is now proposing to amend? As we said when that bill first came through, it was premised on several years of consultation, and it was premised on the notion of a land-use framework, which included a number of worthy principles and ideas and policy initiatives. When that bill came forward a couple of years ago, we identified that, certainly, it grew out of a very positive process that was designed to achieve good things in the best interests of all Albertans. Unfortunately, at the time we said: hear this; there are some real problems with how you're planning on going about it. We had some very significant concerns.

One of the concerns that we had at the time, which continues to this day, was that there were far too many mechanisms through which the government would be able to keep ultimate control of what the outcome was and to make those decisions about what the ultimate outcome was behind closed doors, with a tremendous and profound lack of transparency, you know, notwithstanding that we're going to set regional advisory councils, appointed, of course, hand-picked by the government. Those regional advisory councils themselves would just simply make recommendations, but then the government would certainly have the ability to review and revise and have more meetings behind closed doors and then change what those advisory councils were putting forward. That was the kind of thing that actually went directly against the very transparency that the government claimed was part of the original land stewardship approach.

Indeed, what we've seen since then is exactly that kind of thing. We have the lower Athabasca regional plan. We had an advisory panel, that was appointed very much by government. Although there were some good people on that panel, it was definitely a

panel that did not fully reflect the broad range of groups and stakeholders whose public interests were at stake in terms of the outcome of that plan. Nonetheless, the regional advisory committee did come up with a plan and submitted it to the government, and then the government, behind closed doors, clearly had more conversations with people. We don't know who. We don't know on exactly what. We can make assumptions. But we certainly didn't have it all on the public record. Then changes were made.

Then we brought out another draft land-use framework for that area, which, strangely, accorded much more with the wishes and desires of industrial players in that area and ignored a number of the concerns put forward by community members, First Nations groups downstream from major industrial activity sites, and scientists who were concerned about environmental implications. Those things were mostly ignored, and then we sort of went back to what it was that industry had been advocating for most of the time. Of course, that whole process: we didn't see exactly how that deliberation was done. That was all done by cabinet and by the minister. Now we have another draft report, and we don't know exactly what's going to come of it. We won't be at that table when those decisions are made. It'll just be provided to us.

That was one of the problems that we had with the Alberta Land Stewardship Act in the first place. It was absolutely founded on very good principles, but at the end of the day there needs to be a level of trust with this government, and this government has not earned the trust of the majority of Albertans for years and decades. We simply don't have enough trust in this government to let them go behind closed doors and make these kinds of decisions. As a result, some of the concerns around this Alberta Land Stewardship Act have inflamed people from all different ends of the political spectrum because there are so many opportunities for government to fiddle with the process in a way that does not reflect the public interest.

The question now is whether Bill 10, which we're talking about tonight, deals with any of these problems that we first identified when we said: listen; a good concept, good principles, but you're not implementing it in a way that's going to be the best for Albertans. I would suggest that, in fact, Bill 10 does not address many of the concerns that have been raised throughout this process.

What are some of the failures? Well, generally speaking, I think it's fair to say that what Bill 10 will do is it will cause more confusion and more delay and more opportunities for legal wrangling that will extend this period in-freaking-definitely. It is really quite unfortunate because as it is, although there were grand pronouncements and fabulous articulations of good principles around the Land Stewardship Act and around the land-use framework, the fact of the matter is that the government is way behind schedule in terms of moving forward with any of the land-use frameworks.

[Mr. Mitzel in the chair]

When I first got elected, in 2008, we had all of these great, shiny timelines that we could all look forward to, and we are well behind all of them. The Minister of Sustainable Resource Development tells us that maybe by 2017, all things being equal, we'll be there. Well, I think we all know that he's dreaming in technicolour, and I think he knows that, too.

We don't have the resources dedicated to the work, the Ministry of Environment is completely unable to provide the sort of support that's necessary to do the work, and it's clearly an intensely political process, where we go through sort of the facade of public consultation. Then the draft report is picked up, and everyone scurries behind closed doors and meets with countless vested interest groups, and then we come up with another version. Then we delay and delay and delay, and more conversations are had.

We've been waiting around for two years for the first LARC, and we're still not there. I can't even begin to imagine how much longer it will take for that to be complete because I know that it is an intensely political process. I suspect it will be subject to unprecedented levels of ongoing lobbying before we get anywhere with it.

Does Bill 10 change that? No. It just opens the door for that many more opportunities for behind-closed-door lobbying to take place and for more delay to be suffered by Albertans. The thing of it is that, you know, I've heard people argue: well, you know, it's okay because we've got a legal regime in place that sort of deals with the unfettered, unplanned, chaotic development that we see in this province. But the reality is that even that has been put on hold. Whenever we say to representatives of government, "Gee, you know, you do have this other piece of legislation here, and through that maybe you could engage in some form of planning, some form of conservation, some form of disposition, depending on whatever it is that you want done," we're told, "Well, we could, but let's just wait for the regional land-use framework to come into place." "When will that be?" "Well, sometime between now and 2000-and-whenever." In fact, we've actually now succeeded in some ways in crippling the current legislative regime that's in place. That's sort of the general gist of what Bill 10 does.

Now, we see the new section 15.1 under section 12 of Bill 10. It talks about this whole new process. It injects this whole new process, that after we've gone through this five-, 10-year process, however long it is until we actually get to a land-use framework plan in a particular region, well, then there's the opportunity for applications for variances to be made.

The trigger or the basic level that makes one eligible to make a variance is so low that we will probably see nothing but variance applications for another two years afterward, which will effectively render the regional plan unrecognizable in many cases. Even if it doesn't, it will ensure yet more delay. So I'm not really entirely sure how well thought out that process is, and of course it all goes to the minister, who's not having public hearings. You know, we're not seeing what the arguments are in public, in a transparent way. There's just an application, and the minister kind of goes: maybe, maybe not. This actually puts more discretion back to the cabinet, back to the minister, which is exactly the kind of thing that everybody said was one of the fundamental problems with this act when it first came through. So that doesn't fix it.

10:40

Then we have this whole question of: what triggers the ability to apply for a variance or for variance reviews? It's no longer the kind of thing where we're looking at simply sort of the loss of a land right, but we're now looking at any kind of – I think language is diminution of property value. That's a tremendously vague term. Again, I think what we're going to end up doing is opening the door to copious applications, that will invariably delay the whole thing and ultimately mean that this act dies an untimely and very early death. I mean, it's already on its way because it's very clear that the political will and the resources to support this initiative are only partially supported by this very divided government caucus. It's very clear that it's already, you know, starting to heave its last breaths, but this will ensure that it really does.

You know, another point that I came across in doing a little bit of reading around Bill 10 and what it stands for is this notion that we have the new 19.2, which allows persons directly affected to request the review of the regional plan. I find it very concerning that people who are directly affected, i.e. the property owners,

his life, decided: oh, we'll protect property rights. Here we are 800 years later, and coming up in three years, we're going that full circle, where we think that the king should be able to make the rules and say: "This is what's best for these areas. This is what we're going to invoke, the plan." Again, like I say, it's so comical to think that they would go to a regional advisory committee and say, "What do we need to do there?" and then pass that off to the minister to say, "Now it's yours, and you can go" when they supposedly are relying on a regional advisory committee. Yet they're empowering the minister to make those decisions, to have the discretion to say: "You know, we're not going to listen to the regional advisory committee. We've listened, we've consulted, but we don't have to do."

The most important thing, if we really want to have accountability, is to pass recall. A Wildrose government will have recall, and when government steps out of line, we can stop something. I see the hon. Member for Edmonton-Centre is shaking her head, afraid of allowing the people to hold the power. There's nothing more important than power in the people's hands and accountability 24/7, not once every four years.

Ms Blakeman: Recall doesn't do that.

Mr. Hinman: It does. People haven't researched it. They don't understand it.

We need accountability, and this bill doesn't give accountability. It's just the opposite. It empowers the cabinet. It empowers the minister to make arbitrary decisions over land, over development, over industry, and basically instead of extinguishing rights, they now say that they're going to rescind rights. [interjection] Isn't it interesting that the Minister of Energy is now commenting that he likes to support the Liberals. We've always known that, that they're closer to the Liberals' thoughts.

Again, big government is better government in their mind. This bill absolutely shows that. We understand the intent, what they want with this, Mr. Chair. It's a sad day for Alberta that this bill is going to pass out of Committee of the Whole this evening with no amendments accepted though the government has brought forward numerous amendments because of their shortfall. It's very disappointing.

With that, I'll sit down, and the Energy minister maybe now wants to pontificate on why it's so great.

The Deputy Chair: The hon. Minister of Justice and Attorney General.

Mr. Olson: Well, thank you, Mr. Chair. I don't believe I have too much time left to speak here, but I just want to get a few comments on the record. I'm happy to speak to this Bill 10 because I am a third-generation rural landowner. I have a passion for my land, and I know all of my neighbours around me have a passion for their land. I'm also a lawyer, and I'm familiar with a circumstance where lawyers don't agree on any number of issues. With that in mind, you know, I want to talk a little bit about what motivates me to support this bill and also to have supported Bill 36.

This is difficult because anytime you're talking about planning, you are potentially talking about limiting people's rights. When I go to a meeting of landowners who have concerns about property rights, I'm thinking they probably drove on a highway that went past somebody's house, that maybe limited their rights because maybe there wasn't always a highway there. The fact of life is that we have to plan for the future in Alberta. This legislation is about planning for the future, and we have to create a balance between protecting property rights, which I am passionate about, while at the same time planning.

The Deputy Chair: I hesitate to interrupt the hon. Minister of Justice and Attorney General, but pursuant to Government Motion 15, agreed to on April 27, 2011, the time allotted for debate in Committee of the Whole on Bill 10, the Alberta Land Stewardship Amendment Act, 2011, has expired. I must now put the following question. On the clauses of the bill, are you agreed?

[The voice vote indicated that the clauses of Bill 10 were agreed to]

[Several members rose calling for a division. The division bell was rung at 11:30 p.m.]

[Ten minutes having elapsed, the committee divided]

[Mr. Mitzel in the chair]

For:

Ady	Goudreau	Prins
Allred	Groeneveld	Renner
Benito	Knight	Rodney
Bhullar	Leskiw	Rogers
Campbell	Liepert	Sarich
Denis	Lukaszuk	Tarchuk
Drysdale	Marz	VanderBurg
Elniski	McQueen	Webber
Fawcett	Olson	

Against:

Anderson	Kang	Pastoor
Blakeman	MacDonald	Taylor
Hinman	Notley	

Totals: For – 26 Against – 8

[The clauses of Bill 10 agreed to]

[Title and preamble agreed to]

The Deputy Chair: Shall the bill be reported? Are you agreed?

Hon. Members: Agreed.

The Deputy Chair: Opposed? That's carried.

The hon. Deputy Government House Leader.

Mr. Renner: Thank you, Mr. Chairman. I move that the committee rise and report Bill 10.

[Motion carried]

[Mr. Mitzel in the chair]

The Acting Speaker: The hon. Member for Calgary-North Hill.

Mr. Fawcett: Thank you, Mr. Speaker. The Committee of the Whole has had under consideration a certain bill. The committee reports the following bill: Bill 10. I wish to table all copies of amendments considered by the Committee of the Whole on this date for the official records of the Assembly.

The Acting Speaker: All those members of the Assembly who concur with the report, please say aye.

Hon. Members: Aye.

The Acting Speaker: Opposed, please say no. So ordered.

Province of Alberta

The 27th Legislature
Fourth Session

Alberta Hansard

Tuesday evening, May 10, 2011

Issue 33e

The Honourable Kenneth R. Kowalski, Speaker

Legislative Assembly of Alberta

7:30 p.m. **Tuesday, May 10, 2011**

Government Bills and Orders
Committee of the Whole

[Mr. Mitzel in the chair]

The Deputy Chair: I'd like to call the committee to order.

Bill 16
Energy Statutes Amendment Act, 2011

The Deputy Chair: Are there any comments, questions, amendments to be offered with respect to this bill?

Some Hon. Members: Question.

Mr. Chase: We all wish. It's not you wish; it's we all wish tonight.

With regard to Bill 16, Energy Statutes Amendment Act, 2011, I had already expressed my opinion that for the most part I was supportive of Bill 16. There is concern, however, in our caucus – and it's important to get that concern on the record – that this is such a complex bill that while we've received a certain amount of briefings and we appreciate the briefings that we've received, there are still unanswered questions as to the extent of this bill.

We continue to have concerns with regard to the sequestration aspects of it. We have a good understanding of the value of the coal resource, as I pointed out when I first spoke to this bill, and the idea of the gasification of coal I very much appreciate. The underground process involved is somewhat of a concern based on the sequestration elements involved. The government has chosen to spend $2 billion on carbon sequestration, which is not an absolutely solid-proof science, but that large commitment of funds is a concern to us. The federal government has kicked in approximately a billion dollars, so we've got $3 billion worth of taxpayers' funds riding on this, and we don't have a similar commitment from industry. In other words, there isn't a $6 billion pool out there should things not work as we would hope. Industry to a large extent has been left off the hook on this particular bill just as they're left off the hook when we get to be talking about Bill 10.

Those are the primary concerns that we have. The idea of the regulatory framework is important. Obviously, we need those regulations. We'd like to see the role of the ERCB in terms of the regulatory process strengthened. As I mentioned before, and I don't want to go into detail again: the possibility of the regular gasification of coal as opposed to putting it up the chimney, as is currently the process, and adding to the pollution. Despite Premier Klein's assertions there is no such thing as clean coal. We have cleaner versions of coal in Alberta, but it's a myth to suggest that there is no pollution associated with the burning of coal. Whether it's turned into a synthetic gas or not, there are still emissions that have to be dealt with.

Those primarily, Mr. Chair, are the concerns that I have over Bill 16. The complexity, as I say, will hopefully not come back to bite us at some point in the future.

Thank you, Mr. Chair.

The Deputy Chair: Any other members wish to speak?

Seeing none, I will call the question.

[The clauses of Bill 16 agreed to]

[Title and preamble agreed to]

The Deputy Chair: Shall the bill be reported? Are you agreed?

Hon. Members: Agreed.

The Deputy Chair: Opposed? That is carried.

The hon. Deputy Government House Leader.

Mr. Zwozdesky: Thank you very much, Mr. Chairman, and thank you to all members for their support at this juncture of Committee of the Whole on Bill 16. I would move that we now rise and report the Energy Statutes Amendment Act, 2011, otherwise known as Bill 16.

[Motion carried]

[Mr. Mitzel in the chair]

The Acting Speaker: The hon. Member for Whitecourt-Ste. Anne.

Mr. VanderBurg: Thank you, Mr. Speaker. The Committee of the Whole has had under consideration a certain bill. The committee reports the following bill: Bill 16.

Thank you, sir.

The Acting Speaker: All those members that concur with the report, please say aye.

Hon. Members: Aye.

The Acting Speaker: Opposed, please say no. So ordered.

Government Bills and Orders
Third Reading

Bill 10
Alberta Land Stewardship Amendment Act, 2011

The Acting Speaker: The hon. Deputy Government House Leader.

Mr. Zwozdesky: Thank you very much, Mr. Speaker. On behalf of the hon. Minister of Sustainable Resource Development it's my pleasure to move Bill 10, the Alberta Land Stewardship Amendment Act, 2011, for third reading.

The Acting Speaker: The hon. Member for Calgary-Varsity.

Mr. Chase: Thank you very much. Bill 10 is the equivalent of trying to stuff the winds back into Pandora's box and then keep them there when they should never have been released in the first place, as was the case with bills 50, 36, and 19. I will give the government credit for trying to repair three pieces of questionable legislation, but this doesn't quite achieve what the government had intended.

I have spoken in praise of the former minister of sustainable resources, who is now seeking the leadership of the Conservative Party, for dealing with land stewardship. Unfortunately, we just got basically to the opening chapters. A previous minister, prior to my time in this Assembly, Lorne Taylor, talked about the idea of water stewardship, the blue gold aspects. He is still sort of in the background in terms of being connected with the location and mapping of underground aquifers, which is part of the whole process of stewardship.

Unfortunately, what has happened is bills like Bill 50, Bill 36, Bill 19 are the equivalent of the cart before the horse because until the actual land stewardship is dealt with we have a series of one-

offs. We have, for example, the one-off that is happening in the Castle-Crown area, and that's the clear-cutting where over a period of 30 years one-third of the Castle will have been decimated with this approach to clear-cutting.

Also, with regard to land stewardship in the north the government continues to approve ever-growing tailings ponds. The new methodology, whether it's the sun-dried, spread-it-out, scatter-it-across circumstances, is not keeping pace with the ever-expanding tailings ponds. This is another concern I have.

Also, the whole idea of land stewardship – the land-use framework is the term that I've been searching for – started off correctly in terms of identifying six regions based on water. Obviously, water has to be our starting point. The current system, where anything goes anywhere at any time, makes the whole notion of the land-use framework of no consequence.

7:40

This is a concern that Bill 10 is attempting to address but still does not provide sufficient relief, I guess would be the word I would use, for individuals concerned about the expropriation of their land. The highlights of this bill are that it allows for a wider consultation process, both before a regional plan is developed and when plans are being amended. It allows for compensation for those who are directly impacted, and it apparently allows for appeals regarding either a regional plan or an amendment to a regional plan.

Mr. Speaker, we're aware that there has to be a balance between private ownership and public good. For example, the Liberal Party believes that the rapid rail, the speed train from Calgary through Red Deer and on to Edmonton, is a very good concept. There are chances that, depending on which route is taken – and of course the people in Red Deer hope it goes by their municipal airport because they've purchased land there to develop a station, hoping that that will be the chosen route. But there is the possibility that individuals along whatever right-of-way is chosen will not necessarily agree with the land price that is being offered by the government.

Under certain circumstances for the good of the entire province expropriation has to happen. It's the scale of expropriation that concerns people, particularly with regard to the utility corridors. There is an awful lot of doubt, particularly with the route chosen from northern Alberta to carry electricity down south, where, despite a slight improvement in the price of gas, the idea of local production of electricity as opposed to lengthy line losses is still a preferable option. People aren't convinced, an awful lot of rural landowners aren't convinced that this isn't just taxpayer subsidized, whether it be $10 billion or $16 billion, for the company to export our power down south.

The people in Montana aren't exactly thrilled about what's happening either. We've seen what's happening in terms of Montana and Idaho with bringing up the heavy equipment for the Kearl project. So there are legitimate reasons for people to be concerned about who's benefiting from this Alberta Land Stewardship Act.

We still, unfortunately, create a lot of our energy through coal. It's not the gasified coal. It's the up-the-chimney, polluting variety. In terms of our bitumen processing developments we're putting out an awful lot of chemicals unscreened through the chimneys there. So what's happening is that we are benefiting the countries to whom we export, but we're basically, to use the bird analogy, fouling our own nest, and other individuals are reaping the benefits of our lack of balance.

Now, there is no doubt that we need to expand our exports. There is a concern – and it possibly is playing politics with President Obama – and whether the line down south is not only going to export bitumen but is going to export jobs, it is going to be a circumstance worthy of pursuing.

I believe most members in this House, Mr. Speaker, have seen presentations by Dr. Brad Stelfox where he takes us back to the first oil and gas discoveries, the first development of cities. In other words, he takes us back, rolls the clock back to about 1905, and then with a series of dots he brings us up to where we are in 2011. Then he expands the notion of, if we continue at the pace we're going, what Alberta is going to look like and what places, unfortunately, are going to be overrun if the industrialization continues at the pace it is going.

Land stewardship is about a balance between industrial growth and environmental protection. I think a number of us in this Assembly are either parents or some of us have reached that grandparent stage, and passing on a legacy of value to our grandchildren and our children is extremely important. The Alberta Land Stewardship Amendment Act attempts to make the process more open, more subject to appeal, but this government is going to have to do an awful lot of convincing, particularly in the rural areas affected, that it's acting in the best interests of landowners as well as the best interests of the province in terms of going forward.

Regardless of the concerns that opposition members will be expressing tonight, this bill will go ahead. The government will pass it, and Albertans are left basically holding their breath and once more, because they don't have much choice until the next election is called, trusting that the government is not going to steamroll their land acquisition.

As I began, Mr. Speaker, we've got bits and pieces. We've got a series of loose ends which are not going to be tied together by Bill 10. The whole land act remains basically on hold, so it's an anything goes circumstance.

Mr. Speaker, I don't wish to hold the floor. I have expressed the concerns I have that Bill 10 does not go far enough in relieving the pressure or providing the stewardship that its name suggests.

Thank you for the opportunity, Mr. Speaker.

The Acting Speaker: Any other members wish to speak? The hon. Member for Calgary-McCall.

Mr. Kang: Thank you, Mr. Speaker. My colleague from Calgary-Varsity shed some light on Bill 10, the Alberta Land Stewardship Amendment Act. This goes on to correct some, maybe all of the fears that were created by Bill 36, Bill 19, Bill 50. If we had had Bill 36 done correctly, we wouldn't be here today.

The bill is designed to take some power away from the cabinet, which was originally awarded to it not by a bit but in heaps, and allow compensation for those who were directly impacted by the regional plans. It also creates a public appeals process, all well and good. It also changes "extinguish" to "rescind" in section 8.

However, amendments to this bill do raise some concerns regarding the extent of future regional plans. Will what we see coming forward from regional advisory councils and later the government be too weak or have any real impact in protection of the environment? Is it out of concern that if they're too forceful, the government will face appeal after appeal?

The bill does remove some of the powers that had originally been given to the cabinet, which is a positive move, and it provides for a greater consultation and opportunity for compensation.

7:50

Section 5 requires consultation with respect to the proposed regional plan and requires that proposed regional plans or amendments be tabled in the Legislature. Further on section 14 amends section 19 of the act. This allows the person who is directly or adversely affected by either the region plan or the amendment

plan to request a review again within 12 months. Section 5 requires a proposed regional plan or amendments to be tabled in the Legislature. Will this be debatable as a concurrence motion, for example, or will it simply be tabled, and we move on? There are lots of questions still that have to be answered.

We do not support the expropriation of land without due process, Mr. Speaker, including a public process, a formal appeal process, and appropriate compensation. This bill does address some of these issues, but we continue to have some questions about how.

While the Land Stewardship Act does offer some positive mechanisms for long-term planning for the development of our key resources and our land, this must be done with a transparent public process, and the power should not be exclusively in the hands of cabinet, with decisions to be made behind closed doors. We do believe in the protection of Alberta's Crown lands, sustainable development of our resources, and the growth of our urban communities.

With Bill 16, that we just passed, I don't know what kind of impact those developments in the province are going to have on the environment.

There are so many issues that Bill 16 has created. Even with Bill 10 I don't think we are going all the way. It must provide a fair expropriation process, a transparent process of determining the need for the project. Is it, in effect, for the public good? It must also include fair compensation when land is expropriated. There should be a clear process. With all those issues, you know, we're still not really clear with Bill 10. We still have our concerns, Mr. Speaker.

With that, thank you for the time.

The Acting Speaker: Any other members wish to speak? The hon. Member for Lethbridge-East.

Ms Pastoor: Thank you, Mr. Speaker. I have some notations that I got from the Red Deer Chamber of Commerce, and I'd certainly like to share them on Bill 10. One of the comments was that

> the imminent passage of Bill 10 and the proposed process of adopting each regional plan independently represent a potential for significant economic instability which may generate a lack of investor confidence.

I believe what they're getting at here is that there will be long-term, cumulative effects, and if things are done piecemeal instead of looking at what should be anticipated as long-term effects, how these long-term effects would affect different regions.

In the long run, ultimately, the land-use framework will be the overriding legislation that will probably try to draw it all together, but in the meantime many of these regional plans have gone ahead and may well have to be adopted if the land-use framework is the umbrella that would be over top.

In section 19.1, which is the compensation, which is certainly one of the more contentious issues in bills 36 and 10,

> according to Section 17(4), the Alberta Land Stewardship Act takes precedence over all other legislation including the Expropriation Act. This is a serious concern for the Chamber of Commerce as this Act gives our government over-arching authority to affect the future value of property and impact property development . . . Simply stated, the government has the power under this Act to impact the value and marketability of real property, both in the short term, and the long term.

It's their opinion that

> this section of the Act needs to be enhanced to protect and preserve the interests of the private landholder and interested parties.

Certainly, in Crown land, et cetera, I believe that interested parties are actually sometimes always all Albertans, not just somebody that happens to be within a small radius of a particular problem. That small radius or that problem could well affect us all. I think the woman in Rosebud has already spoken to the United Nations about her problem and the fact that fracking has affected her water supply from the water well. So this is a concern. It should be all Albertans that really understand what's going on in each area and how each area would be affected both short term and long term.

The protection and the preserving of the interests of the private landholder and the other interested parties would recognize injurious affection and the concept of fair market value.

> The definition of Market Value does not fairly consider that a forced devaluation is different from a sale [between] a willing seller and a willing buyer. A willing seller would choose the time to sell the property. [But] the case law under the Expropriation Act recognizes this difference and considers "highest and best use" in its deliberations by expanding the consideration beyond what would normally be considered in a market analysis. ALSA attempts to limit compensation to a "fair market analysis." This is a significant variance and places the burden of loss on individual land-owners and those with present or future interests in land, who are negatively impacted by the Plans.

The recommendations that the Red Deer Chamber of Commerce wanted the government of Alberta to consider were

> (1) Delay the third reading of Bill 10 and immediately conduct a thorough review of all other legislation that would be impacted by ALSA, since it is intended to take precedence over any other Act;
> (2) Prior to passing Bill 10, hold a moratorium on all Regional Plans under the Alberta Land Stewardship Act, keeping it open and active until all regional plans have been submitted and all issues related to procedural fairness have been fully set out and codified in the legislation;
> (3) Prior to adopting any of the regional plans, appoint an independent adjudicator to review each and all of the regional plans individually and collectively to ensure that appropriate public consultation has been considered; and
> (4) Prior to adopting any of the regional plans, conduct a thorough assessment of how any one plan may impact or interact with the plan of another region, and how all of the plans as a whole impact investment, development, and competitiveness throughout the Province of Alberta.

As we know, we live in a global economy, and I believe that investment, development, and competitiveness throughout the province of Alberta are important. However, they certainly will reflect, in the end, how we compete in the global market.

Thank you, Mr. Speaker.

The Acting Speaker: Standing Order 29(2)(a) is available for anyone who wishes to comment or question. The hon. Member for Calgary-Varsity.

Mr. Chase: Thank you. To the hon. Member for Lethbridge-East. I know there is considerable concern about two situations happening in southern Alberta. One is the potential exporting of electricity to the States and the transmission towers that will be necessary to put in place, that will take up a significant footprint in southern Alberta. Then there is also the concern that has been raised in a number of local papers and by local citizens, and that's the clear-cutting of the Castle-Crown. I wonder if the member would like to comment on those two southern Alberta concerns.

The Acting Speaker: The hon. member.

your $675 back." Whoop-de-do. Big deal. Poke you in the eye. He has probably put out $30,000.

Bill 10 has this: if there's a problem of how you're being compensated for what we're taking back – rescinding, extinguishing, whatever word the government wants to use – you can make a variation to the minister, and he'll be happy to listen. We need the court of law. The minister's office has already very much told him: "You know what? You're going to get your $675 back." That isn't what it's about. He has already struggled trying to raise capital to do exploratory mining here in the province.

Again, when mineral leases, mineral permits are rescinded at the whim of the minister, there's no stability. He says that Alberta is the absolute worst place in Canada to try and open and develop a mine. This is one of the reasons why. It's because of Bill 36 and Bill 10 and this government's bulldozing. It's interesting to use the term "bulldozing" because that's what his family first did when he was very young. They had a D8 Cat and did bulldoze mining up in the Yukon to expose the rock. [interjection] It would appear that the Minister of Infrastructure wants to make a comment. I will really enjoy his time to get up and comment on this, seeing as how there is a time allocation. You'll have your 15 minutes. You can answer it or ask me under Standing Order 29(2)(a).

It's just really disappointing that this government doesn't understand that there was a turning point in history – and the member brought it up – in 1215 with the Magna Carta where the people, the citizens of the country had had enough of the dictatorship. They wanted property rights, and 1215 was a turning point.

This bill is a turning point, but it's a turning point in the wrong direction to where people once again no longer have the recourse to the courts. It's a recourse to the minister, who is going to make his own judgments on his own bias and say: "Oh, no. We're compensating you fairly. You never should have invested $30,000 in that mineral permit. Why would you do that?" When his friends went up to the Yukon or Northwest Territories, he said: "No. This government gets it, and I've been assured that this is a safe place to try and develop and to get the mining going." It's just extremely disappointing that this government doesn't understand that. It's screamed to investors throughout the world that it doesn't in this Bill 10 in the fact that there is no recourse to the courts. It's explicit in there that there is no recourse to the courts. It's a recourse to the minister.

8:30

The other thing that they've done very, very well and the best legislation – and my computer, lo and behold, when you're counting on it, won't open up tonight in here, so I can't get my notes that I need. There's an individual out east who looked at Bill 36, and she says that she's never seen such a well-written piece of legislation that crafts it to say that this is a plan, that this is a government policy. When they craft and use those words in legislation, which Bill 10 fails to amend, what it means is that there is no recourse to the courts because it's government policy. When it's government policy, you can't be compensated through the courts on that. It takes the whole process out of the courts and lands it right in the lap of government and government ministries. At best, cabinet or maybe a few more people will debate it.

I was down in Eckville. I witnessed the government trying to defend this. I guess, you know, to show due respect to the government members who were there, none of us outside of the government MLAs were bright enough to understand that these amendments protect us. People just don't buy it. If, in fact, we're all wrong on this, then amend it into language that the common people – those who own property, those who have mineral permits, those who have oil and gas leases – can understand and feel comfortable with. But the bottom line is that those who want to invest in this province look at it, judge it, and they say: "You know what? There's a red zone around here." It's a red zone.

I remember a conference down in Florida back in 2009. There is a red zone around the oil and gas industry because of the new royalty framework, and that red zone is a communist zone. It's a five-year plan zone saying that we don't know which oil and gas companies, which mineral leases, which properties are going to be rescinded by this government and protected from the courts. There's no recourse to the courts.

It's unacceptable, Mr. Speaker. We should not be passing this bill. Bill 10 is wrong. Albertans have spoken out throughout this province. I would ask the government, the Minister of SRD now: what other rallies, what other groups have been so outspoken and come forward since Bill 11? I can't remember which year that was, when they were changing the health care, when people came out by the hundreds, by the thousands to oppose this. Yet this government just bulldozes ahead and says: "Oh, trust us. Trust us. We know what's best for you." History has proven time and time again that government doesn't know what's best for the people.

You know, we always get caught up in our passion. But if central planning is so wonderful and is the way to go, then why don't we go to our senior brothers in Ottawa and say: "Oh, you're more senior. You're bigger. You're smarter. Why don't you look after our planning and tell us what we can and can't do here in the province?" Better yet, why don't we go to the UN and say: "You know what? You're looking after world peace, world interests, and the environment, and you put out these edicts. Why don't you be the ones to tell us what we can and can't do here in Alberta?" I mean, is there any purpose in a sovereign nation with that attitude of centralization? I would say no. We're giving up our sovereignty. The people, the businesses, the entrepreneurs are giving up their sovereignty in this bill to a cabinet minister, who is going to say: we know what's best.

I kind of get a chuckle out of the idea that, you know, local planners sometimes will say: "You know what? There are not going to be any more bridges built across this river that divides our town in half." They go through excruciating pain sometimes for 20 or 30 years before they finally admit: oh, well, you know, what we should have said was that there'll be no more houses built outside this area and only up. But they limit something like a bridge across a river and say: there'll be no more of those because we want to protect the river. Yet the people keep coming and building.

This bill is going to be the downfall of Alberta. It's going to crush our economy. The question is: when? How long? Is it going to be death by a thousand cuts, or is this government going to do something drastic, like it did on January 1, 2009, when they implemented the new royalty program? They'd already done two years' worth of damage to the industry and then said: "Oh, no. It was the economy." No. It was the rules, the regulations, and the legislation that this government passed with its idea that centralization is best. Central planning hasn't worked anywhere in the world. We all relate it back to the Iron Curtain countries, where central planners say: "We know what's best. We'll tell you what industries to build and what other ones you can't build."

We need to go back to the founders. We want peace. We want prosperity. We want pristine wilderness here. How do we do that? How do we create the wealth of our nation? Adam Smith wrote it right back in the 1700s. It's by allowing those people to develop their resources, to use their intelligence, to have universities, to develop how they want to in a sovereign nation, develop and compete how they want to.

This government is squashing all of that. It's putting the fear factor over the entrepreneur through the individual who raises capital to have a new idea that might be something with new non-renewable energy, or it might be renewable energy. Can we do that? No. The government, again, with its new Premier's council on the future is saying: "We know best. We're going to tax a huge amount to go forward." This is all part of a package – Bill 19, Bill 36, Bill 50, Bill 10 now – of central planning at its absolute worst, which is not going to allow us to recover and to enjoy the peace, the prosperity, and the pristine wilderness that we have here. To step in and to write off a whole area might be the absolute best we have.

What are they going to do with shale gas? How are they going to implement this? There are so many areas, Mr. Speaker, we could and should be looking at, but it goes back to one important point, and that is the rule of law. Are we going to respect the rule of law? Are we going to have a constitutional democracy that protects the individual's life, their freedom, and their property, or are we going to have a government that says: "You know, it's in the best interests of the people that we're doing this, and it's okay to sacrifice a few"? This sounds like a war that's going on. A percentage of those first soldiers: we know we're going to have a loss. There's no reason to have an economic loss.

The Acting Speaker: Standing Order 29(2)(a) is available. The hon. Member for Calgary-Varsity.

Mr. Chase: Thank you. The hon. Member for Calgary-Glenmore has a southern perspective. You farmed, I believe, in the Cardston area. What we have been proposing for a number of years in terms of land-use framework and sustainability is the idea of returning the land in the Castle-Crown, which is relatively close to where you were – it's kind of en route – to a provincial park, the Andy Russell I'tai Sah Kòp park, and the protection of areas, whether it be for parkland or environmental purposes; in other words, establishing a balance. I'm just wondering how you feel about some of the clear-cutting that's going on versus the preservation of parkland. Back in the 1930s this land was part of Waterton park, and I'm wondering how you feel about allowing one-third of it to be clear-cut and other questionable uses. As a landowner in that area how do you feel?

The Acting Speaker: The hon. member.

Mr. Hinman: Yes? Oh, I thought that you were going to give me some counsel or something.

The Acting Speaker: I was hoping you could draw it into Bill 10.

Mr. Hinman: Well, I don't know how I can with that question. Perhaps you could give me some guidance.

Mr. Chase: Land use.

Mr. Hinman: He's saying land use, so I guess, Mr. Speaker, what he's bringing up and what I would point out in relevance to Bill 10 is that that is a watershed area. Again, you know, I think that the South Saskatchewan is going to be the next regional plan that's going to be coming forward.

The important part, I guess, looking at this and relating it back to Bill 10 and the problems that it causes, is that here we're having decisions made in Edmonton rather than by the local people. Those local people should have a far greater impact on deciding what is right and how they want to develop. Probably the most exciting part about having, you know, local regional areas decide those things is that they might want to try something different. Maybe there's an area further north that does want to clear-cut, and everyone else looks and watches and observes that and says: "Look at the problems that they're having. Let's not do that in our area. Let's have selective cutting. Let's have this boundary area."

8:40

Human nature is that we all want to progress and do better, and we love to live in wonderful, clean environments, but when you have a regional plan that's pushed down on you and they make those decisions, whether it's good or whether it's bad, there's nothing that we can do, and we don't get to try those things. I mean, many people have tried and failed, but others have looked at their failures and have been able to turn that into success. This is the problem with central planning. One area might come up with a new, innovative way or pass new laws or legislation saying: this is how you're going to care for the forest in this area. Then, we're all going to turn our eyes to that and say: wow, that's really innovative, and it really doesn't cost more. We can allow smaller lumber companies to come in and do selective cutting or to do those other areas.

The whole problem with this is the fact that what we're going to have is a central planner deciding everywhere, and what might work great in northern Alberta in a vast tract of 20 million acres for forestry to do some clear-cutting doesn't work down where you have major slopes, running water, fish habitat. Yet that person says, "Well, it worked here," and wants to impose that.

So what we need to do is to go back and respect property owners. We need to respect local people to actually make a decision: this is what we want. Whether they want more or fewer subdivisions, let them decide it, not have it imposed by some bureaucrat or higher government official saying: "Oh, why don't we step down and say that, you know, Calgary and Edmonton can no longer expropriate any land. You live within your borders. Done." That would change a lot on the development and the problems that we're facing if we were to do something like that. So it's just disappointing that we get to that point, that aristocracy where we know best, that we're entitled to make those decisions. That is so backwards. That is so wrong, in my opinion.

So many people have come and talked to me. They're so concerned about whether they're going to make this decision: oh, we need $16 billion worth of power lines. Why? Because the parameter that they've set up is zero congestion when they don't think we should be paying . . . [Mr. Hinman's speaking time expired]

The Acting Speaker: Any other members wish to speak to the bill? The hon. Member for Airdrie-Chestermere.

Mr. Anderson: Thank you, Mr. Speaker.

Mr. Hinman: It's funny that the government member leaves when it's his opportunity to speak.

Mr. Anderson: Aw, who knows?

You know, I always find it really funny when we talk about this bill and the peanut gallery over there just gets so uptight and chatty. You know, if you have nothing to worry about, if you're not worried about losing your seats or anything like that, why babble? Why chat? Why chirp? Anyway, it's interesting. It's almost like they've got something to fear, and if they don't, they probably should.

There's a huge failure to listen on the part of this government, and a huge failure, in particular, by the rural MLAs to listen to their constituents. There's just a total, utter lack of respect for what their constituents have been telling them for the last months

upon months and months and months and months. It's funny that the former Justice minister from Calgary-Elbow and the leadership candidate, an urban MLA, has actually listened and has actually done the right thing and decided: "You know what? We didn't look at this as closely as we needed to. We made some mistakes on this. We need to go back to the drawing board."

Mr. Hinman: She might actually want to be the Premier.

Mr. Anderson: Yeah, she might actually want to be the Premier. Who knows?

It's just amazing to me that she would figure that out while the peanut gallery over there, the rural MLAs for the government, continue to be the biggest promoters of this act. It is absolutely ridiculous, in my view. We don't have any excuse anymore. From when this bill was introduced to passage, it was done quickly. It was done in just a couple of months. We barely had time to review it.

Mr. Hinman: It was a big, thick bill.

Mr. Anderson: It was a big, thick bill, et cetera, and it was passed.

You know, people can make mistakes. I certainly made a mistake because I sat in this House and supported it. I spoke to it and said that it would adequately protect land rights, as the hon. Member for Livingstone-Macleod still loves to point out. You know what? We all make mistakes, and I certainly did make a huge mistake there. I apologize to Albertans for supporting this bill. That was wrong to do, and I'm more than happy to be accountable for that moving forward.

But I'll tell you: I don't understand why after this year and a half that's gone by since then – I mean, it's almost been two years that have gone by – the rural government MLAs in particular still fail to get it. They're not listening to their constituents. The constituents have passed the verdict. They've gotten educated on it, and they've passed the verdict on the bill. They don't want it. It is too much of a central planning document.

That's what it is. It's a central planning document. Just because you go and talk to a regional RAC that you appoint does not make it a regional document. It's a central planning document, plain and simple. The minister doesn't have to listen to the RAC. There's nothing in the legislation that says that he does. As long as he feels that he has consulted properly, he can do whatever the heck he wants. That is not regional planning. That is central planning. And to say anything otherwise is just completely separated from reality.

I don't understand because I know that there are – you know, it isn't about the intentions. I know that the members over there, particularly the rural government MLAs, are not anti property rights, but they've gotten into this blinder thing where all they can hear is the drivel coming from their bureaucracy telling them that this is the right way to go and from this Premier telling them that this is the right way to go. [interjection] It's drivel, and you should know that, hon. member. You should know that.

I mean, how many times did we sit there and listen about the blue blobs? You remember those conversations we had with the Minister of Municipal Affairs and others about the blue blobs and how that would affect your constituency if they didn't have a veto over those things? You remember that? You were an advocate behind closed doors of that. So why not stand in this House right now and be an advocate for it? I don't understand.

I'll tell you: that's when I became absolutely aware that this was going down the wrong track fast, when we got into the nuts and bolts of actually how this was going to be implemented and who was going to be forced to join the Calgary regional plan, for example, the Calgary Regional Partnership, and we started talking about how that was going to be possibly imposed on our county, the one that the former agriculture minister represents, myself, as well as the members for Foothills-Rocky View and Strathmore-Brooks.

We started getting into that, and it became very clear very quickly that what was being talked about here was imposing a set of regional requirements, the density requirement that our communities would have to abide by and would have to build according to moving forward if they were forced into the regional plan, otherwise there would be no water for them, and that they were going to be forced to join this. Well, that scared the heck out of me because I knew that my constituents sure didn't want that, my rural constituents. So we talked as a group on that, and it became very clear that that is exactly where the government was headed.

Now, I don't know when they're going to force those counties to join the Calgary Regional Partnership or if they're going to do it before the next election. I don't know. But I'll tell you one thing. That's when I knew that this was a BS document. That's when I realized that this was nothing more than a central planning document that was going to enforce the will of cabinet and the will of the bureaucracy, frankly, on locally elected councils and locally elected officials. It's wrong. From that point on, you know, things started to go downhill. It certainly wasn't more than a couple of months after that that I crossed the floor.

There have been other things since then. In listening to the presentation from Keith Wilson, who I'd never even met till three months ago, when I went to Crossfield to listen to his presentation – I'd never met the guy. He's a lawyer. I went in to listen to him. He knew about property rights, and he's done these transmission bills before. He's been involved in those cases and those hearings before. I went and listened to him, and I'm telling you that is a convincing and compelling case. It is.

It's not just him talking about it. There's Richard Jones, who's going to be running against the Minister of Housing and Urban Affairs in Calgary. Twenty years at the bar, a water rights expert, going to be running here for the Wildrose in the next election. Before he was running for us, he came to us and said, "Do they realize what they are doing here?" and went through the bill and tried to make people understand how this type of government centralized planning was going to affect those with water rights moving forward and the dangers that it presented.

8:50

These are not stupid people. These are people that are leaving huge amounts of money behind to run, to travel the province in Keith Wilson's case. As far as I know, he doesn't have any intention of running, but he's travelling the province on his own dime to get this message out. On his own dime, not paid as far as I know. He's not paid. [interjection] Not paid at all. Very sure.

On top of that, you have the member that is going to run there in Calgary-Acadia leaving a – who knows? – million-dollar-a-year job just basically on this issue because he's so ticked off at this PC government becoming a central planning machine. That's essentially what's happened here. That to me says all I need to know. That's commitment. That's not political. That's commitment. They really believe it, and they're case is compelling.

I know there are arguments on the other side. I understand that. Obviously, you know, not every lawyer and every expert is going to agree. There are arguments to be made on the other side. But just the fact that there's so much uncertainty – at a minimum the government could admit that there's a massive amount of uncer-

tainty out there with regard to this legislation. Even that uncertainty shows that it is a poorly drafted bill, that it hasn't been thought through properly.

If you're going to draft a bill with such reaching implications as this one has, then it makes perfect sense to make absolutely certain that it's put through the proper committee and vetting process in our standing policy committee so that we can have the experts in, so we can make sure that we get it right. Because some of the things in that bill are okay. There are some transferable development credits and things like that. These are tools that we could give to municipalities and so forth to empower them, truly regional planning organizations, give them these things as tools so that they can use them to do their own regional planning. What's happened here is that we haven't given them these tools at all. We've taken over the entire planning process, so the province is going to be implementing these plans across the board. That's not the way we should be doing it. It's not right, and Albertans don't want it.

You know, aside from everything else, right or wrong – is my legal argument wrong; is the government's legal argument right, et cetera? Take all that aside. Albertans don't want it. Rural Albertans don't want it. And I'm telling you that if you don't think that this is going to be an election issue, you're smoking something really good. It is going to be a huge election issue. Huge. And there will be multiple MLAs on that side of the House that will lose their seats just based on this one bill. One bill, and Bill 50 as well.

Ms Notley: And 19.

Mr. Anderson: And 19. But Bill 36 is really the big one. Really the big one.

An Hon. Member: That's three times as many.

Mr. Anderson: That's right. It's three times as many. You know what? Maybe if it was just one, it would be only a few, but it's these multiple land-use bills.

You don't understand the effect that you've had. I'm just still waiting for people to stand up on that side of the House and show the courage to speak out against their own government. For those of you who think that this is something your constituents want, I don't know where you're getting your information. I mean, the best information we can have is talking to people. The best information we can have is obviously doing a lot of polling. I've done both, and I know what the people are saying out there. They're certainly not saying they want this legislation. They want it back to the drawing board. They want regional planning – no doubt about it – but they want us to go back to the drawing board and get it right. They do not want centralized planning.

People are going to lose seats. Good people in here are going to lose seats because of that huge mistake that they've made in that regard, misjudging the public's anger, particularly in rural Alberta where it will have the biggest effect.

Now, everyone in here, I think, agrees with the need for better regional planning. The question is not do we need better regional planning, but how do we accomplish better regional planning? The Wildrose, as I'm sure the other opposition parties have done, have put out some alternatives in that regard. How can we have better regional planning? Well, step one, you can immediately repeal the Alberta Land Stewardship Act and pass an Alberta property rights preservation act. When private property is used for a genuine public need, there absolutely must be full, fair, and timely compensation with recourse to the courts. There's step one. Let's get the legislation right. Let's go through the proper process and put landowners first.

Step two, honour existing deals. Grandfather existing leases and licences and establish conservation areas or no-go zones before issuing leases. Investor confidence in the Alberta economy depends on it. After you've issued a licence as a government, you cannot go and just take it away and then say: we're going to pay you back what you paid for it originally. That is banana republic stuff. It is absolutely not the way to do business, and on top of the old royalty framework debacle it's just another step that this government has undertaken to make our province less competitive and really hurt investor confidence when it comes to investing in Alberta.

Step three, use what we've got. Let Alberta Environment perform cumulative effects analysis on impacted areas. They've got the experience and expertise, so let's put them to work. That's what the Department of Environment is for, to oversee the provincial environmental regulations, et cetera. Why on earth can we not empower the Ministry of Environment to oversee cumulative effects management? We all agree it's needed. Why can't they do it? They should be able to do it.

Step four, let the Water Act work. The law has allowed for a stable water supply for those with water licences in Alberta for decades. We need to get it out from under ALSA and promote it. There are many tools within the Water Act – they're there – for the transfer of water licences and the use of water. They're there. But so many can't be approved right now because they're waiting on the land-use framework, particularly the South Saskatchewan regional plan. So they've got all these people that want to do transfers using these tools under the Water Act that can't right now. They're not allowed because they can't get approval from Alberta Environment because everything is being held up by this blinking central planning document, which is the whole problem with overregulation. This is not a Conservative thing we're doing here. We're slowing down commerce, agriculture, business, et cetera, residential, commercial development because we're just not using the tools that are in the Water Act. It's becoming burdensome and full of red tape.

That brings us to step five, cut red tape. Find the best models for a streamlined regulatory framework that is balanced by Alberta Environment's authority over the stewardship of air, land, and water. And I'm glad to see the government is looking into that with Bill 16. We've had some debates on that, and that's good. Very much too late in the game, but it's better late than never. You know, it's like this bill. You could repeal it tomorrow if you really wanted to – better late than never – but I don't think you will.

Step six, the last one, involve the community. Invite locally elected officials, landowners, industry stakeholders, and other regional and government representatives to work together to guide regional development in a sustainable way. Recognize that central planning does not work. This goes back to my first point. These RACs, these – what are they called? – regional advisory councils, are appointed by the government, by the minister, I believe. So, first of all, that's not democratic at all. Who knows what special interests and what favours are being paid back there, okay?

Mr. Hinman: Kind of like the Hunter report.

Mr. Anderson: Yeah, that's right. Exactly. Kind of like the Hunter report with the royalties, very similar.

The point is that you have these people appointed by the government to give counsel on these regional plans, and even if it was a perfect mix . . . [Mr. Anderson's speaking time expired]

The Acting Speaker: Standing Order 29(2)(a) is available. The hon. Member for Calgary-Varsity.

Mr. Chase: Thank you very much. A couple of questions. You talked about the Calgary regional plan and the loss of local autonomy. You mentioned centralization quite a bit. Now, Okotoks, for example, wanted to set boundaries; they didn't want to expand. They saw the problems associated with gobbling up land. They also saw their water limitations and so on, and they were trying to restrict development. They've done some very smart things in terms of solar housing, very smart things with regard to 10 inches of topsoil because it holds the water. I'm just wondering how the Airdrie-Chestermere area is feeling about potentially being gobbled up by larger concerns as Calgary expands its 1.3 million. Is that a concern?

Also, because of your legal background, several government members seem to be very worried about courts being involved in the legislative process. So from your legal background, the relationship between courts and legislation: if legislation is done right, then courts shouldn't need to interfere and turn it over.

I'd be interested in your perception: regional planning, beating up on local areas, and legislation versus legal action.

Mr. Anderson: Thank you for that. I would say to the first part that, yeah, I am concerned about the loss of regional autonomy. It goes back to what we were talking about when that conversation was happening behind closed doors with regard to how we move forward to possibly force the counties of Rocky View, Wheatland, and Foothills into the Calgary Regional Partnership. Think about that for a second.

9:00

One of the reasons that the counties didn't want to get involved is because –for example, a place like Langdon in my constituency. There are about 4,000 people there. If they join the Calgary Regional Partnership, they would have to build to eight units per acre. In Langdon, okay? Now, if anybody knows about density requirements at all, that's insane. That means you'd have to have apartment buildings in Langdon, lots of them, in order to build towards eight units per acre. It's not reasonable, but that's what Rocky View county would have to sign on to if they are forced to join the Calgary Regional Partnership because that's what the CRP is saying: in order to get water out of the CRP, you need to build eight units per acre.

We all want better planning, and we at least want to limit urban sprawl. I don't think we all want to live in cookie-cutter houses that look the same. If I wanted that, I'd go live in Calgary. No offence to Calgary; Varsity is a very nice area and not really a cookie cutter. But if I wanted to live in Calgary, in a cookie-cutter house in suburban Calgary, I would. But that's not why people live in Airdrie, and it's not why people live in Langdon, and it's not why they live on acreages, and it's not why they live on farms. The point is that variety is good. We don't want complete urban sprawl. We want to protect the eastern slopes, for example. That's not a good place to have urban sprawl. I agree that we don't want to go any further west with urban sprawl.

Put protected areas in, do something, but why would you force communities to join this Calgary Regional Partnership, have the province force them to do so, and then have the province come forward and force those communities to build to a certain density and decide that this is what you will build to? How is that not central planning? How is it not? It is central planning in the worst possible sense.

Mr. Hinman: And how is it good?

Mr. Anderson: And how is that good? You know what? It's un-Albertan, frankly. That's what it is. It's got this Big Brother knows best, we're going to tell you how you can develop your land, we're not going to leave it to local people that, you know, have an actual stake democratically or with regard to property rights in the area – it's a top-down, centralized, quasi-socialist system, and it's wrong.

With regard to the legal question about letting courts decide land-use issues, I don't think anybody in here, as far as I know, is a legal expert on water rights or land use. That's why we need to bring people into these committees and actually listen to the experts. Imagine that. That's tough to understand, isn't it? That we're not experts on this. [interjection] I've never claimed to be an expert, hon. member. Never, ever. Quote me. [interjection] When did I? Exactly. Once again, you don't know what you're talking about. Revisionist history. That's clear. Anyway, it's just sad to see.

The Acting Speaker: Any other members wish to speak?

The hon. Member for Edmonton-Strathcona.

Ms Notley: Thank you. It's a pleasure to be able to rise and add my comments to the debate on Bill 10 in third reading. This is an interesting piece of legislation because it's one that is intensely political and not one that comes from good policy planning or development. It's not a bill that comes forward in response to any sort of genuine outcry on the part of the public. It's not a forward-looking bill that represents sort of the best of good governance. It really is a slap-happy attempt to respond to a political crisis, some of which is quite legitimate and some of which is not entirely legitimate, in my point of view.

Nonetheless, it's an attempt to create an impression of responding to that political crisis, yet it doesn't respond to that political crisis, either the real one or the alleged one. It doesn't deal with the real issues that have been raised by a number of people around the concerns with respect to this government's approach to land development generally over the course of the next many years in Alberta.

I want to say that I approach this concern from the perspective of one of these, you know, scary socialists that's been referred to by colleagues in the opposition.

Mr. Anderson: I didn't call you a socialist.

Ms Notley: I think there's been reference to my being a socialist, but they've never actually called me scary, although I think it's implicit in some of the comments they make.

Nonetheless, what I think has happened with Bill 36, which Bill 10 is designed to amend, or with the Alberta Land Stewardship Amendment Act, 2011, and with Bill 50 and with Bill 19, because I see them all as being actually quite linked in certain ways, particularly as it relates to the politics, which I believe is the underlying rationale for this particular attempt at changing the Land Stewardship Amendment Act, is that this government has really given a bad name to thoughtful, consultative, responsive, community-based planning on behalf of the public interest as a whole.

Maybe that's wild socialist language that I'm talking about there, but that's what I believe in. I believe that when you're talking about land and economic development and environmental development and growing into the future, there's nothing wrong with actually planning. In fact, it's kind of a good thing in the long run. To do it thoughtfully in a well-informed way with reference to the environmental science and the demographic plans and the economic needs of the province is a wise thing. To do it in full, open, transparent settings in consultation with the people of Alberta where your primary mandate is one and one thing only, which is

the overall public interest of the people of the province, is a good thing.

I think that some of the people that began to contribute, in particular, to the Alberta Land Stewardship Amendment Act might have actually had those objectives in place as they worked on it, but the act itself did not meet those objectives. Certainly, the act in combination with Bill 19, the Land Assembly Project Area Act, and Bill 50, the We're Going To Try and Make Sure Nobody Ever Has To Question Us on the Public Interest Around Building Transmission Lines Again Act – when you put them all together, what we've done is we've bastardized the goodwill that I think we were attempting to achieve, or some people in government might have been attempting to achieve, when we first approached the concepts inherent in Bill 36.

The Land Stewardship Amendment Act was designed to do some good things, but even when it came forward a couple of years ago, the NDP did vote against it. We voted against it for a number of reasons, probably the most important of which was that we were very concerned that the cabinet, as with all pieces of legislation that this government passes, was given an unprecedented amount of power under the act. It gave the cabinet complete control over the regional plans, and it did not provide for the type of accountability and transparency and sort of completion of the consultation or feedback loop with Albertans that was necessary in order for the kinds of decisions that were authorized under this act to be done truly in the best interests of Albertans after genuinely responding to their contribution to the discussion.

The act did not adequately, in short, reflect the land-use framework's commitment to public input and community involvement because, of course, the document, the land-use framework, preceded the land stewardship act. The land-use framework was quite genuine about public commitment. The piece of legislation that followed was a great deal more superficial in terms of the guarantees that were provided with respect to the public consultation that we were looking for. It allowed cabinet to create and amend regional plans without ever creating a regional advisory council, for example, the kind of thing that means that it was really mostly a lot of window dressing. Certainly, in what little we've seen happen under the authority of Bill 36 since then, we have seen that regional advisory councils are indeed hand-picked and that the reports are greatly massaged. Way too much happens behind closed doors, and it's way too vulnerable to behind-closed-doors lobbying to cabinet members that the public just doesn't see. The government is not held accountable for that kind of process.

Ultimately we didn't believe that Bill 36 actually provided adequate environmental protection in terms of what it required the government to do. It simply required a plan to describe a vision for planning and then to state one or more objectives for the planning region. It didn't actually identify the public interest, or it didn't identify preserving the environment. It didn't identify these things as mandatory components of regional plans.

9:10

At the time the NDP put forward a number of amendments to Bill 36 and focused particularly on efforts to honour the land rights of Albertans and also to improve the consultative processes that existed under the act. They were unfortunately rejected. So then what happened is that we had this sort of political firestorm that was developed through an analysis of Bill 36 and Bill 19 and Bill 50. The government decided to come up with Bill 10 and bring that forward and then say: "Look. We've addressed all of your issues." As I say, it's a highly superficial response, and most people who have evaluated Bill 10 and assessed whether in fact it deals with any of the issues that were originally raised around the concerns with Bill 36 have concluded that it doesn't really relate to almost any of them.

In terms of even dealing with the concerns that it did fundamentally impact property rights: really, truly, just superficial amendments there, so not addressing those issues. Then, of course, those people who particularly address property rights and who were concerned about property rights also always identified the combined authority that the government has given itself not only through Bill 36 but through bills 19 and 50.

You know, I mentioned Bill 19, or I sort of heckled Bill 19, and one of the members opposite suggested that that had nothing to do with this, but I think it really does. What I would have liked to have seen is the government come back and address some of those significant concerns because those are really the concerns that I think are probably the most substantive in many cases to the greatest number of property owners. In this case, I'm not thinking about potential industrialists. I'm thinking about Joe Average Albertan who currently owns property, maybe a bit of farmland, maybe an acreage, whatever. These are the folks that I'm thinking about.

When I think about Bill 19, you know, what did we have concerns about and what did many Albertans across the province – what were their concerns with Bill 19? Well, landowners whose land is part of a project area that can be identified through that bill don't get any compensation for the development restrictions that are placed on their land. Is that addressed through Bill 10? No. Could it be? Should it have been? Yes, because it's all part of the same discussion that generated this. [interjection] It doesn't matter. It's all part of the same political discussion.

My point is that Bill 10 is a superficial response to a political discussion. But the real substance in there as well included the concerns around bills 19 and 50. It also allowed the government to cancel project area orders at any time or without penalty. It allowed the government to choose the appeal body that a property owner might seek to have their rights assessed under. It allowed the government to impose an injunction where someone appeared to be about to commit an offence. It ultimately defined a public project without including the need for it to have any relation to the public good.

That's particularly interesting when you then combine it with Bill 50 and the fact that with Bill 50 – once again, part of this overarching theme of not consulting with Albertans, just as they don't with Bill 36 but also with Bill 10 – they've removed significant obligations on the part of the government to consult with Albertans. We've heard today about how power lines are going to be increasingly expensive. They are not in the public interest. Most Albertans would say that we don't want them, yet through Bill 50 the government has removed their obligation to consult with Albertans on it. They have given themselves more power to take it behind closed doors and have it addressed in cabinet.

This was probably the most significant complaint of Albertans. If this government thinks that this little Bill 10, this teeny-weeny little superficial bit of a bill that casually makes ever so minor amendments to Bill 36, is going to address the significant problems and concerns that have been raised by Albertans across the province with all three bills – with Bill 19, with Bill 50, and with Bill 36 – they are sorely mistaken.

They are going to, I think, suffer the consequences of that when it comes time for people to be campaigning about it in the next election. In every case they've taken the control away from the citizens of Alberta. They have given themselves the opportunity to make those decisions behind closed doors, and they will not give Albertans an opportunity to have public hearings about these very things which ought to be considered in their best interests, in the

TAB 64

Responsible Energy Development Act, SA 2012, c R-17.3

RESPONSIBLE ENERGY DEVELOPMENT ACT
Chapter R-17.3

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Interpretation

1(1) In this Act,

(n) "Minister" means the Minister determined under section 16 of the Government Organization Act as the Minister responsible for this Act;

Part 4
Ministerial Direction to Regulator

Direction to Regulator

67(1) When the Minister considers it to be appropriate to do so, the Minister may by order give directions to the Regulator for the purposes of

(a) providing priorities and guidelines for the Regulator to follow in the carrying out of its powers, duties and functions, and

(b) ensuring the work of the Regulator is consistent with the programs, policies and work of the Government in respect of energy resource development, public land management, environmental management and water management.

(2) The Regulator shall, within the time period set out in the order, comply with directions given under this section.

TAB 65

Government Organization Act, RSA 2000, c G-10

GOVERNMENT ORGANIZATION ACT
Chapter G-10

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Transfer of Responsibilities

Responsibility for Acts

16(1) The Lieutenant Governor in Council may, by regulation,

(a) designate a Minister by the Minister's personal name or name of office as the Minister responsible for an Act;

(b) transfer the responsibility for an Act to another Minister in the Minister's personal name or name of office;

(c) transfer a power, duty or function of a Minister contained in an Act or regulation to another Minister in the Minister's personal name or name of office.

(2) If a Minister is transferred the responsibility for an Act under subsection (1)(b), then notwithstanding anything in that Act

(a) a reference in that Act or a regulation under it to a Minister is to be read as a reference to the Minister to whom the responsibility is transferred,

(b) a reference in that Act or a regulation under it to the deputy of a Minister is to be read as a reference to the deputy of the Minister to whom the responsibility is transferred, and

(c) a reference in that Act or a regulation under it to the department of a Minister is to be read as a reference to the department of the Minister to whom the responsibility is transferred.

(3) If, under subsection (1)(c), a Minister is transferred the responsibility for the exercise or discharge of a power, duty or function contained in a provision of an Act or regulation, then notwithstanding anything in that provision

(a) a reference in that provision to a Minister is to be read as a reference to the Minister to whom the responsibility is transferred,

(b) a reference in that provision to the deputy of a Minister is to be read as a reference to the deputy of the Minister to whom the responsibility is transferred, and

(c) a reference in that provision to the department of a Minister is to be read as a reference to the department of the Minister to whom the responsibility is transferred.

(4) Two or more Ministers may be given common responsibility for the same Act, and in that case any reference in the Act or a regulation under that Act to a Minister, the Minister's deputy or the Minister's department is to be read as a reference to any of those Ministers and their deputies and departments.

(5) Two or more Ministers may be given common responsibility for the exercise or discharge of the same provision of an Act or regulation, and in that case any reference in the provision to a Minister, the Minister's deputy or the Minister's department is to be read as a reference to any of those Ministers and their deputies and departments.

(6) If an Act identifies a Minister as the member of the Executive Council charged with the administration of the Act, that reference is to be read as a reference to the Minister designated under subsection (1) as the Minister responsible for that Act.

TAB 66

Designation and Transfer of Responsibility Regulation, Alta Reg 44/2019

(Consolidated up to 193/2020)

ALBERTA REGULATION 44/2019

Government Organization Act

DESIGNATION AND TRANSFER OF RESPONSIBILITY REGULATION

Energy

9 (3) The Minister of Energy and the Minister of Environment and Parks

(a) are designated as the Ministers with common responsibility for the *Responsible Energy Development Act*, except section 16,

TAB 67

SECTION 67 OF THE *RESPONSIBLE ENERGY DEVELOPMENT ACT*: SEEKING A BALANCE BETWEEN INDEPENDENCE AND ACCOUNTABILITY

GIORILYN BRUNO*

In 2012, the Alberta Government introduced Bill 2, the Responsible Energy Development Act, *to replace the Energy Resource Conservation Board and to establish a single energy regulator. Among the most controversial aspects of this* Act *is section 67, which allows the Minister to give mandatory directions to the regulator. This article looks at the implications of that provision including its effect on board independence, board accountability, and the democratic process as a whole. After evaluating the case law, exploring issues of statutory interpretation, and comparing section 67 with similar provisions in Ontario and British Columbia, the author concludes that section 67 leaves open significant questions about the scope, legal status, and procedural requirements of directives issued under section 67.*

En 2012, le gouvernement de l'Alberta présenta un projet de loi 2 intitulé Responsible Energy Development Act *(Loi sur le développement responsable de l'énergie) pour remplacer le Energy Resource Conservation Board (Conseil pour la conservation de l'énergie) et pour créer un seul organisme de réglementation énergétique. La clause 67 représente un des aspects les plus controversés de cette* Loi, *en ce sens qu'elle permet au ministre de donner des instructions obligatoires à l'organisme de réglementation. Cet article examine les implications de cette disposition incluant son effet sur l'indépendance du Conseil, sa responsabilité et le processus démocratique dans son ensemble. Après avoir étudié la jurisprudence, examiné les questions d'interprétation des lois et avoir comparé la clause 67 aux dispositions semblables des lois en Ontario et en Colombie-Britannique, l'auteur conclut que la clause 67 laisse sans réponse d'importantes questions sur la portée, la capacité juridique et les modalités d'applications des directives émises en vertu de ladite clause.*

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* Research Fellow, Canadian Institute of Resources Law, Faculty of Law, University of Calgary, gbruno@ucalgary.ca. I would like to thank Professor Nigel Bankes for supervising this article and providing feedback throughout its development. I would also like to thank Professor Alastair Lucas, Professor Shaun Fluker, Jim Dilay, and Rob McManus for their insightful comments and suggestions, and the *Alberta Law Review* Editorial Board for its assistance in getting the article ready for publication. Lastly, I am grateful for the generous funding of the Alberta Law Foundation to the Canadian Institute of Resources Law which made this research possible.

I. INTRODUCTION

In response to complaints of inconsistency and complexity in the legislative scheme for reviewing and approving energy development projects in Alberta, the provincial government in 2010 launched a broad initiative to enhance Alberta's competitiveness in attracting energy investments.[1] After commissioning research studies, the Task Force established by the Alberta Government released a technical report in December 2010 observing that "Alberta's regulatory system is complex, lacking integrated policy or policy development, and involving multiple regulators with largely uncoordinated delivery."[2] In particular, the Task Force noted that multiple ministries and agencies were involved in various aspects of upstream oil and gas development and at various points in the project lifecycle.[3] To improve the system, the Task Force provided several recommendations including the creation of a single energy regulatory body.[4]

In the system envisioned by the Task Force, a single regulator would offer one point of contact for industry and other stakeholders, streamline the process for project proponents, and thus encourage investment in the province's resources.[5] Furthermore, the Task Force observed that a single regulator might be a better fit for the province's recent attempts to achieve a broader integrated management system able to address the cumulative impacts of natural resource developments.[6]

The Alberta Government promptly implemented these recommendations starting with the single regulator. As a first step, it published *Enhancing Assurance: Developing an Integrated*

1 Alberta, *Energizing Investment: A Framework to Improve Alberta's Natural Gas and Conventional Oil Competitiveness* (Edmonton: Government of Alberta, 2010), online: <www.energy.alberta.ca/Org/pdfs/EnergizingInvestment.pdf>.

2 Alberta, *Regulatory Enhancement Project, Technical Report* (Edmonton: Government of Alberta, 2010) at 2, online: <www.energy.alberta.ca/Org/pdfs/REPTechnicalReport.pdf> [*Technical Report*].

3 *Ibid* at 11.

4 The six recommendations were to: (1) establish a new Policy Management Office and ensuring integration of natural resource policies; (2) create a single oil and gas regulatory body; (3) provide clear public engagement processes; (4) use a common approach to risk assessment and management; (5) adopt performance measures to enable continuous system improvement; and (6) enforce agreements where required. *Ibid* at 54-56.

5 *Ibid* at 57-58.

6 *Ibid*; Alberta, *Land-Use Framework* (Edmonton: Government of Alberta, 2008), online: <https://www.landuse.alberta.ca/LandUse%20Documents/Land-use%20Framework%20-%20 2008-12.pdf> [*LUF*]; *Alberta Land Stewardship Act*, SA 2009, c A-26.8 [*ALSA*].

Energy Resource Regulator in May 2011.[7] In October 2012, it introduced Bill 2, the *Responsible Energy Development Act*, establishing the new Alberta Energy Regulator (AER).[8] In December 2012, *REDA* received Royal Assent and came into force in three different phases to ensure operational certainty during the transition.[9] This transition is now complete and, as of 1 April 2014, the Regulator has full-lifecycle regulatory oversight of coal, oil sands, and oil and gas development in Alberta, from project application to abandonment and reclamation. The mandate of the Regulator is "to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta."[10] The new Regulator is the successor to the Energy Resources Conservation Board, and assumes the regulatory functions of the Department of Environment and Sustainable Resource Development (ESRD) concerning energy projects, including granting permits, licences and approvals under the *EPEA*,[11] the *Public Lands Act*,[12] and the *Water Act*.[13] Furthermore, the Regulator is responsible for upstream oil, gas, oil sands, and coal development under Part 8 of the *Mines and Minerals Act*.[14]

Amongst the most significant changes, the legislature included in *REDA* a provision, namely section 67, which allows the Minister to give mandatory directions to the new Regulator.[15] While the power to issue directions may assure appropriate oversight and offer guidance within the broader policy framework of the Alberta Government, this type of provision may also cause difficulties concerning the ability of the Regulator to carry out its mandate with the required level of independence from the executive branch.[16]

This framework for energy projects established under the recent legislation is quite different from the previous system in which the ERCB had formal independence from the executive branch.[17] Thus, a series of questions arise. To what extent will the Minister of

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7 Alberta, *Enhancing Assurance: Developing an Integrated Energy Resource Regulator* (Edmonton: Government of Alberta, 2011), online: <www.energy.alberta.ca/Org/pdfs/REPEnhancingAssurance IntegratedRegulator. pdf>.

8 *Responsible Energy Development Act*, SA 2012, c R-17.3 [*REDA*].

9 *Ibid*. Phase 1 occurred in June 2013 when the *REDA* largely came into force and established the AER with a new mandate and governance structure. Phase II occurred in November 2013, when the AER assumed jurisdiction over Part 8 of the *Mines and Minerals Act*, RSA 2000, c M-17; the *Public Lands Act*, RSA 2000, c P-40; and the Private Surface Agreement Registry. Phase 3 occurred in Spring 2014 when the AER took on responsibility for the *Water Act*, RSA 2000, c W-3 and the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [*EPEA*] in relation to energy projects.

10 *REDA*, *supra* note 8, s 2(1)(a).

11 *Supra* note 9.

12 *Supra* note 9.

13 The ERCB has been dissolved and the *Energy Resources Conservation Act*, RSA 2000, c E-10 as repealed by *REDA*, *supra* note 8, ss 2, 30-61, 81, 112. *Water Act*, *supra* note 9.

14 *Mines and Minerals Act*, *supra* note 9.

15 *REDA*, *supra* note 8, s 67.

16 *Ibid*, ss 3-4. See Alberta, *Enhancing Assurance, Developing an Integrated Energy Regulator: Web Survey Feedback* (Edmonton: Government of Alberta, 2011) at 8-9, online: <www.energy.alberta.ca/org/pdfs/2011REPWebResponses.pdf>; Shaun Fluker, "Bill 2 Responsible Energy Development Act: Setting the Stage for the Next 50 Years of Effective and Efficient Energy Resource Regulation and Development in Alberta" (8 November 2012), *ABlawg* (blog), online: <www.ablawg.ca/2012/11/08/bill-2-responsible-energy-development-act-setting-the-stage-for-the-next-50-years-of-effective-and-efficient-energy-resource-regulation-and-development-in-alberta>.

17 See ERCB Board Governance Charter, September 2011 at 3, online: <www.finance.alberta.ca/business/agency-governance/agencies/B-I/ERCB-Mandate-and-Roles.pdf> (stating that the ERCB exercises its quasi-judicial and regulatory functions within the broader policy framework of the government of Alberta. While the Chair of the Board is accountable to the Alberta Legislature through the Minister of Energy for ensuring that the ERCB fulfills its legislative mandate, the ERCB maintains formal independence from the executive with respect to adjudicative and regulatory decision-making processes. Therefore, due to its independence from the government of Alberta and its specific expertise in the

Energy or the Minister of Environment and Sustainable Resource Development interfere with the regulatory and adjudicative functions of the Regulator in order to set policies, priorities, and guidelines? Will the Ministers be able to interfere with the decision-making of the Regulator? How will the ministers communicate with the Regulator in a manner that ensures transparency?

This article analyzes the power of the Minister under section 67 of *REDA*, and attempts to determine how this power may be used and its implications. The article is structured as follows. Part II discusses the rationale for establishing independent or arm's length administrative agencies and analyzes the general advantages and drawbacks of ministerial directions. Part III analyzes section 67 of *REDA* and specifically addresses (i) who may issue directions, (ii) the purpose of a direction, (iii) the legal status of a direction issued under section 67 of *REDA*, (iv) whether the Minister may issue policy directions concerning the adjudicative functions of the Regulator, (v) the procedural requirements to issue a direction, (vi) the scope of section 67 of *REDA*, and (vii) the manner in which section 67 of *REDA* has currently been used. Part IV provides a comparative analysis, and discusses ministerial directions in the context of the BC Oil and Gas Commission, the BC Utilities Commission, and the Ontario Energy Board. Part V provides some concluding thoughts on the jurisdictional comparison and on the future of directions issued under section 67 of *REDA*.

II. ACCOUNTABILITY AND MINISTERIAL DIRECTIONS

Delegation of authority from a government to agencies, boards and commissions is a common feature of contemporary liberal democracies.[18] These public bodies enjoy varying degrees of independence and exercise specialized public functions.[19] However, they also add complexity to democratic government and have been referred to as "constitutional anomalies" since they are neither directly elected by constituents nor formally part of a governmental department, and have been created outside traditional structures to maintain some level of autonomy.[20]

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regulation of oil and gas exploration and development, the courts recognize decisions of the ERCB as worthy of considerable judicial deference).

18 *Ibid* at 7. Several Directives of the European Union and their supporting Regulations emphasize the importance of independent regulators as essential in the goal of promoting competition and achieving full liberalization of electricity and gas markets. See EC, *Commission Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC*, [2003] OJ, L 176/37; EC, *Commission Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC*, [2003] OJ, L 176/57; EC, *Commission Regulation (EC) 1228/2003 of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity*, [2003] OJ, L 176/1; EC, *Commission Regulation (EC) 1229/2003 of 26 June 2003 laying down a series of guidelines for trans-European energy networks and repealing Decision No 1254/96/EC*, [2003] OJ, L 176.

19 Alberta, Board Governance Review Task Force, *At a Crossroads: The Report of the Board Governance Review Task Force*, by Neil McCrank, Linda Hohol & Allan Tupper (Edmonton: Board Governance Secretariat, 2007) at 7, online: <www.assembly.ab.ca/lao/library/egovdocs/2007/alz/162424.pdf>; Alberta, *Public Agencies Governance Framework* (Edmonton: Agency Government Secretariat, 2008) at 7, online: <alberta.ca/albertacode/images/ags-2008-02-Public-Agencies-Governance-Framework.pdf>.

20 See Anders Larsen et al, "Independent Regulatory Authorities in European Electricity Markets" (2006) 34 Energy Policy 2858 at 2859-60; *Public Agencies Governance Framework*, *supra* note 19 at 6; Lorne Sossin "The Puzzle of Independence for Administrative Bodies" at 9 online: <www.law.yale.edu/documents/pdf/CompAdminLaw/Lorne_Sossin_CompAdLaw_paper.pdf>; McCrank, Hohol & Tupper, *ibid* at 21.

There are no universal criteria to determine when it is appropriate to delegate authority to administrative agencies. The literature identifies four main reasons. First, a government may decide to delegate decision-making to technical experts in areas of policy complexity to improve functionality and decrease transaction costs. In recent years policy making has become more technically complex and requires interaction between different policy areas.[21] Political actors may not have the resources or the incentive to develop such expertise for themselves and may require the support of policy experts.[22] Furthermore, since independent institutions are closer to the regulated sector than ordinary bureaucracy, they may be able to adjust regulations to changing conditions and enhance efficiency in rule making.[23] Second, a government may delegate authority to independent bodies to partially shift the blame for unpopular policies or regulatory failure. In particular, Fiorina argues that with delegation "legislators not only avoid the time and trouble of making specific decisions, they avoid or at best disguise their responsibility for the consequences of the decisions ultimately made."[24] Third, political uncertainty, short-term goals, and poor credibility are intrinsic problems of democratic governance. Therefore, a further reason to delegate authority is to enhance political stability and increase the credibility of political commitments.[25] Since independent bodies are isolated from daily political influence or electoral constraints and have a longer time-horizon than politicians, they have the potential to increase the credibility of governments' commitments and help pursue policy objectives more efficiently.[26] As a result, a government may delegate power on the assumption that independent experts will be able to balance conflicting interests and thus make better decisions in the public interest.[27] In addition, delegation may ensure that a government's policies last beyond its term of office or will not be easily changed in the future by political opponents.[28] Finally, administrative bodies may offer the advantage of low-cost expert tribunals because, due to their structure,

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21 Robert Elgie & Iain McMenamin, "Credible Commitment, Political Uncertainty or Policy Complexity? Explaining Variations in the Independence of Non-Majoritarian Institutions in France" (2005) 35:3 British J Political Science 531 at 534.

22 *Ibid.*

23 Mark Thatcher & Alec Stone Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25:1 West European Politics 1 at 4.

24 Morris P Fiorina, "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?" (1982) 39 Public Choice 33 at 47. See also Murray Rankin, "The Cabinet and the Agencies: Toward Accountability in British Columbia" (1985) 19:1 UBC L Rev 25 at 34 (discussing a system of "selective accountability").

25 See Giandomenico Majone, "Strategy and Structure the Political Economy of Agency Independence and Accountability" in OECD, Working Party on Regulatory Management and Reform, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation* (London: OECD, 2005) 126 at 130, online: <www.oecd.org/site/govgfg/39609070.pdf> [Majone, "OECD Report"] (arguing that the need to achieve stability and credible long-term commitments is the main rationale today for delegating authority to independent institutions).

26 Murray J Horn, *The Political Economy of Public Administration* (Cambridge: Cambridge University Press, 1995) at 17, citing Terry M Moe, "Political Institutions: The Neglected Side of the Story" (1990) 6:3 JL Econ & Org 213 at 227 (arguing that political actors know that whatever policies and structures they put in place today may be subject to the authoritative direction of other actors tomorrow, actors with different interests who could undermine or destroy their hard-won achievements). See also Terry M Moe, "The Politics of Structural Choice: Toward a Theory of Public Bureaucracy" in Oliver E Williamson, *Organization Theory: From Chester Barnard to the Present and Beyond* (New York: Oxford University Press, 1995) 116 at 124, 136 (stating that "[t]he group's task in the current period … is to build agencies that are difficult for its opponents to gain control over later … this often means building agencies that are insulated from public authority in general—and thus from formal control by the group itself"); Majone, "OECD Report," *ibid* at 102; Elgie & McMenamin, *supra* note 21 at 533.

27 Clare Hall, Colin Scott & Christopher Hood, *Telecommunications Regulation: Culture, Chaos and Interdependence Inside the Regulatory Process* (London: Routledge, 2000); see also Larsen et al, *supra* note 20 at 2859-60; Philip Bryden, "How to Achieve Tribunal Independence: A Canadian Perspective" in Robin Creyke, ed, *Tribunals in the Common Law World* (Sydney: Federation Press, 2008) 62 at 64-65.

28 *Ibid.*

they may be able to gather relevant information and carry out adjudicative functions with more efficiency than courts.[29]

While a government may establish an agency as independent or arm's length, in practice no institution is completely autonomous.[30] All administrative bodies are expected to exercise their functions within the government policy framework, and to implement those polices in an independent, professional, and transparent manner.[31] Furthermore, they must do so in accordance with the rule of law.[32] Since they are not elected bodies, there has been much discussion concerning their accountability and the legitimacy of their decisions, especially decisions that may have far-reaching policy implications.[33] Certainly, some administrative agencies have large statutory mandates that are open to a broad suite of different interpretations and considerable discretion.[34] Some may operate in fields that are also occupied by departments of a government, which may enhance the desire of a government to have more control over policy development within the agencies.[35]

In this context, ministerial directions are generally proposed as an instrument to provide guidance, ensure accountability, and ensure consistent application of policies between the executive, or a department of the executive, and the agency.[36] However, ministerial directions are very controversial and the interference of the executive branch is often seen as an unjustifiable threat.[37] Some argue that the executive branch should refer any specific concerns and policy changes to the legislature to avoid undermining the integrity of the decision-making process and raising questions about who is really in charge.[38] Accountability for decision-making is owed to the legislature, not cabinet, and if the legislature wishes to maintain the integrity of the process it should be careful about delegating supervisory responsibility to the executive.[39]

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29 Majone, "OECD Report," *supra* note 25 at 102 (the author also states that independent agencies may constitute a more attractive environment for neutral experts). See *McKenzie v Minister of Public Safety and Solicitor General*, 2006 BCSC 1372, 61 BCLR (4th) 57 at para 66 [*McKenzie*].

30 See HN Janisch, "Independence of Administrative Tribunals in Canada: In Praise of 'Structural Heretics'" (1988) 8:2 J National Assoc Admin L Judges 75 at 79, online: <digitalcommons.pepperdine.edu/naalj/vol8/iss2/1> (stating that 'independence' can in no sense be absolute).

31 Larsen et al, *supra* note 20 at 2859-60; Sossin, *supra* note 20 at 2, 9; Canada, *Telecommunications Policy Review Panel: Final Report* (Ottawa: Public Works and Government Services Canada, 2006) at 9-15, online: <www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/ $FILE/tprp-final-report-2006.pdf> [*Telecommunications Policy Review Panel*].

32 *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 125.

33 Larsen et al, *supra* note 20 at 2859-60; Sossin, *supra* note 20 at 9; Majone, "OECD Report," *supra* note 25 at 128; *Public Agencies Governance Framework*, *supra* note 19 at 6; McCrank, Hohol & Tupper, *supra* note 19 at 21; Rankin, *supra* note 24 at 34.

34 Law Reform Commission of Canada, *Independent Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1985) at 25, online: <www.lareau-legal.ca/LRCReport26.pdf> [*Independent Administrative Agencies*].

35 *Ibid*. For example, in Alberta, this tension was evident in the package of amendments to various provincial statutes that was adopted in 2010 with Bill 24, *Carbon Capture and Storage Statutes Amendment Act, 2010*, 3rd Sess, 27th Leg, Alberta, 2010, to provide for the regulation of carbon capture and storage projects in the province. Under this scheme, the Department of Energy has assumed a number of technical responsibilities that one might have expected to be assigned to the ERCB, including issuing the closure certificate for a CCS project. For further details on this discussion, see Nigel Bankes "Alberta makes significant progress in establishing a legal and regulatory regime to accommodate carbon capture and storage (CCS) projects" (3 November 2010), *ABlawg* (blog), online: <ablawg.ca/wp-content/uploads/2010/11/blog_nb_ccsNov2010.pdf>.

36 *Independent Administrative Agencies*, *supra* note 34 at 25.

37 *Ibid*.

38 *Ibid*.

39 *Ibid* at 44.

When important changes to the overall objectives of the agency are involved, it may be easy to agree that the legislature should be in charge of legitimizing those changes. However, policy is by nature dynamic and governments have an ongoing role in refining existing policies and developing new policies to anticipate or respond to changing conditions.[40] Not all policy can be rooted in legislation because sometimes the parliamentary process is too slow or of peripheral interest to the government such that addressing it through legislation may be inefficient.[41] As a result, ministerial directions are appealing when timely guidance from the government is needed to ensure that regulatory boards do not compromise larger policy goals.[42]

Despite these advantages, there seems to be broad consensus that routine involvement by the executive may undermine the very reasons that prompted governments to create independent agencies. The greatest danger with ministerial directions arises if a government issues a direction with the intent of influencing a policy question that has arisen in the context of an existing application before the agency.[43] The tension that generally arises is that a public agency or officer may have a duty to comply with the direction but must also make a decision fairly.[44] Even though it may seem a practical approach for the government to attempt to provide guidance to the administrative agency, some may question whether the direction entailed policy-making or was an illegitimate attempt to interfere with the procedure of the specific case.[45]

Ministerial directions may also give rise to lobbying battles to overturn decisions reached in a more transparent regulatory process.[46] As a result, while applicants may still formally proceed before the regulatory agency, their real efforts may move to influence the minister who might in turn affect the content of the direction.[47] It is not only the government that may abuse directions and raise doubts about the integrity of the whole process, but also the regulatory agencies themselves.[48] For instance, in some tough cases, an agency may be

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40 *Telecommunications Policy Review Panel*, *supra* note 31 at 9-15.

41 Andrew J Roman, "Governmental Control of Tribunals: Appeals, Directives, and Non-Statutory Mechanisms" (1985) 10:2 Queen's LJ 476 at 486, 492.

42 *Independent Administrative Agencies*, *supra* note 34 at 26.

43 *Ibid* at 25.

44 See e.g. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 18-26 (concerning procedural fairness and bias of public officials) and the opinion of Justice Rand in *Roncarelli v Duplessis*, [1959] SCR 121 (concerning the improper exercise of discretionary power by government officials).

45 See e.g. *Shaw v Alberta (Utilities Commission)*, 2012 ABCA 100, 72 Alta LR (5th) 23 [*Shaw*] (The Alberta Utilities Commission approved the construction and operation of a proposed major electrical transmission line and substation known as the Heartland Transmission Project. This project was the first one considered under Bill 50. Those opposed to the project brought an application for leave to appeal Commission's decision. The test for leave to appeal was satisfied on certain grounds of appeal. In particular, the second ground of appeal was based upon the intervention of the Minister of Energy, who wrote two letters to the Chairman of the Commission requesting that the Commission adjourn or suspend its consideration of the Heartland Transmission Project. The Court found that it was arguable that the alleged interference of the Minister would cause a reasonable person to apprehend bias). See also Fluker, *supra* note 16 at 3 (questioning the independence of the Alberta Energy Regulator); *Independent Administrative Agencies*, *supra* note 34 at 25; Majone, "OECD Report," *supra* note 25 at 129.

46 *Telecommunications Policy Review Panel*, *supra* note 31 at 9-16 (arguing that "[s]ince regulatory battles are primarily waged between private sector competitors, any Cabinet review can be viewed as a choice between competing commercial interests, rather than between competing policy alternatives"); Roman, *supra* note 41 at 492.

47 Roman, *ibid* (arguing that lobbying efforts may raise concerns about equity and democracy, and those with narrow short-term commercial interests at stake may likely prevail over those groups with broader public or private interests).

48 *Ibid* at 491.

tempted to seek clarification from the minister to reduce the risk of appeals or to find relief from the criticisms of an unpopular decision.[49]

The extent to which the legislature should allocate responsibility to the executive or to an "independent" agency is a question of political judgment and raises larger issues.[50] However, while accountability might be achieved by placing responsibility for decision-making in the hands of a political body such as cabinet, "[p]olitical decision-making is not an end in itself, but a means to an end — and that is accountability to the public for achievement of public goals."[51] To maintain its integrity and make better decisions in the public interest an independent agency is expected to bring some autonomy of thought to the decision even though this may entail leaving it some room to make policy determinations.[52] In any case, as Murray Rankin, Member of Parliament, notes, many of the technical or narrow issues decided by regulatory agencies are generally not the ones upon which governments are elected or defeated.[53]

III. ANALYSIS OF SECTION 67 OF *REDA*

This part analyzes the power of the Minister under section 67 of *REDA* and attempts to determine its scope and implications.

A. TEXT OF SECTION 67

Section 67 reads as follows:

> (1) When the Minister considers it to be appropriate to do so, the Minister may by order give directions to the Regulator for the purposes of
>
> (a) providing priorities and guidelines for the Regulator to follow in the carrying out of its powers, duties and functions, and

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49 *Ibid*.

50 See e.g. *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781 at para 24 [*Ocean Port*] (Chief Justice McLachlin, for the majority of the Supreme Court, stated that "given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it").

51 Richard Schultz, Frank Swedlove & Katherine Swinton, "The Cabinet as a Regulatory Body: The Case of the *Foreign Investment Review Act*" (1980) Economic Council of Canada Working Paper No 6 at 88.

52 *Independent Administrative Agencies*, *supra* note 34 at 22; Bryden, *supra* note 27 at 72-74; HN Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada" (1979) 17:1 Osgoode Hall LJ 46 at 47 (quoting Guy Roberge, Vice Chairman of the Canadian Transport Commission, who stated "a regulatory body cannot be half-slave and half-free").

53 Rankin, *supra* note 24 at 53.

(b) ensuring the work of the Regulator is consistent with the programs, policies and work of the Government in respect of energy resource development, public land management, environmental management and water management.

(2) The Regulator shall, within the time period set out in the order, comply with directions given under this section.[54]

B. WHO MAY ISSUE DIRECTIONS UNDER SECTION 67 OF *REDA*?

The responsibility for section 67 of *REDA* "is transferred to the common responsibility of the Minister of Energy and the Minister of Environment and Sustainable Resource Development."[55] The *Government Organization Act* provides that, when two or more ministers are given common responsibility for the exercise of the same provision, any reference in the provision to a minister is to be read as a reference to any of those ministers.[56] Thus, it may be inferred that the power to issue directions under section 67 of *REDA* is assigned *disjunctively* to the Minister of Energy and Minister of Environment and Sustainable Resource Development.

Generally, the statutory power to give directions to energy regulatory boards is assigned to the Lieutenant Governor in Council.[57] This approach also seems to be common outside the oil and gas sectors.[58] The difficulty with the approach adopted under section 67 of *REDA* is that a single minister may not have the required skills or tools to address broader governmental policies, or it may be difficult for them to coordinate their work.[59] In addition, a single minister may be individually exposed to conflicts with stakeholders and the general public.[60] Even though the Policy Management Office may address some of the above issues, there is currently not enough information to determine how this office will exactly operate and coordinate with the Ministers.[61]

C. PURPOSES UNDER SECTION 67 OF *REDA*

Directions may be issued to the Regulator for two purposes. First, directions may be issued to provide priorities or guidelines that the Regulator must use in carrying out its "powers, duties and functions" (subsection (a)).[62] Second, directions may be issued to ensure that "the work of the Regulator is consistent with the programs, policies and work of the Government" (subsection (b)).[63]

It is not entirely clear how these two subsections of section 67(1) *REDA* should be read, and what legal effects the conjunction *and* at the end of subsection (a) produces. In other

54 *REDA*, *supra* note 8, s 67.
55 *Designation and Transfer of Responsibility Regulation*, Alta Reg 80/2012, s 6(1.1).
56 *Government Organization Act*, RSA 2000, c G-10, s 16(4).
57 See discussion in Part IV, below.
58 See e.g. *Nuclear Safety and Control Act*, SC 1997, c 9, s 19; *Telecommunications Act*, SC 1993, c 38, s 8; *Broadcasting Act*, SC 1991, c 11, s 7.
59 For a general discussion on this point, see *Independent Administrative Agencies*, *supra* note 34 at 28.
60 *Ibid*.
61 The Policy Management Office is discussed in Part III.G, below.
62 *REDA*, *supra* note 8, s 67(1)(a).
63 *Ibid*, s 67(1)(b).

words, could the Minister give directions to the Regulator for the sole purpose of providing priorities on the powers, duties, and functions of the Regulator? Alternatively, could the Minister give directions to the Regulator for the sole purpose of ensuring that the work of the Regulator is consistent with the programs, policies, and work of the Government? Or is the Minister only allowed to issue directions that have both purposes concurrently?

As pointed out by Professor Dickerson, the conjunction *and* is semantically ambiguous as "it is not always clear whether the writer intends the several "and" (A and B, jointly or severally) or the joint "and" (A and B, jointly but not severally)."[64] Both uses are grammatically correct and common in both popular and legal language.[65] Determining which meaning is appropriate depends on the context.[66] Professors Dickerson and Driedger indicate that, in an enumeration of powers in the legislation, the conjunction *and* tends to be used with the several meaning.[67] In particular, "if the separate items are joined by *and*, the powers are normally regarded as joint and several, and the authority may exercise all or any of them."[68] However, Professor Sullivan indicates that this presumption may be rebutted by linguistic considerations or by knowledge of the world.[69]

Based on this analysis, the conjunction *and* at the end of subsection (a) arguably creates the presumption that the Minister may issue directions for all the purposes indicated in section 67(1) or any of those purposes individually. However, the debate in the Legislature on section 67 of *REDA* may help to rebut this presumption.[70] When Bill 2 (*REDA*) was under

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64 Reed Dickerson, *The Fundamentals of Legal Drafting*, 2nd ed (Boston: Little, Brown & Company, 1986) at 105. See also EA Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 15. However, Professor Dickerson notes that even though *and* sometimes can produce a similar result to *or*, saying that *and* may mean *or* is inaccurate.

65 Driedger, *ibid* at 16.

66 *Ibid* at 18.

67 *Ibid* at 16; Reed Dickerson, *Materials on Legal Drafting* (St Paul, Minnesota: West Publishing, 1981) at 250-51; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada, 2008) at 82-83.

68 Driedger, *supra* note 64. A number of courts have adopted a similar analysis. See e.g. *R v Welsh (No 6)* (1977), 15 OR (2d) 1 (CA).

69 Sullivan, *supra* note 67 at 83.

70 See e.g. Ruth Sullivan, *Statutory Interpretation* (Concord: Irwin Law, 1997) at 199. In *R v Morgentaler*, [1993] 3 SCR 463 at para 31, the Supreme Court of Canada held that Hansard and government publications are admissible evidence of legislative intent in constitutional cases. The Court stated that "[p]rovided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established." See also *Reference re Firearms Act (Canada)*, 2000 SCC 31, [2000] 1 SCR 783 at para 17 (stating that "[w]hile such extrinsic material was at one time inadmissible to facilitate the determination of Parliament's purpose, it is now well accepted that the legislative history, Parliamentary debates, and similar material may be quite properly considered as long as it is relevant and reliable and is not assigned undue weight"). The admissibility of *Hansard* for statutory interpretation in non-constitutional cases remains uncertain but there is a trend towards allowing this type of evidence. See e.g. *Shaw*, *supra* note 45. In that case the Alberta Court of Appeal had to determine under Bill 50 whether and how the amendments to the Commission's governing statutes altered the scope of the public interest inquiry delegated to the Commission in assessing a project designated as critical transmission infrastructure. The Court at para 39 states that "Canadian courts have long recognized that legislative history can play a useful, if limited, role in the interpretation of legislation…. Although, in my view, it is not necessary to resort to the *Hansard* debates to discern the legislative intent in enacting Bill 50 (which is clear on the face of the legislation), a review of those debates bolsters the conclusion reached by the Commission." Similarly, the Ontario Superior Court of Justice in *Branch v Ontario (Minister of Environment)* (2009), 93 OR (3d) 665 (Sup Ct J) at para 20 held that "[l]egislative debates are admissible as evidence of the intent or purpose of the legislature in enacting the legislation, although a court must be mindful of the limited reliability and weight of Hansard evidence." In that case the Ontario Superior Court of Justice relied on the legislative debate to interpret the *Environmental Protection Act*, RSO 1990, c E-19, s 163.1(2).

consideration, the opposition Liberal Party made a motion to strike out subsection (b), describing it as "entirely redundant" or potentially misleading. The following excerpt of the *Alberta Hansard* provides the discussion on this motion.

> Hon. member, you may speak to the amendment.
>
> Dr. Swann: Thank you very much, Mr. Chair. Under part 4 Mr. Hehr moves that Bill 2, Responsible Energy Development Act, 2012, be amended in section 67(1) by striking out the word "and" at the end of clause (a) and striking out all of clause (b), which appears to be entirely redundant. (…)
>
> We fail to see how that [subsection (b)] adds materially to the bill and may give a false impression to some ministers that they can carry out far more intervention than is appropriate. So we see nothing that isn't included under subsection (a) and would suggest that part (b) is either redundant or could be misused. Thank you, Mr. Chair.
>
> The Chair: The hon. Government House leader.
>
> Mr. Hancock: Thank you, Mr. Chair. I'd have to speak against this amendment. Clause (b) is clearly a very important part of the bill. What the report that was done as a backdrop to this bill very clearly set out is that in order for us to do appropriate sustainable development in this province, balancing the interests of industrial development and the environment, the interest of Albertans, there needs to be a policy process that's set by government through the Legislature on behalf of Albertans. The government sets the policy. The Legislature sets the legislation. Those are the structures that are put in place. The regulators don't make policy. They carry out policy in terms of implementation.
>
> Section 67(1) very clearly says in (a) that the minister can give priorities and guidelines in terms of how they carry out their duty and in (b) ensures that the way they carry out their duty is done in compliance with the policies, rules, and processes set out by government. It sets out the very clear delineation of responsibility.
>
> Policy is the role of government and the Legislature. Carrying out the policy with respect to this area is the role of the regulator.[71]

The Opposition did not succeed in its attempt to amend section 67 of *REDA*. As seen in the above discussion, in response to the motion to strike out subsection (b), the Government House Leader emphasized that the importance of subsection (b) is to establish a policy process that is set by the government and to set a clear delineation of responsibility between policy-making (assigned to the Government of Alberta) and policy implementation (assigned to the Regulator).

Based on the statements of the Government House Leader, the role of subsection (a) is unclear if the powers under subsection (a) and (b) are several. A main underlying purpose of executive directions is precisely to allow a government to provide policy guidance to regulators and coordinate their work within the broader framework, regardless of whether or not the provision expressly indicates this purpose. In this context, the criticism of the

[71] Alberta, Legislative Assembly, *Alberta Hansard*, 28th Leg, 1st Sess, No 20e (20 November 2012) at 801.

Opposition that subsection (b) is "redundant" seems understandable. Also, the effect of viewing the powers as several is that under subsection (b) the Ministers might claim to have a power that goes beyond setting priorities and guidelines such as the power to exercise political control over the adjudicative functions of the Regulator (although this interference would still be prohibited by the *Alberta Public Agencies Governance Act*).[72] The whole discussion of the Government House Leader does not seem to support this interpretation; rather, it seems to suggest that the main concern of the Alberta Government was to ensure that section 67 of *REDA* would clearly allow it to set policy guidelines and legitimately require the Regulator to comply with them. That the Government wanted this purpose to be expressly stated in the legislation for sake of clarity does not seem to be an issue. However, the above discussion supports the argument that the powers under subsection (a) and (b) are joint and not several. This interpretation only allows the Minister to set priorities and guidelines for the Regulator to ensure that the work of the Regulator is in compliance with the policy framework set out by the Government.

D. THE LEGAL STATUS OF A DIRECTION ISSUED UNDER SECTION 67 OF *REDA*

Before analyzing the legal status of a ministerial direction issued under section 67 of *REDA*, it is necessary to discuss the status of ministerial directions in general. This discussion is necessary because of the uncertainties and lack of clarity concerning ministerial directions, exacerbated by the fact that the term *direction* is often used interchangeably with other terms such as *guidelines*, *directives*, *rules*, *ordinances*, or *circulars* and that all of these terms are generally undefined in the applicable legislation.

The Supreme Court of Canada has indicated that when the term of the instrument is not defined in the statute, the term in itself is not indicative of its legal status or effects and it is necessary to look at its substance.[73] It seems that three different types of guidance can be distinguished: informal policy statements, administrative policy directions, and policy directions having the nature of delegated legislation.[74] (1) Informal policy statements are an

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72 See discussion in Part III.E, below.

73 *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 34 [*Friends of the Oldman River Society*]. See also *R v Simmermon* (1996), 37 Alta LR (3d) 298 (CA) for the proposition that, in the absence of some express statutory distinction based on nomenclature, the nature of a statutory instrument should be decided on its substance, not its form (at para 12): "If the substance and effect of the instrument is legislative, it will be treated as a regulation." The Court's ruling on this point is based upon, and supported by, the decision in *Canadian Pacific Ltd v Canada (Canadian Transport Commission)*, [1985] 2 FCR 136 (CA).

74 There is also the type of policy statements issued by the agency itself that are in the nature of self-imposed limitations on discretion. See *British Columbia Hydro and Power Authority v British Columbia (Utilities Commission)* (1996), 20 BCLR (3d) 106 (CA). In that case, the Utilities Commission issued guidelines for the utility planning process. The guidelines stated that they did not mandate a specific outcome to the planning process or take away responsibility for making decisions from utility management, but rather that consistency with the guidelines would be an additional factor that the Commission would consider in judging the prudence of investments and rate applications. The Commission made an order against the applicant, a public utility company, outlining the Commission's finding that the applicant had not complied with the guidelines. The order required the applicant to comply with certain directions relating to the guidelines and threatened sanctions should the applicant fail to implement the directions. The applicant appealed from the order and applied for a declaration that the guidelines related to aspects of the order that were void on the ground that Commission had exceeded its jurisdiction in giving the guidelines the force of a Commission order. Held: The declaration was granted. The enforcement by order of the guidelines was an exercise of management of a public utility business beyond the scope of the powers granted to the Commission under the Act. Looking at the Act as a whole, it did not reflect any intention on the part of the legislature to confer upon the

expression of purpose of a government.[75] They may emerge in ministerial speeches or in announced government programs.[76] These statements generally have no legally binding effects.[77] (2) A government may give administrative directions to dictate administrative policy within the ranks of government departments. They may be binding on those to whom the direction is addressed depending on whether they are drafted in indicative or imperative terms.[78] Administrative directions do not need to be authorized by statute because "a minister has an implicit power to issue directives to implement the administration of a statute for which he is responsible."[79] Sometimes they are authorized by statute, but nonetheless the case law seems to suggest that the infringement of administrative directions can only have administrative and non-judicial consequences.[80] Administrative directions might create a legitimate expectation that the public officer or agency will follow a certain procedure depending on the content of the direction and whether it is drafted with mandatory language.[81] Their infringement may be subject to judicial review,[82] however, they generally do not create substantive rights regardless of whether third parties are adversely affected by non-compliance with the direction.[83] (3) Finally, there are directions that are in the nature of delegated legislation or regulations. The power to issue this type of direction only exists if provided for by statute.[84] These directions bind all those to whom the direction is addressed, create substantive rights on third parties, and are legally enforceable in court.[85] It may not be

Commission a jurisdiction to determine, punishable on default by sanctions, the manner in which the directors of a public utility were to manage its affairs.

75 *Independent Administrative Agencies*, *supra* note 34 at 24, n 28.

76 *Ibid*.

77 *Ibid*, n 29 ("The Cabinet review/ appeal process can, in some cases, be used in such a way that it makes enforceable 'non-binding' statements of policy").

78 For instance, in *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 [*Maple Lodge*], the Supreme Court found that the public servants to whom the directives applied were free to decide whether or not to obey them since the directives were worded in an indicative manner. By contrast, the directives issued by the Commissioner of Penitentiaries in *Martineau v Matsqui Institution Inmate Disciplinary Board*, [1978] 1 SCR 118 [*Martineau*], were found to be mandatory on the public servants involved because they clearly indicated an intention to bind those to whom the directive was addressed.

79 *Friends of the Oldman River Society*, *supra* note 73 at 35 (stating that "[t]here is little doubt that ordinarily a Minister has an implicit power to issue directives to implement the administration of a statute for which he is responsible; … It is also clear that a violation of such directives will only give rise to administrative rather than judicial sanction because they do not have the full force of law"). See also *Martineau*, *ibid* at 129, stating that:

> [i]t is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative, not a legislative, nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity. I have no doubt that he would have the power of doing it by virtue of his authority without express legislative enactment. It appears to me that s. 29(3) is to be considered in the same way as many other provisions of an administrative nature dealing with departments of the administration which merely spell out administrative authority that would exist even if not explicitly provided for by statute.

80 *Friends of the Oldman River Society*, *ibid*.

81 See e.g. *Martineau*, *supra* note 78.

82 *Peet v Canada (Attorney General)*, [1994] 3 FCR 128 (TD) [*Peet*].

83 *Ibid*. In that case, the Court discussed decisions taken under directives that had been issued by the Commissioner of Penitentiaries. The Commissioner's authority to issue these directives derived from section 29(3) of the *Penitentiary Act*, RSC 1970, c P-6. The majority of the Court, at 129, held that a review of the decision in question was not within the jurisdiction of the Federal Court of Appeal because the directives were administrative and did not have the force of law. *Friends of the Oldman River Society*, *supra* note 73 at 35; *Hassum v Contestoga College Institute of Technology and Advanced Learning*, 2008 CanLII 12838 (Ont Sup Ct J) at paras 27, 77, online: <http://canlii.ca/t/1w8np> [*Hassum*].

84 *Hassum*, *ibid* at para 26.

85 *Friends of the Oldman River Society*, *supra* note 73 at 33, 36.

easy to challenge them on the ground that they fettered the discretion of the decision-maker.[86] Also, since they must be interpreted and applied as any other law, an interested party may have a direction enforced by way of prerogative relief, including mandamus or certiorari, if the public officer or agency does not comply with the direction.[87] Similarly, a decision of the agency may be subject to judicial review to determine whether or not it complies with the direction or whether the agency committed an error in law in its dispositions.[88]

The test for whether policy directives, guidelines, circulars, directions or other instruments authorized under a statute have the force of law was set out in *Friends of the Oldman River Society v. Canada (Minister of Transport)*.[89] In that case, the court had to consider an application brought by a third party seeking an order for certiorari and mandamus to require the Minister of Transport and the Minister of Fisheries and Oceans to conduct an environmental assessment in compliance with the federal *Environmental Assessment and Review Process Guidelines* (Guidelines). The principal ground on which the Crown contended that the Guidelines were *ultra vires* is that, by using the term "guidelines," section 6 of the *Department of the Environment Act*[90] could not empower the enactment of mandatory subordinate legislation, but only administrative directives not intended to be legally binding on those to whom they were addressed.[91] In determining whether the Guidelines were subordinate legislation or administrative directions, the Supreme Court determined that the denomination of the instrument in itself is neutral, and formulated a two-step analysis.[92] First, the enabling statute needs to be analyzed to determine whether it supports the power to create subordinate legislation of a mandatory nature.[93] This is a question of legislative intent and the wording of the authorizing provision must be considered as a whole.[94] Second, the specific direction, guideline, directive or other instrument needs to

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86 See e.g. *Bell Canada Inc v Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 SCR 884 at paras 35-38, 45 [*Bell*]. In that case, the independence and impartiality of the Canadian Human Rights Tribunal were challenged due to the power of the Canadian Human Rights Commission to issue binding guidelines to the Tribunal. When Bell started the lawsuit, the Commission had the broad power to make guidelines concerning the application of the Act in a particular case, but the legislation was subsequently amended to allow guidelines to be issued only in relation to a "class of cases." The Court ruled that general guidelines having the form of delegated legislation and falling within the scope of statutory authority are similar to regulations, and may be a way for Parliament to ensure that the Act will be interpreted in a manner that furthers the ultimate purpose of the Act as a whole. However, sufficient evidence that, in practice, the guidance has unduly influenced the impartiality of the tribunal in a specific case may produce a different result.

87 See e.g. *Friends of the Oldman River Society*, *supra* note 73.

88 See e.g. *BC Hydro and Power Authority v Terasen Gas (Vancouver Island) Inc*, 2004 BCCA 346, 30 BCLR (4th) 305; *BC Hydro and Power Authority v Terasen Gas (Vancouver Island) Inc*, 2003 BCCA 594, [2003] BCJ No 2531 (QL) (the issue arose from an order of the British Columbia Utilities Commission setting rates for the transmission and distribution of natural gas on Vancouver Island. The British Columbia Hydro and Power Authority contended that the order was unlawful essentially because it conflicted with a Special Direction issued by the Lieutenant Governor-in-Council determining on rates); see also *Yukon Energy Corp v Yukon Utilities Board* (1996), 74 BCAC 58 (CA) (in that case, the Utility board made certain orders in a decision on an application by utility companies for approval of changes in rates charged for electricity. The utility companies appealed orders alleging jurisdictional error and errors of law by the board).

89 *Friends of the Oldman River Society*, *supra* note 73 at paras 35-36.

90 RSC 1985, c E-10. Section 6 reads as follows:

> For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.

91 *Friends of the Oldman River Society*, *supra* note 73 at 33.

92 *Ibid* at 34-35.

93 *Ibid* at 33.

94 *Ibid* at 34-35.

be analyzed to determine if it is framed as mandatory.[95] This is a question of fact and the answer depends on the wording of the direction and, for example, whether it uses terms such as "shall" or "must."[96] The Court also quoted the following passage of Dussault and Borgeat to emphasize the "vital distinction" between administrative instruments (intended for the control of public servants under a minister's authority), and instruments having the nature of subordinate legislation or regulation:

> When a government considers it necessary to regulate a situation through norms of behaviour, it may have a law passed or make a regulation itself, or act administratively by means of directives. In the first case, it is bound by the formalities surrounding the legislative or regulatory process; conversely, it knows that once these formalities have been observed, the new norms will come within a framework of "law" and that by virtue of the Rule of Law they will be applied by the courts. In the second case, that is, *when it chooses to proceed by way of directives*, whether or not they are authorized by legislation, *it opts instead for a less formalized means based upon hierarchical authority, to which the courts do not have to ensure obedience. To confer upon a directive the force of a regulation is to exceed legislative intent*. It is said that the Legislature does not speak without a purpose; its implicit wish to leave a situation outside the strict framework of "law" must be respected.[97]

In this case, the Court concluded that the E.A.R.P. Guidelines were subordinate legislation and could be enforceable through prerogative relief despite being called "guidelines" because they were authorized by statute, were specifically framed in mandatory language, and had been promulgated by order-in-council.[98]

Turning the analysis back to section 67 of *REDA*, it does not seem possible to give a definite answer on whether a direction issued under this provision would have the nature of an internal administrative direction or the force of law. The characterization of a direction turns in part on the language of section 67 of *REDA* but also in part on the language of the direction itself (i.e. a conclusion about the characterization of one direction under this section may not be conclusive with respect to other directions). Despite the reference to "guidelines," section 67 of *REDA* unequivocally allows the Ministers to give mandatory directions to the Regulator because subsection (2) states that "[t]he Regulator shall, within the time period set out in the order, comply with directions given under this section."[99] Determining whether or not section 67 of *REDA* allows the creation of delegated legislation is less straightforward. This issue arises because, as previously discussed, this power exists only if statutorily provided.[100] However, the mere existence of a statutory power to issue directions is not in itself indicative.[101] In *Friends of the Oldman River Society* the Court emphasized that if issuance of the instrument is subject to formal requirements, such as formal enactment by

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95 *Ibid*.
96 *Ibid*.
97 René Dussault & Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed, translated by Murray Rankin (Toronto: Carswell, 1985) 338-39, cited in *ibid* at 36 [emphasis added].
98 *Friends of the Oldman River Society*, *ibid*. The Court, at 36 stated the following:
> Here though we are dealing with a directive that is not merely authorized by statute, but one that is required to be formally enacted by "order", and promulgated under s 6 of the *Department of the Environment Act*, with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority. To my mind this is a vital distinction.

99 *REDA*, *supra* note 8, s 67(2).
100 *Hassum*, *supra* note 83 at para 26.
101 *Maple Lodge*, *supra* note 78.

order in council and approval of the Lieutenant Governor-in-Council, then this may generally indicate that the legislature intended to allow the creation of delegated legislation.[102] Subsequent cases have followed *Friends of the Oldman River Society* and distinguished administrative directions from directions that have the force of law primarily by analyzing whether the provision authorizing the creation of policy directions requires a procedure similar to the creation of legislative acts and regulations.[103] Based on the case law, it may be argued that section 67 of *REDA* does not allow the Minister to create delegated legislation because there is nothing in section 67 of *REDA* indicating that the Legislature intended to confer on the Minister anything more than an administrative function. For instance, section 67 of *REDA* does not specifically require a formal procedure similar to the enactment of regulations, such as the approval of the Lieutenant Governor-in-Council or publication of directions in the Alberta Gazette.[104] In addition, the general power to create regulations under *REDA* is assigned to the Lieutenant Governor-in-Council in Part 6 of the *Act*.[105] This may indicate that the legislature did not intend to assign a similar function to an individual Minister under section 67 of *REDA*. By contrast, it may be argued that section 67 of *REDA* allows the Minister to create delegated legislation because section 67 of *REDA* requires directions to be issued by way of "order" and does not exclude that a direction under section 67 of *REDA* may have the status of regulation. In addition, the *Interpretation Act* defines a "regulation" as "a regulation, *order*, rule, form, tariff of costs or fees, proclamation, bylaw or resolution enacted (i) in the execution of a power conferred by or under the authority of an Act, or (ii) by or under the authority of the Lieutenant Governor-in-Council."[106] However, the case law seems to focus on whether the provision authorizing the direction requires a procedure similar to the creation of legislative acts and regulations. Consequently, it may be difficult to conclude that section 67 of *REDA* allows delegated legislation given the absence of explicit procedural requirements under this provision.

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102 *Friends of the Oldman River Society*, *supra* note 73 at 36. The conclusion of the Court strongly relied on the *Department of Environment Act*, *supra* note 90, s 6, which requires the approval of the Governor-in-Council for Ministerial Orders issued under this provision.

103 *Hassum*, *supra* note 83 at para 23; *Bell*, *supra* note 86 at para 36 (according to the Court, the guidelines issued by the Commission under the *Act* are, like regulations, of general application since, under the amended section 27(2) of the *Act*, they must pertain to a class of cases. Furthermore, these guidelines are subject to the *Statutory Instruments Act*, RSC 1985, c S-22, and must be published in the *Canada Gazette*. Moreover, the process that is followed in formulating particular guidelines resembles the legislative process, involving formal consultations with interested parties and revision of the draft guidelines in light of these consultations.); See also *Peet*, *supra* note 82 at para 133; *Hewko (Guardian ad litem of) v British Columbia (Attorney General)*, 2006 BCSC 1638, 2006 CarswellBC 2703 at paras 314, 318; *Turner-Lienaux v Nova Scotia (Attorney General)* (1993), 122 NSR (2d) 119 at paras 17-20; *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 FCR 385 at para 68; *Martineau*, *supra* note 78 at 129, where the majority of the Court concluded that, as the directives in issue were not of a legislative nature, they were not subject to judicial review.

104 In *Friends of the Oldman River Society*, *supra* note 73 at 34-35 the Court emphasized the importance of looking at the provision to determine whether is contains such requirements. For example, as discussed in Part IV below, directions to the BC Oil and Gas Commission, the BC Utilities Commission and OEB all require publication in the relevant Gazette.

105 *REDA*, *supra* note 8, ss 77-80.

106 *Interpretation Act*, RSA 2000, c I-8, s 1(1)(c) [emphasis added].

E. POLICY DIRECTIONS IN RELATION TO THE ADJUDICATIVE FUNCTIONS OF THE REGULATOR

Like its predecessor ERCB, the Alberta Energy Regulator performs both regulatory and adjudicative functions. The new legislative scheme under *REDA* separates the corporate governance, operational responsibilities, and adjudicative functions of the Regulator. In particular, the chair and the board of directors are responsible for the general direction of the Regulator's business affairs and setting performance expectations for the Regulator and its chief executive officer.[107] The chief executive officer reports directly to the chair and oversees day-to-day operations, including making decisions and delegating decision-making on applications, monitoring, remediation, and reclamation in relation to the closure of energy projects.[108] Finally, hearing commissioners act as decision-makers on applications subject to hearings, regulatory appeals, and reconsiderations.[109]

Before *REDA* received Royal Assent, several critics, including Ecojustice and the Environmental Law Centre, publically recommended that section 67 be deleted from the Bill.[110] Perhaps, the most significant concern is that the Minister will interfere with the adjudicative functions of the Regulator, thus undermining the independence of the Regulator and the integrity of the decision-making process. The general rules concerning the governance of public agencies address some of these concerns. In particular, they address the issue of whether the Minister may give directions concerning the adjudicative functions of the Regulator; the answer seems to be no.[111] The *Public Agencies Governance Framework*,[112] and the *Alberta Public Agencies Governance Act*,[113] both attempt to balance ministerial accountability with the need for independence in some agencies' decision-making.[114] Section 10 *APAGA* reads as follows:

> (1) Subject to subsection (2), a Minister who is responsible for a public agency may set policies that must be followed by the public agency in carrying out its powers, duties and functions.

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107 *REDA*, *supra* note 8, ss 5-6.

108 *Ibid*, s 7.

109 *Ibid*, ss 11-13.

110 See "Legal Backgrounder, Bill 2: Responsible Energy Development Act" *Ecojustice* (May 2013), online: <www.ecojustice.ca/wp-content/uploads/2015/03/REDA-backgrounder-May-2013.pdf>; Letter from Cindy Chiasson, Executive Director, Environmental Law Centre, to Ken Hughes, Minister of Energy (6 November 2012), online: <www.elc.ab.ca/Content_Files/Files/Bill_2_brief_Nov_2012.pdf>.

111 In 2007, the Alberta government launched an initiative to improve the transparency, accountability, and governance of the numerous public agencies existing in the province. The Task Force commissioned by the government identified approximately 250 agencies with different responsibilities, functions, and structures. See McCrank, Hohol & Tupper, *supra* note 19 at 7, 12. To improve the transparency, accountability, and governance of public agencies, the Task Force recommended enhancing standardization and institutionalization, and passing a new piece of legislation. Furthermore, the Task Force (McCrank, Hohol & Tupper, *ibid* at 17-18) recommended the following "functional classification" system based on the primary purpose of agencies: (i) Regulatory/adjudicative agencies; (ii) Public trusts; (iii) Corporate enterprises; (iv) Service delivery agencies; (v) Advisory agencies.

112 *Public Agencies Governance Framework*, *supra* note 19.

113 *Alberta Public Agencies Governance Act*, SA 2009, c A-31.5 [*APAGA*]. Section 80(a) was proclaimed in force 8 July 2009. Sections 1-36, 38-44, 46-52, 54-63, 65-72, 74-79, 80(b)-(e) were proclaimed in force 12 June 2013.

114 See *Public Agencies Governance Framework*, *supra* note 19 (discussing accountability at 3, 5-6 but stating at 7 that "this Framework should *not* be construed so as to interfere with the principles of judicial independence and administrative law that are essential to the functioning of quasi-judicial agencies"); see also McCrank, Hohol & Tupper, *supra* note 19 at 15 (stating that an agency "[i]s accountable to government through a defined reporting relationship, recognizing the need for quasi-judicial independence in some agencies' decision making).

(2) A policy must not be set under this section

(a) in respect of a public agency's adjudicative functions, or

(b) if an Act, the regulations under this Act or any other regulation made by the Lieutenant Governor in Council prohibits the making of policies of that type.

This provision allows a minister responsible for a public agency to set policies that must be followed by the agency in carrying out its powers, duties, and functions.[115] However, this provision also prohibits a minister from setting policy on the public agency's adjudicative functions.[116] The *APAGA* provides the following definition of "adjudicative function":

(i) a function assigned or authorized to be performed by the public agency under an enactment, the performance of which includes

(A) the making of binding decisions in respect of applications, if the enactment authorizes the public agency to hold hearings respecting the applications,

(B) the making of binding decisions in respect of disputes, other than disputes respecting applications, or

(C) the hearing of reviews or appeals and the making of binding decisions in respect of those reviews or appeals,

(ii) any alternative dispute resolution process that is ancillary to a function described in subclause (i), and

(iii) a function specified in the regulations.[117]

Section 2(1) of the *APAGA* makes the *APAGA* paramount over *REDA*.[118] Thus, by reference to section 10(2)(a) *APAGA*, it seems that neither the Minister of Energy nor the Minister of Environment and Sustainable Resource Development are allowed to set mandatory polices on the adjudicative functions of the Regulator. Applying the definition of 'adjudicative functions' provided under section 1(1)(a) *APAGA*, section 67 of *REDA* does not permit at least four types of direction. First, policy directions are not allowed with respect to binding decisions on applications, if the Regulator is authorized to hold hearings on those applications.[119] Second, policy directions are not allowed with respect to the Regulator's

115 *APAGA*, *supra* note 113, s 10. For the general powers and responsibilities of ministers, see also ss 6-12.
116 *Ibid*, s 10(2)(a). For a major restriction on the powers of the minister see also section 9(1)(a) (prohibiting the disclosure of information if it may "reasonably be expected to affect the independence of the public agency respecting that matter").
117 *Ibid*, s 1(1)(a).
118 *Ibid*, s 2(1), "Except where this Act or the regulations provide otherwise, the provisions of this Act and the regulations under this Act prevail to the extent of any inconsistency or conflict with one or more provisions of any other enactment except the *Freedom of Information and Protection of Privacy Act* and the *Health Information Act*." No regulations have yet been issued under *APAGA*.
119 *REDA*, *supra* note 8, s 34(2); *APAGA*, *supra* note 113, s 1(1)(a)(i)(b).

making of binding decisions on disputes other than disputes on applications.[120] Third, policy directions are not allowed on the hearing of reviews or appeals and the Regulator's making of binding decisions with respect to those reviews.[121] Lastly, policy directions are not allowed on any alternative dispute resolution process that is ancillary to a function identified in (1), (2) or (3).

F. PROCEDURAL REQUIREMENTS

Directions under section 67 of *REDA* must be issued by way of "order" and the Regulator must comply with these directions within a prescribed time period.[122] Section 67 of *REDA* does not clarify if the Minister must follow a formal procedure to give orders, including their publication in the Alberta Gazette, or if an order might be issued by way of an informal communication between the Minister and the Regulator.

Given the reference to "order" in section 67(1) of *REDA*, it is arguable that a ministerial direction of a legislative nature issued under this provision must be filed with the Registrar and published in the Alberta Gazette.[123] However, as previously discussed, it is not clear whether section 67 of *REDA* assigns to the Minister a legislative function or whether the function of the Minister under this provision is only administrative.[124] If we assume (contra the tentative conclusion of Part III.D), that the Minister is allowed to issue an order of a legislative nature under section 67 of *REDA*, the Minister has to comply with the procedure prescribed under section 3 of the *Regulations Act*.[125] An order of a legislative nature that is not filed has no effect, and an unpublished order is not effective against a person unless that person has had actual notice of the order.[126] By contrast, a ministerial order of an administrative nature presumably does not need to be filed or published in the Alberta Gazette.

The Ontario Court of Appeal in *Rose v. The Queen.*[127] addressed the issue of whether an order in council was of a legislative nature and thus subject to the *Ontario Regulations Act.*[128] In this case, the plaintiff was seeking a judgment for damages due to lack of maintenance of repair of a highway.[129] By order in council, the Crown had transferred to the municipality

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120 This would, for example, include a decision on a dispute concerning private surface agreements. See *REDA*, *ibid*, ss 62-66 and the regulations enacted under it. For a discussion on the enforcement of private surface agreements see Giorilyn Bruno "Phase 2 of the Implementation of the Alberta Energy Regulator: The Private Surface Agreement Registry" (20 January 2014) *ABlawg* (blog), online: <ablawg.ca/2014/01/20/phase-2-of-the-implementation-of-the-alberta-energy-regulator-the-private-surface-agreement-registry>.

121 *APAGA*, *supra* note 113, s 1(1)(a)(i)(a).

122 *REDA*, *supra* note 8, ss 67(1)-(2).

123 *Regulations Act*, RSA 2000, c R-14, ss 2(1), 2(3), 3(1), 3(5).

124 See discussion in Part III.D, above.

125 See the combined effect of the *Regulations Act*, *supra* note 123, s 1(1)(f) and the *Interpretation Act*, *supra* note 106, s 1(1)(c).

126 *Regulations Act*, *ibid*, s 3(5).

127 *Rose v The Queen*, [1960] OR 147 (CA) [*Rose*].

128 *Regulations Act*, RSO 1950, c 337. Section 3 of the *Act* provides the following: "[e]very regulation shall, within one month of the filing thereof, be published in *The Ontario Gazette*." Section1(*e*) defines *regulation* as follows: "'[r]egulation' means any regulation, rule, order or by-law of a legislative nature made or approved under any Act of the Legislature by the Lieutenant-Governor in Council, a minister of the Crown, a department of the public service, an official of the government or a board or commission all the members of which are appointed by the Lieutenant-Governor in Council."

129 *Rose*, *supra* note 127 at para 1.

certain sections of a highway under section 71(2) of the *Highway Improvement Act*.[130] However, the Crown did not file the order in council with the registrar and the municipality had no notice of it.[131] Therefore, the municipality contended that the order had no effect and that, since the highway was still vested in the Department of Highways, the Crown was liable under section 87 of the *Highway Improvement Act* for the condition of non-repair.[132] The Ontario Court of Appeal emphasized the following criteria in determining whether an order is of a legislative or administrative nature:

> In coming to a conclusion as to the nature of the act performed, not only must one look at the substance rather than the form but indeed in the inquiry upon which one must embark, all the surrounding circumstances must be looked at and by that I include the nature of the body enacting the order in question, the subject matter of the order, the rights and responsibilities, if any, altered or changed by that order.[133]

The Ontario Court of Appeal concluded that the order was of a legislative nature. In doing so, the Court relied on the fact that the order altered the rights and responsibilities of the general public as well as the nature and extent of those responsibilities.[134] Since the order had not been filed under the *Regulations Act* and the municipality had no actual notice of it, the Court concluded that the order had no effect and was not valid against the municipality.[135] Thus, the Crown was liable to the plaintiff. In *Reference re Manitoba Language Rights (No. 2)*[136] the Supreme Court of Canada addressed in a very different context the issue of whether an instrument is of a legislative nature. In that case, the issue was relevant to determine whether certain documents produced by the Government of Manitoba were required to be published in both English and French under section 23 of the *Manitoba Act*.[137] The Supreme Court of Canada identified some criteria indicative of a legislative nature. These criteria can approximately be divided into the headings of *form*, *content*, and *effect*.[138] These criteria do not operate cumulatively, and an instrument may be determined to be legislative in form, though not in content, but would nonetheless be determined to be of a legislative nature.[139]

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130 *Ibid* at paras 7-8; *Highway Improvement Act*, RSO 1950, c 166, ss 71(2), 87.

131 *Rose*, *ibid* at paras 21-23.

132 *Ibid* at paras 14-17.

133 *Ibid* at para 31.

134 *Ibid*. The Ontario Court of Appeal also states that
> [w]e think that to an extent generally applicable to the public or large segments thereof it alters rights and responsibilities and even the nature and extent of those responsibilities. Upon that ground alone we think sufficient has been said to indicate the legislative nature of the action taken by the Lieutenant Governor in council as set out in the order in council referred to.

135 *Ibid*.

136 *Reference re Manitoba Language Rights*, [1992] 1 SCR 212 [*Reference re Manitoba Language Rights (No 2)*].

137 *Ibid* at 216-17

138 *Ibid* at 223.

139 *Ibid*. The criteria identified in *Manitoba Language Rights Reference (No 2)*, *ibid*, are applied in *AUPE v Alberta* (2002), 310 AR 240 (QB). In that case, the Court of Queen's Bench had to determine whether a deputy ministerial order was "of a legislative nature" to address the issue of whether the Minister had improperly sub-delegated its powers to the Deputy Minister under section 21(1) of the *Interpretation Act*. Applying the criteria set out in *Manitoba Language Rights Reference (No 2)*, the Court concluded that the Deputy Ministerial Order did not fit within the general definition of "a rule of conduct, enacted by regulation-making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons" (para 76). In particular, Justice Murray states at para 79: "In my opinion, a declaration made by the Minister under s. 28(2) of the *Hospitals Act* is not an enactment by Government, nor is it subject to the approval of Government. It does not require positive action of Government 'to breathe life into it.' It is not tabled in the Legislative Assembly. It is not subordinate legislation and is not legislative in nature." See also para 83 "I am satisfied that an instrument such as D.M.O. 4/97 is not subordinate legislation or delegated legislation. Rather, it is simply an administrative function being performed by the Minister, or in this case, the Deputy Minister, as permitted under s.

With respect to the *form* of the instrument, the Supreme Court of Canada determined that a sufficient connection between the legislature and the instrument in question is indicative of a legislative nature.[140] This connection is established if a government enacts the instrument, if it is made subject to the approval of a government, or wherever "positive action of the Government is required to breathe life into [it]."[141] Even if some instruments are not necessarily "Acts of the Legislature," they are determined to be legislative in form if they are tabled in the Legislative Assembly.[142] With respect to the *content* and *effect* of the instrument, the Supreme Court of Canada indicated that the following criteria are indicative of a legislative nature: (i) the instrument sets a "rule of conduct," (ii) the instrument has the "force of law," and (iii) the instrument applies to "an undetermined number of persons."[143] The Court further explains this point as follows:

> A "rule of conduct" can be described as a rule which sets norms or standards of conduct, which determine the manner in which rights are exercised and responsibilities are fulfilled. Pairing this with the phrase "force of law," the rule must be unilateral and have binding legal effect. Finally, it must also apply to "an undetermined number of persons," that is, it must be of general application rather than directed at specific individuals or situations.[144]

Even though the case law provides some criteria, there are "grey areas" and sometimes it may be difficult to distinguish whether an instrument is of an administrative or legislative nature. In addition, the Supreme Court of Canada indicated that these criteria are merely indicative and "[i]t is neither possible nor desirable to propose an ironclad test given the proliferation of instruments generated by contemporary governments."[145] For this reason, the Alberta Legislative Counsel recommended that, if in doubt, the safest choice is to file the ministerial order with the Registrar.[146]

Ministerial orders issued under section 67 of *REDA* of an administrative nature presumably do not need to be filed or published in the Alberta Gazette and it remains uncertain whether they must be published elsewhere, such as on the Regulator's website. The value of transparency and accountability require that, regardless of their nature, directions

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21(1) of the *Interpretation Act*." Similar criteria are identified in *Tsuu T'ina Nation v Alberta (Minister of Environment)*, 2008 ABQB 547, 96 Alta LR (4th) 65 [*Tsuu T'ina Nation*]. In that case, one of the remedies sought by the Tsuu T'ina Nation was a declaration to set aside the order in council that had approved the Water Management Plan for the South Saskatchewan River Basin. In deciding whether the order in council was of a legislative nature, the Alberta Court of Queen's Bench determined at para 61 that "[t]he Court must consider the nature of the body enacting the order, the subject matter of the order, the application of the order, and the rights and responsibilities altered by the order." The case was further appealed, 2010 ABCA 137, 482 AR 198, but the appellants on appeal withdrew their request to set aside the order in council approving the Plan and proceeded on other grounds.

140 *Reference re Manitoba Language Rights (No 2)*, *supra* note 136 at 223-24 referring to *Blaikie v Quebec (Attorney General)*, [1979] 2 SCR 1016 at 328-29.

141 *Ibid*.

142 *Ibid* at 224.

143 *Ibid* at 224-25, 233. In identifying these criteria, the Court relies on the following definition of "regulation" to describe the criteria indicative of a "legislative nature": "[a] regulation is a rule of conduct, enacted by a regulation-making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons." The Court notes that, even if in its original context the definition relates specifically to regulations, it provides assistance in developing a general definition of the phrase "of a legislative nature."

144 *Ibid* at 224-25.

145 *Ibid* at 223.

146 See Alberta, Alberta Justice, "A Guide to the Legislative Process — Acts and Regulations" (Edmonton: Alberta Justice, 2005) at 13-14, online: <https://www.solgps.alberta.ca/Publications1/Legislative%20process%20manual.pdf>.

under section 67 of *REDA* should be published on the Regulator's website and be easily accessible to the public.[147] The public should be able to distinguish between a decision made by the Regulator and a decision made by the Alberta Government. If the Government interferes with a decision of the Regulator, it should be held politically responsible for it. Furthermore, when the direction involves substantial policy changes, interested parties should have a reasonable opportunity to comment on the proposed direction.[148] Given that the Policy Management Office was established to act as an interface on policy issues between the Ministers and the Regulator, it could offer a forum for consultation on these proposed directions.

G. THE APPROPRIATENESS OF DIRECTIONS

The appropriateness of directions or the extent to which the Ministers should use them to ensure that the work of the Regulator is "consistent with the programs, policies and work of the Government" remains unclear under the current legislation.[149] The concerns of the Opposition in the legislative debate, voiced by MLA Dr. Swan, that section 67(1)(b) "could be misused" or "give a false impression to some ministers that they can carry out far more intervention than is appropriate" seem to suggest that section 67 of *REDA* was not introduced in the statute to allow the Minister to routinely interfere with the work of the Regulator.[150] However, in response to these concerns the Government House Leader firmly stated that the Regulator is only responsible for policy implementation and that policy-making is the role of the Alberta Government.[151] Drawing a line is not easy and part of this debate depends on the meaning ascribed to the term *policy*. While there may be a general consensus that the Alberta Government is responsible for *general* policy-making, it is less clear that the Minister should also issue directions when policy-making entails technical issues.[152]

Executive directions are generally considered appropriate when a government foresees that the regulations of the agency "may touch sensitive issues of central policy planning."[153] One of the main criticisms of the previous regime for reviewing energy projects in Alberta was that the broad mandate of the ERCB and the lack of guidance from the Government in certain areas created a policy vacuum that left the ERCB with no choice but to make its own policy. A pointed example was the controversy surrounding the decision of the ERCB to

147 See discussion in Part IV, below (directions to the British Columbia Utilities Commission and to the Ontario Energy Board are published on the website of the Commission and Board). See Nigel Bankes, "Constitutional Questions and the Alberta Energy Regulator" (24 October 2013), *ABlawg* (blog), online: <ablawg.ca/2013/10/24/constitutional-questions-and-the-alberta-energy-regulator> (commenting on the AER's policy in deciding what to publish on its website).

148 See e.g. *Broadcasting Act*, *supra* note 58, s 7(6) and *Telecommunications Act*, *supra* note 58, s 10(2) (requiring the Minister of Canadian Heritage to consult with the Commission before the Governor-in-Council makes an order under the *Broadcasting Act*, and the Minister of Industry for consulting with the Commission before the Governor-in-Council makes an order under the *Telecommunications Act*. Both Acts require the Ministers to lay before each House of Parliament the proposed policy order and publish it by notice in the Canada Gazette inviting interested persons to make representations to the Ministers.)

149 *REDA*, *supra* note 8, s 67(1)(b).

150 See discussion in Part III.C, above and notes 71-70, *supra*.

151 *Ibid*.

152 See e.g. *Telecommunications Act*, *supra* note 58, s 8 (requiring that directions of the Governor-in-Council be of general application on broad policy matters); *Nuclear Safety and Control Act*, *supra* note 58, s 19 (requiring that directions of the Governor-in-Council be of general application on broad policy matters); *Broadcasting Act*, *supra* note 58, s 7 (requiring that directions of the Governor-in-Council be of general application on broad policy matters).

153 *Independent Administrative Agencies*, *supra* note 34 at 26.

issue "Directive 074" that identified specific performance criteria for the management of tailing ponds.[154] With the recent adoption of the *Land-Use Framework*[155] and the *Alberta Land Stewardship Act*[156] the Alberta Government is attempting to establish an innovative approach to managing the province's natural resources through integrated regional planning. This scheme is designed to ensure that natural resources are developed more efficiently while preserving the life-supporting capacity of air, water, land and biodiversity.[157] Regional Plans established under *ALSA* are "an expression of the public policy of the Government" and will be binding on all statutory decision-makers in Alberta.[158] They will inform, guide, and direct uses of natural resources in order to achieve the desired outcome.[159] This new scheme provides the Government with an important set of tools to establish policy on a number of important matters including cumulative impacts on air, land, and water.[160] In addition, the Alberta Government established a new Policy Management Office for Natural Resources and Environment that will act as an interface between policy development and policy implementation.[161] The Policy Management Office will report to the Department of Energy and ESRD, and will be responsible for ensuring that they develop coordinated policies as a collaborative effort, and that the policies are clearly communicated and understood by the Alberta Energy Regulator.[162] While the Policy Management Office will initially focus only on the Regulator, its focus could also expand to other strategic policy initiatives in the future, including the *Alberta Land Stewardship Act* and the Land-Use Secretariat established under it.[163] In this context, section 67 of *REDA* offers the legislative link that will allow the

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154 In April 2008 the deaths of 500 ducks on a Syncrude tailing pond drew international attention to the ponds. The ERCB stated that mine operators had failed to meet their targets as promised in mine applications, but there was no sign from the Environment Department that they would address this gap. Therefore, the ERCB took the lead and in February 2009 issued a Ministerial Directive: Alberta Energy Regulator, "Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes," (Calgary: Energy Resources Conservation Board, 3 February 2009) ["Directive 074"], online: <www.aer.ca/documents/directives/Directive074.pdf> identifying specific performance criteria for the proper management of tailing ponds. The Directive is a policy instrument, and the final version reflects feedback from government, industry and the public. The Directive established enforceable cleanup programs and deadlines for tailing pond construction, operations, closure and abandonment. The Directive also allows ERCB inspectors to take action if companies do not respect their commitments. On 13 March 2015, the Alberta Government suspended "Directive 074" and released the Tailings Management Framework for Mineable Athabasca Oil Sands (TMF). The TMF is a new government policy that provides direction to the Regulator on fluid tailings volumes and decreasing risks associated with the accumulation of fluid tailings on the landscape. See Alberta Energy Regulator, "Bulletin 2015-11: Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes Suspended," by Kirk Bailey (AER, 13 March 2015), online: <www.aer.ca/documents/bulletins/Bulletin-2015-11.pdf>. See also *Technical Report*, *supra* note 2 at 54-56; "New eco-Rules can shut oilsands," *Edmonton Journal* (26 June 2008), online: Canada.com <www.canada.com/edmontonjournal/news/story.html?id=315bdd4d-24ad-4f6f-bcll-066823d55add>; for a further example of the tension existing between the Alberta Government and the ERCB, see discussion in *supra* note 35.

155 *LUF*, *supra* note 6.

156 *ALSA*, *supra* note 6.

157 An integrated approach to natural resources promotes the coordinated development and management of water, land and related resources in order to make systematic and strategic decisions concerning appropriate land uses. For a detailed analysis of this type of approach, see Isobel W Heathcote, *Integrated Watershed Management, Principles and Practice*, 2nd ed (New Jersey: John Wiley & Sons, 2009).

158 *ALSA*, *supra* note 6, ss 13(1), 15; *REDA*, *supra* note 8, s 20(1).

159 *Ibid*.

160 Cumulative effects are the impacts on the environment that result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. See Government of Canada, Aboriginal Affairs and Northern Development Canada, *Cumulative Impact Monitoring Program*, online: Aboriginal Affairs and Northern Development Canada <www.aadnc-aandc.gc.ca/eng/1100100023828/1100100023830>.

161 The Policy Management Office is formally established within the Department of Energy. See *Technical Report*, *supra* note 2 at 55.

162 *Ibid*.

163 *Ibid* at 56.

Government to formally coordinate the work of the new Alberta Energy Regulator within the broader provincial framework. Thus, if used carefully, directions to the Regulator might play an essential role particularly during this transitional phase and the shift to an integrated approach for the management of natural resources.

Some directions presumably will be based on the recommendations of the Policy Management Office according to the policy issues identified by the Regulator itself and communicated to the Policy Management Office.[164] Directions could be used to clarify the Regulator's interpretation of its statutory mandate or clarify the general policies that should guide the Regulator in carrying out its mandate. Directions may also be an efficient way to address policy inconsistencies or gaps in the mandate of the Regulator. Section 2 of the *REDA*, requires the Regulator to carry out its mandate with both "energy resource enactments" and with "specified enactments" as defined under *REDA*.[165] Examination of these definitions reveals that the Regulator has several powers, duties, and functions assigned under a variety of acts and that the policies of these different sectors are not necessarily aligned.[166] Therefore, directions could be used to promptly address these issues as they arise and avoid delays in the Regulator's decision-making.

Perhaps pending the implementation of additional Regional Plans, directions might be used to address policy issues concerning the approval of energy projects and other dispositions. At the moment, only the Lower Athabasca Region and South Saskatchewan have an approved Regional Plan under the *ALSA*, but clear thresholds for the environment have not been established. The North Saskatchewan Regional Plan is under development, while the other four regions (Upper Peace, Lower Peace, Red Deer, and Upper Athabasca) have not started the planning process yet.[167] As more information on the status of these regions becomes available, directions could promptly set priorities and guidelines on certain activities, or limits and standards to land disturbance for certain areas.

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164 See Alberta, Legislative Assembly, *Alberta Hansard*, 28th Leg, 1st Sess, No 54a at 2142.

165 *REDA*, *supra* note 8, s 2(1). For the definition of "energy resource enactment" and "specified enactment" under *REDA*, see ss 1(1)(j), 1(1)(s). These enactments include the *Coal Conservation Act*, RSA 2000, c C-17; the *Gas Resources Preservation Act*, RSA 2000, c G-4; the *Oil and Gas Conservation Act*, RSA 2000, c O-6; the *Pipeline Act*, RSA 2000, c P-15; the *EPEA*, *supra* note 9; the *Public Lands Act*, *supra* note 9; the *Water Act*, *supra* note 9; and Part 8 of the *Mines and Minerals Act*, *supra* note 9.

166 *Ibid*. See also *REDA*, *ibid* note 8, s 2(2) (identifying without limitation the long list of the powers, duties and functions assigned to the Regulator including the following: applications under energy resource enactments in respect of pipelines, wells, processing plants, mines and other facilities and operations for the recovery and processing of energy resources; applications for the use of land in respect of energy resource activities, including approving energy resource activities on public land; applications and other matters under the *EPEA* in respect of energy resource activities; applications and other matters under the *Water Act* in respect of energy resource activities; to oversee the abandonment and closure of pipelines, wells, processing plants, mines and other facilities and operations in respect of energy resource activities at the end of their life cycle in accordance with energy resource enactments; to regulate the remediation and reclamation of pipelines, wells, processing plants, mines and other facilities and operations in respect of energy resource activities in accordance with the *EPEA*).

167 See Alberta Environment and Sustainable Development, "Land Use Alberta, Governance," online: Alberta Environment and Sustainable Development <https://www.landuse.alberta.ca/Governance/Pages/default.aspx>.

In 2013, the former Minister of the Department of Energy, Ken Hughes, stated that both the Policy Management Office and the Ministers will be allowed to give directions to the Regulator when necessary and that there will be regular discussions between the parties.[168] In addition, he stated that the Policy Management Office will be responsible for, among other functions, monitoring the Regulator to ensure that water and other environmental permits will be properly issued to energy project proponents.[169] Even though it is positive that, in response to several concerns, the Alberta Government has expressed its intention to ensure that energy development will be conducted in an environmentally responsible way, these statements are not completely reassuring.[170] The new Regulator is not an agent of the Crown and the role of the Government is not to constantly influence its work.[171] As previously discussed, the Regulator will be able to render decisions free of influence from political short-term goals, and thus make better decisions in the public interest, only if it is not subject to the direct control of the Government when exercising its duties and functions. Furthermore, depending on the perceived independence and impartiality of the Regulator in performing its functions, ministerial directions may be subject to litigation, which may itself compromise the vaunted goal of securing additional investments in the energy sector. Drawing a line is not easy and, to a certain extent, it is for the government of the day to make this decision. However, the Regulator was established at arm's length from the executive because its independence allows it to achieve its objective more readily than if it fell under the direct control of a ministry. Thus, ministerial directions should be issued cautiously or they may defeat the same reasons that prompted the Alberta Government to create the new Regulator.

H. THE *ABORIGINAL CONSULTATION DIRECTION*

On 26 November 2013, the Minister of Energy issued to the Regulator the first direction under section 67 of *REDA*, namely the Ministerial Order 141/2013 (or the *Aboriginal Consultation Direction*).[172] On 31 October 2014, the Minister of Energy and the Minister of Environment and Sustainable Resource Development (ESRD) issued a revised *Aboriginal*

168 See Sheila Pratt, "New Energy Regulator will Weaken Environmental Protection, Say Critics," *Edmonton Journal* (17 March 2013), online: <www.albertalandwonerscouncil.com/March%2017,%202013,%20Edmonton%20Journal-New%20energy%20regulation%20will%20weaken%20environmental%20protection.pdf>. In December 2013, Diana McQueen replaced Ken Hughes as Minister of Environment and Sustainable Resource Development.

169 *Ibid*.

170 Several commentators have raised concerns that by taking over the functions previously administered by ESRD with respect to energy projects, environmental protection may be weakened. See e.g. Nigel Bankes, "Bill 2 and its implications for the jurisdiction of the Environmental Appeal Board" (9 November 2012), *ABlawg* (blog), online: <ablawg.ca/2012/11/09/bill-2-and-its-implications-for-the-jurisdiction-of-the-Environmental-Appeal-Board>; Nigel Bankes, "A single window for the permitting of energy projects in Alberta: who will look out for the chickens?" (16 May 2011), *ABlawg* (blog), online: <ablawg.ca/2011/05/16/a-single-window-for-the-permitting-of-energy-projects-in-Alberta-who-will-look-out-for-the-chickens>; Cindy Chiasson, "Single energy regulator bill a poor deal for Alberta's environment" (1 November 2012), *Environmental Law Centre* (blog), online: ELC <environmentallawcentre.wordpress.com/2012/11/01/single-energy-regulator-bill-a-poor-deal-for-albertas-environment>.

171 *REDA*, *supra* note 8, s 4.

172 Alberta, Department of Energy, "Ministerial Order 141/2013" (Edmonton: Department of Energy, 2013) at 2, online: <www.energy.alberta.ca//Org/pdfs/MO141_2013woSignature.pdf>. For a commentary on this Ministerial Order, see Giorilyn Bruno & Nigel Bankes, "The First Ministerial Direction to the Alberta Energy Regulator: The Aboriginal Consultation Direction" (24 April 2014), *ABlawg* (blog), online: <ablawg.ca/2014/04/24/the-first-ministerial-direction-to-the-alberta-energy-regulator-the aboriginal-consultation-direction>.

Consultation Direction to the Regulator.[173] This is the second Ministerial Order issued under section 67 of the *REDA* and it repeals the previous one.

The Regulator does not have the jurisdiction to assess the adequacy of Crown consultation.[174] The current regulatory framework assigns this function to the Aboriginal Consultation Office (ACO), a new office established under the Aboriginal Relations Department.[175] In this context, the *Aboriginal Consultation Direction* sets out a process that the Regulator must follow to ensure that it acts consistently with the decisions of the Government and to facilitate information exchange between the Regulator and the ACO.[176] The *Aboriginal Consultation Direction* applies to applications to the Regulator in respect of energy resource activities under "specified enactments," as defined in the *REDA*.[177] The main purpose of this Direction is "to ensure that the AER considers and makes decisions in respect of energy applications in a manner that is consistent with the work of the Government of Alberta"[178] in meeting its consultation obligations associated with the existing rights of Aboriginal people.

The *Aboriginal Consultation Direction* gives nine directions to the Regulator which are grouped under four subheadings: (1) Coordination; (2) Applications; (3) Decisions; and (4) Appeal and Reconsideration. Under "Coordination," the *Aboriginal Consultation Direction* requires the Regulator to create and maintain a consultation unit that will work with the Aboriginal Consultation Office (ACO).[179] The *Aboriginal Consultation Direction* also requires the Regulator to collaborate with the ACO in establishing operating procedures that address how these two organizations will administer and coordinate their work.[180] The Regulator is required to follow these procedures.[181] Under "Applications," the Regulator must require all proponents to contact the ACO before submitting an energy application to the Regulator.[182] Once submitted, the Regulator is to provide the ACO with certain

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173 Alberta, Department of Energy, "Energy Ministerial Order 105/2014 Environment and Sustainable Resource Development Ministerial Order 53/2014" (Edmonton: Department of Energy, 31 October 2014) [*Aboriginal Consultation Direction*], online: <www.energy.gov.ab.ca/Org/pdfs/MOAboriginal ConsultationDirection.pdf>. For a commentary on this Ministerial Order, see Giorilyn Bruno & Nigel Bankes, "A Revised Aboriginal Consultation Direction issued to the Alberta Energy Regulator" (8 December 2014) *ABlawg* (blog), online: <ablawg.ca/2014/12/08/a-revised-aboriginal-consultation-direction-issued-to-the-alberta-energy-regulator>.

174 *REDA*, *supra* note 8, s 21.

175 The ACO is also responsible for all other aspects of First Nations consultation, including pre-consultation assessment, management, and execution of the consultation process. See generally Alberta, Ministry of Aboriginal Relations, online: <www.aboriginal.alberta.ca/1.cfm>.

176 *Aboriginal Consultation Direction*, *supra* note 173 at 2.

177 *Ibid* at 2. On 10 December 2014, the Assistant Deputy Minister of Aboriginal Relations (Alberta) and the Vice President of Government and Stakeholder Relations (AER) signed the "Joint Operating Procedures for First Nations Consultation on Energy Resource Activities," (Edmonton: AER & ACO, 10 June 2015) ["Joint Operating Procedures"], online: <www.aer.ca/documents/actregs/JointOperating Procedures.pdf>. The Agreement, which came into effect 2 March 2015 (the June 2015 revised version also sets out an application supplement requirement effective 1 July 2015), clarifies that the *Aboriginal Consultation Direction*, *supra* note 173 applies to applications made to the AER under the specified enactments. The Agreement at (iii) states: "The ministerial order issued on October 31, 2014 (*Energy 105/2014* and *Sustainable Resource Development 53/2014*) and the *Procedures* apply only to applications made to the AER under the specified enactments, as defined by the *Responsible Energy Development Act* (i.e., *Public Lands Act*, *Mines and Minerals Act* (Part 8), *Water Act*, and the *Environmental Protection and Enhancement Act*), in respect of energy resource activities."

178 *Aboriginal Consultation Direction*, *ibid* at 2.

179 *Ibid* at 3.

180 *Ibid*. The "Joint Operating Procedures" have recently come into force: see discussion in *supra* note 177.

181 *Aboriginal Consultation Direction*, *ibid* at 3.

182 *Ibid*.

information with respect to the application.[183] Assuming that consultation is required, the Regulator must ensure that proponents have included information about the potential adverse impact of the proposed project on existing rights and traditional uses by Aboriginal people in their application.[184] Also, the Regulator is required to advise the ACO of any changes to the application, whether alternate dispute resolution involving Aboriginal people will be used, whether a hearing will be held on the application, and whether Aboriginal people will be included in the hearing process.[185] Under "Decisions," the *Aboriginal Consultation Direction* requires the Regulator to seek advice from the ACO with respect to the adequacy of consultation and mitigation actions on potential adverse impacts on Aboriginal rights and traditional uses.[186] The Regulator is also required to notify the ACO and provide the ACO with a copy of its decision and related reasons concerning the outcome of an energy application at the same time it notifies the proponent.[187] Finally, under "Appeal and Reconsideration," the Regulator is required to provide the ACO with a copy of any application for regulatory appeal, reconsideration, or leave to appeal to the Court of Appeal filed by Aboriginal people.[188]

Some of the issues previously discussed may be analyzed in the context of the *Aboriginal Consultation Direction*. For instance, neither the first Ministerial Order nor the second one has been published in the Alberta Gazette. The first Ministerial Order 141/2013 was not even published on the Regulator's website; it was published on the website of the Department of Energy but only (and inexplicably) under the heading "Travel Reports."[189] This type of promulgation certainly raises concerns about the transparency of the process. Further, could the latest *Aboriginal Consultation Direction* be challenged on the ground that it was not formally published? Presumably, the Minister has to comply with the procedure prescribed under section 3 of the *Regulations Act* if the *Aboriginal Consultation Direction* is of a legislative nature.[190] However, qualifying its nature is not straightforward. On one side, it may be argued that the *Aboriginal Consultation Direction* is of an administrative nature because it is directed at specific individuals (that is, the Regulator), and its overall thrust is to ensure a coordinated process and efficient information exchange between the Regulator and the ACO on energy applications that require Aboriginal consultation.[191] In this case, the Minister would have no obligation to comply with the procedure prescribed under section 3 of the *Regulations Act*. On the other hand, other requirements of the *Aboriginal Consultation Direction* apply to the public and are concerned with setting standards of conduct. For instance, a proponent is required to contact the ACO before submitting an energy application and to include in the application certain documents and information.[192]

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183 *Ibid* (in particular, the *Direction* requires that a copy of or access to the application be submitted to the Regulator, as well as a copy of any statement of concern, submission, evidence and information filed by any Aboriginal group concerning the application).

184 This requirement does not operate if the application concerns an activity that is deemed not to require consultation. This would happen in two instances: (1) the application concerns an activity that is listed under Appendix C of the Consultation Guidelines or (2) the application is accompanied by a pre-consultation assessment of the ACO indicating that no consultation is required. See *ibid* at 4.

185 *Ibid*.

186 *Ibid*.

187 *Ibid*.

188 *Ibid*.

189 *Supra* note 172.

190 See discussion in Part III.F, above.

191 See *Aboriginal Consultation Direction*, *supra* note 173 at 3-4, Directions 1, 2, 5, 8.

192 *Ibid*, Directions 4, 6.

Since these requirements alter the exercise of rights and responsibilities of the public, it may be difficult to conclude that the *Aboriginal Consultation Direction* is purely of an administrative nature. In this case, it would have no effect because it was not issued in compliance with the procedure prescribed under section 3 of the *Regulations Act*.

Uncertainties arise also in the context of Direction 7, which requires the Regulator to seek advice on actions that may reduce the potential impacts on existing rights or on traditional uses of Aboriginal people. This direction states as follows:

> 7) Prior to making a decision in respect of an energy application for which First Nations consultation is required by the Consultation Guidelines or by the ACO, the AER shall request advice from the ACO
>
> a) respecting whether Alberta has found consultation to have been adequate, adequate pending the outcome of the AER's process, or not required, and
>
> b) on whether actions may be required to address potential adverse impacts on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* or traditional uses as defined in the Consultation Policy.[193]

The Government's duty to consult may include the need to accommodate Aboriginal concerns.[194] The standard of sufficient accommodation remains extremely vague but it may entail adjusting plans and projects to minimize impacts. Therefore, the rationale of Direction 7(b) seems to be to ensure that the duty to accommodate is adequately reflected in the regulatory approval process. However, to what extent can the ACO interfere with a decision of the Regulator concerning mitigating measures? Is the Regulator required to implement the measures recommended by the ACO? Does the Regulator maintain some level of discretion and the ultimate responsibility for the decision? The requirement that the Regulator must seek advice on mitigating measures seems to suggest that the ACO has oversight over the Regulator's decision. At the same time, Direction 7(b) does not require the Regulator to implement the advice received. Thus, presumably the Regulator maintains some level of discretion. Whether and to what extent the Regulator will in practice exercise discretion remains uncertain.

Lastly, it does not seem possible to identify the legal effects of the *Aboriginal Consultation Direction* on third parties or whether third parties have judicially enforceable rights. The reason is that it is first necessary to determine whether section 67 of the *REDA* generally allows legislative or administrative directions. But, as previously discussed, the answer to this issue is not clear.[195]

In conclusion, several issues remain unclear under section 67 of the *REDA* including the scope of the ministerial power, the legal status of directions issued under this provision, and the procedural requirements to issue directions. These legislative gaps create significant uncertainties in the current regulatory regime.

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193 *Ibid* at 4.
194 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 10.
195 See discussion in Part III.F, above.

VI. A COMPARATIVE ANALYSIS WITH THE BC OIL AND GAS COMMISSION, THE BC UTILITIES COMMISSION, AND THE ONTARIO ENERGY BOARD

Even though the power of the Minister under section 67 of *REDA* seems to be quite unique in Alberta,[196] executive directions are not isolated in the tradition of Canadian administrative agencies. This part provides a comparative analysis of the BC Oil and Gas Commission, the BC Utilities Commission, and the Ontario Energy Board. The discussion is structured around the following questions:

- What is the scope of executive directions?
- Who has the power to issue directions?
- What type of procedure must be followed to issue directions?
- Has the power to issue directions been used?

A. THE BC OIL AND GAS COMMISSION

The BC Oil and Gas Commission is a single-window regulatory agency responsible for overseeing oil and gas operations in British Columbia, including exploration, development, pipeline transportation and reclamation.[197] Some see it as the model on which *REDA* is based. The Commission performs regulatory functions and is considered to have a sufficient measure of decision-making authority to warrant being called arm's length or "independent."[198] Regulatory responsibility is delegated to the Commission through the *Oil and Gas Activities Act*[199] and includes specified enactments including provisions of the *Forest Act*,[200] the *Heritage Conservation Act*,[201] the *Land Act*,[202] the *Environmental Management Act*,[203] and the *Water Act*.[204]

1. COMMISSION SUBJECT TO DIRECTIONS

The Commission may be subject to mandatory executive directions under section 25(1.1) of the *Oil and Gas Activities Act.* The provision states as follows:

> (1) Subject to subsection (1.1), on application by a person under section 24 and after considering

196 A search (6 July 2015) using the term <"minister may by order" /p directions> in the Alberta CanLII data base returned 66 hits — none involving a tribunal like the Alberta Energy Regulator. The closest analogy was perhaps section 57.1 of *ALSA* which allows the "Stewardship Minister may by order" issue *directives* that the secretariat and the stewardship commissioner must follow in carrying out their powers, duties and functions under this Act, the regulations and regional plans" [emphasis added].

197 The BC Oil and Gas Commission was originally established under the *Oil and Gas Commission Act*, SBC 1998, c 39. The Commission is now governed by the *Oil and Gas Activities Act*, SBC 2008, c 36, which repealed the *Oil and Gas Commission Act* effective 4 October 2010 (BC Reg 274/2010)).

198 BC Oil and Gas Commission, "About Us" online: BC Oil and Gas Commission <www.bcogc.ca/about-us>.

199 *Ibid*.

200 *Forest Act*, RSBC 1996, c 157.

201 *Heritage Conservation Act*, RSBC 1996, c 187.

202 *Land Act*, RSBC 1996, c 245.

203 *Environmental Management Act*, SBC 2003, c 53.

204 *Water Act*, RSBC 1996, c 483.

(a) written submissions made under section 22(5), if any, and

(b) the government's environmental objectives, if any have been prescribed for the purposes of this section,

the commission may issue a permit to the person if the person meets the requirements prescribed for the purposes of this section.

(1.1) The Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the commission's power under subsection (1), and the commission must comply with the direction despite any other provision of this Act, the regulations or an order made under this Act.[205]

2. WHAT IS THE SCOPE OF EXECUTIVE DIRECTIONS UNDER THE *OIL AND GAS ACTIVITIES ACT*?

By reference to section 25(1), executive directions may be issued with respect to the exercise of the Commission's power to issue permits and authorizations for oil and gas activities.[206] An executive direction has the force of law and far-reaching implications since it trumps any other provision of the *Oil and Gas Activities Act*, the regulations or orders made under the *Oil and Gas Activities Act*.[207]

3. WHO HAS THE POWER TO ISSUE DIRECTIONS TO THE BC OIL AND GAS COMMISSION?

Section 25(1.1) of the *Oil and Gas Activities Act*, gives the power to issue directions to the Lieutenant Governor-in-Council.

4. WHAT TYPE OF PROCEDURE MUST BE FOLLOWED TO ISSUE DIRECTIONS?

The Lieutenant Governor-in-Council may give directions to the BC Oil and Gas Commission by way of regulation.[208] Directions must be published in the British Columbia Gazette and have binding effect when deposited and published in the Gazette.[209]

5. HAS THE POWER TO ISSUE DIRECTIONS BEEN USED?

The Lieutenant-Governor-in-Council recently issued under section 25(1.1) of the *Oil and Gas Activities Act*, the first direction to the Commission. This direction prohibits the Commission from issuing a permit to a person to convert a liquified natural gas facility

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205 *Oil and Gas Activities Act*, *supra* note 197, s 25(1-1.1).
206 *Ibid*.
207 *Ibid*; *Interpretation Act*, RSBC 1996, c 238, s 41(2).
208 *Oil and Gas Activities Act*, *ibid*, s 25(1.1).
209 See *Interpretation Act*, *supra* note 207, s 41; *Regulations Act*, RSBC 1996, c 402, ss 3, 5. But see section 6 for publication exemptions (showing, for example, if publication in the Gazette is impracticable or unduly expensive due to the length of the regulation, or the regulation is or will be available to persons who are likely to be affected by it).

pipeline into a pipeline for transporting oil or diluted bitumen.[210] In 2011, the BC Government directed the Oil and Gas Commission not to issue permits under section 25 of the *Oil and Gas Activities Act* in relation to the exploration, development, and production of oil and gas resources in the Flathead watershed area.[211] Even though this restriction on the powers of the Commission might have fallen under the scope of executive directions, in that instance, the BC Government instructed the Commission through the more formal and legitimate legislative process.[212]

B. THE BC UTILITIES COMMISSION

The BC Utilities Commission is an independent regulatory agency primarily responsible for the regulation of British Columbia's natural gas and electricity utilities under the *Utilities Commission Act*.[213] Additional responsibilities include the regulation of intra-provincial pipelines, electric power transmission facilities, and universal compulsory automobile insurance.[214]

1. COMMISSION SUBJECT TO DIRECTIONS

The BC Utilities Commission is subject to mandatory directions under section 3 of the *Utilities Commission Act*. The provision states as follows:

> (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.
>
> (2) The commission must comply with a direction issued under subsection (1), despite
>
> (a) any other provision of
>
> (i) this Act, except subsection (3) of this section, or
>
> (ii) the regulations,
>
> (a.1) any provision of the *Clean Energy Act* or the regulations under that Act, or
>
> (b) any previous decision of the commission.
>
> (3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly

210 *Direction No 1 to the Oil and Gas Commission*, BC Reg 1/2015.
211 *Flathead Watershed Area Conservation Act*, SBC 2011, c 20, s 3.
212 *Ibid*.
213 *Utilities Commission Act*, RSBC 1996, c 473.
214 *Ibid*.

(a) declare an order or decision of the commission to be of no force or effect, or

(b) require the commission to rescind an order or a decision.[215]

2. WHAT IS THE SCOPE OF EXECUTIVE DIRECTIONS UNDER THE *UTILITIES COMMISSION ACT*?

Executive directions to the BC Utilities Commission may be issued with respect to the exercise of the powers and the performance of the duties of the commission.[216] Similar to directions issued to the BC Oil and Gas Commission, a direction under section 3(2) of the *Utilities Commission Act* has far-reaching implications since it trumps any provision of the *Utilities Commission Act* and the *Clean Energy Act* or the regulations under these acts, as well as any previous decision of the commission.[217]

Section 3(3), sets an important substantive limit and prohibits the executive from declaring an order or decision of the commission to be of no force or effect, or requiring the commission to rescind an order or a decision.[218]

3. WHO HAS THE POWER TO ISSUE DIRECTIONS TO THE BC UTILITIES COMMISSION?

Section 3 of the *Utilities Commission Act* gives the power to issue directions to the Lieutenant Governor-in-Council.

4. WHAT TYPE OF PROCEDURE MUST BE FOLLOWED TO ISSUE DIRECTIONS?

The Lieutenant Governor-in-Council may give directions by way of regulation.[219] Executive directions must be published in the British Columbia Gazette, and have binding effects when deposited and published in the Gazette.[220] As a matter of practice, directions are also published on the website of the BC Utilities Commission.[221]

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215 *Ibid*, s 3.

216 *Ibid*.

217 *Ibid*.

218 *Ibid*, s 3(3). This restriction is consistent with the decision to eliminate Cabinet appeals in the province. See Janisch, *supra* note 30 at 82; *Cabinet Appeals Abolition Act*, SBC 1993, c 38.

219 *Utilities Commission Act*, *supra* note 213, s 3.

220 See *Regulations Act*, *supra* note 209, ss 3-5, but see section 6 for publication exemptions (showing, for example, if publication in the Gazette is impracticable or unduly expensive due to the length of the regulation, or the regulation is or will be available to persons who are likely to be affected by it); *Interpretation Act*, *supra* note 207, s 41.

221 See British Columbia Utilities Commission, "Special Directions and Regulations to the British Columbia Utilities Commission," online: British Columbia Utilities Commission <http://www.bcuc.com/SpecialDirection.aspx>.

5. HAS THE POWER TO ISSUE DIRECTIONS BEEN USED?

The Lieutenant Governor-in-Council has issued several directions requiring the Commission: (i) to set specific rates or to achieve specific outcomes when setting rates;[222] (ii) to consider certain objectives before issuing a project certificate;[223] (iii) to take into account specific factors when making decisions in the public interest;[224] (iv) to exercise certain powers and functions in relation to the corporation generally;[225] and (v) to not exercise certain powers.[226]

C. THE ONTARIO ENERGY BOARD

The Ontario Energy Board regulates the province's electricity and natural gas utilities in accordance with the *Ontario Energy Board Act, 1998*.[227] Additional statutes that give jurisdiction to the Board are the *Electricity Act, 1998*,[228] the *Municipal Franchises Act*,[229] the *Oil, Gas and Salt Resources Act*,[230] the *Assessment Act*,[231] and the *Toronto District Heating Corporation Act*.[232]

1. BOARD SUBJECT TO DIRECTIONS

The Board is subject to mandatory directions under more than eleven provisions of the *Ontario Energy Board Act*.[233] Only two of the main provisions are reproduced here.

> 27. (1) The Minister may issue, and the Board shall implement, policy directives that have been approved by the Lieutenant Governor in Council concerning general policy and the objectives to be pursued by the Board.
>
> (2) A policy directive issued under this section shall be published in *The Ontario Gazette*.

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222 See *Direction No 3 to the British Columbia Utilities Commission*, BC Reg 105/2012; *Special Direction No 10 to the British Columbia Utilities Commission*, BC Reg 245/207 [*Special Direction No 10*].

223 *Special Direction No 9 to the British Columbia Utilities Commission*, BC Reg 157/2005, s 2.1.

224 *Special Direction No 10*, *supra* note 222, s 4.

225 *Special Direction IC2 to the British Columbia Utilities Commission*, BC Reg 307/2004. This direction was challenged in *BC Old Age Pensioners' Org v British Columbia (Minister of Public Safety & Solicitor General)*, 2006 BCSC 257, [2006] BCJ No 330 (QL) (concerning the Lieutenant Governor-in-Council issued Special Direction IC2 requiring the Insurance Corporation of British Columbia to transfer $530,000,000 of capital allocated to its optional business to its basic insurance business, and further directed the British Columbia Utilities Commission to accept that transfer. The Petitioners alleged that Special Direction IC2 perverted the regulatory scheme in that it created a new regulatory chain of command that circumvented the statutory authority of the British Columbia Utilities Commission. The application was dismissed and the Court determined that the ICBC was an agent of government and all of its property and money was deemed to be property of government. As principal, the government, through the Lieutenant Governor-in-Council, was simply directing its agent ICBC in conduct of an aspect of its undertaking. The Special Direction IC2 did not turn the chain of command on its head, but it merely directed the British Columbia Utilities Commission to recognize and accept such direction).

226 *Direction to the British Columbia Utilities Commission Respecting the Iskut Extension Project*, BC Reg 137/2013.

227 *Ontario Energy Board Act, 1998*, SO 1998, c 15, Schedule B.

228 *Electricity Act, 1998*, SO 1998, c 15, Schedule A. The *Electricity Act* outlines the framework for Ontario's competitive electricity marketplace.

229 *Municipal Franchises Act*, RSO 1990, c M-55. The *Municipal Franchises Act* provides for the granting of a franchise to a natural gas distributor to provide natural gas service within a municipality.

230 *Oil, Gas and Salt Resources Act*, RSO 1990, c P-12.

231 *Assessment Act*, RSO 1990, c A-31.

232 *Toronto District Heating Corporation Act, 1998*, SO 1998, c 15, Schedule C.

233 See *Ontario Energy Board Act, 1998*, *supra* note 227, ss. 27-28.7.

> 27.1 (1) The Minister may issue, and the Board shall implement, directives that have been approved by the Lieutenant Governor in Council that require the Board to take steps specified in the directives to promote energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources.
>
> (2) A directive issued under this section shall be published in *The Ontario Gazette*.[234]

2. WHAT IS THE SCOPE OF EXECUTIVE DIRECTIONS UNDER THE *ONTARIO ENERGY BOARD ACT*?

The initial 1998 version of the *Ontario Energy Board Act* contained only two provisions allowing executive directions with respect to (i) "general policy and the objectives to be pursued by the Board,"[235] and (ii) "market rules made under section 32 of the *Electricity Act, 1998* and existing or proposed licence conditions" in order to address market abuses.[236] Subsequent amendments to the *Ontario Energy Board Act* in 2002, 2006, and 2009 have broadened the scope of directions. The *Act* currently allows directions for several purposes, including the following: (i) "to promote energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources,"[237] (ii) "to establish conservation and demand management targets to be met by distributors and other licensees,"[238] (iii) to require the Board "to take such steps as are specified in the directive relating to the establishment, implementation or promotion of a smart grid for Ontario,"[239] and (iv) in relation "to the government's smart metering initiative."[240]

In 2010, a further amendment to the Act introduced section 28.7 allowing executive directions "in relation to the marketing of gas and the retailing of electricity in Ontario."[241] The length and scope of this provision is significant. In particular, subsection (3) of this provision allows the Minister to "require the Board *to amend all licences* so issued [under section 48 in respect of gas marketers or under section 57 in respect of retailers of electricity] or *to amend specific licences of specified licensees*."[242] Subsection (4) provides a long and non-exclusive list of conditions that the Minister may require the Board to implement on licences already issued.[243] Finally, subsection (6) allows directions requiring the Board to exercise audit, inspection, or investigating powers in certain circumstances.[244]

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234 *Ibid*, ss 27-27.1.
235 *Ibid*, s 27(1).
236 *Ibid*, s 28.
237 *Ibid*, s 27.1(1).
238 *Ibid*, s 27.2(1).
239 *Ibid*, s 28.5(1). Under section 28.5(2), a directive may also specify whether the Board is to hold a hearing and the circumstances under which a hearing may or may not be held.
240 *Ibid*, s 28.3(1). Under subsection 2 of this provision, the directives may also require the Board, in the manner specified in the directives, to amend conditions in licences issued by the Board, and provides a list of permissible conditions.
241 *Ibid*, ss 28.7.(1)
242 *Ibid*, s 28.7(3) [emphasis added].
243 *Ibid*, s 28.7(4).
244 *Ibid*, s 28.7(6).

3. WHO HAS THE POWER TO ISSUE DIRECTIONS TO THE ONTARIO ENERGY BOARD?

The power to issue mandatory directions is assigned to the Minister of Energy subject to the approval of the Lieutenant Governor-in-Council.[245]

4. WHAT TYPE OF PROCEDURE MUST BE FOLLOWED TO ISSUE DIRECTIONS?

The *Ontario Energy Board Act* uses the term *directive* as the instrument by which directions are communicated to the Board.[246] The term is not defined, but the Act requires that directives "shall be published in the *Ontario Gazette*."[247] All directives are approved by Orders in Council and published on the OEB's website.[248]

5. HAS THE POWER TO ISSUE DIRECTIONS BEEN USED?

The Minister has used the direction power several times, principally to issue "conservation directives" under section 27.1 of the *Act*.[249] In a few instances, the Minister has also provided policy guidance through this instrument.[250]

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245 The power to issue directives is given to the minister that is responsible for the administration of the *Ontario Energy Board Act, 1998*, *ibid*. At different times, that has been the Minister of Energy, Science and Technology, the Minister of Energy and Infrastructure and the Minister of Energy.

246 See *Ontario Energy Board Act, 1998*, *ibid*, ss 27, 28.7.

247 *Ibid*, s 27-27.2, 28.3, 28.5, 28.7.

248 See Ontario Energy Board, "Directives Issued to the OEB by the Minister of Energy," online: Ontario Energy Board <www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Directives+Issued+to+the+OEB>.

249 See the following directives issued under section 27.1 of the *Ontario Energy Board Act*: directive Jun 4-03 (requiring the Board to consult with stakeholders to identify and review options for the delivery of demand side management and demand response activities within the electricity sector, and to report back to the Minister of Energy with the Board's analysis and recommendations); directive Jun 23-04 (requiring the Board to develop and provide to the Minister of Energy an implementation plan for the achievement of the Government's smart meter targets, as well as in relation to the need for and potential effectiveness of non-commodity time of use rate structures); directive Aug 10-06 (requiring the Board to dispense with compliance by Enbridge Gas Distribution Inc. and Union Gas Limited with sections of their respective undertakings given to the Lieutenant Governor in Council, such that these gas utilities can provide services related to the promotion of conservation, electricity management and the promotion of cleaner energy sources); directive Sep 8-09 (requiring the Board to dispense with compliance by Enbridge Gas Distribution Inc. and Union Gas Limited with sections of their respective undertakings given to the Lieutenant Governor in Council, such that these gas utilities can own and operate certain generation facilities as well as assets required in respect of the provision of energy conservation services); directive Mar 31-10 (requiring the Board to establish electricity conservation and demand management (CDM) targets to be met by licensed electricity distributors and to issue a code pertaining to CDM). *Ibid*, s 27.1.

250 See Directive Jun 7-00 (requiring that the Board give primacy to the objective of protecting the interests of consumers in setting electricity distribution rates, and that the Board invite representations from the council of the municipal corporation(s) within the service area of an electricity distributor before making an order setting that distributor's distribution rates) and Directive May 16-07 (requiring the Board to implement such measures as the Board considers necessary to address the issue of stray voltage as it affects the farm sector). *Ibid*.

D. TABLE OF RESULTS

	BC Oil and Gas Commission	**BC Utilities Commission**	**Ontario Energy Board**
Authorizing provision	*Oil and Gas Activities Act*, s. 25	*Utilities Commission Act*, s. 3	*Ontario Energy Board Act*, ss. 27, 27.1, 27.2, 28, 28.1, 28.2, 28.3, 28.4, 28.5, 28.6, 28.7
Authority to issue mandatory directions	Lieutenant Governor-in-Council	Lieutenant Governor-in-Council	Minister of Energy subject to the approval of the Lieutenant Governor-in-Council
Scope of directions	Power of the Commission to issue oil and gas permits	Powers and performance of duties of the Commission	The scope includes but is not limited to the following: general policy and objectives to be pursued by the Board; market rules; promoting energy conservation and efficiency
Instrument by which the Authority may issue directions	Regulation	Regulation	Directive
Has the power to issue directions been used?	Yes	Yes	Yes
Are directions subject to mandatory publication in the relevant Gazette?	Yes	Yes	Yes
Are directions published on the Commission or Board's website?	No	Yes	Yes

V. CONCLUSION

Section 67 of *REDA* was justified as an attempt to reconcile the need of the executive to delegate decision-making to the Regulator, while preserving oversight of the Regulator's decision-making to ensure accountability. It follows that balancing these two conflicting interests is essential to achieve good governance.

The current legislation leaves open significant issues under section 67 of *REDA*, including the scope, the legal status of directions, and the procedural requirements to issue them.[251] In addition, while this article addressed some aspects of the relationship between section 67 of *REDA* and section 10 of *APAGA*, future research should analyze this topic more extensively.[252] These gaps create uncertainties in the current regulatory regime and exacerbate the concern that ministerial directions will be improperly used.

The comparative analysis with British Columbia and Ontario suggests that section 67 of *REDA* could be improved with respect to three aspects. First, the statutory power to give directions to the Regulator could be either assigned directly to the Lieutenant Governor-in-Council (as in the case of the BC Oil and Gas Commission and BC Utilities Commission) or require the approval of the Lieutenant Governor-in-Council (as in the case of the Ontario Energy Board).[253] This approach may be perceived as more legitimate and may protect the Ministers of Energy and ESRD from direct conflicts with the stakeholders and the general public.[254] Furthermore, this approach may ensure that directions reflect broad policy of the Alberta Government and not the policy of a single department.[255] Second, section 67 of *REDA* could prescribe that orders be published in the Alberta Gazette. This requirement would define the manner in which the executive should communicate with the Regulator and may clarify that issuing policy directions is a legislative act in nature and effect. As we have seen, directions to the BC Oil and Gas Commission and Utilities Commission must be formally issued and have the status of regulation.[256] Similarly, and despite being referred to as "directives," the procedure to issue directions to the Ontario Energy Board resembles the legislative process; thus, they also seem to have the status of delegated legislation.[257] This formal approach avoids the difficulties concerning directions of an administrative nature which may be binding on the agency but unenforceable in the courts.[258] In addition, this approach enhances transparency and may protect the agency from undue political interference.[259] The third lesson that we could learn from the comparative analysis concerns transparency. Transparency requires the information to be easily retrievable and not buried in bureaucracy or, as in the case of Ministerial Order 141/2013, under the "Travel Reports" of the Minister of Energy.[260] The public should be able to distinguish between a decision made by the Regulator and a decision made by the Alberta Government. If the Government interferes with a decision of the Regulator it should be held politically responsible for it. The

251 See discussion in Part III, above.
252 See discussion in Part III.E, above.
253 See discussion in Part IV, above.
254 See discussion in Part III.B, above.
255 *Ibid*
256 See discussion in Part IV, above.
257 *Ibid*.
258 See discussion in Part III.D, above.
259 *Ibid*.
260 See discussion in Part III.H, above.

executive directions issued to the BC Utilities Commission and the Ontario Energy Board offer a pointed example of transparent information. Not only are they published on the agency's website but they are also easily retrievable by the public.[261]

The comparative analysis seems to be less useful when attempting to draw conclusions as to the appropriateness of directions or the extent to which the executive should use section 67 of *REDA* to ensure that "the work of the Regulator is consistent with the programs, policies and work of the [Alberta] Government."[262] The different structure and mandate of both the BC Utilities Commission and the Ontario Energy Board do not allow a meaningful comparison. With respect to the BC Oil and Gas Commission, the Lieutenant Governor-in-Council has only issued one direction under section 25(1.1) of the *Oil and Gas Activities Act*. Reasons may include that the Lieutenant Governor-in-Council has a broad power to make regulations under other provisions of the Act. For instance, the Lieutenant Governor-in-Council has the power to make regulations concerning the "policies and procedures to be followed by the Commission in conducting its affairs, exercising its powers and discretion carrying out its functions and duties and discharging its responsibilities."[263] The Lieutenant Governor-in-Council may make regulations concerning "actions that a permit holder and a person carrying out an oil and gas activity must take or refrain from taking to protect or effectively manage the environment."[264] The Lieutenant Governor-in-Council may make regulations to prohibit the carrying out of an oil and gas activity.[265] Last, the Lieutenant Governor-in-Council may make regulations to exempt "a person, class of persons, place, thing, transaction or activity" from a provision of the *Oil and Gas Activities Act* or the regulations, as well as to restrict the Commission's authority to provide for exemptions in certain matters.[266] An executive direction issued to the BC Oil and Gas Commission under section 25(1.1) would trump these regulations in case of inconsistencies.[267] However, the legislative scheme seems to imply that executive directions should be issued as a last resort given that the Lieutenant Governor-in-Council has a broad power to issue regulations under other provisions. This may partly explain why the power under section 25(1.1) of the *Oil and Gas Activities Act* has been used only once.

By contrast, in Alberta the circumstances are different. The reasons that lead to the enactment of *REDA* include the desire of the Alberta Government to shift to an integrated management system able to address the cumulative impacts of natural resource development.[268] Section 67 of *REDA* was introduced in the Act to facilitate this shift and allow the Government to ensure that the work of the Regulator does not compromise the broader policy framework set out by the Government.[269] Thus, we should not be surprised if section 67 of *REDA* ends up playing a significant role, particularly during this transitional phase.

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261 See discussion in Part IV, above.
262 *REDA*, *supra* note 8, s 67(1)(b).
263 See *Oil and Gas Activities Act*, *supra* note 197, s 95(1).
264 *Ibid*, s 103(1).
265 *Ibid*, s 97.
266 *Ibid*, s 98(1).
267 See discussion in Part IV.A, above.
268 See *Technical Report*, *supra* note 2 at 54-58.
269 See discussion in Part III.C, above.

As we keep searching for the right balance between independence and accountability, we may accept the political reality that the Regulator is not absolutely independent and that the executive has a role in its governance. However, we should also keep in mind that delegation of statutory authority to arm's length regulatory bodies typically occurs when it would be ineffective or inappropriate for the executive to exercise those functions directly. Thirty years ago, the Law Reform Commission of Canada perhaps gave the best general advice. Executive directions should be used as a means of formal guidance when the intervention of the legislature would be inefficient, and following a process that is open to public involvement and transparent.[270]

[270] *Independent Administrative Agencies*, *supra* note 34 at 26. See also Hudson Janisch, "The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right?" (2012) 49:4 Alta L Rev 785 at 795; *Telecommunications Policy Review Panel*, *supra* note 31 at 9-14; Rankin, *supra* note 24 at 56.

TAB 68

Court of Queen's Bench of Alberta

Citation: Calgary (City) v Renfrew Chrysler Inc, 2017 ABQB 197

Date: 20170322
Docket: 1501 10147
Registry: Calgary

2017 ABQB 197 (CanLII)

Between:

City of Calgary

Appellant

- and -

Renfrew Chrysler Inc., Represented by AEC Property Tax Solutions and Assessment Review Board for the City of Calgary

Respondent(s)

Memorandum of Decision
of the
Honourable Mr. Justice R.A. Neufeld

Introduction

[1] In this proceeding, the City of Calgary (the "Appellant", or the "City") appeals a decision by the Assessment Review Board for the City of Calgary (the "Board") dated 13 August, 2015. In it, the Board reduced the assessed value of land leased by the City of Calgary to the Respondent Renfrew Chrysler Inc. (the Respondent" or the "Taxpayer") from $22,130,000 to $16,520,000.

[2] The Appellant contends that it was denied procedural fairness at the hearing of the Taxpayer's complaint. It says that the Board unfairly raised a new issue regarding the impugned assessment during questioning of the City's two witnesses. It also says that the Board unfairly relied on its own expertise, rather than the evidence, in making a finding that the new issue warranted a substantial (20%) reduction in the property assessment.

[3] The Respondent denies that the issue raised by the Board in questioning was new, saying that the need for a downward adjustment to account for restrictions in land use was a enumerated ground of complaint from the beginning. It contends that there was nothing unfair in the Board acting on its own expertise, and in reliance on the evidence before it in concluding a downward adjustment to reflect zoning restrictions was required.

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Background

[4] The land parcel in question in this case is approximately eight acres in size. It is located at the extreme west end of Calgary's downtown district, in the community of Sunalta. In the past, a creosote treatment plant was operated on an adjacent parcel, resulting in substantial contamination of the site.

[5] The land was purchased by the Appellant, City of Calgary, a number of years ago, and leased back to the Respondent, which is responsible for payment of municipal taxes. It is not the only parcel purchased by the City in the area; the City has acquired most of the land in the immediate vicinity with the long term intention of remediation and resale for development in accordance with its West Village Area Redevelopment Plan. Following its purchase, the Land was redesignated by the City as a DC (Direct Control) district, with Urban Reserve Guidelines, and additional Permitted and Discretionary Uses of automobile sales and rentals.

[6] In 2014, the assessed value of the land was $8,530,000. In 2015, it was assessed at $22,130,000- a 160% increase.

[7] The Respondent complained. It gave ten reasons for its complaint, including the absence of an adjustment in market value to account for the restriction of land use.

[8] In support of its complaint, and as required by the Matters Relating to Assessment Complaints Regulation *Alta. Reg. 310/2009* ("MRAC") the taxpayer filed a package of written submissions and supporting evidence within the Board. The submission summarized the complaint issues as follows:

1. The subject has been assessed in excess of market value.
2. The subject assessment is inequitable.
3. The City of Calgary uses inappropriate value adjustments.

[9] As part of its written submissions, the Respondent filed an appraisal report prepared by Mr. Ian Pritchard- an expert land appraiser. That report used as a base assumption that the land could only be legally used as an automobile dealership (or rental). It estimated the land's market value at $11,950,000 by comparing it to land parcels around Calgary that were designated for automobile sales.

[10] The Respondent argued that the market value estimated by Mr. Pritchard should be used by the Board as a base value, and should then be adjusted downward by 30%. Such an adjustment, it said, would be equitable as all similarly-contaminated sited are eligible for a market value adjustment of 30% for assessment purposes.

[11] The Respondent's written submissions did not advocate a reduction in its assessment due to land use restrictions per se, even though a reduction of 20% was an enumerated ground of its complaint.

[12] In reply to the Respondent's submissions, the Appellant filed a 50 page evidence package comprised of property details; a response to the complainant's evidence; comparable information relating to downtown assessment, and a brief conclusion. It also provided 127 pages of appendices compromised of legislation, a glossary of terms supporting sales documentation, and case law and review board decisions.

[13] The thrust of the Appellant's case was that the market value evidence provided by Mr. Pritchard should be rejected on the basis that his sales comparables could not be used to establish market value.

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The Hearing

[14] The complaint was heard by a 3 person panel of the Composite Assessment Review Board.

[15] The Respondent was represented by an experienced agent, Mr. John Smiley of AEC Property Tax Solutions. Mr. Smiley gave evidence, along with Mr. Pritchard.

[16] The Appellant City was represented by two of its expert assessors – Mr. Steven Berzins and Mr. Jared Young. No counsel were involved.

[17] Unsworn oral presentations were made by each side with the participants cross-examining each other. At the conclusion of cross-examination, the Panel members asked questions of their own. Following completion of oral evidence, an opportunity was provided for closing argument. Each side availed itself of that opportunity.

The Decision

[18] On August 13, 2015, the Board decided that the assessment was excessive. As its reasons were brief, I will quote them in their entirety.

> [30] The Board will limit its comments to the relevant facts pertaining to the stated issues(s).
>
> [31] The Board finds that a year-over-year percentage increase in assessment does not in itself, constitute grounds to change an assessment. While an increase may suggest that an assessment could be incorrect, it does not prove market value amount is correct.
>
> [32] On the issue of market value, the Board considered the market evidence presented by both parties, and finds that the Complainant's evidence is not sufficiently compelling to warrant a change to the assessment. The Subject Property's locational proximity is next to Calgary's Central Core. The Board finds the sale comparable utilized by the Appraiser were in non-comparable locations and lacked adjustments.
>
> [33] In respect of the +5% corner lot value adjustment, the Board finds the adjustment is not warranted; the property is not on a corner. The property does not receive the positive effects of superior exposure; the access/degree is considered to be rather circuitous.

[34] With regards to the issue of equity, the Board finds that the Subject Property is currently receiving the -30% adjustment for contamination.

[35] The Board noted the restrictive DC Land Use Guidelines currently in place on the Subject Property. While the Board recognizes that the UR designation currently in place is merely a transitional zoning (pending the environmental clean-up of the site as argued by the Respondent), it is nevertheless, the Land Use that is currently in place. The Board finds that the sole permitted use of "automotive services" is extremely restrictive, and would surely impact the sale of the Subject Property. Consequently, the Board has determined that a -20% adjustment per the City of Calgary's "*Land Influence Chart*" [R1; Pg.48] applies to the Subject Property.

[36] In summary, having considered the evidence presented by both parties, the Board finds sufficient cause to change the assessment per the reasons indicated above.

[37] The Assessment is reduced to **$16,520,000**.

Did the Board Discharge its Duty of Procedural Fairness?

[19] As noted earlier, the Appellant contends that the Board acted unfairly by:

1. Raising and relying on a new issue in finding that the assessment was excessive, without affording the City the opportunity to respond
2. Using its own expertise to decide the matter in substitution for evidence presented at the hearing.

a) Standard of Review

[20] Procedural fairness is not subject to assessment under the correctness versus reasonableness dichotomy discussed in ***Dunsmuir v New Brunswick***, 2008 S.C.R. 190. Instead, the issue is whether the conduct of the tribunal having regard to all of the circumstances, conformed to the standards expected. In ***Thomas v Alberta (Transportation and Safety Board***, 2003 ABCA 256 (***Thomas***) Paperny JA discussed the flexible nature of that standard, as follows:

> 61. The content of the duty of fairness is flexible and variable depending upon the context of the particular statute involved and the rights, privileges or interests affected. "[T]he purpose of the participatory rights contained within the duty is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker." Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para 22.
>
> 62. The several criteria to determine what procedural rights the duty of fairness requires in the circumstances of the operation of this civil law program, as set out in Baker at paras. 23-28, include: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations

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of the person challenging the decision; (5) the choices of procedure made by the agency itself. The list is not exhaustive.

b) Did the Board act unfairly in raising and relying on a new issue, without giving the City a fair opportunity to respond?

[21] The Appellant argues that in order for a party to have a fair opportunity to respond, it must receive timely notice of the evidence as well as the issues that will be considered at the hearing. It quotes Blake, Administrative Law in Canada, 5th Edition for the following proposition:

> In addition to the evidence, the essential issues to be considered should be identified. A party should not be left in the position of discovering upon receipt of the tribunal's decision, that it turned on a matter on which the party had not made representations because the party was not aware it was in issue. Nor is it fair to have an important issue sprung on a party during a hearing without prior notice or an adjournment...(at page 43)

[22] The Appellant says that the question of whether a land use restriction adjustment should be made to the assessed value of the land was sprung for the first time on its representatives by Board member Massey his questioning of the City's two representatives.

[23] The Respondent denies that the Board treated the City unfairly. It says that the issue of whether a land use restriction adjustment should be made was one of its reasons in support of its complaint. Therefore, the Appellant knew that the issue was on the table, even if the Respondent's submissions did not elaborate on that ground. Moreover, it says that both the Respondent and the Appellant included the 2015 Downtown Land Influence Chart that contains a 20% reduction for properties whose use is restricted by a Direct Control district by-law.

[24] At the leave stage, this Court found that leave to appeal should be granted, stating as follows:

> It's obvious to me that in making this minus 20 percent adjustment and the basis upon which it was done, the Board made its decision without giving the parties, and in particular the City of Calgary which has been more negatively affected by this, the opportunity to provide evidence to support its position and its position is obviously contrary to the decision that was ultimately made by the Board. [*Unreported, ABQB Action no. 1501-10147, April 19, 2016, at p.2*]

Findings

[25] In determining whether a tribunal has discharged its duty of procedural fairness, it is necessary to have regard for the statutory scheme, the nature of the issue before the tribunal, and the reasonable expectations of the parties (among other factors) (***Baker***).

[26] In this case, the procedure of adjudication of a complaint regarding a municipal tax assessment is prescribed by the MGA, and the MRAC Regulation promulgated thereunder.

[27] It begins with the filing of a complaint within a specified time period following receipt of an assessment. The complaint must set out the grounds for challenging the assessment.

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[28] Those grounds form the jurisdictional foundation for review of the assessment by the tribunal. For the Board to consider a ground that has not been identified in the complaint constitutes on error of jurisdiction. (***City of Edmonton v. Edmonton East (Capilano Shopping Centres Ltd*** 2016 SCC 47 at para 116)

[29] The second step is the filing of written material in support of the complaint, including "the documentary evidence, a summary of testimonial evidence including a signed witness report for each witness, and any written argument that the complainant intends to present at the hearing in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing." (MRAC, s.8 (2) (a)). This information must be disclosed at least 42 days prior to the hearing date.

[30] The third step is for the Respondent to disclose its documentary evidence, a summary of the testimonial evidence including a signed witness report for each witness, and any written argument that it intends to present at the hearing in sufficient detail to allow the complainant to respond to or rebut that evidence. This must be done at least 14 days before the hearing.

[31] The fourth step is for the complainant to disclose its rebuttal evidence and argument, at least 7 days before the hearing.

[32] The intention of these provisions of MRAC is to ensure that the evidence and arguments to be relied on and advanced by either side, is disclosed in advance. S. 9 (2) of MRAC entrenches goes one step further and prohibits a board from hearing any evidence that has not been disclosed in accordance with s.8.

[33] The Appellant does not dispute that the land use restriction adjustment issue was listed in the Complaint.

[34] However, it says that the Respondent's evidence disclosure made no reference to that issue, leading the Appellant's hearing representatives to believe that it would not be addressed at the hearing. For that reason, when they were questioned on the land use restriction and entitlement to a 20% reduction (as per the City's Land Influence Chart), they were taken by surprise, and were in no position to present considered evidence and argument on the issue.

[35] The Respondent does not dispute the fact that its pre-filed evidence and argument did not in the first instance seek an adjustment for the land use restrictions imposed on the site. It maintains, however, that the City's expert assessors should have been ready to discharge its onus of proof in demonstrating that its assessment was fair and equitable. The Respondent says that the City's experts should have been prepared to defend their decision to not apply such an adjustment irrespective of whether the issue was specifically addressed in the Respondent's pre-filed evidence and in its oral submissions to the Board.

[36] In my view, there is considerable merit to the Respondent's submissions in this regard. The appraisal report submitted by the Respondent did not specifically address the 20% land use restriction adjustment, as was ultimately found by the Board to be warranted. However, it is clear that the limited use to which the land could be put was reflected in the appraiser's choice of comparable land sales, which in turn led him to opine that the market value of the Land was approximately $11 Million, as opposed to the Appellant's estimate of over $22 Million.

[37] The Appellant's own evidence also included an information package prepared by the City explaining how it approaches the estimation of market value for downtown – with the Bow Trail land value listed at $85.00/sq. foot (the base value used in this particular assessment). It then

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discusses out of market adjustments that are or can be made to these base values for assessment purposes. A 2015 Downtown Land Influence Chart is provided, listing adjustments for corner lots (+5%), environmental contamination (-30%) and land use restrictions (-20%). The City's assessment in this case included a 5% upward adjustment for a corner lot and a 30% downward adjustment for environmental contaminating, but stated "NA" in respect of land use restriction.

[38] In the circumstances, the questions put to the City's expert assessors by Board member Massey (an expert appraiser in his own right) as to why a land use restriction adjustment had not been made were logical, reasonable, and somewhat predictable. Having argued against Mr. Pritchard's use of automotive sites as comparables, the City's assessors should have expected to be asked how, then, the restriction on land use contained in the Direct Control district by law could or should be accounted for (if at all).

[39] Unfortunately, it is clear from the transcript that the City's expert assessors were indeed surprised by the question. A considered response would not have included statements such as the City's assessment division being "hooped" by the land use restrictions imposed by the City itself; nor would it likely have included the somewhat circular argument that the restrictions could be ignored because the City of Calgary could just as easily re-designate the land to some other use.

[40] Rather than providing such off the cuff responses, the City's representatives would have been more prudent and helpful to the Board had they noted that the question had taken them by surprise (having not been articulated in the complainant's evidence), and requested an adjournment to provide a considered response. They did not do so, choosing to respond to the Board's questions, and to then provide additional argument on the issue in their final submissions.

[41] For these reasons, it is not at all clear-cut that the Appellant was denied procedural fairness. The broad question of how the market value of the property was affected by its restricted land use was clearly at issue in the hearing. The narrow question of whether a land use restriction adjustment – as described in the City's own landowner information package submitted as evidence- should be applied was raised initially as a specific ground for complaint, and was a question that could reasonably have been anticipated. To the extent that the City's representatives were surprised and unprepared to respond, they could have advised the Board of that and sought an adjournment rather than ploughing ahead.

[42] On the other hand, the Respondent -which was represented by an agency experienced in these hearings-, chose not to advance its complaint regarding the absence of a land use restriction adjustment in its written evidence and argument. It also chose to not mention the need for such an adjustment in its oral evidence at the hearing. It addressed the issue only in closing argument, after it had been raised in the Board's questioning of the City's experts. This clearly contributed to the City's experts being caught by surprise by that questioning and was contrary to the spirit and intent of the regulations to ensure fair disclosure of evidence and arguments before commencement of a hearing.

[43] Procedural fairness accomplishes two broad objectives in administrative hearings. First and foremost, it fulfills the parties' fundamental right to be heard when a decision is being made that affects their interests. Second, (and occasionally overlooked) procedural fairness assists the decision- making process itself by improving the quality of the record through the testing of evidence, and allowing for considered argument on that evidence.

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[44] In my view, the Board was entitled to raise the land use restriction adjustment issue at the hearing. However, in the circumstances it should not have awaited questioning of the City's witnesses to do so. It should have noted its interest in receiving evidence and argument on that ground of complaint at the outset of the hearing, or at the conclusion of the complainants' evidence, and sought submissions from the parties regarding their readiness to proceed. This would have been fair to both sides, and would have increased the quality of evidence and argument received on what turned out to be an important issue. It would also have been in better accord with the spirit and intent of the MRAC Regulation. The Board's failure to take such an approach constituted a beach of procedural fairness.

c) Did the Board act unfairly by using its own expertise to decide the matter in substitution for the evidence presented at the hearing?

[45] Given my decision on the first procedural fairness issue, it is not necessary to decide the second question of law upon which leave was granted.

[46] Had it been necessary to do so, however, I would not have allowed the appeal on this ground.

[47] The decision of the Board to apply a land use restriction adjustment of 20% was not made in the absence of evidence. In fact, there was evidence before the Board – particularly from the City itself- that showed the land use restrictions currently in place under the Direct Control District by-law for this site. There was written and *viva voce* evidence from the Respondent's expert appraiser that discussed those land use restrictions. There was written and *viva voce* evidence from the City's experts that described how downtown land assessments are made, and that identified or discussed the adjustment factors that can be applied. The Board also heard final submissions from both sides on this issue, (among others), which given the informal nature of the hearing process included an evidentiary aspect, as well as pure argument.

[48] Accordingly, while the process used to receive evidence and argument fell short in respect of procedural fairness, it cannot be said that the Board substituted its own expertise for evidence.

Remedy

[49] S. 470.1 (1) (b) of the *Municipal Government Act* provides that on hearing of an appeal the Court may confirm or cancel the decision. S. 470.1(2) states:

> (2) In the event that the Court of Queen's Bench cancels a decision, the Court must refer the matter 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.

For the reasons discussed earlier, I have concluded that the procedure used by the Board fell short of its duty to provide procedural fairness. When the Board concluded that the applicability of a 20% land use restriction adjustment was in issue, it should have offered the parties the opportunity to provide additional evidence and argument on that issue. On rehearing of the matter, the Board will need to decide how best to proceed in ensuring that this specific issue is fully and fairly adjudicated while preserving balance of the hearing record to the extent reasonable.

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Costs

[50] The City has sought costs against the Respondent. In my view, an award of costs is not appropriate in this case, given the mixed result and the circumstances leading to the Board's error.

Heard on the 22nd day of February, 2017.
Dated at the City of Calgary, Alberta this 23rd day of March 2017.

R.A. Neufeld
J.C.Q.B.A.

Appearances:

Tina Squire
for The Appellant City of Calgary

Susan E.A. Trylinski
for the Respondent Renfrew Chrysler Inc.

Michael Janke
for the Respondent Assessment Review Board

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TAB 69

Mavis Baker *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees, and the Charter Committee on Poverty Issues *Interveners*

INDEXED AS: BAKER *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

File No.: 25823.

1998: November 4; 1999: July 9.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Humanitarian and compassionate considerations — Children's interests — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Application denied without hearing or formal reasons — Whether procedural fairness violated — Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) — Immigration Regulations, 1978, SOR/93-44, s. 2.1 — Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.

Administrative law — Procedural fairness — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Whether participatory rights accorded consistent with duty of procedural fairness — Whether failure to provide reasons violated principles of procedural fairness — Whether reasonable apprehension of bias.

Mavis Baker *Appelante*

c.

Le ministre de la Citoyenneté et de l'Immigration *Intimé*

et

Le Conseil canadien des églises, la Canadian Foundation for Children, Youth and the Law, la Défense des enfants-International-Canada, le Conseil canadien pour les réfugiés et le Comité de la Charte et des questions de pauvreté *Intervenants*

RÉPERTORIÉ: BAKER *c.* CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION)

Nº du greffe: 25823.

1998: 4 novembre; 1999: 9 juillet.

Présents: Les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Raisons d'ordre humanitaire — Intérêts des enfants — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Demande rejetée sans audience ni motifs écrits — Y a-t-il eu violation de l'équité procédurale? — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 82.1(1), 114(2) — Règlement sur l'immigration de 1978, DORS/93-44, art. 2.1 — Convention relative aux droits de l'enfant, R.T. Can. 1992 nº 3, art. 3, 9, 12.

Droit administratif – Équité procédurale — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Les droits de participation accordés étaient-ils compatibles avec l'obligation d'équité procédurale? — Le défaut d'exposer les motifs de décision a-t-il enfreint les principes d'équité procédurale? — Y a-t-il une crainte raisonnable de partialité?

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Courts — Appellate review — Judge on judicial review certifying question for consideration of Court of Appeal — Legal effect of certified question — Immigration Act, R.S.C., 1985, c. I-2, s. 83(1).

Immigration — Humanitarian and compassionate considerations — Standard of review of humanitarian and compassionate decision — Best interests of claimant's children — Approach to be taken in reviewing humanitarian and compassionate decision where children affected.

Administrative law — Review of discretion — Approach to review of discretionary decision making.

The appellant, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption, based on humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. This application was supported by letters indicating concern about the availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children. A senior immigration officer replied by letter stating that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. This letter contained no reasons for the decision. Counsel for the appellant, however, requested and was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. The Federal Court — Trial Division, dismissed an application for judicial review but certified the following question pursuant to s. 83(1) of the Act: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?" The Court of Appeal limited its consideration to the question and found that the best interests of the children did not need to be given primacy in assessing such an application. The order that the appellant be removed from Canada, which was made after the immigration officer's decision, was stayed pending the result of this appeal.

Tribunaux — Contrôle en appel — Certification, par le juge siégeant en contrôle judiciaire, d'une question à soumettre à la Cour d'appel — Effet juridique d'une question certifiée — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 83(1).

Immigration — Raisons d'ordre humanitaire — Norme de contrôle d'une décision fondée sur des raisons d'ordre humanitaire — Intérêt supérieur des enfants de la demanderesse — Approche du contrôle d'une décision fondée sur des raisons d'ordre humanitaire touchant des enfants.

Droit administratif — Contrôle du pouvoir discrétionnaire — Approche du contrôle de décisions discrétionnaires.

Une mesure d'expulsion a été prise contre l'appelante, mère d'enfants à charge nés au Canada. Elle a alors demandé d'être dispensée de faire sa demande de résidence permanente de l'extérieur du Canada, pour des raisons d'ordre humanitaire, conformément au par. 114(2) de la *Loi sur l'immigration*. Sa demande était appuyée de lettres exprimant des inquiétudes quant à la possibilité d'obtenir un traitement médical dans son pays d'origine et quant à l'effet de son départ éventuel sur ses enfants nés au Canada. Un agent d'immigration supérieur a répondu par lettre qu'il n'y avait pas suffisamment de raisons humanitaires pour justifier de traiter sa demande au Canada. Cette lettre ne donnait pas les motifs de la décision. L'avocat de l'appelante a cependant demandé et reçu les notes de l'agent investigateur, que l'agent supérieur d'immigration avait utilisées pour rendre sa décision. La Section de première instance de la Cour fédérale a rejeté une demande de contrôle judiciaire mais a certifié la question suivante en application du par. 83(1) de la Loi: «Vu que la Loi sur l'immigration n'incorpore pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention internationale relative aux droits de l'enfant, les autorités d'immigration fédérales doivent-elles considérer l'intérêt supérieur de l'enfant né au Canada comme une considération primordiale dans l'examen du cas d'un requérant sous le régime du par. 114(2) de la *Loi sur l'immigration*?» La Cour d'appel a limité son examen à cette question et a conclu qu'il n'était pas nécessaire d'accorder la primauté à l'intérêt supérieur des enfants dans l'appréciation d'une telle demande. Un sursis à la mesure d'expulsion de l'appelante prononcée après la décision de l'agent d'immigration, a été ordonné jusqu'à l'issue du présent pourvoi.

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Held: The appeal should be allowed.

Per L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.: Section 83(1) of the *Immigration Act* does not require the Court of Appeal to address only the certified question. Once a question has been certified, the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction.

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

A duty of procedural fairness applies to humanitarian and compassionate decisions. In this case, there was no legitimate expectation affecting the content of the duty of procedural fairness. Taking into account the other factors, although some suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model. The duty of fairness owed in these circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered. Nevertheless, taking all the factors into account, the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient.

It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are

Arrêt: Le pourvoi est accueilli.

Les juges L'Heureux-Dubé, Gonthier, McLachlin, Bastarache et Binnie: Le paragraphe 83(1) de la *Loi sur l'immigration* n'exige pas que la Cour d'appel traite seulement la question certifiée. Lorsqu'une question a été certifiée, la Cour d'appel peut examiner tous les aspects de l'appel qui relèvent de sa compétence.

L'obligation d'équité procédurale est souple et variable et repose sur une appréciation du contexte de la loi et des droits visés. Les droits de participation qui en font partie visent à garantir que les décisions administratives sont prises au moyen d'une procédure équitable et ouverte, adaptée au type de décision et à son contexte légal, institutionnel et social, comprenant la possibilité donnée aux personnes visées de présenter leur point de vue et des éléments de preuve qui seront dûment pris en considération par le décideur. Plusieurs facteurs sont pertinents pour déterminer le contenu de l'obligation d'équité procédurale: (1) la nature de la décision recherchée et le processus suivi pour y parvenir; (2) la nature du régime législatif et les termes de la loi régissant l'organisme; (3) l'importance de la décision pour les personnes visées; (4) les attentes légitimes de la personne qui conteste la décision; (5) les choix de procédure que l'organisme fait lui-même. Cette liste de facteurs n'est pas exhaustive.

L'obligation d'équité procédurale s'applique aux décisions d'ordre humanitaire. En l'espèce, il n'y avait pas d'attente légitime ayant une incidence sur la nature de l'obligation d'équité procédurale. Compte tenu des autres facteurs, bien que certains indiquent des exigences plus strictes en vertu de l'obligation d'équité, d'autres indiquent des exigences moins strictes et plus éloignées du modèle judiciaire. L'obligation d'équité dans ces circonstances est plus que minimale, et le demandeur et les personnes dont les intérêts sont profondément touchés par la décision doivent avoir une possibilité valable de présenter les divers types de preuves qui se rapportent à leur affaire et de les voir évalués de façon complète et équitable. Néanmoins, compte tenu de tous ces facteurs, le fait qu'il n'y ait pas eu d'audience ni d'avis d'audience ne constituait pas un manquement à l'obligation d'équité procédurale. La possibilité de produire une documentation écrite complète était suffisante.

Il est maintenant approprié de reconnaître que, dans certaines circonstances, notamment lorsque la décision revêt une grande importance pour l'individu, ou lorsqu'il existe un droit d'appel prévu par la loi, l'obligation d'équité procédurale requerra une explication écrite de

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required here given the profound importance of this decision to those affected. This requirement was fulfilled by the provision of the junior immigration officer's notes, which are to be taken to be the reasons for decision. Accepting such documentation as sufficient reasons upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that, in the administrative context, this transparency may take place in various ways.

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. This duty applies to all immigration officers who play a role in the making of decisions. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference. Statements in the immigration officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him, but on the fact that the appellant was a single mother with several children and had been diagnosed with a psychiatric illness. Here, a reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with the impartiality appropriate to a decision made by an immigration officer. The notes therefore give rise to a reasonable apprehension of bias.

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. Review of the substantive aspects of discretionary decisions is best approached within the pragmatic and functional framework defined by this Court's decisions, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. Though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

la décision. Des motifs écrits sont nécessaires en l'espèce, étant donné l'importance cruciale de la décision pour les personnes visées. Cette obligation a été remplie par la production des notes de l'agent subalterne, qui doivent être considérées comme les motifs de la décision. L'admission de ces documents comme motifs de la décision confirme le principe selon lequel les individus ont droit à une procédure équitable et à la transparence de la prise de décision, mais reconnaît aussi qu'en matière administrative, cette transparence peut être atteinte de différentes façons.

L'équité procédurale exige également que les décisions soient rendues par un décideur impartial, sans crainte raisonnable de partialité. Cette obligation s'applique à tous les agents d'immigration qui jouent un rôle significatif dans la prise de décision. Parce qu'elles visent nécessairement des personnes de provenances diverses, issues de cultures, de races et de continents différents, les décisions en matière d'immigration exigent de ceux qui les rendent sensibilité et compréhension. Elles exigent la reconnaissance de la diversité, la compréhension des autres et l'ouverture d'esprit à la différence. Les déclarations contenues dans les notes de l'agent d'immigration donnent l'impression qu'il peut avoir tiré des conclusions en se fondant non pas sur la preuve dont il disposait, mais sur le fait que l'appelante était une mère célibataire ayant plusieurs enfants, et était atteinte de troubles psychiatriques. En l'espèce, un membre raisonnable et bien informé de la communauté conclurait que l'agent n'a pas traité cette affaire avec l'impartialité requise dans une décision rendue par un agent d'immigration. Les notes donnent donc lieu à une crainte raisonnable de partialité.

La notion de pouvoir discrétionnaire s'applique dans les cas où le droit ne dicte pas une décision précise, ou quand le décideur se trouve devant un choix d'options à l'intérieur de limites imposées par la loi. Le droit administratif a traditionnellement abordé le contrôle judiciaire des décisions discrétionnaires séparément de décisions sur l'interprétation de règles de droit. Le contrôle des éléments de fond d'une décision discrétionnaire est mieux envisagé selon la démarche pragmatique et fonctionnelle définie par la jurisprudence de notre Cour, compte tenu particulièrement de la difficulté de faire des classifications rigides entre les décisions discrétionnaires et les décisions non discrétionnaires. Même si en général il sera accordé un grand respect aux décisions discrétionnaires, il faut que le pouvoir discrétionnaire soit exercé conformément aux limites imposées dans la loi, aux principes de la primauté du droit, aux principes du droit administratif, aux valeurs fondamentales de la société canadienne, et aux principes de la *Charte*.

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In applying the applicable factors to determining the standard of review, considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division, and the individual rather than polycentric nature of the decision also suggest that the standard should not be as deferential as "patent unreasonableness". The appropriate standard of review is, therefore, reasonableness *simpliciter*.

Dans l'application des facteurs pertinents à la détermination de la norme de contrôle appropriée, on devrait faire preuve d'une retenue considérable envers les décisions d'agents d'immigration exerçant les pouvoirs conférés par la loi, compte tenu de la nature factuelle de l'analyse, de son rôle d'exception au sein du régime législatif et de la large discrétion accordée par le libellé de la loi. Toutefois, l'absence de clause privative, la possibilité expressément prévue d'un contrôle judiciaire par la Cour fédérale — Section de première instance, ainsi que la nature individuelle plutôt que polycentrique de la décision, tendent aussi à indiquer que la norme applicable ne devrait pas en être une d'aussi grande retenue que celle du caractère «manifestement déraisonnable». La norme de contrôle appropriée est celle de la décision raisonnable *simpliciter*.

The wording of the legislation shows Parliament's intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children since children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of these values may be found in the purposes of the Act, in international instruments, and in the Minister's guidelines for making humanitarian and compassionate decisions. Because the reasons for this decision did not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of the appellant's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to the appellant's country of origin might cause her.

Le libellé de la législation révèle l'intention du Parlement de faire en sorte que la décision soit fondée sur des raisons d'ordre humanitaire. L'exercice raisonnable du pouvoir conféré par l'article exige que soit prêtée une attention minutieuse aux intérêts et aux besoins des enfants puisque les droits des enfants, et la considération de leurs intérêts, sont des valeurs humanitaires centrales dans la société canadienne. Une indication de ces valeurs se trouve dans les objectifs de la Loi, dans les instruments internationaux, et dans les lignes directrices régissant les décisions d'ordre humanitaire publiées par le ministre. Étant donné que les motifs de la décision n'indiquent pas qu'elle a été rendue d'une manière réceptive, attentive ou sensible à l'intérêt des enfants de l'appelante, ni que leur intérêt a été considéré comme un facteur décisionnel important, elle constituait un exercice déraisonnable du pouvoir conféré par la loi. En outre, les motifs de la décision n'accordent pas suffisamment d'importance ou de poids aux difficultés qu'un retour de l'appelante dans son pays d'origine pouvait lui susciter.

Per Cory and Iacobucci JJ.: The reasons and disposition of L'Heureux-Dubé J. were agreed with apart from the effect of international law on the exercise of ministerial discretion under s. 114(2) of the *Immigration Act*. The certified question must be answered in the negative. The principle that an international convention ratified by the executive is of no force or effect within the Canadian legal system until incorporated into domestic law does not survive intact the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation.

Les juges Cory et Iacobucci: Les motifs du juge L'Heureux-Dubé et le dispositif qu'elle propose sont acceptés sauf pour ce qui concerne la question de l'effet du droit international sur l'exercice du pouvoir discrétionnaire conféré au ministre par le par. 114(2) de la *Loi sur l'immigration*. La question certifiée devrait recevoir une réponse négative. Le principe qu'une convention internationale ratifiée par le pouvoir exécutif n'a aucun effet en droit canadien tant qu'elle n'est pas incorporée dans le droit interne ne peut pas survivre intact après l'adoption d'un principe de droit qui autorise le recours dans le processus d'interprétation des lois, aux dispositions d'une convention qui n'a pas été intégrée dans la législation.

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APPEAL from a judgment of the Federal Court of Appeal, [1997] 2 F.C. 127, 207 N.R. 57, 142 D.L.R. (4th) 554, [1996] F.C.J. No. 1726 (QL), dismissing an appeal from a judgment of Simpson J. (1995), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150, [1995] F.C.J. No. 1441 (QL), dismissing an application for judicial review. Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1997] 2 C.F. 127, 207 N.R. 57, 142 D.L.R. (4th) 554, [1996] A.C.F. nº 1726 (QL), qui a rejeté un appel d'un jugement du juge Simpson (1995), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150, [1995] A.C.F. nº 1441 (QL), qui avait rejeté une demande de contrôle judiciaire. Pourvoi accueilli.

Roger Rowe and *Rocco Galati*, for the appellant.

Roger Rowe et *Rocco Galati*, pour l'appelante.

Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for the respondent.

Urszula Kaczmarczyk et *Cheryl D. Mitchell*, pour l'intimé.

Sheena Scott and *Sharryn Aiken*, for the interveners the Canadian Foundation for Children,

Sheena Scott et *Sharryn Aiken*, pour les intervenants la Canadian Foundation for Children, Youth

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Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees.

John Terry and *Craig Scott*, for the intervener the Charter Committee on Poverty Issues.

Barbara Jackman and *Marie Chen*, for the intervener the Canadian Council of Churches.

The judgment of L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ. was delivered by

L'HEUREUX-DUBÉ J. — Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

I. Factual Background

Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live -in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms. Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their

and the Law, la Défense des enfants-International-Canada et le Conseil canadien pour les réfugiés.

John Terry et *Craig Scott*, pour l'intervenant le Comité de la Charte et des questions de pauvreté.

Barbara Jackman et *Marie Chen*, pour l'intervenant le Conseil canadien des églises.

Version française du jugement des juges L'Heureux-Dubé, Gonthier, McLachlin, Bastarache et Binnie rendu par

LE JUGE L'HEUREUX-DUBÉ — Le règlement passé en vertu du par. 114(2) de la *Loi sur l'immigration*, L.R.C. (1985), ch. I-2, autorise le ministre intimé à faciliter l'admission au Canada d'une personne quand il est convaincu, pour des raisons d'ordre humanitaire, que l'admission devrait être facilitée ou qu'une dispense d'application des règlements passés aux termes de la Loi devrait être accordée. Le présent pourvoi porte essentiellement sur la démarche à suivre lorsqu'un tribunal procède au contrôle judiciaire de ces décisions, à la fois sur le fond et sur le plan de la procédure. Ce pourvoi soulève également des questions relatives à la crainte raisonnable de partialité, à la rédaction de motifs écrits dans le cadre de l'obligation d'agir équitablement et au rôle de l'intérêt des enfants dans le contrôle judiciaire de décisions rendues conformément au par. 114(2). 1

I. Les faits

Mavis Baker, citoyenne de la Jamaïque, est entrée au Canada à titre de visiteur en août 1981 et y vit depuis. Elle n'a jamais obtenu le statut de résidente permanente, mais a subvenu illégalement à ses besoins en travaillant pendant 11 ans comme travailleur domestique. Elle a eu quatre enfants (qui sont tous citoyens canadiens) au Canada: Paul Brown, né en 1985, les jumeaux Patricia et Peter Robinson, nés en 1989, et Desmond Robinson, né en 1992. Après la naissance de Desmond, M^me^ Baker a souffert d'une psychose post-partum et on a diagnostiqué qu'elle était atteinte d'une schizophrénie paranoïde. À cette époque, elle a présenté une demande d'assistance sociale. Quand 2

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situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

ment de situations où il existe des liens familiaux de dépendance, et soulignent que l'obligation de quitter le Canada pour présenter une demande de l'étranger peut occasionner des difficultés à certains membres de la famille proche d'un résident canadien, parents, enfants ou autres proches qui n'ont pas de liens de sang avec le demandeur. Elles précisent que dans de tels cas, il faut aussi tenir compte des raisons pour lesquelles la personne n'a pas présenté sa demande à l'étranger et de la présence d'une famille ou d'autres personnes susceptibles de l'aider dans son pays d'origine.

C. *Procedural Fairness*

C. *L'équité procédurale*

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

Comme premier moyen pour contester la décision de l'agent Caden, l'appelante allègue qu'elle n'a pas bénéficié de l'équité procédurale. L'appelante estime que l'obligation d'agir équitablement exige le respect des procédures suivantes quand des parents ayant des enfants canadiens présentent une demande fondée sur des raisons d'ordre humanitaire: une entrevue orale devant le décideur, un avis de la tenue de cette entrevue aux enfants et à l'autre parent, un droit pour les enfants et l'autre parent de présenter des arguments au cours de cette entrevue, un avis à l'autre parent de la tenue de l'entrevue et du droit de cette personne d'être représentée par un avocat. Elle allègue également que l'équité procédurale exige que le décideur, soit l'agent Caden, motive sa décision, et que les notes de l'agent Lorenz donnent lieu à une crainte raisonnable de partialité.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

En traitant des questions d'équité, j'examinerai d'abord les principes applicables à la détermination de la nature de l'obligation d'équité procédurale, et ensuite les arguments de M^me^ Baker sur l'insuffisance des droits de participation qui lui ont été accordés, sur l'existence d'une obligation de motiver la décision et sur la crainte raisonnable de partialité.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Director of Kent Institution,*

Les deux parties admettent que l'obligation d'équité procédurale s'applique aux décisions d'ordre humanitaire. Le fait qu'une décision soit administrative et touche «les droits, privilèges ou biens d'une personne» suffit pour entraîner l'application de l'obligation d'équité: *Cardinal c.*

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[1985] 2 S.C.R. 643, at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H & C decisions: *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 81 (F.C.T.D.), at p. 88; *Said v. Canada (Minister of Employment and Immigration)* (1992), 6 Admin. L.R. (2d) 23 (F.C.T.D.); *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238 (F.C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

Directeur de l'établissement Kent, [1985] 2 R.C.S. 643, à la p. 653. Il est évident que la décision quant à savoir si un demandeur sera dispensé des exigences prévues par la Loi entre dans cette catégorie, et il est admis depuis longtemps que l'obligation d'équité s'applique aux décisions d'ordre humanitaire: *Sobrie c. Canada (Ministre de l'Emploi et de l'Immigration)* (1987), 3 Imm. L.R. (2d) 81 (C.F. 1re inst.), à la p. 88; *Said c. Canada (Ministre de l'Emploi et de l'Immigration)* (1992), 6 Admin. L.R. (2d) 23 (C.F. 1re inst.); *Shah c. Ministre de l'Emploi et de l'Immigration* (1994), 170 N.R. 238 (C.A.F.).

(1) Les facteurs ayant une incidence sur la nature de l'obligation d'équité

21 L'existence de l'obligation d'équité, toutefois, ne détermine pas quelles exigences s'appliqueront dans des circonstances données. Comme je l'écrivais dans l'arrêt *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653, à la p. 682, «la notion d'équité procédurale est éminemment variable et son contenu est tributaire du contexte particulier de chaque cas». Il faut tenir compte de toutes les circonstances pour décider de la nature de l'obligation d'équité procédurale: *Knight*, aux pp. 682 et 683; *Cardinal*, précité, à la p. 654; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170, le juge Sopinka.

22 Bien que l'obligation d'équité soit souple et variable et qu'elle repose sur une appréciation du contexte de la loi particulière et des droits visés, il est utile d'examiner les critères à appliquer pour définir les droits procéduraux requis par l'obligation d'équité dans des circonstances données. Je souligne que l'idée sous-jacente à tous ces facteurs est que les droits de participation faisant partie de l'obligation d'équité procédurale visent à garantir que les décisions administratives sont prises au moyen d'une procédure équitable et ouverte, adaptée au type de décision et à son contexte légal institutionnel et social, comprenant la possibilité donnée aux personnes visées par la décision de présenter leur points de vue complètement ainsi que des éléments de preuve de sorte qu'ils soient considérés par le décideur.

TAB 70

Date: 20120209

Docket: A-2-11

Citation: 2012 FCA 40

2012 FCA 40 (CanLII)

CORAM: **NADON J.A.**
SHARLOW J.A.
MAINVILLE J.A.

BETWEEN:

MINISTER OF FISHERIES AND OCEANS

Appellant

and

DAVID SUZUKI FOUNDATION, DOGWOOD INITIATIVE, ENVIRONMENTAL DEFENCE CANADA, GEORGIA STRAIT ALLIANCE, GREENPEACE CANADA, INTERNATIONAL FUND FOR ANIMAL WELFARE, RAINCOAST CONSERVATION SOCIETY, SIERRA CLUB OF CANADA and WESTERN CANADA WILDERNESS COMMITTEE

Respondents

Heard at Vancouver, British Columbia, on November 30, 2011.

Judgment delivered at Ottawa, Ontario, on February 9, 2012.

REASONS FOR JUDGMENT BY: **MAINVILLE J.A.**

CONCURRED IN BY: **NADON J.A.**
SHARLOW J.A.

2012 FCA 40 (CanLII)

Date: 20120209

Docket: A-2-11

Citation: 2012 FCA 40

CORAM: **NADON J.A.**
SHARLOW J.A.
MAINVILLE J.A.

BETWEEN:

MINISTER OF FISHERIES AND OCEANS

Appellant

and

DAVID SUZUKI FOUNDATION, DOGWOOD INITIATIVE, ENVIRONMENTAL DEFENCE CANADA, GEORGIA STRAIT ALLIANCE, GREENPEACE CANADA, INTERNATIONAL FUND FOR ANIMAL WELFARE, RAINCOAST CONSERVATION SOCIETY, SIERRA CLUB OF CANADA and WESTERN CANADA WILDERNESS COMMITTEE

Respondents

REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The Minister of Fisheries and Oceans ("Minister") is appealing a judgment of the Federal Court cited as 2010 FC 1233 ("Reasons") in which Russell J. ("Federal Court judge") declared that ministerial discretion does not "legally protect" critical habitat under section 58 of the *Species at*

2012 FCA 40 (CanLII)

[5] The first ground of appeal concerns the standard of review. The Minister submits that Parliament made him responsible for the administration of the regulatory schemes of the SARA and of the *Fisheries Act*; hence, his interpretation of their provisions is entitled to deference. The Minister bases that submission on a judgment rendered fairly recently by the Supreme Court of Canada: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*"). That judgment emphasized the deference owed to an administrative tribunal when it interprets a provision of its enabling (or "home") statute or statutes closely related to its functions.

[6] In my view, no deference is owed to the Minister as to the interpretation of the relevant provisions of the SARA or of the *Fisheries Act*. The Minister's interpretation of the Supreme Court's most recent pronouncements is erroneous as it fails to consider the context in which they were developed and the reasons which may warrant deference to an administrative tribunal when it interprets its enabling statute. The reasonableness standard of review does not apply to the interpretation of a statute by a minister responsible for its implementation unless Parliament has provided otherwise. I thus conclude – as did the Federal Court judge in this case – that where an application for judicial review of a decision as to the implementation of the SARA is based on an allegation that the Minister has misinterpreted a provision of the SARA – or of the *Fisheries Act* as it relates to the SARA – the Minister's interpretation must be reviewed on a standard of correctness. The courts owe no deference to the Minister in that respect.

TAB 71

Date: 20090909

Docket: T-1529-07

Citation: 2009 FC 878

2009 FC 878 (CanLII)

Ottawa, Ontario, September 9, 2009

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

ENVIRONMENTAL DEFENCE CANADA
GEORGIA STRAIT ALLIANCE
WESTERN CANADA WILDERNESS COMMITTEE
and DAVID SUZUKI FOUNDATION

Applicants

and

MINISTER OF FISHERIES AND OCEANS

Respondent

REASONS FOR ORDER AND ORDER

[1] By these reasons, the Nooksack Dace, a small minnow whose habitat is four fresh water streams in the Lower Mainland of British Columbia, has the distinction of being the first endangered species in Canada to benefit by a comprehensive interpretation by this Court of key elements of its protective legislation: the *Species at Risk Act*, 2002, c. 29 (*SARA*).

[29] I agree with the Applicants that the decision-making conducted by Ms. Webb and Mr. Murray requires a definitive interpretation of s. 41 of *SARA* to dispel any idea that policy can supersede Parliament's purpose as expressed in *SARA*. Indeed, the present Application brings the constitutional imperative of the rule of law into sharp focus.

[30] As an outcome to the present pressure exerted by the Applicants to have the Minister and the officials at DFO recognize and meet their statutory responsibility under *SARA*, which has been met by initial resistance but ultimate willingness, the interpretation of s. 41(1)(c) and (c.1) has become less of a challenge. On some key features there is agreement while on others there is a difference of opinion. The following analysis distinguishes between these two results.

IV. The Correct Interpretation of s. 41 (1)(c) and (c.1)

A. *Points of agreement*

1. The standard of review is correctness

[31] In the present Application the Applicants question the Minister's authority to alter the terms of *SARA* by government policy. As authority is a question of law, it is agreed that the Minister's decision must be considered on the standard of correctness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

2009 FC 878 (CanLII)

TAB 72

In the Court of Appeal of Alberta

Citation: Fort McKay First Nation v Prosper Petroleum Ltd, 2020 ABCA 163

Date: 20200424
Docket: 1803-0183-AC
Registry: Edmonton

2020 ABCA 163 (CanLII)

Between:

Fort McKay First Nation

Appellant

- and -

Prosper Petroleum Ltd and Alberta Energy Regulator

Respondents

- and -

Her Majesty the Queen in Right of Alberta

Intervenor

The Court:

The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Sheila Greckol
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment of the Honourable Madam Justice Veldhuis and the Honourable Madam Justice Strekaf

Memorandum of Judgment of the Honourable Madam Justice Greckol Concurring in the Result

Appeal from the Decision of
The Alberta Energy Regulator
Dated the 12th day of June, 2018
(2018 ABAER 005, Docket: 1803 23781)

2020 ABCA 163 (CanLII)

Memorandum of Judgment

2020 ABCA 163 (CanLII)

The Majority:

Introduction

[1] This appeal arises out of negotiations that began in 2003 between the Government of Alberta and the Fort McKay First Nation (FMFN) to develop a Moose Lake Access Management Plan (MLAMP) to address the cumulative effects of oil sands development on the First Nation's Treaty 8 rights. The MLAMP has not yet been finalized.

[2] The Alberta Energy Regulator (AER) approved an application by Prosper Petroleum Ltd (Prosper) in June 2018 for the Rigel bitumen recovery project (Project), which would be located within 5 kilometers of the FMFN's Moose Lake Reserves. The AER approval is subject to authorization by the Lieutenant Governor in Council (Cabinet), which has yet to be granted.

[3] The FMFN was granted permission to appeal on the question of whether the AER erred by failing to consider the honour of the Crown and refusing to delay approval of the Project until the FMFN's negotiations with Alberta on the MLAMP are completed.

[4] For the reasons that follow, the appeal is allowed.

Background

[5] The FMFN is an "aboriginal people of Canada" under s 35 of the *Constitution Act*, *1982* and a "band" within the meaning of the *Indian Act*, RSC 1985, c I-5 that has Treaty 8 rights to hunt, fish and trap within the Moose Lake Area, part of its traditional territory. The Moose Lake Area is north west of Fort McKay and consists of the area around Moose Lake (also known as Gardiner Lake) and Buffalo Lake (also known as Namur Lake), on which lakes the FMFN has two reserves (Moose Lake Reserves). The Moose Lake Area is of cultural importance to the FMFN.

[6] Due to the extensive industrial and resource development surrounding Fort McKay, FMFN is concerned that the ability of its members to pursue their traditional way of life in the Moose Lake Area has been severely and adversely affected by the cumulative effect of oil sands development in the surrounding area. The record shows that 70% of FMFN's traditional territory is leased for oil sands purposes: Lagimodiere Report, p. 3, AEKE Tab 31, A165. The FMFN's traditional territory has been described as "the *most* severely affected of all First Nations by oil sands development in the region": Review Panel Report 2015, p. 156, AEKE Tab 11, A50, emphasis in original.

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[7] A March 2010 report commissioned by FMFN and submitted to a Joint Review Panel established in 2012 as part of the AER process for a separate project proposed by Shell Canada was also submitted to the AER in its consideration of the Rigel Project at issue in this appeal. This report spoke to the need for "the mitigation and accommodation of cumulative effects … beyond the project-level": Fort McKay Specific Assessment, Disturbance and Access: Implications for Traditional Use, p. 61. The Joint Review Panel found that the cumulative effects of oil sands development on the First Nation's cultural heritage are "already adverse, long-term, likely irreversible and significant": 2013 ABAER 011 at para 1741. However, the Panel found that these cumulative effects could not be addressed within the context of the project-specific AER review process: *ibid* at para 1720.

The MLAMP Negotiations

[8] The FMFN began negotiating with Alberta in 2001 to obtain protection for the Moose Lake Area. They began discussing a possible MLAMP in 2003 to address the cumulative effects of oil sands development on the FMFN's Treaty 8 rights. The MLAMP negotiations were delayed while the Lower Athabasca Regional Plan (the LARP) was negotiated and implemented. It is envisaged that when the MLAMP is finalized, it will be adopted as a sub-plan of the LARP.

[9] The LARP is a regional plan under the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 [*ALSA*] to manage the region's natural resources. The purpose of the *ALSA* includes providing "a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples": s 1(2)(b). The LARP addresses conservation areas, water, recreation, air quality and sustainable resource development. The "Regulatory Details" section of LARP is legally binding on the Crown and administrative decision-makers. The Regulatory Details section stipulates that the Strategic Plan and Implementation Plan sections of LARP, while not themselves legally binding, must be considered by decision-makers before they make their decisions: LARP, s 7(1).

[10] During negotiations with Alberta about the LARP between 2009 and 2010, FMFN specifically sought a 10 km buffer zone from oil sands development around the Moose Lake Reserves. Alberta denied this request. The LARP was proclaimed into force in September 2012.

[11] In August 2013, FMFN applied for a review of the LARP, which led the Minister responsible for administration of the *ALSA* to appoint a Review Panel. The Review Panel's June 2015 report found that "[t]he LARP has not taken adequate measures to protect the Applicant's Treaty and Aboriginal rights, Traditional Land Use and culture. In fact, it has done quite the opposite ... in the not-too-distant future, FMFN will not be able to utilize *any* of their Traditional Land because of industrial development activities".

[12] In November 2014, Alberta's then Premier, the late Jim Prentice, met with Chief Jim Boucher of FMFN to discuss the MLAMP. In February 2015, Alberta advised FMFN that it "could

commit to developing a Moose Lake Access Management Plan under LARP on an expedited basis pursuant to terms of a letter of intent that would be agreed upon" by the parties: Affidavit of Karla Buffalo.

[13] In March 2015, Premier Prentice and Chief Boucher signed a Letter of Intent to confirm "our mutual commitment and interest in an expedited completion of the [MLAMP]". It went on to state that "Alberta acknowledges the importance of Moose Lake to the community of Fort McKay and looks forward to advancing mutual goals for the management of the region". The letter contemplated that the draft MLAMP was to be completed and approved by March 31, 2016 and that planning and implementation of the portion of the Access Management Plan within 10 kilometers of the Moose Lake Reserves was to be completed by September 30, 2015.

[14] Alberta issued a press release on March 25, 2015 titled "Traditional First Nations lands in the heart of Alberta's Oil Sands region to be protected". It states:

> The Moose Lake area is culturally significant to the First Nation and Metis people of Fort McKay, so the Alberta government is taking steps to ensure this sacred land is protected for generations to come.
>
> Premier Jim Prentice, Environment and Sustainable Resource Development Minister Kyle Fawcett and Fort McKay First Nation Chief Jim Boucher signed a Letter of Intent in March to develop an access management plan for the Moose Lake area.
>
> > The Fort McKay First Nation has done a wonderful job of preserving their traditional way of life. While allowing for responsible oil sands development near their community. This has enabled their people to thrive economically within the oil sands region. But it has also meant that some land that is meaningful to them near their reserve has been used for development. When Chief Boucher asked for our support to protect the small parcel of land near Moose Lake for his community, I didn't hesitate to say yes.
>
> - Jim Prentice, Premier of Alberta and Minister of Aboriginal Relations

[15] Despite the 2015 Letter of Intent, characterized by FMFN as the "Prentice Promise", the MLAMP has still not been finalized and is the subject of ongoing negotiations between Alberta and the FMFN.

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Prosper's application to the AER

[16] Prosper is the proponent of the Rigel Project, a proposed bitumen recovery project that would use steam-assisted gravity drainage to produce 10,000 barrels a day. Prosper applied to the predecessor of the AER in 2013 for three approvals for the Project under the *Oil Sands Conservation Act*, RSA 2000, c O-7 [*OSCA*], the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, and the *Water Act*, RSA 2000, c W-3.

[17] The Project would be located within the 10-kilometer buffer zone surrounding the Moose Lake Reserves; that is, within the area covered by the MLAMP.

[18] On May 6, 2016, the AER suspended its consideration of Prosper's application as "a result of its recognition of the ongoing discussions between the Government of Alberta and Fort McKay First Nation regarding the [MLAMP] and the close proximity of the activities proposed in the Applications to the areas under consideration in those discussions". It was further noted in the same letter that land use policies stemming from these discussions will "directly impact the outcome of the Applications before the AER".

[19] Prosper requested the AER reconsider its decision to suspend processing of its application for the Project.

[20] On November 2, 2016, the AER resumed the approval process for the Project. By letter dated November 8, 2016, counsel for the AER advised that its "decision was made because MLAMP is still not finalized, there is no indication that finalization of the MLAMP is imminent and there is no certainty when submission of the plan will occur" and that it was prohibited by s 7(3) of the LARP from postponing its consideration of the Project until the MLAMP negotiations were completed.

[21] The AER issued a notice of hearing with respect to Prosper's application in January 2017. The FMFN took part in the hearing as a full participant. After receiving submissions from the parties on the process, scope and timing for the hearing, the AER identified the issues to be addressed. The following issues were "deemed to be not in the scope of this proceeding":

1. The adequacy of Crown consultation. The AER has no jurisdiction with respect to assessing the adequacy of Crown consultation.

2. The adequacy of LARP and any existing subregional plans under LARP.

3. MLAMP does not exist as a subregional plan and consideration of it is not within the panel's mandate.

4. Cumulative effects unrelated to the effects that might be caused by the Rigel Project.

2018 ABAER 005 at para 16 (AER Decision)

[22] The AER hearing was held in Fort McMurray. Evidence was heard by the AER from January 9 to 18, 2018, the Aboriginal Consultation Office (ACO) report was issued on February 22, 2018, and final oral arguments were heard on March 14, 2018.

The AER Decision

[23] The AER issued its decision on June 12, 2018. It found the Project to be in the public interest and approved the Project on conditions, subject to authorization by Cabinet pursuant to s 10(3)(a) of *OSCA*.

[24] The AER recognized that the overarching question to be answered was whether the Project is in the public interest: AER Decision at para 46. It addressed safety, efficiency, and the effects on existing rights of aboriginal peoples. The AER understood the FMFN submission was that it either deny the Prosper application or, if approval is given, that it be subject to the condition that the central processing facility be located more than 10 kilometers from the Moose Lake reserves: AER Decision at para 92.

[25] In considering the potential effects of the Project on FMFN's Treaty 8 rights, the AER found that: (1) the Project will cause members of the First Nation to experience a sense of disruption to their connection to the land but this is not an impact on a Treaty 8 right; and (2) the Project will not render the First Nation's Treaty 8 rights meaningless and will not prevent the First Nation from continuing to exercise its treaty rights on the Moose Lake Reserves or in reasonable proximity to them: AER Decision at paras 126 and 130-32. With respect to several discrete Treaty 8 rights, the AER found that the evidence was insufficient to allow it to determine how the Project will affect those rights.

[26] The AER posed the question for deciding the *OSCA* application as "whether the impacts on Fort McKay First Nation's treaty rights identified above are or are not in the public interest when weighed in the balance with the other impacts, such as social, environmental, and economic impacts": AER Decision at para 134. In finding the Project to be in the public interest, the panel declined to consider the MLAMP negotiations that contemplated a 10-kilometer buffer zone, the Prentice Promise, and whether it implicates the honour of the Crown.

[27] The AER concluded the status of the MLAMP negotiations was not a valid reason to deny Prosper's application. Specifically, the AER concluded that s 21 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 [*REDA*] precludes it from assessing the adequacy of Crown consultation, and that it is prohibited from deferring consideration of a project on the basis that a LARP regional plan is incomplete. The AER also noted that Cabinet is required to authorize the Project and concluded that "Cabinet is the most appropriate place for a decision on the need to finalize the MLAMP". These conclusions were set out at paras 180-182 of the AER Decision:

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> [180] In our view, the balance between the overall economic benefits, including employment, and the negative impacts of the Prosper Rigel project are more or less even. So to answer the question of whether the Rigel project is in the public interest, we also considered the following public-interest considerations: first, Fort McKay First Nation's argument that we should not frustrate the MLAMP negotiations; second, Prosper's submissions about the desirability of regulatory and investment certainty; and third, public policy guidance expressed through the OSCA, EPEA, the Water Act and REDA.
>
> [181] Fort McKay First Nation described MLAMP as accommodation owed to it by the Crown to address historical impacts on their treaty and Aboriginal rights. LARP indicates that, once finalized, MLAMP will be a LARP regional plan.
>
> [182] Fort McKay First Nation provided a significant amount of evidence—e.g. Ms. Buffalo's affidavit and her oral evidence about the adequacy of the LARP and MLAMP processes. To the extent that Fort McKay First Nation frames LARP and MLAMP as elements of Crown consultation, section 21 of REDA says we may not assess their adequacy. LARP prohibits decision makers, including the AER, from "adjourning, deferring, denying, refusing, or rejecting any application…" by reason only of incompletion of a LARP regional plan. We may not deny Prosper's application solely because MLAMP negotiations are not yet complete. Furthermore, AER approval of an application made under section 10 of OSCA is subject to prior authorization by the lieutenant governor in council (cabinet). Cabinet is the most appropriate place for a decision on the need to finalize MLAMP. Consequently, Fort McKay First Nation's assertion that we must not frustrate MLAMP negotiations does not tip the public interest balance against approving the Rigel project.

Permission to Appeal

[28] A decision by the AER can be appealed to this court with permission on a question of law or jurisdiction: *REDA*, s 45(1). The FMFN sought permission to appeal various questions arising out of the AER decision. Permission was granted on the following question (*Fort McKay First Nation v Prosper Petroleum Ltd*, 2019 ABCA 14):

> Did the AER commit an error of law or jurisdiction by failing to consider the honour of the Crown and, as a result, failing to delay approval of the Project until the First Nation's negotiations with Alberta about the MLAMP are completed?

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Standard of Review

[29] As this is a statutory appeal brought pursuant to s 45(1) of *REDA*, the standard of review to be applied to the question of law on which permission to appeal was granted is correctness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37.

Positions of the Parties

FMFN

[30] FMFN submits the AER erred in failing to ensure Alberta's obligation to act honourably with respect to its treaty and aboriginal rights when determining whether approval of the project was in the public interest. The honour of the Crown is implicated by treaty implementation issues and requires consideration of whether approval of the Project is consistent with maintaining a mutually respectful long-term relationship. The direct promise to get the MLAMP completed by March 31, 2016 in the Letter of Intent signed by Alberta's Premier and the Chief of the First Nation attracts the honour of the Crown, and required Alberta to fulfill its promise to complete the MLAMP process to ensure that additional development would proceed in accordance with a cumulative-effects-based approach before any further oil sands facilities were approved within the Moose Lake Area.

[31] The FMFN also submits that the AER erred in finding that it was precluded by s 21 of *REDA* and s 7(3) of the LARP from considering matters relating to the MLAMP. The FMFN says that s 21 of *REDA* only removes assessment of the sufficiency of consultation, and s 7(3) of the LARP only contemplates delay by reason of the Crown's noncompliance with a provision of the LARP Strategic or LARP Implementation Plan or any direction or commitment made therein, none of which are at issue in relation to the MLAMP process.

Prosper

[32] Prosper submits the AER has no statutory authority to consider whether the honour of the Crown required finalization of the MLAMP before the Project is approved, or authority to delay hearing the Project application until the MLAMP was implemented. The AER properly reserved determinations on the MLAMP to Cabinet; because Cabinet has not issued its decision, the appeal is premature.

AER

[33] The AER's submissions were limited to the record of the proceeding, the standard of review and an explanation of the statutory scheme. It did not address the merits of the appeal.

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Alberta

[34] Alberta submits that FMFN's assertion that the AER erred in not considering the honour of the Crown would effectively require the AER to consider the adequacy of Crown consultation (which is contrary to s 21 of *REDA*), or place the AER in a supervisory role over whether, when or how the Crown makes policy decisions, which is beyond its jurisdiction. The AER is a statutory tribunal that is required to act within the confines of its statutory authority. It is neither required nor permitted to indefinitely delay an application for approval of a project while Alberta engages in negotiations with First Nations. Moreover, the LARP specifically prohibits it from doing so.

[35] Alberta also submits that the honour of the Crown is a narrow and circumscribed doctrine that only applies in four situations, none of which require the AER to delay approval of a project while the Crown and a First Nation are discussing a land management policy. The Letter of Intent was a good faith commitment to work with the First Nation and other stakeholders, not an accommodation of the Project.

[36] In oral argument, Alberta conceded that if the honour of the Crown is implicated by the Project in light of the outstanding MLAMP negotiations, Cabinet bears the responsibility for ensuring any resulting obligations are met.

Discussion

The Jurisdiction of the AER

[37] The AER is a public agency which exercises adjudicative functions pursuant to the *Alberta Public Agencies Governance Act*, SA 2009, c A-31.5. As the regulator of energy development in Alberta under *REDA*, its constituent statute, the AER is mandated to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta: *REDA*, s 2. It has final decision-making power over many energy project applications. However, Cabinet authorization is required where, as here, a project is governed by s 10 of *OSCA*.

[38] In deciding whether to approve a project, the AER is required to consider various factors prescribed by its governing regulations: *REDA*, s 15; *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013, 3 [*REDA General Regulation*]. To this end, the AER has broad powers of inquiry to consider the "public interest" in making its decisions: *OSCA*, s 10.

[39] Tribunals have the explicit powers conferred upon them by their constituent statutes. However, where empowered to consider questions of law, tribunals also have the implied jurisdiction to consider issues of constitutional law as they arise, absent a clear demonstration the legislature intended to exclude such jurisdiction: *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 69, [2010] 2 SCR 650 [*Rio Tinto*]. This is all the more so where the tribunal is required to consider the "public interest": *ibid* at para 70. In such circumstances, the

regulatory agency has a duty to apply the Constitution and ensure its decision complies with s 35 of the *Constitution Act, 1982*: *Clyde River (Hamlet) v Petroleum Geo ‑ Services Inc.*, 2017 SCC 40 at para 36, [2017] 1 SCR 1069 [*Clyde River*]. As the Supreme Court has noted, "[a] project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest": *ibid* at para 40. The tribunal cannot ignore that aspect of its public interest mandate.

[40] It follows from a review of its constituent legislative scheme that the AER has the implied jurisdiction to consider issues of constitutional law as they arise in its proceedings. As discussed further below, that jurisdiction is explicitly removed where the adequacy of Crown consultation is concerned: *REDA*, s 21. However, issues of constitutional law outside the parameters of consultation remain within the AER's jurisdiction, including as they relate to the honour of the Crown. Section 21 of *REDA* does not prevent the AER from considering other relevant matters involving Aboriginal peoples when carrying out its mandate to decide if a particular project is in "the public interest".

[41] Nor is the AER confined to considering "questions of constitutional law" as that term is defined in the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c A-3 [*APJA*]. Section 11 of *APJA* provides that "a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so". In the case of the AER, it has been given the jurisdiction to determine "all questions of constitutional law" (*Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, s 2 and Schedule 1), subject to notice requirements being complied with under s 12 of *APJA*. However, not all constitutional issues that arise in an AER hearing will fall within the definition of "questions of constitutional law" in the *APJA*, meaning that the AER will at times be asked to consider constitutional issues for which it has not received formal notice under *APJA*.

[42] In other words, a statute like the *APJA* should not be read as confining the AER's jurisdiction to consider constitutional issues as they relate to the "public interest": *Rio Tinto* at para 71-72. Indeed, the AER itself acknowledges its responsibility to address such issues, having considered under "the public interest" the potential adverse impacts of the Project on Aboriginal rights under s 35 of the *Constitution Act, 1982*. This broad jurisdiction to consider treaty rights outside the scope of the *APJA* is itself recognized in Ministerial Order (Energy 105/2014 and ESRD 53/2014).

[43] The AER therefore has a broad implied jurisdiction to consider issues of constitutional law, including the honour of the Crown, as part of its determination of whether an application is in the "public interest". The question raised by this appeal is whether the AER should have considered the honour of the Crown in relation to the MLAMP negotiations as part of this assessment.

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[44] In determining whether the Project was in the "public interest", the AER considered the effect on FMFN's treaty rights generally but declined to consider whether approval would frustrate MLAMP negotiations. It gave three reasons for that narrow approach:

a. Section 21 of *REDA* prohibits the AER from assessing the adequacy of Crown consultation;

b. Section 7(3) of LARP prohibits the AER from "adjourning, deferring, denying, refusing, or rejecting any application" by reason only of incompletion of a LARP regional plan; and

c. AER approval of the Project under s 10(3) of *OSCA* is subject to authorization by Cabinet, which is "the most appropriate place for a decision on the need to finalize MLAMP".

[45] A statutory decision-maker is required to perform its mandate as outlined in the applicable legislation. Where directed by legislation to grant an approval "if in its opinion it is in the public interest to do so", consideration must be given to all matters relevant to determining the "public interest". A conclusion that legislation precludes considering certain matters does not relieve the decision-maker of its obligation if that legislative interpretation proves incorrect. Nor can a decision-maker decline to consider issues that fall within its legislative mandate because it feels the matter can be better addressed by another body. As a result, the three reasons given by the AER for declining to consider anything relating to the MLAMP process when considering the public interest must be examined to determine if their reasons justify its decision.

Section 21 of *REDA*

[46] When an energy project is under consideration in Alberta that could affect the treaty interests of a First Nation, the provincial Crown has a duty to consult and potentially accommodate. This duty stems from the honour of the Crown, a constitutional principle (*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 24, [2018] 2 SCR 765 [*Mikisew 2018*], citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42, [2010] 3 SCR 103) that has as its ultimate objective the reconciliation of pre-existing Aboriginal interests with the assertion of Crown sovereignty: *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 66, [2013] 1 SCR 623 [*Manitoba Metis*].

[47] The responsibility to ensure the honour of the Crown is upheld remains with the Crown: *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 37, [2017] 1 SCR 1099; *Clyde River* at para 22. However, the Crown can determine how, and by whom, it will address its obligations to First Nations, meaning that aspects of its obligations can be delegated to regulatory bodies.

[48] Alberta has delegated procedural aspects of the duty to consult and to consider appropriate accommodation arising out of that consultation to the AER. Under Ministerial Order (Energy

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105/2014 and ESRD 53/2014), the AER must "consider potential adverse impacts of energy applications on existing rights of Aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* within its statutory authority under *REDA*". It is said that "AER processes will constitute part of Alberta's overall consultation process as appropriate". The Order also sets out the Aboriginal Consultation Direction, which describes its objective as follows:

> [T]o ensure that the AER considers and makes decisions in respect of energy applications in a manner that is consistent with the work of the Government of Alberta
>
> (a) in meeting its consultation obligations associated with the existing rights of aboriginal peoples as recognized and affirmed under Part II of the Constitution Act, 1982; and
>
> (b) in undertaking its consultation obligations pursuant to The Government of Alberta's [consultation policies] as amended and replaced from time to time ("Consultation Policy") and associated Consultation Guidelines ("Guidelines")

[49] The AER is ultimately responsible for considering and accommodating potential adverse impacts on the advice of the Aboriginal Consultation Office (ACO), a specialized office housed within the Ministry of Indigenous Relations. Most of the responsibility for managing Crown consultation on AER applications rests with the ACO. The ACO has the responsibility to: (1) determine if consultation is required; (2) manage the consultation process; (3) assess the adequacy of consultation undertaken; and (4) advise the AER on whether actions may be required to address potential adverse impacts of a project on Treaty rights and traditional uses.

[50] The Government of Alberta has retained the responsibility to assess the adequacy of Crown consultation on AER-regulated projects. This is reflected in s 21 of *REDA*, which provides as follows:

> The Regulator has no jurisdiction with respect to assessing adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*.

[51] In the present case, the ACO held consultations with FMFN regarding the Rigel Project, and the AER considered the recommendations of the ACO and the impact of the Project on the FMFN's treaty rights as part of its hearing. FMFN has challenged the adequacy of the ACO process in another proceeding, and it is not the subject of this appeal.

[52] Neither the ACO nor the AER considered the issue raised on this appeal, namely whether the honour of the Crown was implicated by the MLAMP process and the Letter of Intent. Are the

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matters that FMFN sought to put before the AER in relation to the MLAMP negotiations limited to the "adequacy of Crown consultation"? We find they are not.

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[53] The honour of the Crown can give rise to duties beyond the duty to consult. The Supreme Court of Canada in *Manitoba Metis* at para 73 stated that the "duty to consult" is only one of four situations recognized "thus far" where the honour of the Crown arises:

> (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);
>
> (2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution* Act, 1982, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida Nation*, at para. 25);
>
> (3) The honour of the Crown governs treaty-making and implementation (*Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at p. 512, per Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51), leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and
>
> (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47).

[54] While the honour of the Crown is always at stake in its dealings with Aboriginal peoples, it is not engaged by every interaction: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16, [2004] 3 SCR 511 [*Haida Nation*]; *Mikisew 2018* at para 23; *Manitoba Metis* at para 68. Rather than being an independent cause of action, the honour of the Crown "speaks to *how* obligations that attract it must be fulfilled": *Manitoba Metis* at para 73, emphasis in original. It will give rise to different duties in different circumstances: *Haida Nation* at para 18; *Mikisew 2018* at para 24. In the present case, FMFN asserts that the honour of the Crown is implicated through treaty implementation, relying on *Manitoba Metis* and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew 2005*]. It notes that the honour of the Crown infuses the performance of every treaty obligation, and stresses the ongoing relationship between the Crown and First Nations brought on by the need to balance the exercise of treaty rights with development under Treaty 8.

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[55] Since *Haida Nation*, it is clear that the honour of the Crown and its attendant focus on reconciliation arise prior to questions of rights infringement, or even proof of Aboriginal rights claims. Where rights have yet to be concluded through treaty, "the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims": *Haida Nation* at para 20. And while treaties "serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" (*ibid*), they do not end the need for reconciliation, which is "not a final legal remedy" but a "process flowing from rights guaranteed by s 35(1)": *Haida Nation* at para 32; see also Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR 433 at 440.

[56] In this case, FMFN argues that the MLAMP process and the Letter of Intent give rise to additional obligations stemming from the honour of the Crown beyond the duty to consult on an individual project. Specifically, FMFN suggests that the honour of the Crown is engaged in this case on the basis of treaty implementation.

[57] Section 21 does not prevent the AER from considering relevant matters involving aboriginal peoples when carrying out its mandate to decide if a particular project is in the public interest. The issues raised here are not limited to the adequacy of the consultation on this Project, but raise broader concerns including the Crown's relationship with the FMFN and matters of reconciliation. These issues engage the public interest and their consideration is not precluded by the language of s 21.

[58] Accordingly, the AER erred in concluding that s 21 of *REDA* prevented it from considering whether the MLAMP process was relevant to assessing whether the Project was in the public interest. While that provision removes the adequacy of Crown consultation from the AER's jurisdiction, the issues raised here are not so limited.

Section 7(3) of LARP

[59] The AER is required to "act in accordance with any applicable ALSA regional plan": *REDA*, s 20. The LARP is the applicable *ALSA* regional plan for the area where the Project is proposed. Section 7(3) of the LARP states:

> Notwithstanding subsections (1) and (2), a decision-maker or local government body must not adjourn, defer, deny, refuse, or reject any application, proceeding or decision-making process before it by reason only of
>
> (a) the Crown's non-compliance with a provision of either the LARP Strategic Plan or LARP Implementation Plan, or
>
> (b) the incompletion by the Crown or any body of any direction or commitment made in a provision of either the LARP Strategic Plan or LARP Implementation Plan.

[60] The AER interpreted s 7(3) as prohibiting it from delaying or denying approval of the Project because "LARP indicates that, once finalized, MLAMP will be a LARP regional plan" (para 181). However, the only mention of the MLAMP in the LARP is a statement in the "Introductory Section" that "the Moose Lake Access Management planning initiatives will be assessed for inclusion in the LARP implementation" (LARP, page 5). A planning initiative that will be assessed for inclusion in the LARP implementation does not fall within the scope of a "provision of either the LARP Strategic Plan or LARP Implementation Plan" or a "direction or commitment made in a provision of either the LARP Strategic Plan or Implementation Plan" so as to be subject to s 7(3).

[61] The AER failed to properly interpret s 7(3) of the LARP when it concluded that it applied to the MLAMP process.

Deferring consideration to Cabinet under s 10(3) of *OSCA*

[62] Section 10(3) of *OSCA* provides that the AER may "if in its opinion it is in the public interest to do so, and with the prior authorization of the Lieutenant Governor in Council, grant an approval on any terms and conditions that the Regulator considers appropriate ".

[63] As noted, the AER viewed the positive and negative impacts of the Project as being "more or less even" (para 180), and that FMFN's "assertion that we must not frustrate MLAMP negotiations does not tip the public interest balance against approving the Rigel project" (para 182). The AER referred to s 10 of *OSCA* and concluded that Cabinet was "the most appropriate place for a decision on the need to finalize MLAMP".

[64] A statutory decision-maker is required to follow the directions in the applicable legislation. It is the legislature, not the statutory decision-maker, which delegates responsibility for making a particular decision. The responsibility to determine whether projects reviewed under s 10 of *OSCA* are in "the public interest" was delegated to the AER. Only projects deemed by the AER to be in the public interest may proceed to the next stage. Cabinet then has the authority to decide whether "to authorize" and impose "terms and conditions" on the project. Matters that fall within the scope of the "public interest", within the meaning of s 10(3) of *OSCA*, must be considered by the AER as part of its public interest mandate; the regulator is not entitled to decline to address such matters because, in its view, they could be better addressed by Cabinet. This is not to say that Cabinet cannot also take such matters into account when considering whether to authorize the Project, but that does not relieve the AER of its responsibility.

[65] The legislature granted to the AER a broad mandate to determine whether a project is in the public interest; factors to consider include the social and economic effects of the energy resource activity, the effects of the energy resource activity on the environment, and the impacts on a landowner as a result of the use of the land on which the energy resource activity is or will be located: *REDA*, s 15; *REDA General Regulation*, s 3. The "public interest" also includes adherence

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to constitutional principles like the honour of the Crown, and the AER is no less responsible for considering the Crown's constitutional obligations than is Cabinet. To the extent the MLAMP negotiations implicate the honour of the Crown and therefore need to be considered as part of the "public interest", the AER was under a statutory duty to consider that issue.

[66] The need for ultimate Cabinet approval does not provide the AER a lawful reason to decline to consider the MLAMP negotiations and related issues insofar as they implicate the honour of the Crown. For that reason, we reject Prosper's argument that this appeal is premature on account of the fact that Cabinet has yet to give final authorization to the Project. Prosper notes that only final decisions can be reviewed and likens the decision of the AER to the National Energy Board (NEB), whose recommendations to Cabinet are said not to be amenable to judicial review: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras 170-203, leave to appeal to SCC refused, 38379 (2 May 2019). However, as FMFN points out, the decision of the AER regarding whether the Project is in the public interest is, unlike an NEB recommendation, a final decision subject to statutory appeal. Whether the AER erred in failing to consider the honour of the Crown as it relates to MLAMP negotiations when determining "the public interest" is a matter for which permission to appeal was granted and is properly before us.

[67] Moreover, the AER's consideration of these issues does not, contrary to Alberta's argument, place the AER in an improper role with respect to government policy decisions. The issue before the AER is whether the approval of a project is in the public interest. Considerations of the effect of the project on aboriginal interests and adherence with constitutional principles are part of the AER's public interest mandate. The AER's consideration of these issues in the context of a proposed project does not relieve the Crown of its ultimate constitutional responsibilities.

Conclusion

[68] We are satisfied that there was no basis for the AER to decline to consider the MLAMP process as part of its assessment of the public interest rather than deferring the issue to Cabinet. The public interest mandate can and should encompass considerations of the effect of a project on aboriginal peoples, which in this case will include the state of negotiations between the FMFN and the Crown. To preclude such considerations entirely takes an unreasonably narrow view of what comprises the public interest, particularly given the direction to all government actors to foster reconciliation.

[69] At the oral hearing, FMFN asked that the matter be remitted back to the AER to consider this issue, acknowledging it is for that decision-maker to determine whether the Project should be delayed, approved or denied. We agree.

[70] We have had the opportunity to review the concurring judgment of Greckol JA. She concludes that the honour of the Crown was engaged by the MLAMP negotiation process. As the AER declined to consider this issue at the hearing, a full evidentiary record relating to this matter is

not available. We are therefore of the view that the issue should be determined by the AER on an appropriate record.

[71] Accordingly, the appeal is allowed and the AER's approval of the Project vacated. The AER is directed to reconsider whether approval of the Project is in the public interest after taking into consideration the honour of the Crown and the MLAMP process. In so concluding, we stress that nothing in this decision should be viewed as a comment on whether approval of the Project is in the public interest.

Appeal heard on October 29, 2019

Memorandum filed at Edmonton, Alberta
this 24th day of April, 2020

Authorized to sign for: Veldhuis J.A.

Authorized to sign for: Strekaf J.A.

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Greckol J.A. (concurring in the result):

[72] I agree that the appeal must be allowed and join with them in the reasons for doing so. However, I wish to make a few additional comments by way of guidance regarding the honour of the Crown and the MLAMP negotiations in this case.

[73] The honour of the Crown is a constitutional principle which governs the relationship between Aboriginal peoples and the Crown: *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765 at paras 21, 24 [*Mikisew 2018*]. Dating back to the *Royal Proclamation of 1763*, the Crown's duty of honourable dealing arises out of its assertion of sovereignty over an Aboriginal people who had *de facto* control of land and resources: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32, [2004] 3 SCR 511 [*Haida Nation*]; *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 66, [2013] 1 SCR 623 [*Manitoba Metis*]; *Mikisew 2018* at para 21.

[74] Reconciliation of these opposing realities – pre-existing Aboriginal societies with the assertion of Crown sovereignty – is the ultimate purpose of the honour of the Crown: *Mikisew 2018* at para 22; *Manitoba Metis* at para 66. The duty to treat Aboriginal peoples honourably is also enshrined in s 35 of the *Constitution Act, 1982*, of which "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose": *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103.

[75] The continued need to reconcile Aboriginal interests with Crown sovereignty through treaty implementation is evident from *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew 2005*], itself a case involving the Crown's ability to "take up" land under Treaty 8. As noted by Binnie J at para 54, "[t]reaty making is an important stage in the long process of reconciliation, but it is only a stage". In *Mikisew 2005*, the Supreme Court of Canada held that the duty to consult imposed upon the Crown in *Haida Nation* similarly applied to the "taking up" of land where a First Nation's treaty rights might be affected. The implementation of Treaty 8 was said to "demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not)", the content of which was dictated by the duty of the Crown to act honourably: *Mikisew 2005* at para 33, emphasis in original.

[76] That the honour of the Crown attaches to the implementation of its constitutional obligations is particularly clear from *Manitoba Metis*, where the Supreme Court of Canada granted a declaration that the Crown failed to implement the *Manitoba Act, 1870* in a manner consistent with the honour of the Crown. *Manitoba Metis* considered s 31 of that constitutional document, which obliged the Crown to distribute 1.4 million acres of land to the children to Metis families. In implementing such obligations, the honour of the Crown requires that the Crown (1) take a broad

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purposive approach to the interpretation of the promise, and (2) act diligently to fulfill it: para 75. The latter duty was said to arise because "the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled" (para 79) and not leave the Aboriginal group "with an empty shell of a treaty promise" (para 80, citing *R v Marshall*, [1999] 3 SCR 456 at para 52).

[77] Alberta points out that the promise at issue in *Manitoba Metis* is quite different from any promise in this case. However, in my view, the question is not whether the so-called Prentice Promise must itself attract the label "solemn obligation" or "solemn promise", or even whether it is sufficiently exacting to preclude any development in the Moose Lake area. The question, rather, is whether it was made in furtherance of the Crown's obligation to protect FMFN's rights under Treaty 8. If so, then it can properly be said to fall within treaty implementation as a measure designed to ensure the Crown's obligations are fulfilled. To see why this is the case, the precise nature of FMFN's treaty rights must be considered.

[78] First Nations groups who adhered to Treaty 8 in 1899 – of which FMFN is a descendant – ceded a large amount of land to the Crown in exchange for certain guarantees, chief among them a provision protecting the right of the signatories to hunt, trap, and fish: *Mikisew 2018* at para 5. Indeed, it has been said that "the guarantee that hunting, fishing and trapping rights would continue was the *essential element* which led to their signing the treaties": *R v Badger*, [1996] 1 SCR 771 [*Badger*] at para 39, emphasis added. These rights as set out in Treaty 8 were subsequently circumscribed by the *Natural Resources Transfer Agreement*, a schedule of the *Constitution Act, 1930*, of which paragraph 12 provided for a continuing right to hunt for food on unoccupied land: *Badger* at para 100. The right to hunt will accordingly be lost where land has been "taken up" as contemplated by Treaty 8, meaning it will not extend to private lands put to a visible use incompatible with hunting: *Badger* at paras 49, 51, 58, 66.

[79] As later clarified in *Mikisew 2005*, however, not every "taking up" by the Crown constitutes an infringement of Treaty 8: para 31. Instead, an action for treaty infringement will only arise once, as a result of the Crown's power to take up land, "no meaningful right to hunt" remains over the Aboriginal group's traditional territories: *Mikisew 2005* at para 48; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 52, [2014] 2 SCR 447. This raises the prospect that the effects of any one "taking up" of land will rarely, if ever, itself violate an Aboriginal group's Treaty 8 right to hunt; instead, the extinguishment of the right will be brought about through the *cumulative effects* of numerous developments over time. In other words, no one project on FMFN's territory may prevent it from the meaningful right to hunt – however, if too much development is allowed to proceed, then, taken together, the effect will be to preclude FMFN from being able to exercise their treaty rights.

[80] The right to hunt (in a meaningful way) in Treaty 8 is a "solemn promise" (*Badger* at para 41) made by the Crown, just as the promise of land in *Manitoba Metis* was a solemn constitutional

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obligation. And yet it is clear that, given the nature of the respective rights, their implementation will necessarily look very different. The obligation in *Manitoba Metis* was met at the point in which the Crown distributed the 1.4 million acres of land to Metis children (and would have accorded with the honour of the Crown had it been done diligently). Conversely, the "promise" of hunting – given the reality of large-scale oil and gas developments in Treaty 8 territory, which is incompatible with Aboriginal hunting – is not fulfilled definitively. Rather, the promise is easy to fulfill initially but difficult to *keep* as time goes on and development increases.

[81] The foregoing makes clear that the Crown's obligation to ensure the meaningful right to hunt under Treaty 8 is an *ongoing* one. Proper land use management remains a perennial concern for the Crown, as "none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint": *Mikisew 2005* as para 27. Reconciling this "inevitable tension" (para 33) between Aboriginal rights and development in Treaty 8 territory has, first and foremost, been a matter of the Crown adhering to its duty to consult on individual projects, as mandated in *Mikisew 2005*. Acting honourably in this fashion has promoted reconciliation, in part, by "encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims" (*Mikisew 2018* at para 26), much as *Haida Nation* had counselled with respect of unproven Aboriginal rights claims. And yet, as this record itself attests, the long-term protection of Aboriginal treaty rights, including the right to hunt under Treaty 8, is increasingly thought to require negotiation and just settlement of disputes outside the context of individual projects in order to address the *cumulative effects* of land development on First Nation treaty rights.

[82] That is exactly what has been taking place in this case between the Crown and FMFN. The Crown has long been on notice that the piece-meal approach to addressing FMFN's concerns through consultation on individual projects has not adequately considered the cumulative effects of development. Whether MLAMP itself is mandated by Treaty 8 is not the issue. If the evidence establishes that the Crown entered into negotiations with FMFN on a buffer zone and ultimately agreed to implement MLAMP as a way of seeking to uphold its ongoing constitutional obligation to protect FMFN's right to hunt within its traditional area, then these were not, as suggested by Alberta, mere "policy" discussions. They would instead be negotiations designed to ensure that the Crown meet its treaty obligations. In such circumstances, the honour of the Crown would be engaged.

[83] Nor would it be an answer to say – as both Prosper and Alberta have suggested – that FMFN's concerns could instead be addressed in its treaty infringement claim against the Crown. The honour of the Crown has as its ultimate purpose the reconciliation of Aboriginal interests with Crown sovereignty. It is engaged *prior* to treaty infringement (*Mikisew 2018* at para 67) and seeks to protect Aboriginal rights from being turned into an empty shell. Whether or not the treaty rights of FMFN have been infringed remains to be seen. Regardless, the Crown must deal honourably with First Nations in negotiations designed to stave off infringement. The honour of the Crown may not mandate that the parties agree to any one particular settlement, but it does require that the

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Crown keep promises made during negotiations designed to protect treaty rights. It certainly demands more than allowing the Crown to placate FMFN while its treaty rights careen into obliteration. That is not honourable. And it is not reconciliation.

Appeal heard on October 29, 2019

Memorandum filed at Edmonton, Alberta
this 24th day of April, 2020

Greckol J.A.

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Appearances:

J.J. Arvay, Q.C
J. Woodward, Q.C.
for the Appellant

S. Duncanson
S.R. Sutherland
for the Respondent, Prosper Petroleum Ltd.

M.G. Lacasse
for the Respondent, Alberta Energy Regulator

D.L. Sharko
A.J. Croteau
for the Intervenor

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TAB 73

Pierre Crevier *Appellant*;

and

The Attorney General of the Province of Quebec and Harmel Aubry *Respondents*;

and

Pierre Crevier *Appellant*;

and

The Attorney General of the Province of Quebec and Robert Cofsky *Respondents*;

and

The Attorney General for the Province of Alberta *Intervener.*

1981: February 10, 11; 1981: October 20.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Professions Tribunal — Writs of evocation — Privative clauses — Express general exclusion of the supervisory authority of the Superior Court in respect of jurisdiction and law — Power to determine limits of jurisdiction without appeal or review — Whether a s. 96 court created — British North America Act, art. 96 — Professional Code, R.S.Q. 1977, c. C-26, arts. 162, 163, 164, 169, 175, 193, 194, 195 — Code of Civil Procedure, arts. 33, 846.

The appellant obtained two writs of evocation from a judge of the Superior Court of Quebec from two decisions of the Professions Tribunal quashing a decision of a Discipline Committee of a professional corporation on the ground that that body had acted beyond its authority. The Superior Court held that the wide powers conferred upon the Professions Tribunal—powers encompassing review of law or fact and jurisdiction—offended s. 96 of the *B.N.A. Act* because the question whether a body has exceeded its jurisdiction fell within the superintending and reforming power belonging solely to a superior court whose members are appointed by the Governor General in Council. That decision was reversed by a majority of the Quebec Court of Appeal. Hence the appeal to this Court.

Pierre Crevier *Appelant*;

et

Le procureur général de la province de Québec et Harmel Aubry *Intimés*;

et

Pierre Crevier *Appelant*;

et

Le procureur général de la province de Québec et Robert Cofsky *Intimés*;

et

Le procureur général de la province de l'Alberta *Intervenant.*

1981: 10, 11 février; 1981: 20 octobre.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard et Lamer.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Tribunal des professions — Brefs d'évocation — Clauses privatives — Exclusion expresse et générale du pouvoir de surveillance de la Cour supérieure à l'égard des questions de droit et de compétence — Pouvoir de définir les limites de sa propre compétence sans appel ni révision équivaut à créer une cour visée par l'art. 96 de l'A.A.N.B. — Acte de l'Amérique du Nord britannique, art. 96 — Code des professions, L.R.Q. 1977, chap. C-26, art. 162, 163, 164, 169, 175, 193, 194, 195 — Code de procédure civile, art. 33, 846.

L'appelant a obtenu deux brefs d'évocation d'un juge de la Cour supérieure du Québec à l'encontre de deux décisions du Tribunal des professions qui a infirmé une décision du comité de discipline d'une corporation professionnelle au motif que cet organisme avait excédé sa compétence. La Cour supérieure a statué que les pouvoirs étendus accordés au Tribunal des professions (pouvoirs englobant la révision de questions de droit, de fait ou de compétence) étaient de nature à contrevenir à l'art. 96 de l'*A.A.N.B.* car la question de savoir si un organisme a excédé sa juridiction relève du pouvoir de surveillance et de contrôle lequel seul est réservé à une cour supérieure dont la nomination des membres relève du gouverneur général en conseil. La Cour d'appel, à la majorité, a infirmé ce jugement, d'où le pourvoi devant cette Cour.

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Held: The appeal should be allowed.

The Professions Tribunal is given no function other than that of a general tribunal of appeal in respect of all professions covered by the *Professional Code* and it was, therefore, impossible to see its final appellate jurisdiction as part of an institutional arrangement by way of a regulatory scheme for governance of the various professions.

Where a provincial legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, and where that insulation encompassing jurisdiction, the legislation must be struck down as unconstitutional because it constitutes, in effect, a s. 96 court. It is unquestioned that privative clauses, when properly framed, may effectively oust judicial review on questions of law and on other issues not touching jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, there is nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review. Consequently, a provincially-constituted statutory tribunal could not constitutionally be immunized from review of decisions on questions of jurisdiction.

The present case was no different in principle from the *Farrah* case, [1978] 2 S.C.R. 638, when regard is had to ss. 175, 194 and 195 of the *Professional Code*. In both cases there was a purported exclusion of the reviewing authority of any court, whether by appeal or by evocation.

Attorney General of Quebec v. Farrah, [1978] 2 S.C.R. 638, followed; *Tomko v. Labour Relations Board (N.S.)*, [1977] 1 S.C.R. 112, distinguished; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Farrell v. Workmen's Compensation Board*, [1962] S.C.R. 48; *Toronto Newspaper Guild, Local 187 v. Globe Printing Company*, [1953] 2 S.C.R. 18; *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140; *Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, referred to.

APPEAL from a decision of the Court of Appeal of Quebec[1], reversing a judgment of the

[1] [1979] C.A. 333.

Arrêt: Le pourvoi est accueilli.

Le Tribunal des professions n'a pas d'autre fonction que celle d'un tribunal d'appel à l'égard de toutes les professions que vise le *Code des professions* et il est, par conséquent, impossible de considérer sa compétence d'appel en dernier ressort comme une partie d'un mécanisme institutionnel sous forme de dispositif de réglementation de la conduite des diverses professions.

Chaque fois que le législateur provincial prétend soustraire l'un des tribunaux créé par la loi à toute révision judiciaire de sa fonction d'adjuger, et que la soustraction englobe la compétence, la loi provinciale doit être déclarée inconstitutionnelle parce qu'elle a comme conséquence de faire de ce tribunal une cour au sens de l'art. 96. Il est incontestable que des clauses privatives bien formulées peuvent efficacement écarter le contrôle judiciaire sur des questions de droit et sur d'autres questions étrangères à la compétence. Toutefois, comme l'art. 96 fait partie de l'*Acte de l'Amérique du Nord britannique* et que ce serait le tourner en dérision que de l'interpréter comme un pouvoir de nomination simple et sans portée, la Cour ne peut trouver de marque plus distinctive d'une cour supérieure que l'attribution à un tribunal provincial du pouvoir de délimiter sa compétence sans appel ni autre révision. En conséquence, un tribunal créé par une loi provinciale ne peut être constitutionnellement à l'abri du contrôle de ses décisions sur des questions de compétence.

L'affaire en l'espèce n'est pas différente en principe de l'affaire *Farrah*, [1978] 2 R.C.S. 638, si l'on considère les art. 175, 194 et 195 du *Code des professions*. Dans les deux affaires on a voulu écarter le pouvoir de contrôle de tout autre tribunal, sous forme d'appel et d'évocation.

Jurisprudence: arrêt suivi: *Procureur général du Québec c. Farrah*, [1978] 2 R.C.S. 638; distinction faite avec l'arrêt *Tomko c. Labour Relations Board* (N.-É.), [1977] 1 R.C.S. 112; arrêts mentionnés: *Re Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; *Farrell c. Commission des accidents de travail*, [1962] R.C.S. 48; *Toronto Newspaper Guild, Local 187 c. Globe Printing Company*, [1953] 2 R.C.S. 18; *L'Alliance des Professeurs Catholiques de Montréal c. Commission des relations ouvrières du Québec*, [1953] 2 R.C.S. 140; *Succession Woodward c. Ministre des Finances*, [1973] R.C.S. 120.

POURVOI contre un arrêt de la Cour d'appel du Québec[1], qui a infirmé un jugement de la Cour

[1] [1979] C.A. 333.

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Superior Court [2], authorizing writs of evocation to be issued. Appeal allowed.

Robert Lesage, Q.C., and *Daniel Lavoie*, for the appellant.

Henri Brun, Louis Crête and *Jean-François Jobin*, for the respondent the Attorney General of the Province of Quebec.

Pierre Saint-Martin, for the respondents Aubry and Cofsky.

B. A. Crane, Q.C., for the intervener.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The issue in this appeal is whether the Professions Tribunal, established under s. 162 of the *Professional Code,* R.S.Q. 1977, c. C-26, may competently exercise the powers conferred upon it under s. 175 and under ancillary provisions such as s. 169 or whether, by reason of such powers and having regard also to the privative terms of s. 194, there would be a violation of s. 96 of the *British North America Act* in their exercise. The issue so stated requires a close examination of the recent judgment of this Court in *Attorney General of Quebec v. Farrah* [3], to determine whether there is a sufficient distinction between the challenged legislation here and that involved in the *Farrah* case to warrant a different answer, one of validity rather than invalidity as in *Farrah*.

I need make but a brief allusion to the facts. The *Professional Code* governs some 38 professional corporations listed in an annex to the Code. Each of these corporations is required to establish a Discipline Committee in conformity with the Code to deal with allegations of professional misconduct. The Discipline Committees have authority under s. 156 to impose a range of sanctions upon a finding of guilty, such as a reprimand or a temporary or permanent striking off the rolls of the particular corporation or a fine of at least $200 for each offence. The Discipline Committee has no authority to admit members to the particular

[2] [1977] C.S. 324.
[3] [1978] 2 S.C.R. 638.

supérieure [2], autorisant la délivrance de brefs d'évocation. Pourvoi accueilli.

Robert Lesage, c.r., et *Daniel Lavoie*, pour l'appelant.

Henri Brun, Louis Crête et *Jean-François Jobin*, pour l'intimé le procureur général de la province de Québec.

Pierre Saint-Martin, pour les intimés Aubry et Cofsky.

B. A. Crane, c.r., pour l'intervenant.

Le jugement de la Cour a été rendu par

LE JUGE EN CHEF—La question en litige dans ce pourvoi est celle de savoir si le Tribunal des professions, institué par l'art. 162 du *Code des professions*, L.R.Q. 1977, chap. C-26, a compétence pour exercer les pouvoirs que lui attribuent l'art. 175 et des dispositions complémentaires comme l'art. 169 ou si, à cause de ces pouvoirs et compte tenu des dispositions privatives de l'art. 194, leur exercice contrevient à l'art. 96 de l'*Acte de l'Amérique du Nord britannique*. Ainsi formulée, la question en litige appelle un examen attentif de l'arrêt récent de cette Cour *Procureur général du Québec c. Farrah* [3], pour déterminer s'il y a suffisamment de différence entre la loi contestée en l'espèce et celle visée dans l'affaire *Farrah* pour justifier une réponse différente, savoir que la loi est valide et non pas nulle comme dans l'affaire *Farrah*.

Il me faut faire un bref rappel des faits. Le *Code des professions* régit quelque 38 corporations professionnelles énumérées en annexe au Code. Chacune d'elles est tenue de constituer un comité de discipline conformément au Code pour entendre les plaintes d'inconduite. Les comités de discipline ont, en vertu de l'art. 156, le pouvoir d'imposer une gamme de sanctions sur déclaration de culpabilité, dont la réprimande, la radiation temporaire ou permanente du tableau de la corporation concernée ou l'imposition d'une amende d'au moins $200 pour chaque infraction. Le comité de discipline n'a pas le pouvoir d'admettre des membres à une

[2] [1977] C.S. 324.
[3] [1978] 2 R.C.S. 638.

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with a provincial statutory provision which purported to make certain determinations by the Minister final and conclusive and not open to appeal or review in any court. Martland J., speaking for this Court, dealt with this provision as follows (at p. 127):

> The effect which has been given to a provision of this kind is that, while it precludes a superior court from reviewing, by way of *certiorari*, a decision of an inferior tribunal on the basis of error of law, on the face of the record, if such error occurs in the proper exercise of its jurisdiction, it does not preclude such review if the inferior tribunal has acted outside its defined jurisdiction. The basis of such decisions is that if such a tribunal has acted beyond its jurisdiction in making a decision, it is not a decision at all within the meaning of the statute which defines its powers because Parliament could not have intended to clothe such tribunal with the power to expand its statutory jurisdiction by an erroneous decision as to the scope of its own powers.

Although this was not a direct pronouncement on constitutional power (jurisdiction as such was not expressly involved as it is in the case at bar), it was a clear indication that the constitutional issue was in the background. It is necessary to bring it forward, however, when it is raised as squarely as it has been under the *Professional Code*.

It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touch-

disposition législative provinciale qui prétendait rendre certaines décisions du Ministre définitives sans recours ni appel à aucun tribunal. Le juge Martland, au nom de la Cour, s'exprime ainsi à propos de cette disposition (à la p. 127):

> L'effet qui a été donné à une disposition de ce genre est que même si elle empêche une cour supérieure de réviser, par voie de *certiorari*, la décision d'un tribunal inférieur pour erreur de droit manifeste à la lecture du dossier, si pareille erreur est commise dans l'exercice approprié de la compétence de ce dernier tribunal, elle n'empêche pas cette révision si le tribunal inférieur a outrepassé les limites de sa compétence définie. Le fondement de ces arrêts est que si le tribunal a excédé sa compétence dans une décision, cette dernière n'est pas une décision du tout, selon la loi qui définit les pouvoirs du tribunal, parce que le Parlement ne pouvait pas avoir l'intention de conférer à pareil tribunal le pouvoir d'étendre sa compétence légale au moyen d'une décision erronée quant à l'étendue de ses propres pouvoirs.

Même s'il ne s'agit pas là d'une décision directement reliée à la compétence constitutionnelle (la juridiction n'était pas expressément visée comme en l'espèce), il est manifeste que l'aspect constitutionnel était présent en arrière-plan. Il est nécessaire cependant de le mettre au premier plan lorsqu'il est mis en cause aussi précisément que dans le cas du *Code des professions*.

C'est la première fois, il est vrai, que cette Cour déclare sans équivoque qu'un tribunal créé par une loi provinciale ne peut être constitutionnellement à l'abri du contrôle de ses décisions sur des questions de compétence. A mon avis, cette limitation, qui découle de l'art. 96, repose sur le même fondement que la limitation reconnue du pouvoir des tribunaux créés par des lois provinciales de rendre des décisions sans appel sur des questions constitutionnelles. Il peut y avoir des divergences de vues sur ce que sont des questions de compétence, mais, dans mon vocabulaire, elles dépassent les erreurs de droit, dont elles diffèrent, que celles-ci tiennent à l'interprétation des lois, à des questions de preuve ou à d'autres questions. Il est maintenant incontestable que des clauses privatives bien formulées peuvent efficacement écarter le contrôle

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TAB 74

David Dunsmuir *Appellant*

v.

Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management *Respondent*

INDEXED AS: DUNSMUIR *v.* NEW BRUNSWICK

Neutral citation: 2008 SCC 9.

File No.: 31459.

2007: May 15; 2008: March 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decision makers — Whether judicial review should include only two standards: correctness and reasonableness.

Administrative law — Judicial review — Standard of review — Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of notice — Adjudicator interpreting enabling statute as conferring jurisdiction to determine whether discharge was in fact for cause — Adjudicator holding employer breached duty of procedural fairness and ordering reinstatement — Whether standard of reasonableness applicable to adjudicator's decision on statutory interpretation issue — Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, ss. 97(2.1), 100.1(5) — Civil Service Act, S.N.B. 1984, c. C-5.1, s. 20.

Administrative law — Natural justice — Procedural fairness — Dismissal of public office holders — Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of notice — Employee not informed of reasons for termination or provided with opportunity to respond — Whether employee entitled to procedural fairness — Proper approach to dismissal of public employees.

David Dunsmuir *Appelant*

c.

Sa Majesté la Reine du chef de la province du Nouveau-Brunswick, représentée par le Conseil de gestion *Intimée*

RÉPERTORIÉ : DUNSMUIR *c.* NOUVEAU-BRUNSWICK

Référence neutre : 2008 CSC 9.

N° du greffe : 31459.

2007 : 15 mai; 2008 : 7 mars.

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

EN APPEL DE LA COUR D'APPEL DU NOUVEAU-BRUNSWICK

Droit administratif — Contrôle judiciaire — Norme de contrôle — Démarche appropriée pour le contrôle judiciaire d'une décision administrative — Le contrôle judiciaire devrait-il s'effectuer au regard de deux normes seulement : celle de la décision correcte et celle de la raisonnabilité?

Droit administratif — Contrôle judiciaire — Norme de contrôle — Fonctionnaire provincial amovible congédié sans motif avec indemnité de quatre mois de salaire tenant lieu de préavis — Arbitre concluant que sa loi habilitante l'autorisait à déterminer si le congédiement constituait en fait un congédiement pour motif — Arbitre statuant que l'employeur avait manqué à son obligation d'équité procédurale et ordonnant la réintégration de l'employé — La norme de la décision raisonnable s'appliquait-elle à l'interprétation de la loi par l'arbitre? — Loi relative aux relations de travail dans les services publics, L.R.N.-B. 1973, ch. P-25, art. 97(2.1), 100.1(5) — Loi sur la Fonction publique, L.N.-B. 1984, ch. C-5.1, l'art. 20.

Droit administratif — Justice naturelle — Équité procédurale — Congédiement d'un titulaire de charge publique nommé à titre amovible — Congédiement sans motif avec indemnité de quatre mois de salaire tenant lieu de préavis — Employeur n'ayant pas précisé les motifs du congédiement ni donné à l'employé la possibilité d'y répondre — L'employé avait-il droit à l'équité procédurale? — Démarche appropriée pour le congédiement d'un fonctionnaire.

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D was employed by the Department of Justice for the Province of New Brunswick. He held a position under the *Civil Service Act* and was an office holder "at pleasure". His probationary period was extended twice and the employer reprimanded him on three separate occasions during the course of his employment. On the third occasion, a formal letter of reprimand was sent to D warning him that his failure to improve his performance would result in further disciplinary action up to and including dismissal. While preparing for a meeting to discuss D's performance review the employer concluded that D was not right for the job. A formal letter of termination was delivered to D's lawyer the next day. Cause for the termination was explicitly not alleged and D was given four months' pay in lieu of notice.

D commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act* ("*PSLRA*"), alleging that the reasons for the employer's dissatisfaction were not made known, that he did not receive a reasonable opportunity to respond to the 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 and then referred to adjudication. A preliminary issue of statutory interpretation arose as to whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to determine the reasons underlying the province's decision to terminate. The adjudicator held that the referential incorporation of s. 97(2.1) of the *PSLRA* into s. 100.1(5) of that Act meant that he could determine whether D had been discharged or otherwise disciplined for cause. Ultimately, the adjudicator made no finding as to whether the discharge was or was not for cause. In his decision on the merits, he found that the termination letter effected termination with pay in lieu of notice and that the termination was not disciplinary. As D's employment was hybrid in character, the adjudicator held that D was entitled to and did not receive procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered D reinstated as of the date of dismissal, adding that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

On judicial review, the Court of Queen's Bench applied the correctness standard and quashed the adjudicator's preliminary decision, concluding that the adjudicator did not have jurisdiction to inquire into the

D travaillait pour le ministère de la Justice du Nouveau-Brunswick. Il occupait un poste suivant la *Loi sur la Fonction publique* et était titulaire d'une charge à titre amovible. Sa période d'essai a été prolongée deux fois, et l'employeur l'a réprimandé à trois occasions distinctes en cours d'emploi. La troisième réprimande a pris la forme d'une lettre officielle l'informant que s'il n'améliorait pas son rendement, il s'exposait à de nouvelles mesures disciplinaires pouvant aller jusqu'au congédiement. Lors d'une rencontre préalable à l'évaluation du rendement de D, l'employeur a conclu que ce dernier ne répondait pas aux exigences du poste. Le lendemain, un avis de cessation d'emploi a été transmis à l'avocat de D. Nul motif de congédiement n'était expressément invoqué, et D avait droit à une indemnité de quatre mois de salaire tenant lieu de préavis.

D a présenté un grief sur le fondement de l'art. 100.1 de la *Loi relative aux relations de travail dans les services publics* (« *LRTSP* »), alléguant que l'employeur n'avait pas précisé ses motifs d'insatisfaction, qu'il ne lui avait pas donné la possibilité raisonnable de répondre aux reproches, que les mesures pour mettre fin à l'emploi avaient été prises sans préavis, sans application régulière de la loi et au mépris de l'équité procédurale et que l'indemnité versée était insuffisante. Le grief a été rejeté, puis renvoyé à l'arbitrage. Une question préalable d'interprétation législative s'est alors posée : dans le cas d'un congédiement avec préavis ou indemnité en tenant lieu, l'arbitre est-il autorisé à déterminer les raisons de la décision de la province de mettre fin à l'emploi? L'arbitre a estimé que l'incorporation par renvoi du par. 97(2.1) de la *LRTSP* au par. 100.1(5) de la même loi l'autorisait à déterminer si D avait été congédié ou avait autrement fait l'objet d'une mesure disciplinaire, pour motif. Finalement, il n'a pas conclu qu'il s'agissait ou non d'un congédiement pour motif. Dans sa décision au fond, il a statué que l'avis de cessation d'emploi opérait un congédiement avec indemnité tenant lieu de préavis et que la cessation d'emploi n'était pas de nature disciplinaire. Vu la nature hybride de l'emploi, il a conclu que D avait droit au respect de l'équité procédurale, mais que l'employeur ne s'était pas acquitté de son obligation à cet égard en mettant fin à l'emploi. Il a déclaré nulle *ab initio* la cessation d'emploi et ordonné la réintégration de D dans ses fonctions à compter de la date du congédiement et, pour le cas où son ordonnance de réintégration serait annulée à l'issue d'un contrôle judiciaire, il a ajouté qu'un préavis de huit mois lui paraissait indiqué.

Saisie d'une demande de contrôle judiciaire, la Cour du Banc de la Reine a appliqué la norme de la décision correcte et annulé la décision sur la question préalable, arrivant à la conclusion que l'arbitre n'avait pas

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reasons for the termination, and that his authority was limited to determining whether the notice period was reasonable. On the merits, the court found that D had received procedural fairness by virtue of the grievance hearing before the adjudicator. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the court quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice. The Court of Appeal held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter*, not correctness, and that the adjudicator's decision was unreasonable. It found that where the employer elects to dismiss with notice or pay in lieu of notice, s. 97(2.1) of the *PSLRA* does not apply and the employee may only grieve the length of the notice period. It agreed with the reviewing judge that D's right to procedural fairness had not been breached.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ.: Despite its clear, stable constitutional foundations, the system of judicial review in Canada has proven to be difficult to implement. 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. Notwithstanding the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, any actual difference between them in terms of their operation appears to be illusory. There ought to be only two standards of review: correctness and reasonableness. [32] [34] [41]

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and 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. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations

compétence pour s'enquérir des motifs de la cessation d'emploi et qu'il lui était seulement permis de déterminer si le préavis était raisonnable. Sur le fond, elle a statué que D avait bénéficié de l'équité procédurale du fait de l'audition de son grief par l'arbitre. Comme la décision de ce dernier ne satisfaisait pas à la norme de la raisonnabilité *simpliciter*, elle a annulé l'ordonnance de réintégration, mais confirmé la décision subsidiaire portant le préavis à huit mois. La Cour d'appel a estimé que la norme de contrôle applicable à l'interprétation des pouvoirs conférés à l'arbitre par la *LRTSP* était celle de la raisonnabilité *simpliciter*, et non celle de la décision correcte, et que la décision de l'arbitre était déraisonnable. Elle a conclu que lorsque l'employeur opte pour le congédiement avec préavis ou indemnité en tenant lieu, le par. 97(2.1) de la *LRTSP* ne s'applique pas et le seul recours dont dispose l'employé réside dans la contestation du préavis par voie de grief. Elle a convenu avec la cour de révision qu'il n'y avait pas eu d'atteinte au droit de D à l'équité procédurale.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Bastarache, LeBel, Fish et Abella : Malgré ses assises constitutionnelles claires et stables, le mécanisme canadien de contrôle judiciaire se révèle difficile à appliquer. Il faut repenser tant le nombre que la teneur des normes de contrôle, ainsi que la démarche analytique qui préside à la détermination de la norme applicable dans un cas donné. Malgré ce qui distingue théoriquement la norme du manifestement déraisonnable et celle du raisonnable *simpliciter*, toute différence réelle d'application paraît illusoire. Il ne devrait y avoir que deux normes de contrôle, celle de la décision correcte et celle de la décision raisonnable. [32] [34] [41]

La cour de révision qui applique la norme de la décision correcte relativement à certaines questions de droit, y compris une question de compétence, n'acquiesce pas au raisonnement du décideur; elle entreprend plutôt sa propre analyse au terme de laquelle elle décide si elle est d'accord ou non avec la conclusion du décideur. En cas de désaccord, elle substitue sa propre conclusion et rend la décision qui s'impose. La cour de révision qui applique la norme de la décision raisonnable se demande si la décision contestée possède les attributs de la raisonnabilité. Le caractère raisonnable tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit. Empreinte de déférence, la norme de la raisonnabilité commande le respect de la volonté du législateur de s'en remettre, pour certaines choses, à des décideurs

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that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system. [47-50]

An exhaustive analysis is not required in every case to determine the proper standard of review. Courts must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision maker with regard to a particular category of question. If the inquiry proves unfruitful, courts must analyze the factors making it possible to identify the proper standard of review. The existence of a privative clause is a strong indication of review pursuant to the reasonableness standard, since it 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. It is not, however, determinative. Where the question is one of fact, discretion or policy, or where the legal issue is intertwined with and cannot be readily separated from the factual issue, deference will usually apply automatically. Deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. While deference may also be warranted where an administrative decision maker has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context, a question of law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. So will a true question of *vires*, a question regarding the jurisdictional lines between two or more competing specialized tribunals, and a constitutional question regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*. [52-62]

The standard of reasonableness applied on the issue of statutory interpretation. While the question of whether the combined effect of ss. 97(2.1) and 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 is a question of law, it is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator, who was in fact interpreting his enabling statute. Furthermore, s. 101(1) of the *PSLRA* includes a full privative clause, and the nature of the regime favours the standard of reasonableness. Here, the adjudicator's

administratifs, de même que le respect des raisonnements et des décisions fondés sur une expertise et une expérience dans un domaine particulier, ainsi que de la différence entre les fonctions d'une cour de justice et celles d'un organisme administratif dans le système constitutionnel canadien. [47-50]

Il n'est pas toujours nécessaire de se livrer à une analyse exhaustive pour arrêter la bonne norme de contrôle. Premièrement, la cour de révision vérifie si la jurisprudence établit déjà de manière satisfaisante le degré de déférence correspondant à une catégorie de questions en particulier. En second lieu, lorsque cette démarche se révèle infructueuse, elle entreprend l'analyse des éléments qui permettent d'arrêter la bonne norme de contrôle. L'existence d'une clause privative milite clairement en faveur d'un contrôle suivant la norme de la raisonnabilité, car elle atteste la volonté du législateur que la décision du décideur administratif fasse l'objet de plus de déférence et que le contrôle judiciaire demeure minimal. Cependant, elle n'est pas déterminante. En présence d'une question touchant aux faits, au pouvoir discrétionnaire ou à la politique, ou lorsque le droit et les faits s'entrelacent et ne peuvent aisément être dissociés, la retenue s'impose habituellement d'emblée. Lorsqu'un décideur interprète sa propre loi constitutive ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie, la déférence est habituellement de mise. Elle peut également s'imposer lorsque le décideur administratif a acquis une expertise dans l'application d'une règle générale de common law ou de droit civil dans son domaine spécialisé, mais la question de droit qui revêt une importance capitale pour le système juridique dans son ensemble et qui est étrangère au domaine d'expertise du décideur administratif appelle toujours la norme de la décision correcte. Il en va de même pour une question touchant véritablement à la compétence, une question liée à la délimitation des compétences respectives de tribunaux spécialisés concurrents et une question constitutionnelle touchant au partage des pouvoirs entre le Parlement et les provinces dans la *Loi constitutionnelle de 1867*. [52-62]

La question de l'interprétation législative était assujettie à la norme de la raisonnabilité. Bien que la question de savoir si, ensemble, le par. 97(2.1) et l'art. 100.1 de la *LRTSP* autorisent l'arbitre à s'enquérir des motifs d'un congédiement avec préavis ou indemnité en tenant lieu constitue une question de droit, elle ne revêt pas une importance capitale pour le système juridique et elle n'est pas étrangère au domaine d'expertise de l'arbitre, lequel a en fait interprété sa loi habilitante. En outre, le par. 101(1) de la *LRTSP* constitue une clause privative absolue et la nature du régime milite en faveur de la norme de la raisonnabilité. En l'espèce, l'interprétation

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interpretation of the law was unreasonable and his decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law. The employment relationship between the parties in this case was governed by private law. The combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* cannot, on any reasonable interpretation, remove the employer's right, under the ordinary rules of contract, to discharge an employee with reasonable notice or pay in lieu thereof without asserting cause. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. [66-75]

On the merits, D was not entitled to procedural fairness. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. Where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness. The principles expressed in *Knight v. Indian Head School Division No. 19* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that *Knight* ignored the important effect of a contract of employment, it should not be followed. In the case at bar, D was a contractual employee in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that as a civil servant he could only be dismissed in accordance with the ordinary rules of contract. To consider a public law duty of fairness issue where such a duty exists falls squarely within the adjudicator's task to resolve a grievance. Where, as here, the relationship is contractual, it was unnecessary to consider any public law duty of procedural fairness. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of D, the adjudicator erred and his decision was therefore correctly struck down. [76-78] [81] [84] [106] [114] [117]

Per Binnie J.: The majority reasons for setting aside the adjudicator ruling were generally agreed with, however the call of the majority to re-evaluate the pragmatic and functional test and to re-assess "the structure and characteristics of the system of judicial review as a whole" and to develop a principled framework that is

du droit par l'arbitre était déraisonnable et sa décision ne faisait pas partie des issues acceptables au regard des faits et du droit. Le lien d'emploi entre les parties ressortissait au droit privé. L'application concomitante du par. 97(2.1) et de l'art. 100.1 de la *LRTSP* ne saurait donc raisonnablement supprimer le droit de l'employeur, suivant les règles contractuelles ordinaires, de congédier un employé avec préavis raisonnable ou indemnité en tenant lieu et sans invoquer de motif. En concluant que la *LRTSP* lui permettait de rechercher les motifs du congédiement, l'arbitre a tenu un raisonnement foncièrement incompatible avec le contrat d'emploi et, de ce fait, entaché d'un vice fatal. [66-75]

Sur le fond, D n'avait pas droit à l'équité procédurale. En présence d'un contrat d'emploi, le renvoi d'un fonctionnaire, que ce dernier soit ou non titulaire d'une charge publique, est régi par le droit contractuel, et non par les principes généraux du droit public. Lorsqu'un organisme public prend la décision de congédier une personne conformément à ses pouvoirs et à un contrat d'emploi, nulle considération supérieure du droit public ne justifie l'imposition d'une obligation d'équité. Les principes formulés dans l'arrêt *Knight c. Indian Head School Division No. 19* relativement à l'obligation générale d'équité à laquelle est tenu l'organisme public dont la décision touche les droits, les privilèges ou les biens d'une personne demeurent valables et importants. Toutefois, dans la mesure où cet arrêt n'a pas tenu compte de l'effet déterminant d'un contrat d'emploi, il ne devrait pas être suivi. Dans la présente affaire, D était à la fois titulaire d'une charge publique et employé contractuel. L'article 20 de la *Loi sur la Fonction publique* prévoyait qu'à titre de fonctionnaire, il ne pouvait être congédié que suivant les règles contractuelles ordinaires. L'examen d'une question touchant à l'obligation d'équité en droit public, lorsqu'une telle obligation existe, ressortit clairement au mandat de l'arbitre chargé du règlement d'un grief. Lorsque, comme en l'espèce, le lien est contractuel, il n'est pas nécessaire de tenir compte de quelque obligation d'équité procédurale en droit public. En assujettissant l'intimée à l'obligation d'équité procédurale en sus de ses obligations contractuelles et en ordonnant la réintégration de D, l'arbitre a commis une erreur, et sa décision a été annulée à bon droit. [76-78] [81] [84] [106] [114] [117]

Le juge Binnie : Malgré l'accord général avec les motifs invoqués par les juges majoritaires pour annuler la décision de l'arbitre, l'invitation à réévaluer l'analyse pragmatique et fonctionnelle ainsi qu'à revoir « l'architecture et les caractéristiques du mécanisme de contrôle judiciaire dans son ensemble » et à « établir

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"more coherent and workable" invites a broader reappraisal. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. Litigants find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. The Court should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case. [119-122] [133] [145]

The distinction between "patent unreasonableness" and reasonableness *simpliciter* is now to be abandoned. The repeated attempts to explain the difference between the two, was in hindsight, unproductive and distracting. However, a broad reappraisal of the system of judicial review should explicitly address not only administrative tribunals but issues related to other types of administrative bodies and statutory decision makers including mid-level bureaucrats and, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. [121-123] [134-135] [140]

It should be presumed that the standard of review of an administrative outcome on grounds of substance is reasonableness. In accordance with the ordinary rules of litigation, it should also be presumed that the decision under review is reasonable until the applicant shows otherwise. An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision rests on an error in the determination of a legal issue not confided (or which constitutionally could not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. Questions of law outside the administrative decision maker's home statute and closely related rules or statutes which require his or her expertise should also be reviewable on a "correctness" standard whether or not it meets the majority's additional requirement that it be "of central importance to the legal system as a whole". The standard of correctness should also apply to the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. Nobody should have his or her rights,

un cadre d'analyse rationnel qui soit plus cohérent et fonctionnel » appelle un réexamen plus large. Ces dernières années, des débats métaphysico-juridiques ont indûment embrouillé la notion de contrôle judiciaire. La cour de révision ne met l'accent ni sur la prétention du justiciable ni la mesure prise par l'État, mais arbitre plutôt un long et mystérieux débat sur une méthode dite « pragmatique et fonctionnelle ». La Cour devrait à tout le moins (i) établir quelques présomptions et (ii) faire en sorte que les parties cessent de débattre des critères applicables et fassent plutôt valoir leurs prétentions sur le fond. [119-122] [133] [145]

La distinction entre le « manifestement déraisonnable » et le raisonnable *simpliciter* doit désormais être abandonnée. Avec le recul, les tentatives répétées d'expliquer la différence entre les deux étaient vaines et importunes. Cependant, la réévaluation globale du mécanisme de contrôle judiciaire devrait explicitement viser non seulement les tribunaux administratifs, mais aussi d'autres types d'organisme administratif et de décideur d'origine législative, y compris des fonctionnaires de rang moyen, voire des ministres. Lorsque ni la logique ni la langue ne peuvent saisir la distinction dans un contexte, elles ne peuvent non plus le faire par ailleurs dans le domaine du contrôle judiciaire. [121-123] [134-135] [140]

Il devrait être présumé que la norme de contrôle d'une décision administrative sur le fond est celle de la raisonnabilité. Conformément aux règles qui régissent habituellement les litiges, on devrait aussi présumer que la décision visée par le contrôle est raisonnable, sauf preuve contraire du demandeur. Celui qui préconise l'application de la norme de la décision correcte — soit l'absence de déférence — devrait être tenu de prouver que la décision contestée résulte du règlement erroné d'une question juridique ne relevant pas (ou ne pouvant pas constitutionnellement relever) du décideur administratif, qu'elle ait trait à la compétence ou au droit en général. La raison d'être de l'obstacle constitutionnel est manifeste. S'il n'existait pas, l'État pourrait confier la tâche des tribunaux judiciaires à des organismes administratifs qui ne sont pas indépendants de l'exécutif et, par voie législative, soustraire les décisions de ces organismes à un véritable contrôle judiciaire. Les questions de droit ne relevant pas de la loi constitutive du décideur administratif ou de quelque règle ou loi très connexe faisant appel à son expertise devraient aussi être assujetties à la norme de la décision correcte, qu'elles satisfassent ou non à l'exigence de l'« importance capitale pour le système juridique dans son ensemble » formulée par les juges majoritaires. Cette norme devrait également s'appliquer à l'obligation d'« équité procédurale », qui varie selon la catégorie à laquelle appartient le décideur et la

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interests or privileges adversely dealt with by an unjust process. [127-129] [146-147]

On the other hand when the application for judicial review challenges the substantive outcome of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended. [130]

Abandonment of the distinction between reasonableness *simpliciter* and patent unreasonableness has important implications. The two different standards addressed not merely "the magnitude or the immediacy of the defect" in the administrative decision but recognized that different administrative decisions command different degrees of deference, depending on who is deciding what. [135]

"Contextualizing" a single standard of "reasonableness" review will shift the courtroom debate from choosing between two standards of reasonableness that each represented a different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference. [139]

Thus a single "reasonableness" standard will now necessarily incorporate both the degree of deference owed to the decision maker formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, and an assessment of the range of options reasonably open to the decision maker in the circumstances. The judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose. [141] [149]

A single "reasonableness" standard is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making. "Contextualizing" the reasonableness standard will require a reviewing court to consider the precise nature and function of the decision maker including its expertise, the terms and objectives

nature de la décision en cause. Nul ne devrait voir ses droits, ses intérêts ou ses privilèges faire l'objet d'une décision défavorable à l'issue d'une procédure injuste. [127-129] [146-147]

Par contre, lorsque le demandeur conteste la mesure administrative quant au fond, la cour de révision est invitée à faire un pas de plus et à remettre en question une décision relevant du décideur administratif. Cela prête à controverse, car en ce qui concerne la raisonnabilité d'une politique administrative ou de l'exercice d'un pouvoir discrétionnaire administratif, il n'y a pas de raison évidente de préférer l'appréciation judiciaire à celle du décideur administratif auquel le législateur a attribué le pouvoir de trancher, sauf lorsque la loi prévoit un droit d'appel devant une cour de justice ou que l'intention du législateur d'assujettir le décideur à la norme de la décision correcte ressort par ailleurs de la loi habilitante. [130]

L'abandon de la distinction entre la norme de la décision raisonnable *simpliciter* et celle de la décision manifestement déraisonnable a d'importantes répercussions. Les deux normes ne s'intéressaient pas seulement à « l'importance du défaut » entachant la décision administrative ou à son « caractère flagrant », mais reconnaissaient aussi le fait que différentes décisions administratives appellent différents degrés de déférence, selon l'identité du décideur et la nature de la décision. [135]

L'application d'une norme unique en fonction du contexte transforme le débat : il ne s'agit plus de choisir entre deux normes de raisonnabilité correspondant chacune à un degré de déférence distinct, mais bien de déterminer le bon degré de déférence à l'intérieur d'une seule norme de raisonnabilité. [139]

Ainsi, dorénavant, une norme de « raisonnabilité » unique englobera nécessairement le degré de déférence auquel a droit le décideur et que traduisait auparavant la distinction entre le manifestement déraisonnable et le raisonnable *simpliciter*, et la prise en considération des décisions qui auraient pu raisonnablement être rendues dans les circonstances. Le rôle de la cour de révision est de délimiter les résultats raisonnables parmi lesquels le décideur administratif est libre de choisir. [141] [149]

La notion de « raisonnabilité » est vaste et l'application d'une norme unique devra prendre en compte un grand nombre de variables qui délimitent le contrôle judiciaire d'une décision administrative. Appliquer la norme de la raisonnabilité en fonction du contexte exige de la cour de révision qu'elle tienne compte de la nature et de la fonction précises du décideur, y compris

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of the governing statute (or common law) conferring the power of decision including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred. In some cases the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case careful consideration will have to be given to the reasons given for the decision. This list of "contextual" considerations is non-exhaustive. A reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the administrative outcome is an issue given to another forum to decide. [144] [151-155]

Per Deschamps, Charron and Rothstein JJ.: Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. In the adjudicative context, decisions on questions of fact, whether undergoing appellate review or administrative law review, always attract deference. When there is a privative clause, deference is owed to the administrative body that interprets the legal rules it was created to interpret and apply. If the body oversteps its delegated powers, if it is asked to interpret laws in respect of which it does not have expertise or if Parliament or a legislature has provided for a statutory right of review, deference is not owed to the decision maker. Finally, when considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court. [158-164]

Here, the employer's common law right to dismiss without cause was the starting point of the analysis. Since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court can proceed to its own interpretation of the applicable rules and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is essential if s. 97(2.1) of the *PSLRA* is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5) of the *PSLRA*. The adjudicator's failure to inform himself of this crucial difference led him to look for a cause for the dismissal, which was not relevant. Even if deference had been owed to the adjudicator, his interpretation could not have stood. Employment security is so fundamental to an employment relationship

son expertise, du libellé et des objectifs de la loi (ou de la common law) conférant le pouvoir décisionnel, y compris la présence d'une clause privative, et de la nature de la question à trancher. L'examen attentif de ces éléments révélera l'étendue du pouvoir discrétionnaire. La cour de révision devra parfois reconnaître que le décideur devait établir un juste équilibre (ou une proportionnalité) entre, d'une part, les répercussions défavorables de la décision sur les droits et les intérêts du demandeur ou d'autres personnes directement touchées et, d'autre part, l'objectif public poursuivi. Elle devra toujours considérer attentivement les motifs de la décision. D'autres éléments « contextuels » pourront s'ajouter. Tout au long de la démarche, la cour de révision doit se rappeler que, fondamentalement, ce n'est pas à elle de juger de la « raisonnabilité » de la décision administrative. [144] [151-155]

Les juges Deschamps, Charron et Rothstein : Lors de toute révision, il faut d'abord déterminer si la question en litige est une question de droit, de fait ou mixte de fait et de droit. Dans le contexte juridictionnel, qu'elle fasse l'objet d'un appel ou d'un contrôle judiciaire, la décision sur une question de fait commande toujours la déférence. En présence d'une clause privative, la déférence s'impose à l'égard de l'organisme administratif qui interprète les règles juridiques pour l'interprétation et l'application desquelles il a été créé. La déférence ne s'impose pas lorsque l'organisme administratif outrepasse ses pouvoirs délégués, qu'il interprète des dispositions législatives ne relevant pas de son expertise ou que la loi prévoit expressément un droit de révision. Enfin, la cour de révision qui se penche sur une question mixte de fait et de droit devrait manifester autant de déférence envers le décideur que le ferait une cour d'appel vis-à-vis d'une cour inférieure. [158-164]

En l'espèce, le droit que la common law confère à l'employeur de congédier un employé sans invoquer de motif était le point de départ de l'analyse. Comme l'arbitre ne possède aucune expertise particulière dans l'interprétation de la common law, la cour de révision peut s'en remettre à sa propre interprétation des règles applicables et déterminer si l'arbitre pouvait ou non s'enquérir du motif du congédiement. La norme de contrôle applicable est celle de la décision correcte. La distinction entre les règles de la common law régissant l'emploi et celles d'origine législative applicables à l'employé syndiqué est essentielle à l'application du par. 97(2.1) de la *LRTSP* à un employé non syndiqué, avec les adaptations nécessaires, conformément au par. 100.1(5) de la même loi. L'omission de tenir compte de cette différence cruciale a amené l'arbitre à rechercher un motif de congédiement, ce qui était hors de propos. Même si l'arbitre avait eu droit à la déférence, son interprétation

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that it could not have been granted by the legislature by providing only that the *PSLRA* was to apply *mutatis mutandis* to non-unionized employees. [168-171]

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By Bastarache and LeBel JJ.

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n'aurait pu être retenue. La sécurité d'emploi est si fondamentale à la relation de travail que le législateur n'a pu l'accorder en prévoyant seulement l'application de la *LRTSP* aux employés non syndiqués, compte tenu des adaptations nécessaires. [168-171]

Jurisprudence

Citée par les juges Bastarache et LeBel

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Commissioners, [2000] 1 R.C.S. 360, 2000 CSC 14; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureur général)*, [2004] 2 R.C.S. 185, 2004 CSC 39; *Canada Safeway Ltd. c. SGDMR, section locale 454*, [1998] 1 R.C.S. 1079; *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, [2002] 1 R.C.S. 249, 2002 CSC 11; *Ridge c. Baldwin*, [1963] 2 All E.R. 66; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311; *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602; *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105; *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Reglin c. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790; *Gismondi c. Toronto (City)* (2003), 64 O.R. (3d) 688; *Seshia c. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151; *Rosen c. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83; *Hanis c. Teevan* (1998), 111 O.A.C. 91; *Gerrard c. Sackville (Ville)* (1992), 124 R.N.-B. (2e) 70; *Malloch c. Aberdeen Corp.*, [1971] 2 All E.R. 1278; *Hughes c. Moncton (Ville)* (1990), 111 R.N.-B. (2e) 184, conf. (1991), 118 R.N.-B. (2e) 306; *Rosen c. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40; *Wells c. Terre-Neuve*, [1999] 3 R.C.S. 199; *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 94 L.A.C. (4th) 56; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701.

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By Deschamps J.

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J. Gordon Petrie, *Q.C.*, and *Clarence L. Bennett*, for the appellant.

C. Clyde Spinney, *Q.C.*, and *Keith P. Mullin*, for the respondent.

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

BASTARACHE AND LEBEL JJ. —

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

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POURVOI contre un arrêt de la Cour d'appel du Nouveau-Brunswick (les juges Turnbull, Daigle et Robertson) (2006), 297 R.N.-B. (2e) 151, 265 D.L.R. (4th) 609, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 2006 CLLC ¶220-030, [2006] A.N.-B. no 118 (QL), 2006 CarswellNB 156, 2006 NBCA 27, qui a confirmé la décision du juge Rideout (2005), 293 R.N.-B. (2e) 5, 43 C.C.E.L. (3d) 205, [2005] A.N.-B. no 327 (QL), 2005 CarswellNB 444, 2005 NBBR 270, qui a annulé la décision de l'arbitre sur la question préalable et annulé en partie sa sentence. Pourvoi rejeté.

J. Gordon Petrie, *c.r.*, et *Clarence L. Bennett*, pour l'appelant.

C. Clyde Spinney, *c.r.*, et *Keith P. Mullin*, pour l'intimée.

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

LES JUGES BASTARACHE ET LEBEL —

I. Introduction

[1] Une fois de plus, la Cour est appelée à se pencher sur l'épineuse question de la démarche qu'il convient d'adopter pour le contrôle judiciaire des décisions des tribunaux administratifs. Au Canada, l'évolution récente du contrôle judiciaire a été marquée par une déférence variable, l'application de critères déroutants et la qualification nouvelle de vieux problèmes, sans qu'une solution n'offre de vérita-

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the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, 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" ("Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures*, *Appellate Courts: Policy, Law and Practice*, V-1, at 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 (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at

ils portent atteinte au principe de la primauté du droit. C'est pourquoi lorsque la cour de révision se penche sur l'étendue d'un pouvoir décisionnel ou de la compétence accordée par la loi, l'analyse relative à la norme de contrôle vise à déterminer quel pouvoir le législateur a voulu donner à l'organisme en la matière. Elle le fait dans le contexte de son obligation constitutionnelle de veiller à la légalité de l'action administrative : *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, p. 234; également, *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 21.

[30] Non seulement le contrôle judiciaire contribue au respect de la primauté du droit, mais il joue un rôle constitutionnel important en assurant la suprématie législative. Comme l'a fait observer le juge Thomas Cromwell, [TRADUCTION] « la primauté du droit est consacrée par le pouvoir d'une cour de justice de statuer en dernier ressort sur l'étendue de la compétence d'un tribunal administratif, par l'application du principe selon lequel il convient de bien délimiter la compétence et de bien la définir, en fonction de l'intention du législateur, d'une manière à la fois contextuelle et téléologique, ainsi que par la reconnaissance du fait que les cours de justice n'ont pas le pouvoir exclusif de statuer sur toutes les questions de droit, ce qui tempère la conception judiciarisée de la primauté du droit » (« Appellate Review : Policy and Pragmatism », dans *2006 Isaac Pitblado Lectures, Appellate Courts : Policy, Law and Practice*, V-1, p. V-12). Essentiellement, la primauté du droit est assurée par le dernier mot qu'ont les cours de justice en matière de compétence, et la suprématie législative, par la détermination de la norme de contrôle applicable en fonction de l'intention du législateur.

[31] L'organe législatif du gouvernement ne peut supprimer le pouvoir judiciaire de s'assurer que les actes et les décisions d'un organisme administratif sont conformes aux pouvoirs constitutionnels du gouvernement. Même si elle est révélatrice de l'intention du législateur, la clause privative ne saurait être décisive à cet égard (*Succession Woodward c. Ministre des Finances*, [1973] R.C.S. 120, p. 127).

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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 *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 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*:

Le pourvoir inhérent d'une cour supérieure de contrôler les actes de l'Administration et de s'assurer que celle-ci n'outrepasse pas les limites de sa compétence tire sa source des art. 96 à 101 de la *Loi constitutionnelle de 1867* portant sur la magistrature : arrêt *Crevier*. Comme l'a dit le juge Beetz dans l'arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1090, « [l]e rôle des cours supérieures dans le maintien de la légalité est si important qu'il bénéficie d'une protection constitutionnelle ». En résumé, le contrôle judiciaire bénéficie de la protection constitutionnelle au Canada, surtout lorsqu'il s'agit de définir les limites de la compétence et de les faire respecter. Le juge en chef Laskin l'a expliqué dans l'arrêt *Crevier* :

> 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. [pp. 237-38]

> [Q]uand la disposition privative englobe spécifiquement les questions de droit, cette Cour n'a pas hésité, comme dans l'arrêt *Farrah*, à reconnaître que cette limitation du contrôle judiciaire favorise une politique législative explicite qui veut protéger les décisions des organismes judiciaires contre la rectification externe. La Cour a ainsi, à mon avis, maintenu l'équilibre entre les objectifs contradictoires du législateur provincial de voir confirmer la validité quant au fond des lois qu'il a adoptées et ceux des tribunaux d'être les interprètes en dernier ressort de l'*Acte de l'Amérique du Nord britannique* et de son art. 96. Les mêmes considérations ne s'appliquent cependant pas aux questions de compétence qui ne sont pas très éloignées des questions de constitutionnalité. Il ne peut être accordé à un tribunal créé par une loi provinciale, à cause de l'art. 96, de définir les limites de sa propre compétence sans appel ni révision. [p. 237-238]

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

Voir aussi D. J. Mullan, *Administrative Law* (2001), 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.

[32] Ses assises constitutionnelles claires et stables n'ont pas empêché le contrôle judiciaire de connaître une évolution constante au Canada, les cours de justice s'efforçant au fil des ans de concevoir une démarche tout autant valable sur le plan théorique qu'efficace en pratique. Malgré les efforts pour l'améliorer et le clarifier, le mécanisme actuel s'est révélé difficile à appliquer. Le temps est venu de revoir le contrôle judiciaire des décisions administratives au Canada et d'établir un cadre d'analyse rationnel qui soit plus cohérent et fonctionnel.

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[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.

[52] L'existence d'une clause privative milite clairement en faveur d'un contrôle suivant la norme de la raisonnabilité. En effet, elle atteste la volonté du législateur que les décisions du décideur administratif fassent l'objet de plus de déférence et que le contrôle judiciaire soit minimal. Cependant, elle n'est pas déterminante. La primauté du droit exige des cours supérieures qu'elles s'acquittent de leur rôle constitutionnel et, nous le rappelons, ni le Parlement ni une législature ne peuvent écarter totalement leur pouvoir de contrôler les actes et les décisions des organismes administratifs. Il s'agit d'un pouvoir protégé par la Constitution. Le contrôle judiciaire est nécessaire afin que la clause privative soit interprétée dans le bon contexte législatif et que les organismes administratifs respectent les limites de leurs attributions.

[53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. 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.

[53] En présence d'une question touchant aux faits, au pouvoir discrétionnaire ou à la politique, la retenue s'impose habituellement d'emblée (*Mossop*, p. 599-600; *Dr Q*, par. 29; *Suresh*, par. 29-30). Nous sommes d'avis que la même norme de contrôle doit s'appliquer lorsque le droit et les faits s'entrelacent et ne peuvent aisément être dissociés.

[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: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, 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.*, 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*, [1975] 1 S.C.R. 517, where it was held that an administrative decision

[54] La jurisprudence actuelle peut être mise à contribution pour déterminer quelles questions emportent l'application de la norme de la raisonnabilité. Lorsqu'un tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie, la déférence est habituellement de mise : *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157, par. 48; *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, par. 39. Elle peut également s'imposer lorsque le tribunal administratif a acquis une expertise dans l'application d'une règle générale de common law ou de droit civil dans son domaine spécialisé : *Toronto (Ville) c. S.C.F.P.*, par. 72. L'arbitrage en droit du travail demeure un domaine où cette approche se révèle particulièrement indiquée. La jurisprudence a considérablement évolué depuis l'arrêt *McLeod c. Egan*, [1975] 1 R.C.S. 517, et la Cour

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TAB 75

Court of Queen's Bench of Alberta

Citation: Canadian Natural Resources Limited v Elizabeth Métis Settlement, 2020 ABQB 210

2020 ABQB 210 (CanLII)

Date: 20200327
Docket: 1901 09334
Registry: Calgary

Between:

Canadian Natural Resources Limited, Husky Oil Operations Ltd., Crescent Point Energy Corp., Altagas Ltd., Altagas Holdings Inc. and Altagas Processing Partnership and Altagas Extraction and Transmission Limited Partnership as Successors to Altagas Services Inc.

Applicants

- and -

Elizabeth Métis Settlement and the Métis Settlements General Council

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice N. Devlin

I. Introduction

[1] Elizabeth Métis Settlement ("Elizabeth") is a small Métis community of just over 600 residents on the eastern edge of Alberta, south of Cold Lake. In 2019, Elizabeth levied property taxes amounting to 187% of assessed land value on four natural resource companies whose lands comprise virtually its entire taxable base. Those companies ask this Court to quash the bylaw which imposed this rate of tax (the "Property Tax Bylaw") on the basis that it was invalidly enacted and is substantively unreasonable.

[2] Elizabeth responds that the Applicants have no standing to challenge the Property Tax Bylaw, that its unusual procedures in enacting it were justified by a looming financial

emergency, and that the context of Alberta's Métis settlements uniquely informs the question of what constitutes a reasonable rate of taxation in this situation.

[3] For the reasons that follow, the Application is allowed and the Tax Bylaw is quashed as unlawfully enacted and unreasonable in substance.

II. Facts

[4] Determination of this case requires consideration of both the legislative history of the impugned Property Tax Bylaw, as well as the overall context of the Métis people in Alberta and their emergent form of self-government.

a. Alberta's Métis Settlements

[5] The Métis people are the descendants of 18th-century unions between European explorers, fur traders and pioneers, and Indian women: see *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 22 at paras 17*ff*. They first gained formal recognition as one of Canada's three aboriginal groups in section 35 of the *Constitution Act, 1982*, 1982, c 11 (UK), which recognized existing aboriginal and treaty rights of "Indian, Inuit and Métis peoples of Canada".

[6] Unlike First Nations, however, the Métis people lacked any territory to call their own. Beginning with a Joint Government-Métis Committee report in 1984, a movement began towards securing lands to support Métis communities in Alberta attaining self-governance: Alberta, *Report of the MacEwan Joint Métis-Government Committee to Review the Métis Betterment Act and Regulations: Foundations for the Future of Alberta's Métis Settlements* (Edmonton: Municipal Affairs, 1984).

[7] A period of negotiations between the Métis and the Government of Alberta followed, focusing on providing settlement lands for Métis communities and extending self-government powers to them: see ***Alberta (Aboriginal Affairs and Northern Development) v Cunningham***, 2011 SCC 37 [***Cunningham***] at paras 5-19. This consultation ultimately led to the *Alberta-Métis Settlements Accord* dated July 1, 1989. This framework agreement and related legislation created eight Métis settlement corporations (the "Settlements" or "Métis Settlements") and granted fee simple title to those lands to the Métis Settlements General Council ("MSGC").

[8] This process also led to the incorporation of the Métis people in the *Constitution of Alberta Amendment Act, 1990*, RSA 2000, c C-24, which expressly recognized that the Métis people were to gain self-governance, and protected their land base with the specific stated aim of preserving and enhancing Métis culture and identity.

[9] Ultimately, the *Métis Settlements Act*, RSA 2000, c M-14 (the "*MSA*") was brought into force to provide a structure of delegated authority by which these communities could govern themselves individually, and collectively through the MSGC. All legal authority for the Métis Settlements flows through the *MSA*, Recital 0.1 of which states that:

> This Act is enacted
>
> (a) recognizing the desire expressed in the *Constitution of Alberta Amendment Act, 1990* that the Metis [*sic*] should continue to have a land base to provide for the preservation and enhancement of Métis culture and identity

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> and to enable the Metis [*sic*] to attain self-governance under the laws of Alberta...

[10] The top level of Métis governance established by the *MSA* is the MSGC. This umbrella body creates policies from which each of the Settlements derive sub-delegated authority to run their own communities. The individual Métis Settlements, in practice, operate at a quasi-municipal level. While their existence has a deeper social, cultural and historical underpinning than ordinary municipal corporations, they perform many of the same functions of a local municipal government and provide the panoply of local services and infrastructure common to municipalities across the province.

[11] Similar to municipalities, the sole source of tax revenue for the Settlements is through property taxation. Due to the structure of land holding on the Settlements, however, Elizabeth appears to have only four taxpayers – Canadian Natural Resources Limited ("CNRL"), Husky Oil Operations Limited, Crescent Point Energy Corp., and Altagas Limited and its related companies, who are the Applicants in this case.

b. Structure of Métis Landownership

[12] The lands comprising the eight Métis Settlements were granted under patent to the MSGC, and their interest can only be devolved in narrow circumstances provided by the *Métis Settlements Land Protection Act*, RSA 2000, c M-16. Settlement members are permitted to own and occupy homes on the Settlements, on terms defined by the MSCG and the Settlements themselves. As discussed below, however, these lands are exempt from taxation.

c. Self-Governance and Financial Sustainability

[13] The roots of this case lie in the challenges of attaining viable self-government and fiscal stability for a small and newly-autonomous series of communities. In July 2013, the Government of Alberta and the MSGC signed Long-Term Governance and Funding Arrangements (the "LTGFA"). Ms. Irene Zimmer, Elizabeth's elected Chairperson, swore an affidavit on December 2, 2019 in response to the Application (the "Zimmer Affidavit"). She stated that the purpose of the LTGFA was to secure initiatives that would allow the Settlements "to effectively and efficiently deliver core services, including infrastructure, on par with neighbouring communities, provide access to sustainable housing, promote safe and healthy communities."

[14] The recitals of the LTGFA state that both Alberta and the MSGC are committed to achieving certain goals over the 10-year period of 2013-2023, including:

- strengthened settlement governance and enhanced accountability;
- long-term sustainability of settlement communities; and
- a fiscal relationship with the Government of Alberta comparable to that of other local governments.

[15] The LTGFA contain detailed schedules covering essential services, infrastructure, housing, governance, capacity building in local government, education, training, consultation between settlements, government and industry, and financial sustainability. The LTGFA came into being together with a Co-Management Agreement, designed to allow the MSGC and Métis

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Settlements to negotiate royalties and working interests with oil and gas operators wishing to secure mineral leases on Settlement lands.

[16] It is clear from all of these documents that both Alberta and the MSGC envisioned a situation whereby the Settlements would receive substantial ongoing financial support from the government, but would also receive funding from the MSGC, along with contributions from individual households and property owners. This, together with a clear intention that industrial development in the natural resources sector continue to the benefit of the Settlements, appears to have formed the financial vision on which the Settlements were to operate.

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d. Settlement Taxation Powers

[17] Métis Settlements first gained independent taxation powers in 1997. Prior to that, any taxation was subject to direct ministerial approval. Section 166(1) of the *MSA* allows Settlement councils to make bylaws taxing interests in land if the MSGC has enacted a General Policy permitting them to do so. MSGC policy defines the parameters of Settlement taxation powers and the process for property assessment. Each Settlement in turn is left to pass its own property tax bylaw.

(i) Taxation structure beginning in 1997

[18] Effective in 1997, the MSGC enacted a tax policy called the *Business Property Contributions Policy*, GC-P9602 ("*BPCP*"). Section 1.02 of the *BPCP* defined its purpose as follows:

> The purpose of this Policy is to establish a fair, orderly, and equitable system by which those who use land in a Settlement area for business purposes can be required to contribute a fair share, based on valuation or agreement, to the cost of maintaining a viable Metis [*sic*] community in the Settlement area.

[19] The *BPCP* permitted Settlements to make annual business property contribution bylaws, through which the Settlements levied property tax based on the deemed value of land holdings. The *BPCP* limited any Settlement's tax rate to 130% of the maximum mill rate for similar classes of property in adjacent local government areas: *BPCP*, s 2.03(3)(b).

[20] In the case of Elizabeth, its mill rate from 2014 to 2018 was 40.97, which translates to a tax rate of 4.097% of the assessed value of the property. The Applicant, CNRL, had filed complaints (which remain pending) that these rates significantly exceeded that permitted by the *BPCP*. By comparison, the equivalent tax rate in the adjacent Municipal District of Bonnyville was 1.4% in 2019.

(ii) A new property taxation structure comes into force for 2019

[21] In 2019, the basis and structure of property taxation within the Métis Settlements changed fundamentally. On November 14, 2018, the MSGC revoked the *BPCP* and replaced it with a new instrument called the *Métis Settlements General Council Property Taxation Policy 2018*, GC-P1806 (the "*Tax Policy*"). This policy was intended to work in conjunction with the *Métis Settlements General Council Property Assessment Policy 2018*, GC-P1807 (the "*Assessment Policy*"), which was enacted on March 6, 2019.

[22] Neither of these documents contained any cap on Settlement property tax rates. Notably, gone is any mention of "fair, orderly, and equitable" contributions being required by businesses

operating on Settlement lands. The relevant section of the new preamble of the *Assessment Policy* reads instead:

> B. The General Council deems it to be in the best interests of the settlements of Alberta to make such a policy to authorize settlements to assess and tax business property located within settlement areas for the purposes of raising revenue for the cost of settlement expenditures and community services;

[23] The *Tax Policy* specified a new formula by which the tax rate was to be calculated. It is based on dividing its total budget by the value of its assessed taxable base. Each Settlement was to determine its tax rate by dividing its budget by the total value of its tax base. The relevant terms of the *Tax Policy* are as follows:

> **PART VI – LEVY OF TAX**
>
> **Tax Levy**
>
> **8(1)** No settlement Council may pass a property tax bylaw in respect of the year unless the operating and capital budget for that year's been passed by the settlement Council.
>
> **(2)** A property tax bylaw that sets the rate of tax to be applied to each assessment class must be passed by a settlement Council on or before May 15 each taxation year. [Emphasis added]
>
> **(3)** A tax rate is calculated by dividing the amount of revenue required pursuant to the budget by the total assessed value of all property in which the tax is to be imposed.
>
> ...

[24] Four facets of the *Tax Policy* bear on the issues in this Application. They are:

- the total exemption of any Métis-held property from taxation;
- the elimination of any rate cap;
- the calculation of the tax rate by dividing the community's financial needs by its assessed taxable base; and
- the establishment of a May 15 deadline for the enactment of each Settlement's annual property tax bylaw.

[25] Under section 7(1) of the *Tax Policy*, any property held or occupied by a Settlement member is exempt from taxation. This exemption extends to property held or occupied by member-owned corporations as well. The result of this structure is that the Settlements appear to have a very small taxable base, comprised almost exclusively of non-Métis businesses or residents. In the case of Elizabeth, the four oil and gas companies who brought this Application appear to make up the entire taxable property base of the community.

e. The New Tax Regime Comes into Force

[26] The *Tax Policy* was passed by the MSCG on November 14, 2018, and came into force on February 14, 2019 by operation of section 224(1) of the *MSA.* The MSGC's new *Assessment Policy* was passed on March 6, 2019 and came into force on March 16, 2019 through direct

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Ministerial Approval pursuant to section 224(1)(a) of the *MSA*: *MSA-03/2019*. Both instruments were published in the *Alberta Gazette, Part I* on April 30, 2019 at pages 359 and 380, respectively.

[27] In this case, the role of the Minister and the exact date the MSGC Polices came into force take on significance. Both are governed by section 224 of the *MSA*, which provides that:

> **Ministerial veto**
>
> **224(1)** General Council Policies made under section 222 or an amendment or repeal of those Policies must be sent to the Minister and come into effect 90 days after they are received by the Minister, or any other period to which the General Council and the Minister agree, unless
>
> (a) the Minister by order approves the Policy in writing at an earlier date, in which case the Policy comes into effect when it is approved, or on any later date specified in the Policy, or
>
> (b) the Minister vetoes the Policy or any portion of it by notice in writing to the President of the General Council.
>
> (2) A General Council Policy or any portion of it that is vetoed by the Minister has no effect.
>
> [Emphasis added]

[28] Under section 224(1), the Minister may do three things when an MSGC Policy is sent to him or her: (i) nothing, in which case the Policy comes into force automatically after 90 days; (ii) actively approve a Policy, which brings it into force immediately, unless her or she specifies another date; or (iii) veto all or part of a Policy, which prevents those sections coming into force at all.

[29] In this case, the Minister vetoed certain provisions of the *Tax Policy* on February 7, 2019, and noted that the balance would come into force automatically by operation of the *MSA*. He specifically approved the *Assessment Policy* on March 15, 2019, bringing it into force that day pursuant to section 224(1)(a).

f. Elizabeth's Original 2019-2020 Budget

[30] Elizabeth had a 2019-2020 budget in place by March 21, 2019 under the previous *BPCP*. This budget forecast total operating expenditures of $7,171,411.68, offset against revenues in the same amount. Industrial property taxation contributed $662,592.44 of the revenue contemplated in the original budget. This amount appears to be in line with previous Elizabeth budgets. The lion's share of Elizabeth's revenues were budgeted to come from federal and provincial grants and transfers, though the original 2019-2020 budget listed "Road Maintenance" of $439,922 to be provided by the Applicant, CNRL.

g. Elizabeth Passes a New Amended Budget and the Property Tax Bylaw

[31] Under the *Tax Policy*'s new formula, Elizabeth was permitted, and chose, to include additional capital infrastructure items in its budget. Elizabeth sought to take advantage of this change by preparing and passing a new budget for the 2019-2020 year (the "Amended Budget"). This was accompanied by the contentious Property Tax Bylaw, which was to implement the new rate of taxation.

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[32] The timing of these events is key to this dispute. The Zimmer Affidavit states that it was only after the *Tax Policy* was published in the *Alberta Gazette* on April 30, 2019, that "Elizabeth's Council and administrative staff immediately began considering how the new MSGC Taxation policy would effect Elizabeth's budget process." [Emphasis added]

[33] The Zimmer Affidavit gives the impression that the Settlement's leaders and managers were operating under the misconception that the new MSGC *Tax Policy* was not in force until published in the *Alberta Gazette*. This timeline married awkwardly with the *Tax Policy*'s requirement that any bylaw, and the budget underlying it, must be in place by May 15. Elizabeth's late start in responding to the new tax regime left it only 15 calendar days in which to draft and enact the Amended Budget and Property Tax Bylaw.

[34] The resulting time-crunch collided with the *MSA*'s requirements for bylaw enactment, discussed in more detail below, including that at least 14 days' public notice be given between the second and third reading of any proposed bylaw: *MSA*, s 54.

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h. "Emergency" Enactment of the Amended Budget and the Property Tax Bylaw

[35] All three readings of the Budget Amendment Bylaw and Property Tax Bylaw took place on May 6, 2019, at two notionally distinct meetings of the Elizabeth Settlement Council. Minutes of the first meeting reveal that the first and second readings of the Budget Amendment Bylaw and Property Tax Bylaw took place right before the first meeting adjourned at 3:09 p.m.

[36] The second meeting convened at 3:10 p.m., and had only three items of business: (i) declaration of an emergency under section 56 of the *MSA*, allowing the Elizabeth Settlement Council to dispense with the public notice, public hearing, and quorum requirements in sections 54-55 of the *MSA*; (ii) third reading of the Budget Amendment Bylaw; and (iii) third reading of the Property Tax Bylaw.

[37] The Record on review shows that all three motions passed without recorded discussion or debate. The second meeting adjourned four minutes after it began, at 3:13 p.m. No discussion, reports, or debate were recorded in respect of the first and second readings of either bylaw at the first meeting either. Notably, the minutes record specific details from reports from two Settlement officials on other matters at the first meeting, showing that if any substantive discussion on the merits of the bylaws had taken place, there would be a record of it.

i. The Amended Budget

[38] The Amended Budget, passed during the May 6 meetings, was essentially the same as the original budget, except that it added $25,000,733 in infrastructure spending, itemized in broad, round numbers. These amounts were outlined in the Zimmer Affidavit, as reproduced below:

Renovations	
Homes – 183 homes at $65,000/home	$9,150,000
Office	$500,000
Hall	$600,000
Fire Hall	$500,000
Seniors Building	$200,000

Daycare	$200,000
Water & Sewer	$3,488,141
Gas Lines	$500,000
Road Upgrades	$6,000,000
Driveways 183 driveways – $10,000/driveway	$1,000,000
Gravel	$1,000,000
Garbage Truck	$300,000
Security Positions	$100,000
Fire Department Upgrades	$200,000
Existing Dump Maintenance	$600,000
Total Industry[1]	**$24,338,141**
Operating – Department Disbursements	$662,592
Total Industry and Operating	**$25,000,733**

[39] The addition of these amounts increased Elizabeth's total annual operating budget from $7.17 million to $31.55 million for the 2019-2020 year.[2]

j. Impact of the Amended Budget on Taxation

[40] The net result of the Amended Budget, by operation of the formula dictated by the MSGC *Tax Policy*, was to increase the total property tax bill levied against the four Applicants from $624,692.44 to $25,000,733. In short, it increased the Applicants' property tax bills 40-fold. This additional $24.4 million from the Applicant taxpayers was allocated to repair or replace virtually all infrastructure at the Elizabeth Settlement, including $75,000 in repairs and renovations to each and every residence in the community.

k. Evidence of Economic Impact or Viability

[41] There is no evidence that Elizabeth considered the economic impact or viability of this rate of taxation. This includes a complete absence of discussion on whether taxes in this amount could possibly be paid, and what the economic and legal impact on the subject landowners would be. Counsel for Elizabeth was pressed on what thought-process could be ascribed to Elizabeth in formulating the Amended Budget and Property Tax Bylaw. His response was that, since these are revenue-generating properties, the tax may exceed the assessed value, "but that's not necessarily saying it's taxing more than they are making on it...and how much they've made per year for the last ten years." He emphasized that Elizabeth is suffering a very large and growing infrastructure deficit and, when advised by the MSGC that they could put into place a needs-based tax system, the Elizabeth Settlement Council felt that this course of action was reasonable.

[1] The reference to "Total Industry" appears to be the amount of corresponding revenue to be derived from industrial taxpayers.
[2] The Amended Budget also appears to contemplate a small increase in grants expected from Government sources.

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[42] The Applicants were never given an opportunity to provide an economic analysis of the impact of this level of taxation on their operations and their ability to continue owning their land interests in Elizabeth. There was no point during the formulation of the disputed Property Tax Bylaw at which their input was sought or welcomed.

[43] The sole source of evidence on the economic impact of the impugned tax is in the affidavit of the Supervisor of General Accounting for CNRL, Darren Hrycak, in which he states that "the effect of the tax rate imposed by Elizabeth settlement is to make the operation of the assessed property uneconomic". While not supported in numerical detail, this assertion has intuitive force, was not challenged in evidence, and I accept it as a fact on this Application.

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III. The Application for Judicial Review

[44] On July 4, 2019 the Applicants filed this Application for Judicial Review, asking this Court:

- to quash the Property Tax Bylaw and notices issued under it;
- to quash the *Assessment Policy* or for a declaration that the *Assessment Policy* is of no force and effect;
- for a declaration that the Applicants are exempt from further property assessment and taxation for the 2019 year;
- for an order in the nature of *quo warranto* requiring the Settlement to produce a record of all matters concerning the consideration, adoption and implementation of the Property Tax Bylaw; and
- for an order in the nature of *quo warranto* requiring the MSGC to produce a record of all matters concerning the consideration, adoption and limitation of the *Tax Policy* and the *Assessment Policy*.

[45] In their brief filed on November 22, 2019, the Applicants allege that the *Tax Policy* is discriminatory. Elizabeth and the MSGC object that this is a new issue not pled in the original Notice of Application and accordingly should not be considered by this Court. This issue will be discussed below.

a. Preliminary Issue: Whether the Minister was a Necessary Respondent

[46] The Applicants initially challenged the MSGC *Assessment Policy* along with the Property Tax Bylaw. The *Assessment Policy* came into force as a result of the express consent of the Minister of Indigenous Relations, leading Elizabeth and the MSGC to assert that the Minister should be named as a respondent. Rule 3.15(3)(a) of the *Alberta Rules of Court*, Alta Reg 124/2010 requires that "[a]n originating application for judicial review must be served on (a) the person or body in respect of whose act or omission a remedy is sought...".

[47] However, the Application as argued focussed solely on whether the Property Tax Bylaw was validly enacted and reasonable, and the whether the Applicants had standing to challenge it. The Minister was not a necessary respondent in respect of that issue and his absence was not asserted as a procedural bar to proceeding.

[48] The role of the Minister in respect of approval of MSGC policies is not always that of a decision-maker for the purpose of judicial review under Rule 3.15. Judicial review of a

ministerial veto would require him or her to be named as a respondent and to receive notice of the proceedings. Inaction, leading to a policy automatically coming into force by operation of the statute, does not, however, obviously engage any decision-making function necessitating the Minister to be a party to a judicial review of that policy. That is the case with the *Tax Policy*. The Minister's veto of specific provisions is not challenged. The relevant provisions came into force absent any ministerial action. He is thus not a necessary party to this Application. Whether the Minister would be a necessary party in a case where his or her overt approval hastens the coming into force of a policy is a question for another day.

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IV. The Issues

[49] The following issues must be determined based on how the matter was advanced in the oral hearing before me:

a. Do the Applicants have standing to challenge Elizabeth's Property Tax Bylaw?

b. If so, was the Property Tax Bylaw lawfully enacted under the emergency provisions of section 56 of the *MSA*?

c. Is the Property Tax Bylaw unreasonable?

d. Should the Applicants be permitted to argue that the *Tax Policy* and the Property Tax Bylaw are discriminatory and, if so, are they?

V. Law and Analysis

a. Applicants' Standing

(i) Standing to challenge the Property Tax Bylaw

[50] The Respondents assert that the Applicants have no legal standing to challenge the Property Tax Bylaw. The basis for their argument is section 245 of the *MSA*. That provision grants three specific groups a time-limited procedure to have the legality of Settlement bylaws judicially reviewed:

> **Application to quash illegal bylaws**
>
> **245(1)** The Minister, the General Council or a settlement member may apply to the Court of Queen's Bench to quash a settlement bylaw or resolution in whole or in part for illegality.
>
> **(2)** The application must be made within 2 months of the coming into force of the bylaw or resolution.
>
> **(3)** The Court may make whatever order it considers appropriate in the circumstances.
>
> [Emphasis added]

[51] Elizabeth and the MSGC argue that this statutory provision is the one and only way in which the bylaws of a Settlement may be challenged. Since this provision does not extend that right to any of the Applicants in this case, the Respondents say that this challenge to the Property Tax Bylaw is brought without standing and should be dismissed. In support of their position,

they invoke the interpretive maxim *expression unius est exclusio alterius* – that to expressly include one thing is to exclude another: ***R v Ochotta***, 2004 ABQB 552 at para 22.

[52] The Respondents further point to the special context in which Métis Settlements were established and their nascent self-governance powers as a reason to give the *MSA* an ameliorative reading that both explains and justifies the bar on third parties attacking Settlement bylaws. In ***Cunningham*** at para 53, the Supreme Court of Canada noted that:

> ...Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality. ...

[53] Two principles, however, preclude interpreting section 245 in the manner the Respondents ask. The first is that, as a fundamental tenet of our constitutional order and the rule of law, no statute can immunize legislative or executive acts from judicial review for root illegality. The second is that the Courts will not infer a significant derogation of private rights in the absence of explicit statutory language. In short, there is no such creature as a 'stealth super-privative clause' in our legal system.

[54] These principles merge and find expression in a definitive line of authority from the Supreme Court of Canada that entrenches the right of taxpayers to challenge the legality of property taxation. That jurisprudence protects the Applicants' standing to challenge the Property Tax Bylaw in this case.

(ii) No absolute immunity from judicial review

[55] Elizabeth and the MSGC argue that section 245 absolutely precludes the Applicant taxpayers from challenging the legality of the Property Tax Bylaw, even for non-compliance with mandatory pre-conditions imposed by the enabling legislation. This interpretation asks what the legislature cannot give, namely insulation from judicial review of the basic legality of executive or legislative action. As the Supreme Court of Canada has commented:

> 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 (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, 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...*: ***Dunsmuir v New Brunswick***, 2008 SCC 9 at para 31.

[56] Simply put, the Superior Courts always retain the constitutional power and obligation to ensure the foundational lawfulness of governmental actions. No legislation can abrogate this authority: ***Crevier v Québec (Attorney General)***, [1981] 2 SCR 220 at 234-38; ***Canada (Canadian Human Rights Commission) v Canada (Attorney General)***, 2018 SCC 31 at para 40; ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 ["***Vavilov***"] at para 24.

[57] Even if section 245 were interpreted as erecting an absolute bar on parties such as the Applicants from challenging the lawfulness of bylaws which impact them, constitutionally it cannot have this effect. The Supreme Court of Canada has repeatedly made clear that:

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> In the presence of a full privative clause, judicial review exists not by reason of the wording of the statute (which is, of course, fully preclusive) but because as a matter of constitutional law judicial review cannot be ousted completely...: ***United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd,*** [1993] 2 SCR 316 at 333.

[58] The rationale underlying the courts' abiding jurisdiction to review state acts for foundational lawfulness was well-articulated by Stratas JA in ***Fisher-Tennant v Canada (Minister of Citizenship and Immigration)***, 2018 FCA 132 at paras 23-24, where he explained that:

> 23 "L'etat, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them--the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on--must obey the law: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385; *United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 5 U.S. 137 (1803); *Magna Carta* (1215), art. 39. From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed...
>
> 24 Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power--no matter how lofty, no matter how important--must be subject to meaningful and fully independent review and accountability.

[59] Irrespective of the interpretation given it, section 245 of the *MSA* cannot have the effect of ousting this Court's jurisdiction to review a bylaw enacted under its delegated authority for compliance with the legal preconditions permitting that authority to flow-through to the delegate. Therefore, section 245 cannot bar this Application or deprive the Applicants of standing to bring it, irrespective of the interpretation given it.

(iii) A material derogation of rights will not be inferred

[60] The second flaw in the Respondents' proposed interpretation of section 245 is that it is not expressly drafted as a privative clause. Nothing in the language purports to oust the Superior Court's supervisory jurisdiction. Privative clauses exist to curtail rights. It follows, therefore, that privative clauses should normally be explicit in their scope and meaning. The fact that this provision requires active interpretation to be read as a privative clause, and in particular as one stripping the fundamental right to challenge the lawfulness of a delegated legislative act that may amount to functional expropriation, reduces the viability of that interpretation.

[61] While courts may infer a legislative intent that deference be accorded to an administrative body (***Vavilov*** at paras 23-24), the same cannot be said for a material derogation of rights a citizen affected by administrative action may otherwise have. This is especially true in the

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context of the removal of private land rights. In such cases, Canadian courts have long applied the interpretive principle established by Lord Blackburn that:

> It is clear that the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that by express words or by necessary implication, such an intention appears: ***Metropolitan Asylum District v Hill*** (1881), 6 App Cas 193 (HL) at 208, adopted in ***Venning v Steadman*** (1884), 9 SCR 206 at 216; see also ***British Columbia Electric Railway Co v British Columbia (Utilities Commission)***, [1960] SCR 837 at 846.

[62] Although this principle has been promulgated and applied in respect of property rights, I find that it applies by logical analogy to rights of legal recourse relating to substantial governmental inference with property rights and any attempt to insulate that interference from review. This conclusion is consonant with the Supreme Court of Canada's guidance on citizens' rights to challenge the legality of taxation on their lands.

(iv) An enduring right to challenge unlawful taxation

[63] The Supreme Court of Canada has repeatedly affirmed the common law right of citizens to seek judicial review of municipal bylaws taxing their property. That right is effectively constitutional in nature and supersedes any provincial enactment, as explained by McLachlin CJ in ***Catalyst Paper Corp v North Cowichan (District)***, 2012 SCC 2 ["***Catalyst Paper***"] at paras 10 to 11:

> ***A. Judicial Review of Municipal Bylaws***
>
> 10 It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law. The corollary of this constitutionally protected principle is that superior courts may be called upon to review whether particular exercises of state power fall outside the law. We call this function "judicial review".
>
> 11 Municipalities do not have direct powers under the Constitution. They possess only those powers that provincial legislatures delegate to them. This means that they must act within the legislative constraints the province has imposed on them. If they do not, their decisions or bylaws may be set aside on judicial review.

[64] The Supreme Court's decision in ***Catalyst Paper*** establishes a fundamental, non-derogable right of taxpayers to judicially review the legality of municipal taxation imposed under subordinate legislation. Specifically, it has been repeatedly held that sub-delegated decision-makers, such as municipalities, must strictly adhere to their statutory procedural requirements when exercising powers that directly or indirectly strip citizens of property. In ***Costello and Dickhoff v City of Calgary***, [1983] 1 SCR 14 ["***Costello***"] at 21, the Court unanimously held that:

> The courts have endeavoured to avoid interference with municipal enactments by an overly strict approach to their construction, but have generally insisted upon strict compliance with enabling legislation that authorizes municipalities to exercise extraordinary powers or pass by-laws concerning taxation, expropriation, or other interference with private rights. ... [Emphasis added]

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[65] In that same judgment, the Supreme Court described this rule of strict compliance as being "of long-standing", and cited Ian Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed (Toronto: Carswell, 1971) at 432 for the proposition that:

> As a general rule, in the exercise of extraordinary powers conferred by legislation authorizing interference by the municipality with private rights, all conditions precedent to the exercise of such power must be strictly complied with prior to the performance thereof, which, if done without specific statutory authority, would be tortious. Likewise with formalities required for the exercise of taxing and expropriation powers and other powers entitling local authorities to interfere with common law rights: ***Costello*** at paras 22-23. [Emphasis added]

[66] Métis Settlements are not completely analogous to municipal governments. They may well be afforded different and/or greater range in decision-making that touches upon the core animating values that underlie their existence, namely the preservation and promotion of Métis culture and society. That said, when Settlements levy property tax, they perform a function virtually indistinguishable from municipal governments, and derive their authority to do so through a similar process of sub-delegation. Moreover, the power they exercise in this capacity is no less impactful on the people against whom it is used. Therefore, I adopt the approach taken by Desjardins JA in her concurring opinion in ***Canadian Pacific Ltd v Matsqui Indian Band*** (1999), [2000] 1 FC 325, 1999 CanLII 9362 (FCA) ["***Matsqui CA***" cited to CanLII] at para 76, where, speaking in the context of a First Nation, she says:

> I am of the view that band councils are a *sui generis* type of subordinate statutory bodies. As such, I fail to see, however, how they could escape the principles of administrative law which govern subordinate statutory bodies.

[67] In the context of this case, I conclude that the principles of administrative law apply to Settlements as subordinate statutory bodies, just as Desjardins JA concluded in ***Matsqui CA***. On this basis, the decisions of the Supreme Court of Canada in ***Costello*** and ***Catalyst Paper*** apply with equal force to Métis Settlement taxation bylaws.

(v) A preferred understanding of section 245

[68] There is also a preferable reading of section 245 that does not generate the extreme result advocated by Elizabeth and the MSGC. Specifically, this section is better understood as creating a process and limitation period for the three parties responsible for decision-making under the *MSA* (Settlement members, the MSGC and the Minister) to challenge the validity of bylaws they had a hand in making. On a plain reading, section 245 operates to require the key actors in the bylaw-making process to bring any concerns about a Settlement bylaw to the fore in a timely fashion. It does not oust ordinary powers of judicial review, but rather creates an estoppel against politically interested entities and individuals from retroactively attacking Settlement bylaws, potentially years after the fact, as a result of changing political winds.

[69] This interpretation of the section is bolstered by the fact that s. 245(3) provides the Court broader remedial scope than that afforded under the inherent power of judicial review. This extension of authority to the Court hearing an application under section 245 is more consistent with this provision being a free-standing mechanism to deal with internal conflicts between political stakeholders, rather than a privative clause limiting judicial review. It also makes sound policy sense to require these participants to assert any concerns with the legality of bylaws

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within a limited time frame, and to permit this Court a broad remedial power to resolve these disputes pragmatically.

[70] Overall, this interpretation of section 245 is more consistent with the principles of statutory interpretation mandated by the Supreme Court of Canada in ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27, as well as administrative and constitutional principles, than the privative interpretation urged by Elizabeth and the MSGC.

(vi) Conclusion on standing

[71] In conclusion, section 245 of the *MSA* does not have a preclusive effect. The Applicants have standing to challenge the lawfulness of the Property Tax Bylaw.

b. Enactment of the Taxation Bylaw did not Comply with the Requirements of the *MSA*

[72] The *MSA* establishes mandatory procedures which must be followed to pass Settlement bylaws. These procedures are found in sections 52, 54 and 55 of the *MSA*, and prescribe four key procedural elements necessary for a valid enactment (the "Democratic Process Requirements"). These are:

(i) three readings of the proposed bylaw at two separate meetings (s 52(1));

(ii) 14 days' notice between the second and third reading (s 54(2));

(iii) an opportunity for affected persons to participate in discussion on the issues raised by the bylaw in a public meeting between second and third reading (s 55(3)); and

(iv) a quorum of 15 Settlement members eligible to vote on the bylaw (s 55(1)).

[73] The relevant sections of the *MSA* read:

Enactment of bylaws

52(1) No bylaw has any effect unless it is given 3 distinct and separate readings at a meeting of a settlement council, and no more than 2 readings may be given at the same meeting.

(2) If a proposed bylaw is in writing and available to councillors and the public, only the title or identifying number need be read at each reading of the bylaw.

(3) A bylaw must not be given second reading unless it is in writing and available to councillors.

(4) Following each reading and debate, if any, of a proposed bylaw, a vote of the councillors must be taken and the proposed bylaw can be given the next reading only if at least 3 councillors vote in favour of the bylaw.

Public notice of bylaws

54(1) Every proposed bylaw must be presented at a public meeting in the settlement area after second reading but before third reading.

(2) At least 14 days' public notice of the date, time and place of the public meeting must be given.

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> **Approval of bylaws**
>
> **55(1)** A quorum for public meetings called to vote on settlement bylaws is 15 settlement members who are eligible to vote on the bylaw, or any other number specified by settlement bylaw.
>
> **...**
>
> **(3)** Persons affected by an issue under discussion at a public meeting have the right to participate in the discussion of the issue but may not vote on it unless they are settlement members and eligible to vote on it.
>
> [Emphasis added]

[74] There is no dispute that the Democratic Process Requirements were not met in this case. There was no public notice. There was no public meeting. There was no opportunity for affected parties to express their views and concerns about the bylaw. There was no quorum of Settlement members present for passing.

(i) Invocation of Emergency Powers Provision of the MSA

[75] The Elizabeth Settlement Council was aware of these defects. For this reason, it passed it passed the Property Tax Bylaw and Budget Amendment Bylaw together with a declaration that it was relying on the exemptions from procedural requirements allowed by the *MSA* in urgent circumstances. Specifically, the *MSA* provides that the public meeting, notice, and right to participate requirements may be dispensed with in the case of an emergency:

> **Emergencies**
>
> **56** In an emergency that affects the health or safety of the community, the settlement council may, by unanimous resolution, declare that sections 54 and 55 do not apply to a bylaw designed to deal with the emergency, in which case no public meeting or vote is required.

[76] Elizabeth and the MSGC strenuously argued that the late publication of the *Tax Policy* and the companion *Assessment Policy* in the *Alberta Gazette* left the Settlement with only 15 days to enact its own budget and Property Tax Bylaw. They characterized the purported emergency in the following terms: "The reason the settlement council invoked section 56 was the sudden change in taxation policy."

[77] The circumstances of this case do not, however, permit Elizabeth and the MSGC to rely on the emergency powers granted in section 56.

(ii) Any emergency was self-created

[78] The changes to the property taxation regime applying to Métis Settlements came as a surprise to no one. The MSGC passed its new *Tax Policy* in mid-November 2018. Every Elizabeth Councillor is, *ex officio*, a member of the MSGC: *MSA*, s 214(2). At the hearing, it was acknowledged that Ms. Zimmer, the elected Chairperson of Elizabeth, was present when the *Tax Policy* was passed. Irrespective of that, the Settlement's leadership would certainly have known these changes were coming by virtue of the notification requirement in section 224(3) of the *MSA* requiring a copy of General Council Policies to be sent to each Settlement council.

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[79] Therefore, the Elizabeth Settlement Council knew, as of November 14, 2018, that a major change to the taxation landscape was likely coming, and that it would include a May 15 deadline for enactment of a property tax bylaw. By February 14, it was a certainty that the tax changes were taking place and, by March 15, every piece of the regulatory framework was fully in force. The Settlement had six months' notice of the overall change, and two months from the complete finalization of the new regime in which to plan its approach to 2019-2020 property taxation.

[80] Elizabeth and MSGC contends that these two polices could not be acted upon until they were published in the *Alberta Gazette*, which only occurred on April 30. They are mistaken in this contention. The *MSA* contains no requirement that MSGC policies enacted under section 222 be published before taking force. To the contrary, these instruments gain legal effect on the timeline specified in section 224(1), which mandates that General Council Policies "come into effect 90 days after they are received by the Minister, or any other period to which the General Council and the Minister agree", subject to several exceptions. Indeed, the Minister's own letter to the MSGC stated:

> The rest of the MSGC Taxation Property Taxation policy GC-P1806 will come into effect on February 14, 2019, as per section 224(1) of the MSA. [emphasis added]

[81] Similarly, the Ministerial Order of March 15, 2019, approving the *Assessment Policy*, stated that "The Policy is in effect as of the date of this Order." If the Settlement acted on a contrary impression regarding either policy, they were functioning under a mistake of law.

[82] Perhaps more relevantly, however, I find as a matter of fact that there was no element of surprise, no basis for doubt that the new regime would govern for the upcoming year, and no sudden event that caught Elizabeth unaware. Rather, there was, a failure to plan for a known and foreseen change in operating parameters.

[83] A governmental authority's failure to adequately plan and prepare for impending changes in its legislative ecosystem does not constitute the sort of 'emergency' in which the Democratic Process Requirements constraining its authority can be bypassed. This was a self-created crisis and not a situation for which section 56 was intended. Indeed, it would be ironic, and an affront to democratic principles, if a local government could invoke its own failure to do its job as a basis to dispense with the statutory constraints circumscribing its authority.

[84] The fact that Elizabeth declared that an emergency existed does not make it so: ***Kuypers v Langley (Township)*** (1992), 87 DLR (4th) 303, 1992 CarswellBC 9 (SC) (WL) at paras 50-52. The emergency exception to the Democratic Process Requirements is intended for true emergencies, such as natural disasters or other unforeseeable events that impair the basic democratic functioning of the community. These provisions exist to make it possible for communities to respond in situations of disaster and danger. The language of the *MSA* makes this clear by referring to emergencies "that affect the health or safety of the community". The powers in section 56 do not exist to remedy inadequate administrative planning.

[85] Elizabeth's emergency argument fails for two further factual reasons. First, it ignores that Elizabeth could simply have carried on levying property taxes for 2019-2020 on the basis of its original budget. It had months to pass the required bylaws to set this *status quo* rate of taxation in place. It was entirely open to Elizabeth to forego increased tax rates under the new *Tax Policy* if it believed the new regime was not yet in force. This would have avoided any crisis.

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[86] Second, even if Elizabeth found itself without any ability to levy property taxes, those charges were expected to contribute less than 10% of expected revenue in the original 2019-2020 budget. Loss of that income would have been difficult, but far from devastating. Even if the potential consequences of a financial emergency could warrant the invocation of the extraordinary powers contained in section 56, I am not satisfied that Elizabeth's impending problem rose to the requisite level of severity.

[87] That said, the Court is sympathetic to the challenges of running the equivalent of a very small municipality on what must be a skeleton staff, supporting a council of local citizens acting on a part-time basis for the betterment of their community. I do not find that Elizabeth's reliance on the emergency provisions of the *MSA* was anything other than a *bona fide* attempt to deal with the unfortunate situation the Elizabeth Settlement Council found itself in.

[88] However, no emergency within the meaning of section 56 existed in this case. The emergency powers it provides were improperly invoked. Consequently, the Property Tax Bylaw was invalidly enacted and is of no force: ***Costello*** at 21, 27; ***London (City) v RSJ Holdings***, 2007 SCC 29 ["***London v RSJ***"] at paras 38-42; Ian Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed, Vol 2 (Toronto: Carswell, 1971) at 1025.

[89] The Application to quash the Property Tax Bylaw is granted on this basis.

c. The Taxation Bylaw is Substantively Unreasonable

[90] Quashing the Property Tax Bylaw for its procedural defects is dispositive of this Application. The parties would benefit, however, from knowing whether taxation at the impugned rate would be reasonable if properly enacted, since property tax is a recurring annual event. As this issue was fully argued, it is ripe for decision. I conclude that, even if the Property Tax Bylaw was upheld in the face of its procedural defects, it is substantively unreasonable and must be quashed on that basis.

(i) The bar to challenge a valid taxation bylaw is high

[91] While the Supreme Court of Canada has jealously guarded the citizen's right to challenge the reasonableness of property taxation bylaws, the highest level of deference is paid to decisions on rates of taxation reached through a proper legislative process. Once the procedural preconditions for valid public decision making are met, the policy merits of any given approach to taxation are left within the municipal decision-maker's ambit. The Supreme Court's guidance in ***Catalyst Paper*** definitively delineates the realm of protected public policy making and sets a very high bar for judicial intervention:

> ...[C]ourts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal counsellors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*: ***Catalyst Paper*** at para 24. [Emphasis added]

[92] To reach this level of "unreasonableness", a bylaw must be shown to have been passed in bad faith, have an improper ulterior purpose, or have a confiscatory effect: ***Hlushak v City of Fort McMurray***, 1982 ABCA 140 (1982), 37 AR 149, [1982] AJ No 1029 (CA) (QL) at para

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16; ***Falardeau v Hinton (Town)*** (1983), 50 AR 120, [1983] AJ No 693 (QB) (QL) at paras 24, 31, aff'd (1985), 65 AR 387 (CA).[3]

(ii) Defining the standard of "unreasonableness"

[93] In effect, the party challenging a property taxation bylaw will have to show that the impugned levy has stopped making sense as a form of the tax it purports to be. There are numerous examples in the jurisprudence of where taxes have been found to possess this prohibited character. In Alberta, the Social Credit government of the 1930s took aim at financial institutions through a number of pieces of legislation, including an act which increased the tax on banks almost 28-fold in a single year. Unsurprisingly, this legislation failed to find favour with the courts. The Privy Council held that the effect of the legislation was such that it would prevent banks from carrying on their businesses at all, concluding that:

> ...there is no escape from the conclusion that, instead of being in any true sense taxation in order to the raising of a revenue for Provincial purposes, the Bill No. 1 is merely "part of a legislative plan to prevent the operation within the Province of those banking institutions...": ***Reference re An Act respecting the Taxation of Banks (Alberta)***, [1939] AC 117, [1938] JCJ No 3 (PC) (QL) at para 26.

[94] The Supreme Court of Canada reached a similar result in ***Texada Mines Ltd v Attorney-General of British Columbia***, [1960] SCR 713 at 724-25, where it struck down a provincial tax on raw iron ore designed to make it uneconomical to export the raw material, thus structurally mandating the establishment of a smelter in the province. Writing for the Court, Locke J held:

> The very high rate of the tax authorized, which would in ten years' time impose in the aggregate an amount of tax equal to the assessed value of the minerals, indicates, in my opinion, that the true nature and purpose of the legislation is something other than the raising of revenue for provincial purposes under head 2 of s. 92. ...

[95] In a similar vein, in ***McCormick (Re)***, [1948] 3 DLR 70, [1948] OJ No 361 (HC) (QL), the Ontario High Court of Justice quashed a City of Toronto bylaw which purported to impose regulatory fees, but was found in fact to be an attempt to drive a certain type and segment of business out of the community altogether. Since the City lacked the power to enact such a prohibition, and in particular to do so in the guise of regulatory fees, the Court quashed the bylaw, concluding:

> What was given here was a power to pass by-laws for the licensing, regulating and governing of tourist camps. It was not a right to prohibit tourist camps, but to regulate and govern them. Under the guise of a licensing by-law the municipality cannot, in my opinion, impose fees which in effect are confiscatory and prohibitive. ...: at para 8.

[96] A taxation measure will be quashed as invalid when it is driven by an ulterior motive, even when that motive may, in and of itself, be a legitimate policy aim of the enacting body. In ***TimberWest Forest Corp v Campbell River (City)***, 2009 BCSC 1804 at para 100, the Court

[3] This line of authority derives from the judgment of Duff J in ***City of Montréal v Beauvais***, [1909] 42 SCR 211 at 216, where the Supreme Court of Canada held that a bylaw will only be found unreasonable where "it was not passed in good faith in the exercise of the powers conferred by the statute or… is so unreasonable, unfair or oppressive as to be upon any fair construction an abuse of those powers."

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struck down as *ultra vires* a property tax bylaw which imposed differential taxation on a particular class of property at such a level that it would compel landowners to withdraw those lands from that class and convert them to a use consistent with the city's planning objectives. The fact that zoning and planning are legitimate municipal undertakings did not save the infringing tax measures.

[97] In summary, the jurisprudence describes a standard of review whereby the impugned decision must be shown to transcend the spectrum of reasonable policy options available in view of the legitimate legislative purpose in play. The decision must be so out of range vis-à-vis the power the municipality was purporting to exercise that it is only understandable as an attempt to achieve an improper purpose, an act of raw irrationality, or a bad faith taking. The standard is not so much one of examining the reasonableness of the taxing authority's policy choice, but asking whether the delegated legislator has remained within the object of the enabling statute: ***Katz Group Canada Inc v Ontario (Health and Long-Term Care)***, 2013 SCC 64 at para 24. This is as deferential a standard as exists in judicial review.

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(iii) Deference to Ameliorative Legislation Involving Métis and First Nations

[98] An additional layer of context is added to the analysis of 'reasonableness' when reviewing administrative acts of Métis Settlements. In such cases, it is appropriate for the Court to take into account the unique role, structure, and mandate of the Settlements in preserving and promoting Métis life and culture. This is an additional component of the "context and nature of the impugned administrative act" under consideration and may, in certain cases, mean that the flexible deferential standard the court should apply will result in greater leeway being given to Settlement decisions: ***Catalyst Paper*** at para 23.

[99] This approach honours the principle of prioritizing protection of Indigenous interests when interpreting legislation dealing with their rights. As explained by the Supreme Court of Canada in ***Osoyoos Indian Band v Oliver (Town)***, 2001 SCC 85 at para 49, citing La Forest J in ***Mitchell v Peguis Indian Band***, [1990] 2 SCR 85 at 143:

> ... it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them ....
>
> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote. [Emphasis in ***Osoyoos***]

[100] This principle finds traction in the taxation context. While Métis Settlements are broadly analogous to municipalities, they remain fundamentally different in their history, evolution, and context. That lens of difference must be applied when considering the revenue-generating powers granted to them under the *MSA*. As the Supreme Court of Canada held in ***Canadian Pacific Ltd v Matsqui Indian Band***, [1995] 1 SCR 3 ["***Matsqui***"] at para 18:

> ... [I]t is important that we not lose sight of Parliament's objective in creating the new Indian taxation powers. The regime which came into force in 1988 is intended to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves. Though this Court is not faced with the issue of Aboriginal self-government directly, the underlying purpose and functions of the Indian tax assessment scheme provide considerable guidance in applying the principles of administrative law to the statutory provisions at issue here. I will therefore employ a purposive and functional approach where appropriate in this ruling.

[101] While the history and constitutional position of Métis people is not entirely the same as that of First Nations, similar principles apply here. In ***Matsqui***, Lamer CJ and Cory J characterized the broader purposes of First Nations' taxation powers in the following terms:

> Here, the evidence indicates that the purpose of the tax assessment scheme is to promote the interests of Aboriginal peoples and to further the aims of self-government. Although the scheme resembles the kind of tax assessment regime we see at the municipal level of government in Canada, it is more ambitious in what it sets out to achieve. The scheme seeks to provide governmental experience to Aboriginal bands, allowing them to develop the skills which they will need for self-government: at para 43.

[102] The historic disadvantages suffered by Métis communities, coupled with the unique challenges that arise in operating small-scale self-governing communities, suggest there is more leeway to what a "reasonable body" might decide is a reasonable taxation structure. Put simply, Métis Settlements did not begin with very much. They have limited sources of funding. They lack any traditional property tax base, as a result of the unique communal ownership structure of their land base. Their need for infrastructure development is often intense, as described by Ms. Zimmer in this case. They may also feel that they have historically received little or no benefit for the resource riches extracted from their lands. I expressly consider all of these factors in determining whether the Property Tax Bylaw in this case meets the broad range of "reasonable outcomes" defined by the Supreme Court's jurisprudence, including the direction to consider broader social, economic and political issues: ***Catalyst Paper*** at para 32.

[103] Despite the deferential and contextually-sensitive approach mandated for reviewing Elizabeth's Property Tax Bylaw, a number of factors specific to this case operate to undercut that deference.

(iv) Procedural defects compromise the deference afforded

[104] A core rationale for according the utmost level of deference to taxation policy choices made by democratic local governments is that their decisions are reached through an inclusive and consultative decision-making process: ***Catalyst Paper*** at paras 17-20, 24. This in turn stems from the belief that the available policy alternatives, and the costs and benefits associated with them, have been openly and thoroughly considered: see ***Catalyst Paper*** at paras 29-30.

[105] In this case, that robust policy making processes is absent. For the reasons outlined above, the Property Tax Bylaw was passed without discussion, debate or examination. Policy options and implications were not considered. Part of this is attributable to the absence of the public hearing mandated by section 55(3) of the *MSA*. However, even the meeting minutes of

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the hastily convened May 6, 2019, meetings reflect no substantive discussion of the tax rates being imposed.

[106] If the merits and viability of this approach to taxation was ever discussed, this was done in secret.

[107] Elizabeth's failure to undertake any public deliberation of the social and economic impact wrought by the Property Tax Bylaw strikes at the core of the rationale for deference to municipal councils on what constitutes reasonable policy. On this point, the Supreme Court of Canada's decision in ***Catalyst Paper*** is illuminative. In that case, the struggle between the industrial taxpayer and the municipality over the former's share of the municipal tax burden had been going on for decades. Conscious of the impact of squeezing out one of its largest employers and taxpayers, the municipality conducted extensive studies into the problem of tax burden allocation. The issue was examined from numerous perspectives. The industrial taxpayer even proposed a detailed alternative model of tax allocation. The municipality undertook corrective steps to achieve a more sustainable balance. The social and economic impact of the competing policy alternatives were studied, discussed and publicly debated. In the end, the municipality made its difficult social choice; it did so on the basis of a thorough understanding of the problem and the economic realities involved. The Supreme Court deferred to the Council's decision, notwithstanding the grave impact on the industrial taxpayer upon whom an undue burden of funding the community fell: ***Catalyst Paper*** at para 36; 2010 BCCA 199 at paras 15-23; 2009 BCSC 1420, at paras 94-108.

[108] The contrast with the present case is stark. Here, the impacted taxpayers were never informed about the proposed Property Tax Bylaw and never given the opportunity to be heard, despite both of those rights being statutorily guaranteed: *MSA*, ss 54, 55(3).

[109] In his thoughtful and elegant defence of Elizabeth's position, Mr. Epp pointed out that, in a small community such as Elizabeth, the members of the community and the Council have an inherent understanding of the scale and scope of economic activity taking place. This local knowledge, he argued, attenuates the absence of a more formal record of policy deliberation. Mr. Epp also emphasized that Elizabeth offered to meet with the Applicants after the tax bills had been sent out, but this invitation was declined.

[110] However, the absence of the Democratic Process Requirements, coupled with the absence of any apparent deliberative process whatsoever, undercuts the rationale for deference in assessing the Property Tax Bylaw's reasonableness. As was observed by the British Colombia Court of Appeal in ***Pitt Polder Preservation Society v Pitt Meadows (District)***, 2000 BCCA 415, a public hearing provides an opportunity "for those whose interests might be affected by such a decision to make their views known to the decision-maker and it gives the decision-maker the benefit of public examination and discussion.": at para 45. The Court also noted that public hearings enhance the quality of a decision and the public's acceptance of it while dispelling perceptions of arbitrariness, bias, or impropriety: at paras 46-47.

[111] Allowing impacted citizens to be meaningfully heard in the public consultation process preceding enactment of a bylaw is fundamental to the legality and legitimacy of the legislative process: ***Keefe v Clifton Corporation***, 2005 ABCA 144 at para 17. The failure to notify the small number of parties who were profoundly impacted by this proposed bylaw, together with the absence of a public hearing, are the sort of indicators of bad faith that erode the deference

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normally granted to a democratic decision-maker like the Elizabeth Settlement: ***HG Winton Limited and Borough of North York*** (1978), 20 OR (2d) 737 at 744.

[112] Similarly, where the procedure used by the decision-maker appears to be a contrivance allowing the body to remain facially compliant with the letter of its enabling statute, while obviating the spirit of those said-same requirements, courts will often look askance at the practice: see ***London v RSJ*** at paras 38-42. The curious procedure adopted to pass the Property Tax Bylaw through short, sequential meetings is a contextual factor undermining deference in this case.

[113] The lack of deliberation, coupled with the abrogation of the Democratic Process Requirements enshrined in the *MSA*, operate to deprive the Property Tax Bylaw of much of the deference accorded to properly enacted policy measures of democratically-constituted public decision makers.

(v) The Rate Tax is Unreasonable on its Face

[114] Irrespective of the process problems seen in this case, the raw quantum of this tax is breathtaking and beyond anything previously known in Canada. It demands that landowners pay almost twice the value of their holdings to the local government as an annual levy. This amount is 47 times higher than the rate over which the Supreme Court deliberated in ***Catalyst Paper***. This amount is unreasonable *per se* given the nature and purpose of a property tax.

[115] Assessments on which this tax is based are meant to reflect the properties' objective market rate. Therefore, it is difficult to comprehend how a tax of this magnitude is anything other than a functional expropriation. A failure to pay property tax will result in the land being seized and sold for the arrears: MSGC *Tax Policy*, s 28. Pursuant to section 28(1):

> Where taxes remain unpaid more than nine (9) months after a Tax Arrears Certificate is issued, the tax administrator may levy the amount of unpaid taxes by way of the seizure and assignment of the taxable property.

[116] Six months after the delivery of the notice contemplated in section 28(1), "the tax administrator may sell the right to an assignment of the taxable property by public tender or auction": *Tax Policy*, s 28(3). Land taxed above its worth is unlikely to have any economic value. The only potential market would be tax-exempt entities. In this case, that group is restricted to Settlement members and their majority-owned corporations. There is thus a logical straight-line from the Property Tax Bylaw to the subject properties to ending up in the hands of Elizabeth's members, without any compensation to their present owners.

[117] If a foreign government levied taxes at the rates in issue here on a Canadian company operating within their territory, one can only imagine that allegations of an improper state expropriation would be leveled against the tax measure, as occurred in an arbitration claim brought by Yukos Oil Company alleging that the Russian Federation unlawfully dispossessed it of its assets through illegitimate tax levies: ***Quasar de Valores SICAV v Russian Federation***, Stockholm Chamber of Commerce Case No 24/2007, Award (20 July 2012) at para 48.

[118] The Supreme Court of Canada recently pronounced on disguised expropriations. In ***Lorraine (Ville) v 2646-8926 Québec inc***, 2018 SCC 35 at para 27, Wagner CJ said the following:

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> It is settled law that a "disguised" expropriation, insofar as it occurs in the guise of a zoning by-law, constitutes an abuse of the power of regulation conferred on the body in respect of such matters (*Développements Vaillancourt Inc. v. Rimouski (City)*, 2009 QCCA 1475, 98 L.C.R. 1, at para. 22). Where a municipal government limits the enjoyment of the attributes of the right of ownership of property to such a degree that the person entitled to enjoy those attributes is *de facto* expropriated from them, it therefore acts in a manner inconsistent with the purposes being pursued by the legislature in delegating to it the power "to specify, for each zone, the structures and uses that are authorized and those that are prohibited"... [Emphasis added]

[119] This conclusion is consistent with the Supreme Court of Canada's earlier holding that "[t]he courts have often set aside municipal decisions perpetrating a manifest injustice against one or more taxpayers...": ***Immeubles Port Louis Ltée v Lafontaine (Village)***, [1991] 1 SCR 326 at 346, citing ***Ville de la Tuque v Desbiens*** (1919), 30 Que KB 20 at 21, per Lamothe CJ.

[120] The quantum of tax in this case is so extreme that the language of "manifest injustice" is properly invoked. Elizabeth appears to have decided to effectively take the Applicants' land, without proper process, deliberation, or even notice. This is not reasonable.

(vi) The MSA permits property tax only – not an income or profit tax

[121] Elizabeth defended the rate of tax on the basis that it had not been established that it destroyed the economic value of the taxed assets, as they may be generating income that could offset the tax. This argument must be understood in light of Ms. Zimmer's evidence that the Métis Settlements do not reap any benefits of mineral leases pre-existing the *MSA*, and that a moratorium on new leases between 2008 and 2013 deprived the Settlements of the economic benefits that might have flowed from the Co-Management Agreements contemplated by the *MSA* during the richest years of Alberta's energy heyday.

[122] While the Record reveals no contemplation or consideration of the economic viability or rationale for the 187% tax rate, the subtext of Ms. Zimmer's evidence, and the Respondents' argument, is that the Applicant resource companies have done very well off their holdings within the Settlement and will continue to reap profits from these, allowing them to contribute generously to the community's needs.

[123] Section 222(1)(i) of the *MSA* permits and empowers the MSGC and the Settlements to impose "assessment or taxation, or both, of land, interests in land or improvements on land, in a settlement area, including rights to occupy, posses or use land in a settlement area." This is a power to impose a tax on the value of property. It is expressly not a power to tax on revenues, profitability, or ongoing commercial activity. A property tax must be reasonable as a tax on the assessed value of the land, not as a disguised income tax, profit-sharing scheme, or social redistribution of economic resources.

[124] Elizabeth's defence of the Property Tax Bylaw, put at its highest, is that it was reasonable to believe that these taxpayers could and would pay because they were making enough money off these properties over time. That reasoning transforms the Property Tax Bylaw into a form of income tax. That is *ultra vires* of the Settlement, and outside the proper purposes of the taxing powers granted by the *MSA*, irrespective of how valid Elizabeth's need for the money may be.

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[125] Providing renewed and viable infrastructure may be a proper purpose driving Elizabeth's Amended Budget, but the laudability of this aim does not salvage a property tax that, at best, would function, and is defended, as a disgorgement of past and future commercial income. Moreover, the Record does not contain any evidence supporting the contention that the taxpayers in this case could afford the punishing tax being levied by virtue of their long-term profitability. This approach to taxation in not within Elizabeth's authority, and is not supported as factually reasonable on the Record in any event.

(vii) Minimum taxes of low-value land engage different principles

[126] Elizabeth and the MSGC argue that even a tax at or near the assessed value of the property may be reasonable, relying on this Court's decision in ***Bergman v Innisfree (Village)***, 2018 ABQB 326. That case, however, concerned the imposition of a $750 minimum tax that would apply to low-value properties in the municipality. It is broadly distinguishable. First, the Court in ***Bergman*** found that the Legislature had expressly contemplated that the authorization of a minimum property tax could result in a very high assessment-to-tax ratio for a handful of low valued properties: at para 59. The minimum tax, and its impact, were the product of a considered, express decision to permit this result.

[127] Second, and more importantly, it is reasonable that landowners be levied a modest minimum charge for holding land within a municipal district. That principal bears no resemblance or analogy to demanding that commercial industrial enterprises give-over millions of dollars, far in excess of the assessed value of developed properties, in order to wholly fund the capital (re)construction of an entire community.

(viii) The Property Tax Bylaw operates at cross-purposes to the MSA

[128] Imposing taxation at the level seen in this case is both practically and conceptually inconsistent with the economic structure contemplated for the Settlements by the underlying legislative and contractual framework. The *MSA* specifically contemplates that resource extraction companies will be able to access Settlement lands and conduct mineral and resource development in exchange for compensation separate and apart from the tax they may pay on their property interests: ***Fishing Lake Métis Settlement v Métis Settlements Appeal Tribunal Land Access Panel***, 2003 ABCA 143 at paras 6, 43; *MSA*, Part 4, Division 7.

[129] The Property Tax Bylaw clashes with this legislative vision because, as I find based on the Record before me, it would rapidly have the effect of expropriating the resource operators. Partnership, not expropriation without compensation, was the contemplated model.

[130] Levying taxes at a rate that obviates the commercial activities for which an entire Part of the statutory regime was drafted is internally contradictory to the purposes of legislation. This factor is a potent indicator that the taxation in this case exceeds its intended purpose and is unreasonable. Concluding Observations

[131] While Elizabeth's Property Tax Bylaw is unreasonable, it did not come about in a vacuum. The evidence in this case also showed that Elizabeth's infrastructure need is very real, and that the stated aim of creating self-sufficient Métis communities has been thwarted by chronic capital underfunding: see, for example, *MSA* ss 114-128 on surface and mineral rights, and Schedule 3 Co-Management Agreement for Resource Development; see also the LTGFA, Schedule J regarding Financial Sustainability. It is noteworthy that the preamble of the LTGFA states that:

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> The 1989 Alberta-Métis Settlements Accord and the subsequent corresponding legislation, including the *Constitution of Alberta Amendment Act*, 1990, established the foundation for Métis people in Alberta to secure their own land base, preserve and enhance Métis culture and identity, gain local autonomy and achieve economic self-sufficiency; [Emphasis added]

[132] I find that the impugned Property Tax Bylaw is the product of Métis frustration with the failure to achieve this objective. Ironically, the lack of adequate capital funding for Métis Settlements, or a viable model for the Settlements to raise capital funds through economic benefits derived on their territory, has driven Elizabeth to enact a measure that would severely, if not fatally, impair its ability to attract the investment it needs to develop a viable tax base in the future. The present circumstance is thus unsatisfactory from many perspectives.

d. Discrimination

[133] Given this Court's conclusions on the legality of the enactment and the unreasonableness of the Property Tax Bylaw, it is not necessary to consider the allegation that the Property Tax Bylaw is improperly discriminatory. The Applicants' right to argue this late-arising ground is also contentious. Therefore, I decline to address this issue.

VI. Conclusion

[134] The Application is allowed and the Property Tax Bylaw is quashed. At the hearing, counsel indicated that the Applicant companies had made tax payments to Elizabeth equal to the previous year's levy, and would not seek reimbursement of these amounts if successful. That is a fair and reasonable position. The applicants are therefore granted the declaration they seek that they have paid their allotted share of property tax for 2019.

Heard on the 11th day of December, 2019.
Dated at the City of Calgary, Alberta, this 27th day of March, 2020.

N. Devlin
J.C.Q.B.A.

Appearances:

Gilbert J. Ludwig, QC, Aimee Louie and Brian K. Dell
for the Applicants

Glenn K. Epp and William (Bill) McElhanney
for the Respondents

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TAB 76

Fisher-Tennant v. Canada (Minister of Citizenship and Immigration)

Federal Court Judgments

Federal Court of Appeal

D.W. Stratas J.A.

Heard: In writing.

Judgment: July 4, 2018.

Docket: A-104-18

[2018] F.C.J. No. 707 | *[2018] A.C.F. no 707* | *2018 FCA 132*

Between The Minister of Citizenship and Immigration, Appellant, and Andrew James Fisher-Tennant by his Guardian at law, Jonathan Tennant, Respondent

(30 paras.)

Case Summary

Immigration law — Naturalization or citizenship — Application for grant of citizenship — Appeals and judicial review — Motion by respondent for order removing the Minister's notice of appeal from court file because the Court lacked jurisdiction to hear the appeal dismissed — Minister appealed Federal Court decision granting respondent citizenship although the Citizenship Act gave this power only to Minister — Although Federal Court had not certified question for consideration on appeal, Federal Court judgment on its face, if upheld, would be a clear exceedance of authority that implicated the rule of law in a serious way.

Motion by the respondent for an order removing the Minister's notice of appeal from the court file because the Court lacked jurisdiction to hear the appeal. The Minister appealed a Federal Court decision declaring the respondent to be a citizen of Canada although the Citizenship Act gave this power only to the Minister. The Federal Court did not certify a question. Section 22.2(d) of the Citizenship Act provided that the Court could not hear an appeal from the Federal Court unless the Federal Court had certified a question for its consideration.

HELD: Motion dismissed.

The judgment of the Federal Court granted the respondent citizenship although the clear language of the Citizenship Act gave this power only to the Minister. The judgment on its face, if upheld, would be a clear exceedance of authority not requiring a contentious debate over statutory interpretation, a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case in the way it did. The clear, apparent exceedance of authority implicated the rule of law in a serious way. This Court thus had jurisdiction over the notice of appeal.

Statutes, Regulations and Rules Cited:

Citizenship Act, *R.S.C. 1985, c. C-29, s. 22.2*(d)

Federal Courts Rules, *SOR/98-106, Rule 72*, Rule 74

Immigration and Refugee Protection Act, *S.C. 2001, c. 27, s. 74*(d)

Counsel

Greg George, David Joseph, Eleanor Elstub, for the Appellant.

Martha A. Cook, for the Respondent.

REASONS FOR ORDER

D.W. STRATAS J.A.

1 The Minister appeals from the judgment dated February 13, 2018 of the Federal Court (per Ahmed J.): *2018 FC 151*. The Federal Court declared the respondent to be a citizen of Canada.

2 The Federal Court did not certify a question under subsection 22.2(*d*) of the *Citizenship Act*, R.S.C., 1985, c. C-29. This subsection provides that this Court cannot hear an appeal from the Federal Court unless the Federal Court has certified a question for its consideration.

3 The respondent has brought a motion under Rule 74 of the *Federal Courts Rules*, *SOR/98-106*, asking for the notice of appeal to be removed from the court file and the court file to be closed because this Court lacks jurisdiction.

A. Has this Court already decided the matter?

4 Upon the filing of the notice of appeal in March, 2018, the Registry forwarded it to this Court for direction. In a single-sentence direction, this Court allowed the notice of appeal to be filed. In making this direction, has this Court already decided the issue under Rule 74?

5 The Minister answers that question in the affirmative. The respondent obviously thinks not: he has brought a motion under Rule 74.

6 The transmittal sheet from the Registry that prompted the Court's direction suggested that at that time Rule 72 was the concern. Thus, it may be that this Court's earlier direction that the notice of appeal may be accepted for filing was only a ruling on Rule 72, not Rule 74.

7 Rule 72 and Rule 74 fulfil different purposes. Rule 72 concerns formal defects in a document presented for filing or the failure to satisfy conditions precedent for the filing of a document; Rule 74 deals with

whether a document should be removed because it suffers from a fatal substantive defect, such as jurisdiction. See *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192, 434 N.R. 144 at paras. 20-29.

8 The certified question requirement can be a matter of form to be addressed under Rule 72. A notice of appeal must be in Form IR-4 under Rule 20 of the *Federal Courts Immigration and Refugee Protection Rules*, *SOR/93-22* and the Form requires the appellant to set out the certified question. In this case, it is possible that the Court noticed the absence of a question on the notice of appeal, thought that one had been stated, regarded the absence as a mere oversight of form, and allowed the notice of appeal to be filed. Left only with a single sentence directing the Registry to file the notice of appeal, I cannot be certain that this Court considered the substantive issue. Therefore, I shall entertain the substantive issue raised in the respondent's motion under Rule 74: whether this Court has jurisdiction to consider this appeal despite the absence of a certified question.

B. The applicable law

9 The certified question requirement serves only a "gatekeeping" function: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909. Once appellants get past the requirement, they can raise any issues that affect the validity of the appeal. This Court explained this as follows:

> Once an appeal has been brought to this Court by way of certified question, this Court must deal with the certified question and all other issues that might affect the validity of the judgment under appeal: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 12; *Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122, [2012] 3 F.C.R. 635 at para. 6. The certification of a question "is the trigger by which an appeal is justified" and, once triggered, the appeal concerns "the judgment itself, not merely the certified question": *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 at para. 25. Simply put, "once a case is to be considered by the Federal Court of Appeal, that Court is not restricted only to deciding the question certified"; instead, the Court may "consider all aspects of the appeal before it": *Ramoutar v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 32, [1993] 3 FC 370 at pp. 379-380.

(*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at para. 50.)

10 Subsection 22.2(*d*) of the *Citizenship Act* and subsection 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 both impose a statutory bar against appeals: appeals shall not be brought to this Court unless the Federal Court has certified a question. In particular, both provide that "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the [Federal Court] certifies that a serious question of general importance is involved and states the question." From all appearances, these are absolute bars.

11 Nevertheless this Court has recognized certain "well-defined" and "narrow" categories of exception and has allowed appeals falling within the categories to be brought: see, *e.g.*, the summary in *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3 at para. 28.

12 The judicial implication of exceptions into seemingly absolute bars may strike some as strange. After all, judges, like everyone else, are subject to the laws passed by Parliament. Only Parliament can legislate, not judges. Judges have no business amending Parliament's laws. This is nothing more than the "hierarchy of law" described in *Tsleil-Waututh Nation v. Canada (Attorney General)*, *2017 FCA 128* at para. 82: a constitutional provision or principle takes precedence over statutory and subordinate legislative provisions, and they take precedence over judge-made common law. Put another way, only a constitutional principle can trump or modify legislation: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, *2001 SCC 52*, *[2001] 2 S.C.R. 781*.

13 Thus, the only plausible basis for the judge-made exceptions to the statutory bars is a constitutional principle. Here, that constitutional principle is the rule of law, recognized in the preamble to the *Constitution Act, 1982* and in the unwritten principles of the Constitution. On occasion, the case law under subsection 74(*d*) explicitly acknowledges this: see *e.g. Huntley v. Canada (Citizenship and Immigration)*, *2011 FCA 273*, *[2012] 3 F.C.R. 118* at para. 7.

14 The recognized exceptions to the statutory bars--all of which exemplify rule of law concerns--include the Federal Court's failure to exercise jurisdiction in circumstances where it must exercise it (*Canada (Solicitor General) v. Subhaschandran*, *2005 FCA 27*, *[2005] 3 F.C.R. 255*), and a lack of jurisdiction owing to some fundamental flaw in the proceedings going to the root of the Federal Court's ability to decide the case (*Narvey v. Canada (Minister of Citizenship and Immigration)* *(1999), 235 N.R. 305* (F.C.A.); *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, *2011 FCA 1* at para. 6 and *Canada (Citizenship and Immigration) v. Goodman*, *2016 FCA 126* at para. 3), such as a reasonable apprehension of bias (*Re Zundel*, *2004 FCA 394*, *331 N.R. 180*).

15 An alleged error of law--even one where "an appeal would certainly succeed if it were entertained"--is not an exception to the statutory bars: *Mahjoub v. Canada*, *2011 FCA 294*, *426 N.R. 49* at para. 12; *Huntley* at para. 8; *Goodman* at para. 9.

16 The case law has not defined particularly well the exception for loss of jurisdiction for some fundamental flaw in the proceeding going to the root of the Federal Court's ability to decide the case. This motion provides this Court with an opportunity to offer a better explanation for it. The explanation I offer does not change the threshold for the exception. It remains an exceedingly difficult one to meet. Indeed, most of the cases in para. 14, above that assert the existence of this exception deny it on the particular circumstances of the case.

17 This exception covers cases where:

* it is alleged that there is a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case--examples include a blatant exceedance of authority obvious from the face of the judgment or an infringement of the rule against actual or apparent bias supported by substantial particularity in the notice of appeal; and
* the flaw raises serious concerns about the Federal Court's compliance with the rule of law.

This exception does not include contentious debates over issues of statutory interpretation, errors of law, exercises of judicial discretion, and the weight that should be accorded to evidence and its assessment.

18 The threshold is high--one must show a flaw that is "fundamental," strikes at "the very root" of the judgment or "the very ability" of the Court to hear the case, in some circumstances has "substantial particularity," and raises "serious concerns" regarding the rule of law. This high threshold allows Parliament's preference for an absolute bar to prevail in all cases except for those most rare cases where concerns based on the constitutional principle of the rule of law are the most pronounced.

19 This explanation of the exception does not use the word "jurisdiction." "Jurisdiction" is an unhelpful word that too often is thrown around with abandon. When people speak of a body regulated by legislation, such as the Federal Court, going "beyond its jurisdiction," they usually mean that the body has gone beyond the powers given to it by the statute, properly interpreted. Seen in this way, issues of so-called "jurisdiction" are just issues of legislative interpretation: *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, *2018 FCA 58* at paras. 57-59; *Canadian National Railway Company v. Emerson Milling Inc.*, *2017 FCA 79* at paras. 15-16; *City of Arlington v. F.C.C.*, 133 S. Ct. 1863 (2013). And errors in legislative interpretation are at best just errors of law, matters caught by the statutory bar: *Mahjoub* (2011), *Huntley* and *Goodman*, above.

20 Seen in this way, "jurisdiction" is not some sort of a magic password that opens the door to access to this Court. Rather, it is nothing more than a rhetorical label people sometimes use to try to boost a garden-variety issue of statutory interpretation into something more significant. In my view, in describing this very rare exception to the statutory bars it would be best if this word were avoided altogether. Rather, the exception is for fundamental flaws in well-defined, extraordinary circumstances.

21 Further underscoring the very rare nature of this exception is the meaning of the "rule of law." The "rule of law" does not mean whatever counsel can decry as egregious or unfair: *Galati v. Harper*, *2016 FCA 39* at para. 43 (concurring but not disputed by the majority) and cases cited therein. Rather, it is a limited concept illustrated by the very rare cases that have successfully applied it in this context.

22 In this context, the rule of law takes its flavour from the ills sought to be prevented by this exception. If this exception did not exist, a judge of the Federal Court could always blatantly disregard binding law and do whatever he or she wants in a case based on her or his own ideology, whim or personal idiosyncratic feelings, and then decline to certify a question. The effect? Immunization from any accountability or review.

23 "L'etat, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them--the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on--must obey the law: *Reference re Secession of Quebec*, *[1998] 2 S.C.R. 217*, *161 D.L.R. (4th) 385*; *United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 5 U.S. 137 (1803); *Magna Carta* (1215), art. 39. From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed. See the discussion in *Tsleil-Waututh Nation v. Canada (Attorney General)*, *2017 FCA 128* at paras. 77-79, *Slansky v. Canada*

(Attorney General), *2013 FCA 199*, *[2015] 1 F.C.R. 81* at paras. 313-315 (dissenting but not disputed by the majority), and the numerous authorities cited therein.

24 Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power--no matter how lofty, no matter how important--must be subject to meaningful and fully independent review and accountability.

C. Application of the applicable law to this case

25 In this case, the judgment of the Federal Court granted the respondent citizenship. But the clear language of the *Citizenship Act* gives this power only to the Minister. The judgment on its face, if upheld, would be a clear exceedance of authority not requiring a contentious debate over statutory interpretation--a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case in the way it did. The clear, apparent exceedance of authority implicates the rule of law in a serious way.

26 It follows, then, that this Court has jurisdiction over the notice of appeal; put another way, this Court should not remove the notice of appeal from the court file and close the file. To the extent that, contrary to what I have held, this Court has already pronounced on this substantive matter in its earlier direction, my ruling here effectively confirms it.

27 In reaching this conclusion, this Court is not in any way deciding the appeal against the respondent. Nor are serious aspersions being cast upon the Federal Court in this case. All that is being said is that the type of ground alleged--not yet proven--is of the qualitative kind that triggers an exception to the statutory bar, nothing more. And even if this ground is borne out, it may just be a technical error: although the Federal Court cannot grant citizenship, the same practical result should follow in this case because a mandatory order against the Minister forcing him to grant citizenship passes muster under the standard of review. (Note that the appellate standard of review applies, not the administrative law standard of review, to the Federal Court's choice of remedy: *Canada v. Long Plain First Nation*, *2015 FCA 177*, *388 D.L.R. (4th) 209* at paras. 88-89.)

28 I note that the reasons of the Federal Court speak of something called a "directed verdict"--a remedy not listed under section 18.1 of the *Federal Courts Act*. Perhaps what was meant was *mandamus*, which is a listed remedy: *Canada (Public Safety and Emergency Preparedness) v. LeBon*, *2013 FCA 55*, *444 N.R. 93* at para. 13; *Garshowitz v. Canada (Attorney General)*, *2017 FCA 251* at para. 8. But *mandamus*--the requiring of an administrative decision-maker to take positive action--is granted only where certain relatively rarely occurring prerequisites are met: *LeBon* at para. 14 and authorities cited therein; see also *D'Errico v. Canada (Attorney General)*, *2014 FCA 95*, *459 N.R. 167* at para. 16. And under *mandamus*, it is the Minister that performs the required administrative action, not the Court.

29 These issues and all other issues said to affect the validity of the Federal Court's judgment will be for the hearing panel to decide.

D. Disposition

30 The respondent's motion to remove the notice of appeal from the court file and close the court file will be dismissed. Costs will be in the cause.

D.W. STRATAS J.A.

End of Document

TAB 77

Form 49
[Rule 13.19]

COURT FILE NO.	2001-08938
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

Clerk's Stamp

APPLICANTS	E. MACLEAY BLADES, ROCKING P RANCH LTD., JOHN SMITH, and PLATEAU CATTLE CO. LTD. **(RESPONDENTS)**
RESPONDENTS	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and the MINISTER OF ENERGY FOR THE PROVINCE OF ALBERTA **(RESPONDENTS)**
DOCUMENT	**AFFIDAVIT ON BEHALF OF THE PROPOSED INTERVENOR ALBERTA BACKCOUNTRY HUNTERS AND ANGLERS** **(APPLICANT)**
Address for Service and Contact Information of Party Filing this Document	**Big Spruce Law** Attn: Michael M. Wenig 6 Varbay Place NW Calgary, AB T3A 0C8 T: 403-879-1006; F: 403-398-4260 Email: mike@bigsprucelaw.ca

AFFIDAVIT OF NEIL KEOWN

Sworn on December 14, 2020

I, Neil Keown, of the City of Airdrie, Alberta, SWEAR AND SAY THAT:

1. I am the chair of the Alberta chapter of Backcountry Hunters & Anglers ("Alberta BHA"). As such, I have authority to represent Alberta BHA for the purpose of this affidavit.

2. I have personal knowledge of the matters stated in this affidavit, except where stated to be on information and belief, in which case I believe that information to be true and I have provided the source of that information.

My background and expertise

3. I have been Alberta BHA's chair since the chapter's inception in 2017.

4. As Alberta BHA's chair, I am the official spokesman and representative of Alberta BHA to the media and public. My roles as chair also include: facilitating Alberta BHA's development, implementation and strategic planning process to carry out the chapter's policies and objectives; appointing committees and special positions as needed; presiding at chapter meetings; managing social media communications and newsletters; and, generally supervising the chapter's activities.

5. My professional expertise is in electrical engineering. I have 25 years of experience working in the energy, forestry, and construction sectors. My particular focus has been using remote and near sensing technologies to help assess the safety and environmental risks of various development and recreational activities on the landscape.

The Alberta Backcountry Hunters and Anglers

6. Alberta BHA is a registered non-profit society under the *Alberta Societies Act*.

7. Alberta BHA is a non-partisan organization. It does not receive support from, nor officially supports, any political party or candidate.

8. Alberta BHA's members are all full-time residents of Alberta who pay an annual membership fee. Alberta BHA has no paid staff. All my and other members' work for Alberta BHA is on a volunteer (that is, non-paying) basis.

9. Alberta BHA is loosely affiliated with, and generally shares the values and mandate of, the North American Backcountry Hunters & Anglers. This organization, based in the U.S., was founded in 2004 as a grassroots organization to advocate for ecosystem-based conservation throughout North America. (There are two other Canadian BHA chapters, in B.C. and Yukon.)

10. Alberta BHA generally operates as a stand-alone organization, setting its own policies, agenda, and priorities, and does not receive direction, or funding from the North American affiliate. Alberta BHA is managed by its volunteer board members, with direction provided by our other members.

11. As stated in Alberta BHA's bylaws, the purposes of Alberta BHA are to:

i. Ensure the protection, and the continuance of Alberta's outdoor heritage of hunting and fishing in a natural setting, through education and work on behalf of wild public lands and waters.

ii. Encourage and promote the handling and harvesting of wild game in an ethical, humane manner consistent with the principles of fair chase.

iii. Work to protect and enhance non-motorized hunting and fishing opportunities and experiences and the lands and waters that support those activities.

iv. Work in concert with the North America BHA and other BHA chapters to preserve access for Alberta residents to public lands (including, but not limited to, provincial and crown lands) throughout Canada.

12. Since Alberta BHA's inception in 2017, the Government of Alberta has recognized Alberta BHA as a stakeholder representing public interests in hunting and fishing and in wildlife and habitat conservation. At the government's invitation, we belong to several committees, including the Southern Alberta Recreational Advisory Group (now renamed the Castle/Livingstone-Porcupine Recreation Advisory Group), the Fisheries Stakeholders Advisory committee, the Bighorn Standing Committee, the Alberta Game Policy Advisory Committee (AGPAC), the Alberta Sheep Management committee, and the Castle Provincial Park planning committee.

13. Of these committees, the Castle/Livingstone-Porcupine Recreation Advisory group was spun out of the South Saskatchewan Regional Plan (SSRP), and the Livingstone-Porcupine Hills Recreation Management Plan. [The SSRP is Exhibit B to the Affidavit of E. MacLaey Blades ("Blades Affidavit"). The Recreation Management Plan is Exhibit B to the Affidavit of Alistair Des Moulins. All Exhibit references below are to Exhibits in my affidavit, unless otherwise noted.] Hunters and anglers are recognized stakeholders for the areas covered by these plans.

14. Based on its organizational activities, and many of its members' professional and personal experiences, Alberta BHA has a deep organizational knowledge of the Eastern Slopes ecosystems where hunting and fishing occur and on which fish and wildlife generally depend. Alberta BHA is also generally knowledgeable of the threats to fish

and wildlife along the Eastern Slopes and the various provincial plans, policies, and other tools for addressing those threats.

Category 1 and 2 lands under the Coal Policy

15. The land classification map in Exhibit B of Macleay Blades' affidavit shows the lands classified as Category 1 and 2 lands under part 3.13 of *A Coal Development Policy for Alberta* (1976) (the "Coal Policy"). [The Coal Policy is in Exhibit A of the Blades Affidavit.]

16. Category 2 lands consist mostly of areas that the Alberta government has designated as "environmentally sensitive areas." (See Map 3 attached to CPAWS' November 2020 letter, in Exhibit Q to the Affidavit of Katherine Morrison, p. 111.) These designations are for areas that are either "[i]mportant to the long-term maintenance of biological diversity, soil, water, or other natural processes, at multiple spatial scales" or, that "contain rare or unique elements or that include elements that may require special management consideration due to their conservation needs."[1]

17. The map in Exhibit Y of the Morrison affidavit shows the locations of Category 2 lands relative to parks and other protected areas, and to "prime protection zones" (PPZs) designated in the Government of Alberta's *Policy for Resource Management of the Eastern Slopes* (revised 1984) (the "Eastern Slopes Policy" [Exhibit A]). My veritable belief is that the PPZs used for this map include the PPZs designated in the Integrated Resource Plans (IRPs) that cover parts of the Eastern Slopes. Coal exploration and development are not a permitted land use in those PPZs. This is shown on the tables of "compatible activities by land use zone," on page 29 of the Livingstone-Porcupine Hills IRP which is attached to the Blades Affidavit as Exhibit F, page 15 of the Eastern Slopes Policy, and Table 2 of the Ghost River IRP. (Excerpts of this IRP are in Exhibit F of my affidavit.) My understanding is that the Eastern Slopes Policy and all other relevant IRPs use the same table.

18. The environmental values and natural, renewable resources of the Category 1 and 2 regions are well known. These lands are home to the westslope cutthroat and bull trout, both of which are designated as "threatened" species under the federal *Species at*

[1] Alberta Environment and Parks, *Environmentally Significant Areas Report*, https://www.albertaparks.ca/albertaparksca/library/environmentally-significant-ar. eas-report/.

Risk Act.[2] Numerous other wildlife species, including mountain goats, bighorn sheep, grizzly bear (which are a "threatened" species[3]), elk, whitetail and mule deer are located within these lands.[4] These lands are also the source of fresh water for numerous downstream communities.

19. The ecological values of Category 1 and 2 lands have been under greater and greater threats—especially in the last few decades since the Coal Policy was adopted in 1976. These threats have been caused by Alberta's steadily (and sometimes rapidly) growing population and from increasing, often conflicting demands on the landscape from resource extraction and industrial and recreational uses.

20. These increasing demands on the landscape have led to considerable habitat fragmentation and loss[5] and direct wildlife disturbances.[6]

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[2] Government of Canada, *Species at risk public registry – Species List*, *Species Profiles for Westslope Cutthroat Trout and Bull Trout*, https://wildlife-species.canada.ca/species-risk-registry/species/speciesDetails_e.cfm?sid=861, and https://wildlife-species.canada.ca/species-risk-registry/species/speciesDetails_e.cfm?sid=1204. See also, Government of Alberta, *Fish species at risk*, https://www.alberta.ca/fish-species-at-risk.aspx#toc-12.

[3] See Government of Canada, *Species Profiles,* https://wildlife-species.canada.ca/species-risk-registry/species/speciesDetails_e.cfm?sid=1195 and Alberta, *Grizzly Bear Recovery Plan – Overview*, https://www.alberta.ca/grizzly-bear-recovery-plan-overview.aspx#:~:text=Alberta%20grizzly%20bears,-Grizzly%20bears%20are&text=Grizzly%20bears%20were%20classified%20as,800%20grizzly%20bears%20in%20Alberta.

[4] See, e.g., Alberta Environment and Parks, *Fish and Wildlife Internet Mapping Tool – Public*, https://maps.alberta.ca/FWIMT_Pub/Viewer/?TermsOfUseRequired=true&Viewer=FWIMT_Pub.

[5] E.g., Government of Alberta, *A Guide to Endangered and Threatened Species and Species of Special Concern in Alberta, Ver. 1* (2014), https://open.alberta.ca/dataset/d5f03916-aa1a-4c37-acee-354e69a479f0/resource/7bc9e468-740d-4f06-8805-212eb178ffa0/download/speciesatriskguide-aug27-2014.pdf.

[6] Dan Farr, et al., *Ecological Response to Human Activities in Southwestern Alberta: Scientific Assessment and Synthesis* (Dec. 2017), https://open.alberta.ca/dataset/e77ce35a-230d-4aff-9df9-e15ccb4ddf04/resource/8a3af9fe-e4ec-4914-92ae-b25774866421/download/emsdcastlesciencereviewv58final.pdf.

21. The ecological values of Category 1 and 2 lands are also significantly at risk from climate change—which is reducing water supplies,[7] and causing or at least exacerbating forest fires[8] and timber loss from pine bark beetles[9]—and from linear disturbances.[10]

22. The Alberta Government has long acknowledged these threats, for example, in the 1984 Eastern Slopes Policy (p. 1) [Exhibit A], the 2006 Land Use Framework (p. 6) [Exhibit B], the 2007 companion to that Framework, *Understanding Land Use in Alberta* (p. i) [Exhibit C], and statements about climate change.[11]

23. Following its adoption of the Coal Policy's land classifications, the government revised its Eastern Slopes Policy in 1984 and adopted several Integrated Resource Plans (IRPs). While these plans have had some value, they have long been recognized as falling well short of the mark for establishing an integrated system for managing cumulative effects and for resolving competing demands on the land.[12]

24. The government ceased developing and updating the IRPs in the 1990s.[13]

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[7] E.g., Stewart Rood, et al., *Impacts of Climate Change on Rocky Mountain River Flows* (Nov. 2019), https://www.ppwb.ca/uploads/media/5df7ecc7680d5/presentation-2-stewart-rood.pdf?v1; Vinod Mahat and Axel Anderson, *Impacts of Climate and Forest Changes to Streamflow in Southern Alberta*, http://environment.alberta.ca/apps/emw/PresPost/ICF.aspx.

[8] E.g. Xuebin Zhang, "Temperature and Precipitation Across Canada," Ch. 4, Government of Canada, *Canada's Changing Climate Report* (2019), https://changingclimate.ca/CCCR2019/chapter/4-0/

[9] E.g. Barry J. Cooke and Alan L. Carroll, "Predicting the risk of mountain pine beetle spread to eastern pine forests: Considering uncertainty in uncertain times," 396 Forest Ecology and Management 11 (2017), https://cfs.nrcan.gc.ca/publications?id=38435.

[10] E.g., Dan Farr, et al., *Linear Disturbances in the Livingstone-Porcupine Hills of Alberta: Review of Potential Ecological Responses* (Government of Alberta, June, 2018), https://open.alberta.ca/dataset/c157288f-ba13-47f3-8280-673e32dd83c7/resource/d84dc68a-8670-492a-a11e-791215da877f/download/livingstone-porcupine-review.pdf; and Dan Farr, et al., *Ecological Response to Human Activities in Southwestern Alberta: Scientific Assessment and Synthesis* (Government of Alberta, 2017), http://environmentalmonitoring.alberta.ca/biodiversity/castle-region-scientific-assessment-and-synthesis/.

[11] E.g., Government of Alberta, *Climate Change in Alberta*, https://www.alberta.ca/climate-change-alberta.aspx.

[12] E.g., Steven A. Kennett and Monique M. Ross, *In Search of Public Land Law in Alberta*, Occasional Paper # 5 (Canadian Inst. of Resources Law, 1998), pp. 11, 21-28, and 43-45; Steven A. Kennett, *Integrated Resource Management in Alberta: Past, Present and Benchmarks for the Future*, Occasional Paper # 11 (CIRL, 2002), pp. v, and 1-15; Steven A. Kennett, *Integrated Landscape Management in Canada: Getting from Here to There*, Occasional Paper # 17 (CIRL, 2006), pp. 43-45. (The CIRL Occasional Papers are accessible from https://cirl.ca/publications/occasional-papers.). See also Steven A. Kennett, "Change to Believe In: A Legal Checklist for Alberta's Land-Use Framework," No. 104 Resources (CIRL, 2009), https://cirl.ca/sites/default/files/Resources/Resources104.pdf.

[13] Kennett and Ross, *In Search of Public Land Law in Alberta*, *supra* note 12, p. 11.

25. These deficiencies led ultimately to the Legislature's adoption of the *Alberta Land Stewardship Act*, but that tool has been criticized for failing to *require* regional plans to manage cumulative effects and to set other *binding* benchmarks for environmental protection.[14] To date, the provincial cabinet has adopted a regional plan, under the *Alberta Land Stewardship Act*, for the South Saskatchewan region, but not for any other part of the Eastern Slopes.[15]

Effects of the Coal Policy Rescission

26. Information Letter 2020-23 states that, with the Coal Policy rescission, "all restrictions on issuing coal leases within the former coal categories 2 and 3 have been removed." [Exhibit C to the Blades Affidavit.] However, that Letter also states that Alberta will "continue to restrict coal leasing, exploration and development" on former Category 1 public lands and that this "prohibition on coal activities" is being continued to "maintain watershed, biodiversity, recreation and tourism values" along the Eastern Slopes.

27. The environmental risks and impacts of surface coal mining are described in the Morrison affidavit and in the CPAWS letter attached as Exhibit Q to that affidavit. I agree with those descriptions and stress that the impacts from mining activities on Category 2 lands will be felt even on those Category 1 lands where mining is still prohibited. Watersheds and other types of ecosystems cut across the Category boundaries.

Effects of the rescission on Alberta BHA and its members

28. The impacts from the Coal Policy rescission are already being felt, given the exploration roads and drilling sites that have appeared on the landscape since the rescission came into effect. Alberta BHA members, and others who recreate in those areas, are raising alarms over the speed and extent that these disturbances are taking place, often in critical habitat for westslope cutthroat trout, and bighorn sheep.

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[14] See, e.g., Nigel Bankes, Sharon Mascher, and Martin Olszynski, "Can Environmental Laws Fulfill Their Promise? Stories from Canada," 6(9) Sustainability 6024 (2014), pp. 6026-30, https://www.mdpi.com/2071-1050/6/9/6024; and, Jennette Poschwatta Yearsley and Adam Zelmer, "The Alberta Land Stewardship Act: Certainty or Uncertainty," No. 106 Resources (CIRL, 2009). https://cirl.ca/sites/default/files/Resources/Resources106.pdf.

[15] E.g., Government of Alberta, *Environment and land use planning*, https://www.alberta.ca/environment-and-land-use-planning.aspx.

29. Alberta BHA's members generally spend much of their free time in Alberta's backcountry, from the prairies to the mountains, seeking the solitude of the wilderness, searching adventure, and foraging from the land in a sustainable fashion. Our members use fish and wildlife habitats for fishing (e.g. westslope cutthroat trout and bull trout) and hunting (e.g. bighorn sheep, goat, elk, black bear, and mule deer). Our members rely on these areas for outdoor enjoyment, in addition to supplying food for themselves and their families. Our membership has grown steadily which reflects the trend of increased hunting/fishing licence sales in Alberta over the last decade.[16] Healthy habitats and game populations are needed to sustain this trend.

30. A substantial part of our members' outdoor activities occurs on public lands within both Categories 1 and 2 of the Coal Policy, as many of us are drawn to undisturbed areas. For the last 6 years, I personally have spent an average of 25 days every year, recreating in some form—backcountry camping, hiking, hunting, or fishing—on Category 1 and 2 public lands, including lands in the Livingstone, Porcupine Hills, Castle, Oldman, Ghost, and Ram River areas.

31. Given their uses of wildlife habitat, our members are generally adversely affected by and deeply concerned about industrial and other activities that harm wildlife habitat or limit public access to wildlife habitat. The habitat disturbances and other environmental impacts of the Coal Policy, as noted above, will in turn harm my and our other members' uses of those Category 1 and 2 lands.

32. Coal developments in Category 2 lands will also remove public access for our members to important hunting and fishing areas on these lands.

33. The Coal Policy rescission adversely affects me and Alberta BHA's other members in one more respect. I and many other members spend time and effort in the field working to protect trout habitat and remediate damage from human causes. This work includes garbage removal, willow planting, and stream crossing remediation projects within the Elbow River Watershed (2018), Ghost Public Land Use Zone (2019, 2020), Maclean Creek Public Land Use Zone (2019), CPR Lake (2020), Edmonton River Valley (2020), and Manawan Lake (2020). The Coal Policy rescission will frustrate field work in any Category 2 lands by increasing coal exploration and development which in

[16] Government of Alberta, *Historic Annual Licence Sales Statistics*, https://open.alberta.ca/publications/historic-annual-licence-sales-statistics.

turn will increase threats to the same habitats or species our field work is trying to protect.

34. Government consultations on proposed land use policies provide an important tool to enable Alberta BHA to fulfill its purposes. The lack of any chance to consult on the Coal Policy rescission has therefore adversely affected Alberta BHA as an organization.

Alberta BHA's expectation of consultation before the Coal Policy rescission

35. According to a 2017 survey conducted for the Alberta government, the hunting and angling community makes up 25% of the outdoor recreationists in Alberta.[17]

36. From my experience, when the government is considering policy changes that could impact hunting and angling or wildlife habitat, these changes are brought forward to at least one of the committees in which Alberta BHA participates, or to the public as a whole, as part of a public consultation process. (Examples of these changes include the "Alberta Crown Land Vision" (2020), "Sustainable Outdoor Recreation" (2020-21), the opening of the crane hunt (2020), Wildlife Regulation revisions (2018/2019/2020), and the proposed angling ban for Central Alberta watersheds (Dec. 2018).) Alberta BHA typically provides input on these types of consultations and encourages its members to participate on an individual basis.

37. The committees then discuss the proposed changes and provide feedback to the government representatives. The records of these discussions, and any subsequent votes, are generally recorded by the government representatives, to identify the stakeholders that have been consulted and to record their input.

38. The committees listed in paragraph 12 above are among the multiple committees that meet on a regular basis to discuss land planning and other matters of concern regarding Category 1 and 2 lands. Given committee members' ongoing work in these committees, those members would have expected that any proposed major government policy changes for these lands would have been raised in these committees before the changes were made.

[17] Advanis, *2017 Albertan Recreation Survey* (July 2017), https://open.alberta.ca/dataset/58b1254f-9842-4abf-8bb5-86ecb940245e/resource/077024f6-9900-4c70-a101-d0c1c099b0c3/download/recreation-survey-2017.pdf.

39. However, since 2017, the government has never asked for input in the committees to which Alberta BHA belongs, on a proposal to rescind the Coal Policy generally or its zoning categories, in particular. Nor has the government even notified those committees that it was considering any such proposed action.

40. In addition, at least since 2017, the government has not invited the general hunting and angling community, or (to my knowledge) the public generally, to consult on any proposed changes to, or the rescission of, the Coal Policy's zoning categories. Nor has the government invited Alberta BHA or me personally to provide input on any such proposal.

41. Page 61 of the South Saskatchewan Regional Plan (SSRP) refers to IRPs and to the Coal Policy; page 62 explains that an "integrated approach" includes "coordination of engagement with other governments, industry, stakeholders and the public…." [Blades Affidavit, Exhibit G]

42. Before the Coal Policy was rescinded, I and Alberta BHA generally were aware of these cross-references and the "integrated approach" explanation, on pages 61 and 62 of the SSRP, respectively. Based on these pages, we expected that, before the government rescinded or revised the Coal Policy, the government would review Part 3.13 of the Coal Policy as part of a review of the relevant IRPs and that that review would include public consultation.

43. To my knowledge, the integrated review referenced in pages 61 and 62 of the SSRP has not occurred. In addition, the Government of Alberta did not consult with Alberta BHA before rescinding the Coal Policy.

44. For many years, the hunting and angling community has raised concerns about the destruction of wildlife habitat from resource exploitation in Alberta. According to one source, the Alberta Fish and Game Association was one of two groups "directly responsible" for spurring the provincial Environment Conservation Authority (ECA) to conduct hearings, in the early 1970s, on the impact of surface coal mining in Alberta.[18] Members of the hunting and angling community were also active participants in the ECA's 1973 consultations on land use and resource development in the Eastern

[18] P.S. Elder, "The Participatory Environment in Alberta," 12 Alta. L. Rev. 403 (1974), pp. 411 and 414, http://www.albertalawreview.com/index.php/ALR/article/download/2366/2355/2478.

Slopes.[19] And the fish and game community was represented on the Public Advisory Committee on the Environment, which provided input for the ECA's 1976 report on coal mining in the Eastern Slopes.[20] (The ECA's 1973 consultations and 1974 report are described in the Luff Affidavit filed by the Judicial Review Applicants.)

45. A more recent example of our expression of these concerns was in a public consultation held by Coalspur Mines Ltd., regarding its "Vista Coal Underground Mine and Expansion Activities Project".[21] In another public consultation, done by Coal Valley Resources, fish and game associations raised concerns about loss of access.[22]

46. Had Alberta BHA been consulted on a proposed rescission to the Coal Policy's zoning categories, it would have noted the impacts of coal mining and the threats to the Eastern Slopes discussed above—that is, the increasing threats to Category 1 and 2 lands, and the continued absence of an effective integrated land management system for addressing competing uses and cumulative effects.

Complaint to the Land Use Secretariat

47. Alberta BHA's counsel Michael Wenig informed me that, on October 23, 2020, he emailed the complaint attached to this affidavit (Exhibit D) to the Land Use Secretariat. The complaint was submitted under the *Alberta Land Stewardship Act*, on behalf of Alberta BHA.

48. On December 3, 2020, a representative from the Land Use Secretariat sent Mr. Wenig an email stating that the complaint had been received and was "currently under review." Mr. Wenig has informed me that, to date, he has not received any further response. Alberta BHA has also not received any further response.

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[19] Luff Affidavit, Exhibit A, pdf pp. 82 (Fort Macleod Fish & Game Assn.), 217 (Claresholm Fish and Game Assn.), and 241 (Alberta Fish and Game Association).
[20] Alberta Environment Conservation Authority, *Review of Coal Exploration Policies and Programs in the Eastern Slopes of Alberta,* pp. 19-20 [Luff Affidavit, Exhibit B, pdf pp. 390-391].
[21] Coalspur Mines Ltd., *Vista Coal Project – Public Engagement Report – Appendix 2,* pdf p. 21 (summarizing input requesting "[r]equest for hunters, anglers, trappers, etc. and their use of the land today"), https://open.alberta.ca/dataset/2a9db6ed-4149-4b01-9fa1-676f1e78ea53/resource/05454089-3684-48c1-9c1d-6ab3301e3621/download/appendix-5-public-consultation.pdf.
[22] https://open.alberta.ca/dataset/46f82c2d-b6eb-4283-be04-527524070fa2/resource/09dd6545-89f6-454c-aa3c-d790b68add27/download/Coal-Valley-Resources-Public-Comments-3.pdf

Clarification of continuing "restrictions" on Category 1 lands

49. Information Letter 2020-23 states that "Alberta will continue to restrict coal leasing, exploration and development within public lands formerly designated as coal category 1." [Blades Affidavit, Exhibit C]

50. On November 12, 2020, Alberta BHA's counsel Mr. Wenig emailed Alberta Energy Regulator (AER) officials (with a copy to Energy Assistant Deputy Minister Martin Chamberlain, Q.C.) the letter attached to my affidavit as Exhibit E. The letter requests clarification of whether the word "restrict," in the statement quoted in the prior paragraph, means "prohibit".

51. On November 30, 2020, I received the AER response attached to this affidavit in Exhibit E.

52. This affidavit is filed in support of Alberta BHA's application for leave to intervene or, in the alternative, in support of the application of CPAWS Southern Alberta Chapter for intervenor status.

SWORN BEFORE ME at Calgary, Alberta,
on December 14, 2020

Michael M. Wenig
Law Society of Alberta, Member # 11362
A Commissioner for Oaths in and for
Alberta

Neil Keown

EXHIBIT A – EASTERN SLOPES POLICY (1984)

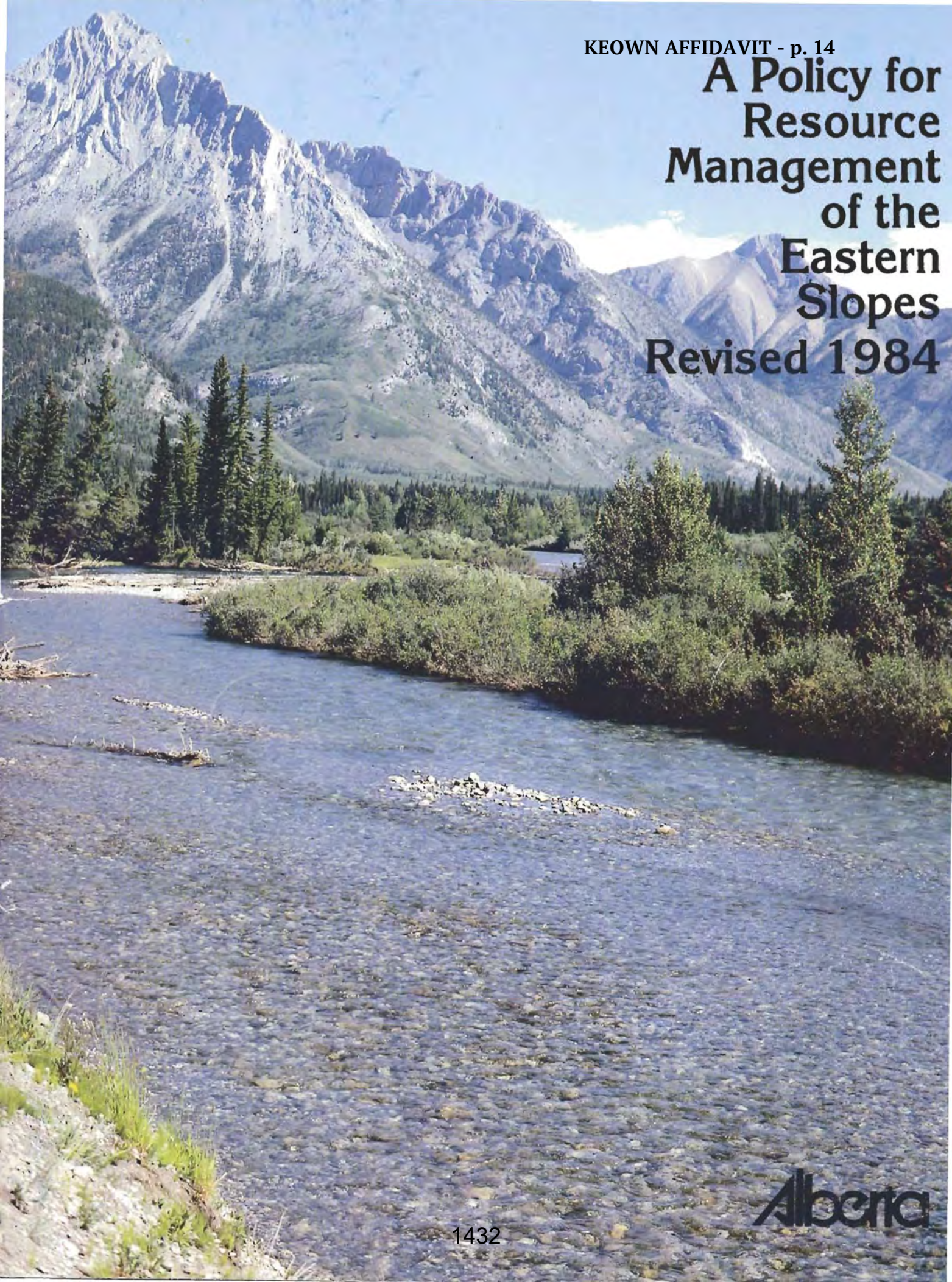
This is exhibit A referred to in the affidavit of

Neil Keown sworn before me on December 14, 2020.

Michael M. Wenig

A Notary Public in and for the Province of Alberta
Michael M. Wenig
Law Society of Alberta, Member # 11362

A Policy for Resource Management of the Eastern Slopes Revised 1984



Alberta

A Policy for Resource Management of the Eastern Slopes

Revised 1984

Edmonton
1984

Alberta
GOVERNMENT OF ALBERTA

ENR Number T/38
International Standard
Book Number 0-86499-067-7

Originally published in 1977 under the title
A Policy for Resource Management of the Eastern Slopes.

NOTE:
A Policy for Resource Management of the Eastern Slopes, Revised 1984 applies to lands and resources vested in the Crown in right of Alberta. Neither the Eastern Slopes Policy, nor any of the plans developed pursuant to that policy, is intended to apply to privately owned land.

Additional copies of this report may be obtained from:

Information Centre
Alberta Energy and Natural Resources
1st Floor, Bramalea Building
9920 - 108 Street
Edmonton, Alberta
T5K 2M4
(403) 427-3590

PREFACE

A Policy for Resource Management of the Eastern Slopes, published in 1977, provided for a range of opportunities in the region in keeping with the provincial social, economic and environmental goals of the day. Since its introduction, the policy has served as the regional base for an active program and more detailed sub-regional planning designed to deliver the benefits of the area to all Albertans.

During the past several years, the administrative aspects of the policy have been reviewed in detail and certain revisions have been made in order to keep the policy current and consistent.

The 1984 revision is intended to reflect the realities of the economic situation in Alberta, and to provide for the maximum delivery of the full range of values and opportunities in this important region. Given the high scenic and recreation values of the area, particular emphasis is placed on the need for the development of a strong tourist industry in the region during the next two decades. Such development must rely heavily on the private sector for success.

The policy presents the Government of Alberta's resource management policy for the public lands and resources within the region. It is intended to be a guide to resource managers, industry and publics having responsibilities or interests in the area rather than a regulatory mechanism. Resource potentials and opportunities for development are identified with a view to assisting in the economic progress of Alberta. The policy is sufficiently flexible so that all future proposals for land use and development may be considered. No legitimate proposals will be categorically rejected. Should a proposal not be in keeping with the provisions of the policy for that area, alternative means will be explored for accommodating the proposal in a more appropriate location in the region.

The on-going integrated resource plans will make the policy work — to provide opportunities and stimulate economic growth and security while maintaining the key watershed and recreation values of the area.

I am confident that the Eastern Slopes Policy will continue to serve as a strong guide for the future in this important region of Alberta.

Hon. Don Sparrow
Associate Minister
Public Lands & Wildlife

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TABLE

MAPS

MAP 1

ALBERTA
EASTERN SLOPES

SCALE 1: 5 000 000

Introduction

MANAGEMENT IN THE EASTERN SLOPES — PAST AND PRESENT

The Eastern Slopes of Alberta's Rocky Mountains covers an area of approximately 90 000 square kilometres of mainly forest-covered mountains and foothills. The region possesses a great wealth of renewable and non-renewable resources — water, scenery, timber, forage, wildlife, fisheries and mineral resources — the majority of which lie upon or beneath public lands. Demands for use of these resources have increased at a rapid rate over recent years, making it more evident that the resource base of the Eastern Slopes is not unlimited. Growing pressures for resources and land in the area have led to conflicts in land allocation and to a rising concern for the protection of environmental quality and the management of this extremely important watershed region.

To deal with issues and concerns over the years, the development of resource and land use policies for the Eastern Slopes has passed through several stages. The Eastern Rockies Forest Conservation Board, which operated under joint federal-provincial legislation between 1948 and 1973, was effective in providing a watershed management policy and planning framework for the Rocky Mountains Forest Reserve — the reserve recognized as the critical headwaters region for the prairie provinces. The Board analyzed the watershed and hydrologic characteristics of the area and provided priorities and guidelines for the management of renewable and non-renewable resources to optimize water quality and quantity.

The establishment of the Green Area in 1948 also gave policy direction for Eastern Slopes management. The Green Area, in which most of the Eastern Slopes region lies, defines the extent of those lands withdrawn from settlement. The majority of the lands in the area are public lands on which farming and residential development have been prohibited. The Rocky Mountain Forest Reserve was formally established by the Forest Reserve Act, 1964, for the conservation of forests and other vegetation, and the maintenance of conditions favourable to optimal water supply.

In 1970, in response to rapidly growing demand for resources, the Alberta Government began two planning studies in the Eastern Slopes — the Foothills Resource Allocation Study and the HintonYellowhead Regional Land Use Study. These studies initiated a planning process designed to identify resource uses for land units based on an evaluation of resource capability, present land use, economics and demand.

In 1973, the Environmental Conservation Authority (ECA) conducted hearings into land use and resource development in the Eastern Slopes in order to identify the views and concerns of the public of Alberta. Briefs presented to the hearings, and the results of a public opinion survey, strongly emphasized watershed and public recreation priorities and the need for an integrated resource policy and land use planning for the area. The importance of beginning such a program was stressed throughout the 232 recommendations of the ECA which were submitted to government in 1974. On July 18, 1975, the government announced a policy for integrated resource management in the Eastern Slopes.

In addition, the Eastern Slopes Interdepartmental Planning Committee was established in 1975 to make recommendations on an integrated resource planning approach for the management of this strategic region of Alberta. Based on these recommendations, the government approved the original policy, published in July 1977 as *A Policy for Resource Management of the Eastern Slopes*, to ensure that all public lands and resources in the Eastern Slopes are protected, managed or developed according to a philosophy of integrated resource management.

Reviews of, and revisions to, the policy will ensure that it continues to be an effective tool for the government to respond to the needs and wants of Albertans and their concerns for protection of the Eastern Slopes.

FRAMEWORK OF PROVINCIAL NATURAL RESOURCE GOALS

Provincial goals for the various resource sectors provide the framework for developing more detailed regional resource objectives. The provincial goals outlined here are those that are relevant to the Eastern Slopes and apply only to public lands and resources. They are only part of a much larger picture. Provincial social, economic and environmental goals will greatly influence the achievement of the resource objectives. However, as the Eastern Slopes is a very large area and one which is important to many of the social, economic and environmental aspects of life in Alberta, the achievement of the regional resource objectives is important to the province as a whole.

The environment of land, water, vegetation and wildlife must be managed totally and not as separate elements. Although the provincial goals and regional objectives are defined individually, the management required to achieve any one objective does consider the many interrelationships with the environment.

Because the demands are so high, there is often a competition for the same land and same resources in the Eastern Slopes. Thus, not all goals will be achieved to the same degree of success in all areas.

The following goals relate to the natural resources of the region, and are not presented in any particular order of priority.

Water Management
To ensure a continuous, reliable supply of clean water to meet the needs of Albertans and interprovincial users now and in the future.

Wildlife
To provide a variety of outdoor recreational and commercial opportunities based on wildlife resources for the benefit and enjoyment of Albertans.

Fisheries
To provide a variety of outdoor recreational opportunities based on fisheries resources for the benefit and enjoyment of Albertans.

Recreation
To provide both private and public recreation opportunities that will meet the needs of Albertans and also enhance the vacation experiences of visitors to the province.

Timber
To provide the optimal continuous contribution to the economy by the forest-based industries consistent with sound environmental practices recognizing other uses of the forest.

Rangeland
To provide a properly managed forage base of the rangelands for use by wildlife and domestic livestock.

Agriculture
To encourage the optimal development of the renewable resources for the production, processing and marketing of agricultural products for an expanding domestic and export market.

Tourism
To encourage the provision of a diverse range of private and public sector tourism facilities, attractions, accommodations and services capable of meeting increasing demands for leisure and business-related opportunities.

Mineral Resources
To encourage exploration and development of all mineral resources to meet the needs of Albertans now and in the future.

Cultural and Ecological Resources
To ensure that significant features of archaeological, ecological or historical value are identified, protected and managed for scientific, educational and recreational benefits.

DOCUMENT ORGANIZATION

The *Policy for Resource Management of the Eastern Slopes, Revised 1984* is organized into two major parts:

1. Policy statements define the management intentions for the region. These statements reflect the priorities for resource management that will ensure that the special benefits from this region will continue to be provided to Albertans.
2. The regional plan provides more specific resource management direction. Resource objectives that can be achieved in the region are stated. Zoning maps and descriptions indicate where the objectives or groups of objectives can be met. Within the zone descriptions, the compatibility of a number of land use activities and the objectives generally to be achieved from the zone are identified. In addition, a complete description of how the policy statements and the regional plan will be implemented has been included in this revised edition of the document. Guidelines for specific aspects of resource management affecting the region have been included for both the Eastern Slopes Policy statements and the regional plan.

This revised document has been organized to show the relationship among broad provincial goals, policy statements for resource management of a special region — the Eastern Slopes — and the regional plan, which provides the initial level defining what, where and how resources will be managed to meet parts of the provincial goals.

Eastern Slopes Policy

The Eastern Slopes Policy defines the emphasis for realizing resource opportunities in the area. Policy statements describe:

- The management intentions for the Eastern Slopes and the direction which is required to assure that the character of the slopes will continue to provide the special benefits the region has to offer Albertans.
- The policy guidelines which identify the most important resource opportunities of the region and the major priorities to be considered in the management of the Eastern Slopes.
- The general procedure to assure that the desired direction and the policy guidelines are recognized in the on-going management of the public lands and resources in the Eastern Slopes.

MANAGEMENT INTENTIONS FOR THE EASTERN SLOPES

Public concerns for the future of the Eastern Slopes have centred on the need for government policy which would recognize those land areas providing different types of benefits. The public has also strongly requested that government employ a comprehensive and integrated approach in managing the natural resources in the region.

Information from the Foothills Resource Allocation Study, combined with public concerns and government objectives and priorities, has led to the recognition that, within the Eastern Slopes, different intensities of land use zones are required to ensure that the desired qualities are protected and that the resources are used effectively to provide benefits to Albertans.

These broad areas are conceptual in nature; however, they are clearly defined by their intents.

BROAD AREAS	INTENTS
Protection	To provide the highest level of protection for those areas which are known to form the unique character of the Eastern Slopes.
Resource Management	To foster wise mixed use of the natural resources to achieve specific goals and objectives.
Development	To recognize existing and provide for future site-specific development.

South Kakwa River

POLICY GUIDELINES FOR THE EASTERN SLOPES

To achieve the policy intents for this special part of Alberta, and also to gain benefits from all the natural resources, the government will follow these basic policy guidelines:

- The highest priority in the overall management of the Eastern Slopes is placed on watershed management. Recreation and tourism benefits from the private and public sectors are also extremely important.
- The natural resources of the Eastern Slopes will be developed, managed and protected in a manner consistent with principles of conservation and environmental protection.
- The uniqueness of the Eastern Slopes, due to its aesthetic qualities and combination of environments, will be maintained.
- The recreation resources of the mountains and foothills will be maintained while increasing the opportunities for Albertans to enjoy this unique region.
- The management of renewable resources is the long-term priority in the Eastern Slopes. Non-renewable resource developments will be encouraged in areas where this priority can be maintained.
- Decisions for development, management and protection of natural resources in the Eastern Slopes will be based on an integrated resource planning system.
- All levels of integrated resource planning will include a public involvement program.

IMPLEMENTATION

The management intentions and policy guidelines for the Eastern Slopes are incorporated into the programs the provincial agencies use to manage Alberta's natural resources. The government has determined that public lands and resources will be protected, managed and developed with a philosophy of integrated resource management. According to this philosophy, the process for combining the intents and policy guidelines for the detailed management of the Eastern Slopes involves the allocation of resources on a regional scale through the use of a regional plan. Generally, this is a broad plan which defines what is to be achieved, where the protection, management and development emphasis will be, and what resource objectives might be met in the different parts of the region.

The regional plan considers provincial natural resource goals within the intents and policy guidelines of the Eastern Slopes, other provincial policies and goals, and information on resource capabilities, uses and demands. The plan gives broad direction to the resource management agencies and a further commitment to the public of what benefits can be expected from this region.

The management intents for the Eastern Slopes Policy are also implemented through other policies and guidelines. Some of the more relevant of these are as follows.

Above left: Provincial Legislative Assembly

Above right: Energy and renewable resources (Gas plant and cutblock)

Below: Managing the forest (Cutblock)

1. Integrated Resource Planning System

As part of the concept of integrated resource management, it is desired that decisions on the allocation and use of public lands and resources be made through an integrated resource planning system. This system has been formally developing since the completion of the Eastern Slopes Policy in 1977.

Integrated resource plans completed for the Eastern Slopes will be approved by a provincial Cabinet committee.

2. Public Involvement Process

The purpose of the public involvement process is to provide a means for involving the interested public of Alberta in integrated resource planning in an appropriate way. The government believes that this results in better and more acceptable plans for public lands and resources.

One level of public involvement is the Alberta Integrated Planning Advisory Committee which provides advice to the Associate Minister of Public Lands and Wildlife on provincial integrated resource planning issues. The committee is composed of representatives from major provincial interest groups concerned with public land and resource uses. These public interest groups are also consulted to provide their perspective at the working level.

Other concerned groups and individuals are also recognized and given the opportunity to be involved and informed during the integrated resource planning process.

A successful public involvement program allows government to learn from the concerned public, consider its views and keep it informed on a continuing basis. This provides better and more acceptable integrated resource plans for Alberta's public lands and resources.

A protected area (Willmore Wilderness)

3. Existing Legislation

A Policy for Resource Management of the Eastern Slopes, Revised 1984 was prepared with the understanding that it would be implemented within the terms of existing legislation and regulations by those government departments with appropriate administrative responsibilities. In addition, the lands affected by the policy were not to be considered exempt from requirements established by other legislation.

4. Other Government Policy Statements

Extensive areas of the Eastern Slopes designated for long-term development or large-scale resource development are frequently recognized by government policy statements. Examples are *The Policy for Recreation Development of Kananaskis Country, A Coal Development Policy for Alberta* and the *Fish and Wildlife Policy for Alberta*. The application of all such policies which have implications for the protection, management and development of public land and resources in the region must conform with the intent of the Eastern Slopes Policy.

5. Preliminary Disclosure

A preliminary disclosure is a means by which both the private and public sectors may make major development proposals, on a *confidential* basis, to government. Through preliminary review, the government may indicate whether it has objections "in principle" to a proposal's form, timing, location or any other essential feature. No objection in principle of a major development proposal resulting from preliminary disclosure constitutes approval for the filing of necessary applications and documents as required under controlling legislation.

6. Request for Proposals

A "request for proposals" is a means by which the government may play a more active role in identifying and directing the development of major resource facilities, particularly those involving the recreation sector in the Eastern Slopes. The request-for-proposals approach has been used in recent years in Alberta as the decision mechanism for major resource developments such as integrated forest products operations. This approach has allowed the government to identify key requirements prior to receiving proposals, and ensures that the best proposal, rather than the first, is accepted.

The request-for-proposals approach handles development concepts from either the private sector or government departments. Integrated resource planning will identify areas and sites having the potential for various types of developments. The request-for-proposals approach recognizes, however, the need to maintain the preliminary disclosure process as the means of reacting to development concepts from the private sector.

7. Referral Review

In the case of major developments and site-specific dispositions of public lands and resources in the Eastern Slopes, the requests are subjected to intensive referral review procedures. Referral procedures and information requirements have been defined for a number of types of major developments and site-specific requests. The approach is consistent with the shared decision-making philosophy of integrated resource management.

Regional Plan for the Eastern Slopes

The regional plan takes direction from the provincial natural resource goals and the Eastern Slopes Policy. The plan combines the direction with information on broad resource capabilities, present land uses and demands. (The Foothills Resource Allocation Study and the Environmental Conservation Authority hearings provided a significant information base for the development of the plan.) Thus, the plan is able to link the general provincial direction and ideals with the specifics of the resource base of the Eastern Slopes. This gives clearer direction to the government agencies involved with the management of the natural resources of the region. The regional plan is the first stage and one part of integrated resource management for the Eastern Slopes.

The regional plan considers three major questions:

- What are the main resource objectives that will be striven for in this region in order to meet some of the various needs of Albertans?
- Where are these objectives going to be met and where are the development, management and protection intents, vital to the Eastern Slopes Policy, to be achieved?
- How are the various resource uses going to occur together in the region in order to ensure that the policy guidelines for the Eastern Slopes are being followed?

The plan has three main parts:

1. Regional Objectives, which outlines those objectives that will be striven for in various parts of the region.
2. Regional Land Use Zones, as shown on the three map sheets in the back-cover pocket, which describes the resource objectives that might be achieved in each zone and the intent of the zone in terms of development, resource management or protection.
3. Implementation, which describes how the regional plan is to be implemented through both the more detailed integrated resource planning and the Table of Compatible Activities.

REGIONAL OBJECTIVES

Identification of objectives for each resource sector is necessary in order to determine what range of benefits can possibly be gained from the region's resources. For the regional plan, the objectives have been developed from broad information gathered during studies such as the Foothills Resource Allocation Study and through the continuing management programs of the departments involved in the management of the Eastern Slopes. The objectives, however, have not been modified in terms of how one affects another in any particular area. Thus, although it is expected that all objectives have a high possibility of being achieved in the Eastern Slopes, not all objectives will necessarily be achieved in all areas. If the objective is not achievable in a particular zone, every attempt will be made to accommodate it in another area.

A source of prairie water (Kananaskis Country creek)

Watershed Management

1. To manage and develop natural resources in the region to maintain or increase the volume of water yield and the natural timing of surface and sub-surface discharge.
2. To manage headwaters in the region to maintain the recharge capabilities and protect critical fisheries habitat.
3. To manage intensively the South Saskatchewan River Basin for water supply stability.
4. To manage the North Saskatchewan and Athabasca river watersheds to maintain natural flows and provide the option for future increases in water yield through intensive management.

Wildlife

The following are the general objectives for wildlife management. More specific population goals will be identified in the *Status of the Fish and Wildlife Resource in Alberta* and the subsequent detailed species management plans.

1. To allocate benefits derived from the wildlife resources with priority to recreation benefits to Albertans followed by economic benefits gained from various uses of wildlife through tourism.
2. To ensure that wildlife populations are protected from severe decline and that viable populations are maintained.
3. To identify very rare, scarce or special forms of outdoor recreation opportunities from wildlife and to ensure that access to these opportunities continues to be available.
4. To ensure that significant local resource shortfalls between demand and supply are addressed regionally.
5. To maintain wildlife on the basis of fundamental ecological principles.

Mountain wildlife (Mountain goat)

Fisheries

1. To protect aquatic habitat and ensure high water quality.
2. To establish optimal instream flow for fish through modification of land/water use practices.
3. To recognize sport fishing as the principal use of the fishery resources in the Eastern Slopes.
4. To maintain naturally reproducing salmonid (trout, char, grayling and whitefish) populations in the region and to expand these fish resources into presently vacant and appropriate aquatic habitat.
5. To supplement or enhance game fish stocks by stocking when natural reproduction does not occur or is limited.

Recreation

1. MAJOR RECREATION OPPORTUNITIES
   To establish recreation development opportunities to be provided by the private and public sectors based on present and future recreation demand. To develop and manage a diverse range of resource-based recreation developments.
2. CAMPING FACILITIES
   ☐ Auto Access
   To increase the number and scope of designated camping opportunities by expanding existing facilities and developing new sites.
   ☐ Group Camping
   To increase group camping facilities throughout the Eastern Slopes.
   ☐ Remote Camping
   To increase the number of camping sites accessible on foot, by horse, and by off-highway vehicles (OHV).
3. TRAILS
   ☐ Land-Based
   To increase the number of kilometres of long-distance trails in the region for hiking, skiing, horse-riding and OHV use.
   ☐ Water-Based
   To designate and manage water-based trails to provide opportunities for a variety of activities such as canoeing, power boating, kayaking and rafting.
4. DAY USE
   To increase extensive day-use sites, e.g., rest stops, picnic areas and viewing points.
5. VISITOR SERVICES
   To provide for a variety of trails oriented toward nature and historical appreciation and understanding resource management. To increase public awareness toward the preservation of representative and unique features of natural and/or cultural significance for interpretation, education and appreciation throughout the Eastern Slopes.
6. WILDERNESS
   To maintain areas of wilderness or primitive character.
7. WATER ACCESS
   To develop and manage a range of facilities and services to provide access to various water bodies throughout the region.
8. FISH AND WILDLIFE
   Within the context of the *Status of the Fish and Wildlife Resource in Alberta*, to establish fish and wildlife outdoor recreation objectives and priorities related to the supply and the present and projected demands.

Cultural and Ecological Resources

To protect both representative and unique areas of natural or cultural significance for the recreational, scientific and educational use of Albertans.

Tourism

1. To encourage the provision of a wide variety of tourism opportunities and services in the Eastern Slopes.
2. To encourage the development of tourism opportunities and services capable of operation on a year-round basis.
3. To support the provision of tourism opportunities and services by the private sector wherever feasible and to minimize the occurrence of public sector competition with private sector developments for specific tourism markets.
4. To ensure the provision of an adequate land base for tourism activities while maintaining the high aesthetic quality and thus maintaining the value of the tourism experience.
5. To maintain the environmental and aesthetic qualities of the Eastern Slopes, while expanding tourism opportunities in the area through:
   - ☐ grouping tourism facilities and services where feasible (recognizing the need for unique siting and scenic requirements of particular types of facilities)
   - ☐ ensuring the careful design of facilities to limit impact on the environment
   - ☐ encouraging environmentally-conscious operation of facilities and services after their completion

Recreational use of the land (Outfitting)

Timber

1. BOW/CROW FOREST

☐ Crowsnest Portion

To increase the sustained-yield timber supply available to quota holders and the general public through an expanded permanent forest land base consistent with optimal forest land allocation.

☐ Southern Bow Portion (Kananaskis Country)

To ensure a healthy forest environment in this prime recreational area and provide a reasonable supply of timber on a sustained-yield basis to wood utilizing facilities and the general public. The high standard of harvest operations will ensure maintenance of aesthetic qualities and a quality environment for the prime use of recreation.

☐ Northern Bow Portion (Ghost, Little Red Deer, Red Deer and Burnt Timber river areas)

To maintain a sustained-yield timber supply to wood utilizing facilities and for local public use. To increase the sustained-yield timber supply available to timber quota holders and/or forest management agreement holders and the general public through an expanded permanent forest land base consistent with optimal forest land allocation.

2. ROCKY/CLEARWATER, EDSON, WHITECOURT AND GRANDE PRAIRIE FORESTS

To maintain a sustained-yield timber supply to the wood utilizing facilities and for local public use. To increase the sustained-yield timber supply available to timber quota holders and/or forest management agreement holders and for local use consistent with optimal forest land use allocation.

Mineral Resources

1. COAL
   To increase income and job benefits from the coal resources and to meet Alberta's growing demands for coal for energy and other industrial requirements. To encourage the supply of coal and coal products to other parts of Canada and foreign countries after ensuring the long-term adequacy of supply for provincial needs.
2. OIL AND NATURAL GAS
   To create income and job benefits from oil and natural gas resources throughout the region.
3. QUARRIABLE AND METALLIC MINERALS
   To create income and job benefits from quarriable and metallic mineral resources.
4. AGGREGATE RESOURCES
   To make aggregate resources in the region available to meet present and future needs.

Rangeland

1. To maintain rangelands in good condition through sound range management practices.
2. To restore rangelands on which forage productivity has declined from the encroachment of unproductive brush species.
3. To improve rangeland capability through more intensive range management.

Agriculture

1. To ensure the continued viability of existing livestock operations by sustaining 1977 levels of livestock numbers through the use of public lands.
2. To provide for the cultivation of lands that are suitable for production of annual and/or forage crops.
3. To expand domestic livestock grazing opportunities on public lands in that part of the region north of the Trans-Canada Highway.

A prime protection area (Mountains west of Hinton)

REGIONAL LAND USE ZONES

The three broad areas of protection, management and development can be defined, on the land base of the region, as eight regional land use zones.

Broad Areas	Regional Zones
Protection	1. Prime Protection
	2. Critical Wildlife
Resource Management	3. Special Use
	4. General Recreation
	5. Multiple Use
	6. Agriculture
Development	7. Industrial
	8. Facility

Regional zoning identifies units of land for which intents and objectives are specified. While regional zoning recognizes opportunities and allocates resources at a broad regional scale, it does not allocate land to specific projects within a zone. Through the recognition of zone intents, the process provides general guidance in locating specific project proposals within the region and often resolves land use conflicts.

Integrated resource planning at more detailed levels will provide further guidance for the future. It will also be the means used to develop more specific objectives and subsequent zones. Through integrated resource planning regional objectives and zoning will be confirmed and/or changed in order to ensure the appropriate delivery of benefits to Albertans.

Regulations under existing legislation ensure a high standard of resource protection, management and development control. Regional zoning does not replace or impinge upon these, but rather gives positive direction for future management of the Eastern Slopes.

The key to successful implementation of the regional plan will be co-operative, integrated decision-making. Regional zone names do not imply that a particular department or agency maintains jurisdiction over a given zone. All resources, wherever they are found, will be administered according to principles of integrated resource management.

The eight regional land use zones are discussed in the following text and displayed on the three map sheets in the pocket of the back cover. Activities considered to be generally consistent with the intent of each zone are summarized in the Table of Compatible Activities (page 15). The activities and uses listed are only a representative group of those which may be consistent with any given zone intent. For some activities or land uses such as transportation and utility corridors, commercial and industrial developments and residential development, it is not always possible to identify where and when they might be required. Exceptions may be made for these activities.

In all zones, watershed protection will be of paramount concern along with essential fish and wildlife habitat. The Eastern Slopes also will provide different types of opportunities for scientific study within the intents of the zones.

1. Prime Protection Zone

The intent of the prime protection zone is to preserve environmentally sensitive terrain and valuable ecological and aesthetic resources.

It contains high-elevation forests and steep rocky slopes of the major mountain ranges in the Eastern Slopes. The lower boundary for this zone has been defined by elevation, ecological variables and aesthetic qualities. The boundary generally represents the lower extremities of the more sensitive terrain in the Eastern Slopes.

This zone is intended to protect the rugged mountain scenery for which the region is highly valued. It is the zone which receives the greatest amounts of precipitation and produces most of the streamflow of the Eastern Slopes. Many critical wildlife ranges, especially for bighorn sheep and mountain goats, are found within this zone.

Regional objectives which are considered compatible with the intent of this zone include those of watershed, fisheries and wildlife management, and extensive recreational activities such as hunting, trail use (non-motorized) and primitive camping. The objective for commercial fur harvesting will also be met to some degree. Future access or utility corridors may be required through this zone. Approved snowmobile trails may also cross this zone. Future commercial ski development may be considered in this zone, as it contains the only suitable snow and terrain conditions in the Eastern Slopes. In these cases, the ski lifts and associated facilities will be permitted in the prime protection zone, while accommodation and other services will be located in adjacent zones where such commercial development is appropriate.

Where considered essential and under strict operating guidelines, management programs may include activities such as wildlife habitat improvement, fire control, and timber sanitation cutting to protect merchantable timber in other zones.

2. Critical Wildlife Zone

The Eastern Slopes is a unique and important wildlife region due to the many combinations of climate, topography and vegetation which provide habitat for a wide variety of species.

The intent of the critical wildlife zone is to protect ranges or terrestrial and aquatic habitats that are crucial to the maintenance of specific fish and wildlife populations.

The zone consists of such areas as key winter range, migration routes and calving areas that are essential to the survival of specific wildlife species such as mountain goats, bighorn sheep, elk and caribou, and of spawning areas vital to maintaining naturally

Ensuring wintering area for wildlife (Bighorn sheep)

reproducing salmonid populations. The zoning recognizes only those habitat areas which are crucial to the life cycle of particular species due to vegetation, climate or topography. Regional objectives which are considered compatible with the intent of this zone include watershed, fisheries and wildlife management, serviced camping and extensive recreation activities such as hunting and fishing, trail use and primitive camping. Resource extraction objectives such as those of trapping, logging, domestic grazing, petroleum, natural gas, coal and mineral exploration and development may be achieved. Future roads or utility corridors may require access through this zone.

3. Special Use Zone

The intent of this zone is to recognize historic resources, lands set aside for scientific research and any lands which are required to meet unique management requirements, or legislative status, which cannot be accommodated within any of the other zones.

Examples include the Frank Slide and the abandoned mining community of Lille, the Marmot Creek Watershed Research Basin, the Cache Percotte Forest Reserve, the northern portion of Whaleback Ridge, Indian reserves and other federal Crown land.

Any regional objective may be achieved to a limited extent in special use zones which fall within provincial jurisdiction. Management guidelines will be defined according to the purpose and need on a site-specific basis.

4. General Recreation Zone

The intent of the general recreation zone is to retain a variety of natural environments within which a wide range of outdoor recreation opportunities may be provided. Most of the areas of the general recreation zones are associated with river valley corridors or lakes.

Regional objectives which are considered compatible with the intent of this zone include those of watershed management, fishing, hunting, trail use (non-motorized), use of off-highway vehicles on designated trails, all types of camping, and day-use recreation. Resource extraction objectives such as those of trapping, logging, domestic grazing, petroleum and natural gas exploration and development, and coal and mineral exploration and development may be achieved to a limited degree. Future roads or utility corridors may require access through this zone. Commercial development which serves the general public may occur. Management emphasis will be on maintaining the natural environment for recreation purposes, an example being to maintain or improve vistas or improve stream habitat to increase sport fishing opportunities.

Important recreational resources (Water and fisheries)

5. Multiple Use Zone

The intent of the multiple use zone is to provide for the management and development of the full range of available resources, while meeting the objectives for watershed management and environmental protection in the long term.

This zone contains broad areas of forested lands and comprises approximately 65 percent of the Eastern Slopes, exclusive of the national parks. A variety of natural resources — water, timber, oil, gas, coal, scenic areas, forage and fish and wildlife — is found in this zone. Much of the area is accessible and is experiencing growing pressures for private uses and resource development.

The multiple use zone produces an important portion of the water supply and associated fisheries from the Eastern Slopes by a dense network of stream courses. The zone contains coniferous and deciduous forests of varying age classes which have development potential and considerable economic value. A significant num-

ber of jobs and other benefits are provided by the forest industries in the region. These industries depend largely on this zone to provide a permanent land base for sustained production. The large area of forested land also provides the major habitats for wildlife. Those portions of the zone which are suitable are utilized for improved and unimproved summer grazing by domestic livestock.

The multiple use zone has been extensively explored and developed for petroleum and natural gas and contains a number of producing fields. Future energy needs will exert pressure for additional recovery of oil and gas reserves. Mineral and coal exploration and development continue at an increasing rate in this zone. Present and future recreation use of the zone will include all types of camping, trail use, hunting and fishing.

All regional objectives may be achieved to a greater or a lesser degree within the multiple use zone. As with all zones, decisions as to the primacy of use and allocation of land and resources will occur through the integrated resource planning or referral processes which operate within a framework of existing regulations.

Relatively small areas of land in the zone will be disturbed by resource development at any one time. Areas for off-highway vehicle use, such as snowmobiling, have been identified within this zone. Commercial and residential development may occur on a limited basis as required.

6. Agriculture Zone

The intent of the agriculture zone is to recognize those lands within the Eastern Slopes which are presently utilized or are considered suitable for cultivation and/or improved grazing.

Such lands are located along the eastern boundary of the region. Designation of lands to the zone was based on a combination of soil capability, existing land use patterns and land ownership. The zone includes a mixture of public leased lands and private lands. As the integrated resource planning proceeds, increased agricultural opportunities in new areas could be identified.

Some regional objectives may be achieved to a greater or lesser degree in this zone. As intensive agriculture now occurs on private lands, other land and resource uses will generally be governed by the owner in conformity with local land use orders and bylaws under the Planning Act of Alberta. The Eastern Slopes Policy has no jurisdiction over privately owned lands.

7. Industrial Zone

The intent of the industrial zone is to recognize existing or approved industrial operations, such as coal mines, gas processing plants, cement plants and large permanent forest product mills.

The size of each zone is limited to that which will reasonably support the specific development. The zones are essentially single use as the intensity of development generally precludes other activities. However, users of these zones are encouraged to develop compatible facilities for public use.

Because infrastructure and transportation facilities are a requirement of most major developments they are frequently adjacent to transportation and utility corridors and existing settlements.

8. Facility Zone

The intent of the facility zone is to recognize existing or potential settlement and commercial development areas. The zone must be able to accommodate future growth and additional areas will be zoned as required.

Settlement areas are primarily confined to existing major corridors, hamlets, villages or towns. Commercial areas not within the corridors include the existing and potential recreation service centre developments and visitor accommodations. Resource objectives which may be consistent with the intent of this zone include those of logging, oil and gas development, and most types of outdoor recreation.

Tourism and water management (Abraham Lake)

Skiing at Fortress Mountain

Domestic grazing (Livingstone area)

IMPLEMENTATION: Integrated Resource Planning, and Policies and Guidelines

1. Integrated Resource Planning

The regional plan for the Eastern Slopes is a guide for the future at the broad regional scale and does not permanently zone the areas. It is an intermediate step between the Eastern Slopes Policy and the integrated resource plans that will provide more detailed and comprehensive land use allocations and guidance. Secondly, the regional plan through the Table of Compatible Activities also provides interim guidance for resource managers who must make daily decisions on land and resource uses until the more detailed integrated resource plans are completed.

Both the integrated resource plans and site-specific decisions made using the Table of Compatible Activities conform generally to the regional plan and the Eastern Slopes Policy. It is recognized, however, that additional and more detailed information may support decisions that would be contrary to the initial direction. Requests for changes or adjustments of zones may originate during the detailed integrated resource planning projects or on a site-specific decision. The requests may come from resource management agencies, other government departments, industry or the general public.

During the integrated resource planning process, resource objectives for each area are tested for compatibility with the intent of that area as defined in the regional plan. If compatible, the planning process will describe how the objectives are to be achieved through management guidelines. If not, the request should be forwarded to a higher level of authority (ministerial) to test the requested decision with the intents of the Eastern Slopes Policy.

On a site-specific decision where there is not an integrated resource plan to provide direction, decisions are tested against the Table of Compatible Activities. If the Table indicates that the activity or land use is not permitted, a request for a zoning change can be made. This request is also tested against the intents of the regional plan and the Eastern Slopes Policy and can be accepted or rejected. The objectives and zoning for the regional plan will also be implemented through the following policies and guidelines.

As part of the implementation, detailed planning will identify designated vehicle access routes which may include routes in all zones.

2. Existing Land Use Commitments

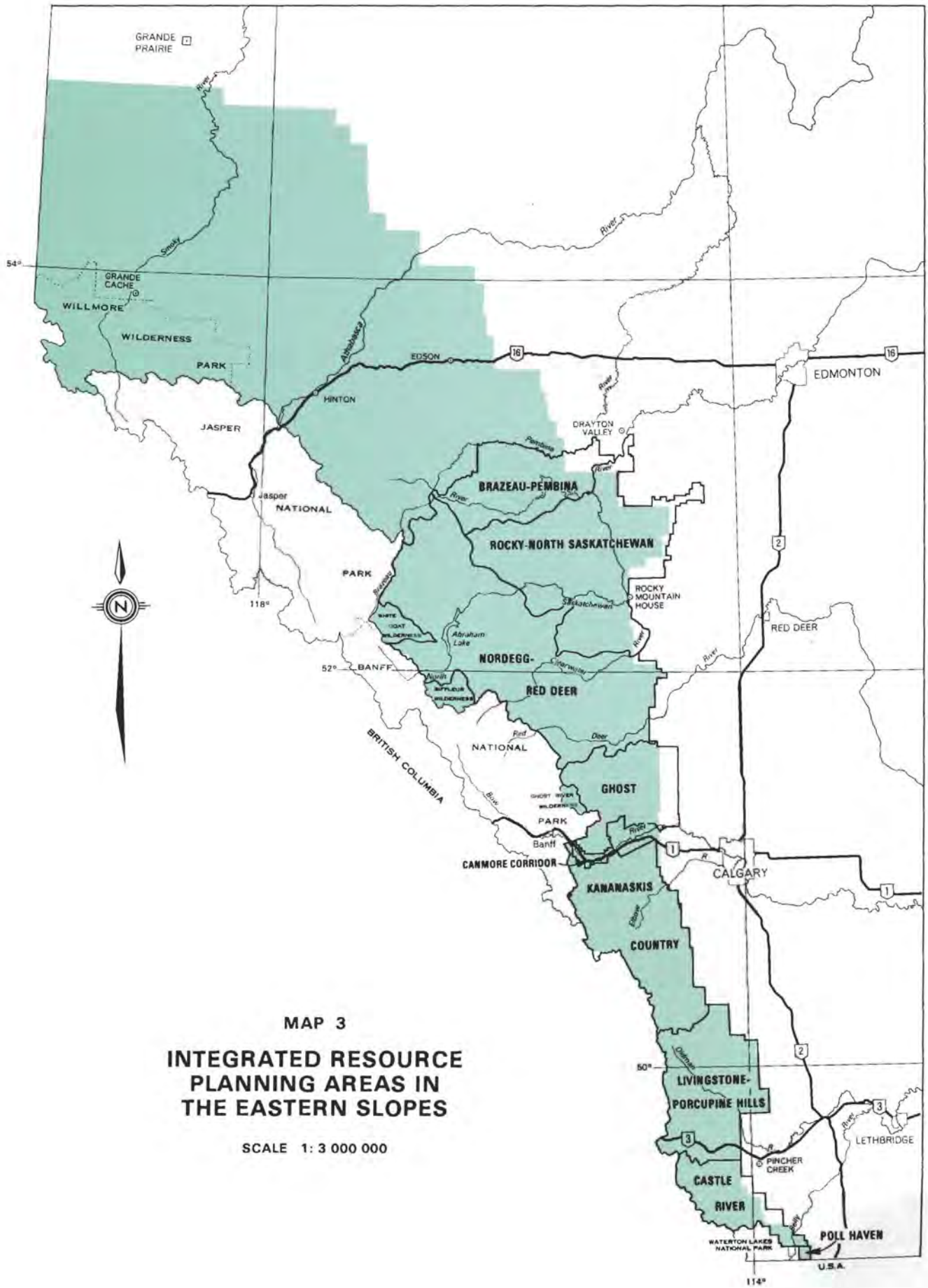
Existing land use activities and industrial operations will continue, subject to the regulatory systems now in effect.

3. Sale of Public Lands

Most of the public lands in the Eastern Slopes will be retained in public ownership for the use of all Albertans. The sale of parcels of public land for permanent and seasonal residential use may be considered. Parcels of public land may also be sold for site and capital-intensive development where site-specific conditions are met.

4. Service Centres

Service centre development will generally be directed to defined nodes associated with transportation corridors.



MAP 3

INTEGRATED RESOURCE PLANNING AREAS IN THE EASTERN SLOPES

SCALE 1: 3 000 000

TABLE OF COMPATIBLE ACTIVITIES BY LAND USE ZONE

ZONE / ACTIVITY	1 PRIME PROTECTION	2 CRITICAL WILDLIFE	3 SPECIAL USE	4 GENERAL RECREATION	5 MULTIPLE USE	6 AGRICULTURE	7 INDUSTRIAL	8 FACILITY
Non-motorized recreation	■	■	□	■	■	■	□	■
Fishing	■	■	□	■	■	■	□	■
Hunting	■	■	□	□	■	■	□	
Scientific study	■	□	□	□	■	■	■	■
Trapping	■	□	□	□	■	■		
Trails, non-motorized	□	□	□	■	■	■	□	■
Transportation & utility corridors	□	□	□	□	■	■	■	■
Primitive camping	□	□	□	■	■	■		
Intensive recreation	□		□	■	■	□	□	■
Off-highway vehicle activity		□	□	□	■	■	■	■
Logging		□	□	□	■	■	■	□
Domestic grazing		□	□	□	■	■		□
Petroleum and natural gas exploration & development		□	□	□	■	■	■	□
Coal exploration & development		□	□	□	■	■	■	
Mineral exploration & development		□	□	□	■	■	■	
Serviced camping		□	□	■	■	□	□	■
Commercial development			□	□	□	□	□	■
Industrial development			□		■	□	■	□
Residential subdivisions			□	□	□	■	□	■
Cultivation			□		□	■	□	□

■ Compatible Use — Uses that are considered to be compatible with the intent of a land use zone under normal guidelines and land use regulations.

□ Permitted Use — Uses that may be compatible with the intent of a land use zone under certain circumstances and under special conditions and controls where necessary.

Not Permitted Use — Uses that are not compatible with the intent or capabilities of a land use zone.

These activities are only representative of the range of activities that occur in the Eastern Slopes. For these and any other activities, the possibility of whether they should or should not take place in a particular area must always be measured against the fundamental management intentions for that zone. Since economic opportunities are not all known in advance, site-specific developments may be considered in any zone.

As integrated resource plans are completed and approved, this table and the regional zoning maps will no longer apply.

For information concerning the guidelines, regulations, conditions and procedures, contact the Current Planning Section, Resource Planning Branch, Alberta Energy and Natural Resources, Edmonton, Alberta. (Telephone: (403) 427-3608).

5. Surface Developments

Dispositions for facility and ancillary uses will be by lease or sale in accordance with established policies under the Public Lands Act.

6. Recreational Townhouse Units

Private development of recreational townhouse units will be allowed on a controlled basis in appropriate zones. All necessary services, such as sewage, water, garbage disposal and fire protection, will normally be provided by the owner or the municipal authority. Permanent residency will not be permitted without the approval of the local development authorities.

7. Recreational Cottages

Cottage development for seasonal recreation use will be considered. Such sites will be developed and managed on a carefully controlled basis.

8. Improved Grazing

Various programs may be carried out in order to improve domestic grazing on rangeland including that within forested areas. Methods may include mechanical clearing of aspen and brush, chemical brush control, fertilization, fencing and the provision of dugouts.

9. Public Access to Public Lands

All public land in the province is available for public use unless specifically restricted by regulation or disposition.

Access to public lands that are held under Grazing Lease or Grazing Permit is presently restricted by common law. The government encourages the disposition holder and the general public to co-operate in the use of these lands where outdoor recreation activities are involved. Forest Grazing Licences, Head Tax Permits and Forest Reserve Grazing Permits do not convey any interest in land and therefore, permission to gain access is not needed.

Except when vehicular access could cause damage to the road, holders of Licences of Occupation for roadways must allow non-commercial users access over such roads. Holders of Licences of Occupation for roadways can request the Minister to restrict vehicular access when conditions are such that vehicular traffic will damage the road.

Access to timber dispositions is available to the public as no interest in the land is conveyed with these types of dispositions.

10. Petroleum and Natural Gas Exploration and Development

"Step-out" drilling may be permitted in Zone 1 so that an oil or gas field can be (would be) developed to the point of recovering the reserves in place. Geophysical activity may be permitted in Zone 1 on a very limited scale and under stringent operating conditions where localized geophysical activity is required to determine a "step-out" location.

New petroleum and natural gas dispositions will also be considered in Zone 1 for lands for which drilling prior to July 1977 has identified the existence of petroleum or natural gas. Where this existence was not identified, dispositions in Zone 1 near zones where petroleum and natural gas exploration and development is a permitted use may be granted with restrictions of surface activity for all lands which fall within Zone 1. Such a restriction will be identified in an addendum to the sales notice.

Applications for mineral surface leases will continue to be handled using the referral system currently in place and applications may be approved in Zone 1 where adequate environmental protection can be ensured.

Conclusion

The policy continues to provide broad direction for resource protection, management and development. This direction has led to the regional plan and its major parts — resource objectives and regional zoning. The policy also provides the direction for more detailed planning and resource management, to provide the various benefits the Eastern Slopes has to offer Albertans.

The policy is not the final plan or end product in integrated resource planning for the Eastern Slopes. It is not a prescription of land use that is unreceptive to new information and changing conditions; rather than the document that constrains resource management, it is the positive response leading to better resource management in this special region — the Eastern Slopes.

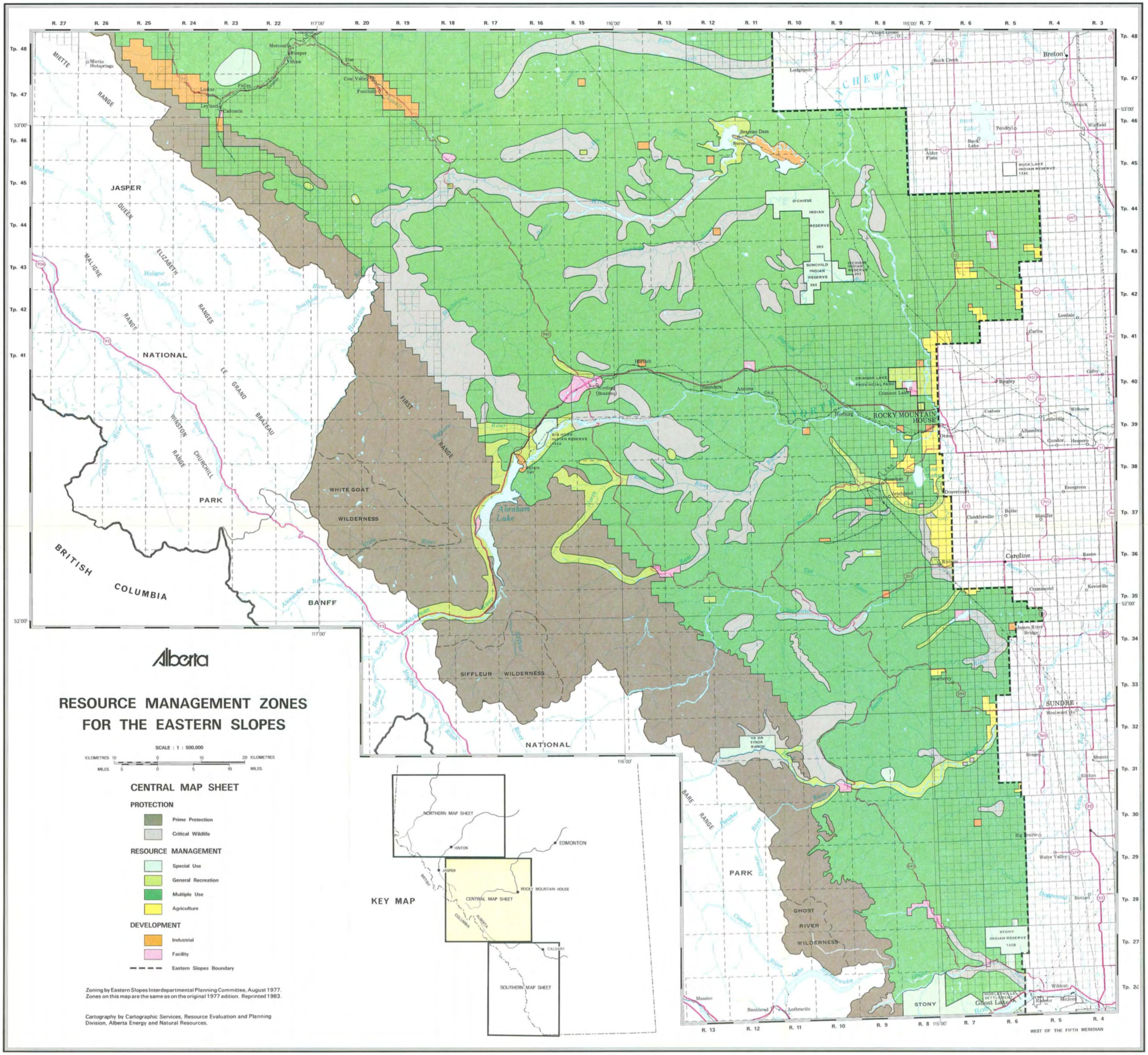
With a program in place for implementing the Eastern Slopes Policy through integrated resource planning, the monitoring of changing public needs and the incorporation of new information will serve to identify the need for future reviews of the policy. Determination of the timing and extent of future reviews will remain the responsibility of the Associate Minister of Public Lands and Wildlife.

Major or significant changes to the policy will continue to require approval by the provincial Cabinet.

Glossary

Camping	The following levels of camping can be provided by either the private or public sectors.
☐ Auto Access	A formally designated camping facility that is accessible to normal vehicles from designated highways or improved roads.
☐ Group	The same as auto access camping but designed and managed to meet the needs of recognized groups.
☐ Primitive	An undesignated camping area accessible only by non-motorized means.
☐ Random	An undesignated area used for camping that is accessible by any means.
☐ Remote	A formally designated camping facility that is accessible by off-highway vehicles, helicopters or by non-motorized means.
☐ Serviced	A major designated camping facility that is directly accessible by designated road or improved road and that provides significant services such as electricity and pressurized water systems.
Coal Exploration and Development	All activities and infrastructure development associated with the exploration, development and production of coal.
Commercial Development	All activities and infrastructure associated with the development of facilities for the use of the general public, including fixed-roof recreation accommodation such as hunting, fishing, skiing and backcountry lodges, hotels, motels, apartments, townhouses, cottages and commercial recreation activities involving facilities such as ski hills and golf courses, whether owned and/or operated by the private or public sectors.
Cultivation	Agricultural practices associated with the regular tillage of land for the production of annual and/or forage crops.
Disposition	A lease, licence, permit or letter of authority issued under provincial legislation for activities either surface or sub-surface.
Domestic Grazing	All activities associated with the production and utilization of forage for domestic livestock.
Fishing	The removal of fish species under a licence for any purpose including commercial, recreational or domestic use and for management purposes.
Forage	All browse and non-woody plants that are available to livestock or game animals and used for grazing or harvested for feeding.
Goal	An end to be striven for but not necessarily achievable.
Hunting	The stalking of any wild animal for recreational and management purposes or as a source of food.
Industrial Development	All activities and infrastructure associated with the development of an industrial base to accommodate the extraction, removal and processing of resources.
Integrated Resource Management	A co-operative and comprehensive approach to the establishment of plans and to the delivery of benefits from the resource base in an efficient and effective manner.

Integrated Resource Planning	A co-operative and comprehensive approach to decision making on resource uses.
Logging	All activities associated with the removal and transport of timber for manufacture into forest products.
Mineral Exploration and Development	All activities and infrastructure associated with the exploration, development and production of industrial minerals.
Objective	A clear and specific statement of planned results to be achieved.
Off-Highway Vehicle (OHV) Activity	Any activity using motorized transportation to traverse any area not designated as a highway or improved road.
Petroleum and Natural Gas Exploration and Development	All activities and infrastructure associated with the exploration, development and production of petroleum and natural gas resources.
Public Lands	Lands of the Crown in right of Alberta.
Rangeland	Land used for grazing by domestic livestock and wildlife including natural grasslands, savannas, shrublands, alpine communities and wet meadows. The term has also come to include forest lands with an understorey or periodic cover of herbaceous or shrubby vegetation. Seeded lands which are managed under ecological principles rather than agronomic principles are properly termed range.
Recreation	The followings levels of recreation can be provided by either the public or private sectors.
☐ Dispersed	Various kinds of recreation activities that generally occur throughout a large area and are not confined to a specific place. Activities that would be associated with dispersed recreation include hiking, remote or primitive camping, hunting, fishing, horseback riding and cross-country skiing.
☐ Extensive	Low-density, dispersed recreational use that does not require sustained recreation management to maintain the recreation opportunities.
☐ Intensive	High-density recreational use such as developed camp and picnic grounds, swimming beaches, ski hills, sky trams, golf courses and other sites or areas requiring continuous recreation management and services to maintain the recreation opportunities.
☐ Non-Motorized	All recreational activities that do not involve or require the use of motorized equipment.
Residential Subdivisions	All activities and infrastructure associated with permanent-housing subdivisions for residents.
Resource	Any part of the natural environment which society perceives having value.
Resource Management	The planned and wise use of a particular natural resource to achieve a specific end.
Restricted Activity	An activity which will not be permitted until such time as more strict than normal conditions are defined through integrated decision-making processes such as integrated resource planning and referrals.
Sanitation Cutting	The removal of dead, diseased, infested, damaged, or susceptible trees, essentially to prevent the spread of pests or pathogens and so promote forest hygiene.


Alberta
RESOURCE MANAGEMENT ZONES
FOR THE EASTERN SLOPES
SCALE : 1 : 500,000
KILOMETRES 10 0 10 20 KILOMETRES
MILES 5 0 5 10 MILES
CENTRAL MAP SHEET
PROTECTION
Prime Protection
Critical Wildlife
RESOURCE MANAGEMENT
Special Use
General Recreation
Multiple Use
Agriculture
DEVELOPMENT
Industrial
Facility
Eastern Slopes Boundary
Zoning by Eastern Slopes Interdepartmental Planning Committee, August 1977.
Zones on this map are the same as on the original 1977 edition. Reprinted 1983.
Cartography by Cartographic Services, Resource Evaluation and Planning Division, Alberta Energy and Natural Resources.
KEY MAP
NORTHERN MAP SHEET
CENTRAL MAP SHEET
SOUTHERN MAP SHEET
HINTON
EDMONTON
JASPER
ROCKY MOUNTAIN HOUSE
CALGARY
JASPER
NATIONAL
PARK
BANFF
NATIONAL
PARK
BRITISH
COLUMBIA
WHITE GOAT
WILDERNESS
SIFFLEUR WILDERNESS
GHOST
RIVER
WILDERNESS
Abraham Lake
ROCKY MOUNTAIN HOUSE
SUNDRE
Caroline
Breton
STONY
WEST OF THE FIFTH MERIDIAN

RESOURCE MANAGEMENT ZONES FOR THE EASTERN SLOPES

SCALE : 1 : 500,000

KILOMETRES 10 0 10 20 KILOMETRES
MILES 5 0 5 10 MILES

SOUTHERN MAP SHEET

PROTECTION

- Prime Protection
- Critical Wildlife

RESOURCE MANAGEMENT

- Special Use
- General Recreation
- Multiple Use
- Agriculture

DEVELOPMENT

- Industrial
- Facility
- Eastern Slopes Boundary
- Municipality of Crowsnest Pass

Zoning by Eastern Slopes Interdepartmental Planning Committee, August 1977.
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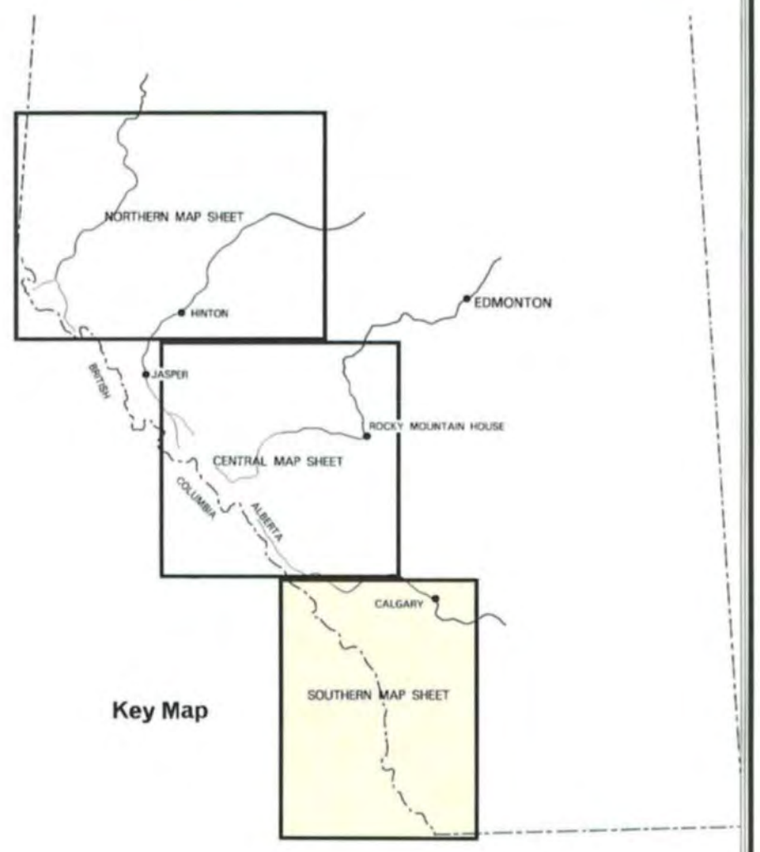

Alberta

RESOURCE MANAGEMENT ZONES FOR THE EASTERN SLOPES

SCALE : 1 : 500,000

KILOMETRES 10 0 10 20 KILOMETRES
MILES 5 0 5 10 MILES

NORTHERN MAP SHEET

PROTECTION
- Prime Protection
- Critical Wildlife

RESOURCE MANAGEMENT
- Special Use
- General Recreation
- Multiple Use
- Agriculture

DEVELOPMENT
- Industrial
- Facility
- Eastern Slopes Boundary

Zoning by Eastern Slopes Interdepartmental Planning Committee, August 1977. Zones on this map are the same as on the original 1977 edition. Reprinted 1983.

Cartography by Cartographic Services, Resource Evaluation and Planning Division, Alberta Energy and Natural Resources.

Key Map

EXHIBIT B – LAND USE FRAMEWORK

This is exhibit B referred to in the affidavit of

Neil Keown sworn before me on December 14, 2020.

Michael M. Wenig

A Notary Public in and for the Province of Alberta
Michael M. Wenig
Law Society of Alberta, Member # 11362

Land-use Framework

Alberta

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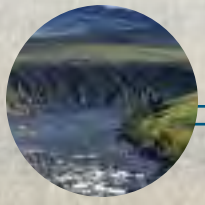


Executive Summary

Whaleback, Southern Alberta

Alberta's prosperity has created opportunities for our economy and people, but it also has created challenges for Alberta's landscapes. Industrial activity, municipal development, infrastructure, recreation and conservation interests often are competing to use the same piece of land. There are more and more people doing more and more activities on the same piece of land. The competition between user groups creates conflict, and often puts stress on the finite capacity of our land, air, water and habitat.

What worked for us when our population was only one or two million will not get the job done with four, and soon five million. We have reached a tipping point, where sticking with the old rules will not produce the quality of life we have come to expect. If we want our children to enjoy the same quality of life that current generations have, we need a new land-use system.

The purpose of the Land-use Framework is to manage growth, not stop it, and to sustain our growing economy, but balance this with Albertans' social and environmental goals. This is what the Land-use Framework is about—smart growth.

Our consultations with Albertans indicate widespread support for greater provincial leadership on land-use issues. This does not mean creating a heavy-handed, centralized bureaucracy in Edmonton. It does mean that the Alberta government must provide the kind of policy direction and guidelines, and opportunities that the local levels of government cannot. The Land-use Framework will leave local decision-making authority with the same officials who currently exercise it. However, in the future, these decisions will have to be consistent with regional plans. Accordingly, the Land-use Framework consists of seven basic strategies to improve land-use decision-making in Alberta.

Strategy 1

Develop seven regional land-use plans based on seven new land-use regions.

Alberta does not currently have formalized regional-level planning. Nor is there any formalized co-ordination between Government of Alberta land-use decisions on Crown lands and municipal land-use decisions. To remedy this, the government will create seven new land-use regions and develop a regional plan for each. The regional plans will integrate provincial policies at the regional level; set out regional land-use objectives and provide the context for land-use decision-making within the region; and reflect the uniqueness and priorities of each region. Municipalities, other local authorities and provincial government departments will be required to comply with each regional plan.

Strategy 2

Create a Land-use Secretariat and establish a Regional Advisory Council for each region.

Strong provincial leadership will be critical to the success of land-use planning and resource management. Establishing a formal governance structure for implementing the Land-use Framework will be necessary. To meet this need, the Land-use Framework creates a Land-use Secretariat to support implementation of the framework. The Secretariat will develop regional plans in conjunction with government departments and Regional Advisory Councils. Final decision on regional plans rests with Cabinet.

Strategy 3

Cumulative effects management will be used at the regional level to manage the impacts of development on land, water and air.

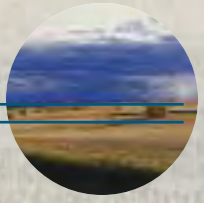
Our watersheds, airsheds and landscapes have a finite carrying capacity. Alberta's system for assessing the environmental impacts of new developments has usually been done on a project-by-project basis. This approach worked at lower levels of development activity. However, it did not address the combined or cumulative effects of multiple developments taking place over time.

A cumulative effects management approach will be used in regional plans to manage the combined impacts of existing and new activities within the region.

Strategy 4

Develop a strategy for conservation and stewardship on private and public lands.

Clean water and air, healthy habitat and riparian areas, abundant wild species and fisheries are all "public goods" that Albertans enjoy and value. The costs of supplying these goods on private lands are left largely on the shoulders—and pocketbooks—of our ranchers and farmers. Public lands that are managed for a variety of purposes also supply these goods. If Albertans value these landscapes and the benefits they provide to all of us, we have to find new ways to share the costs of conserving them. To do this, the Government of Alberta will develop new policy instruments to encourage stewardship and conservation on private and public lands.



Strategy 5

Promote efficient use of land to reduce the footprint of human activities on Alberta's landscape.

Land is a limited, non-renewable resource and so should not be wasted. Land-use decisions should strive to reduce the human footprint on Alberta's landscape. When it comes to land use, other things being equal, less is more—more choices for future generations. This principle should guide all areas of land-use decision-making: urban and rural residential development, transportation and utility corridors, new areas zoned for industrial development, and agriculture.

Strategy 6

Establish an information, monitoring and knowledge system to contribute to continuous improvement of land-use planning and decision-making.

Good land-use decisions require accurate, timely and accessible information. A sound monitoring, evaluation and reporting system is needed to ensure the outcomes of the Land-use Framework are achieved. The Government of Alberta will collect the required information to support land-use planning and decision-making, and create an integrated information system to ensure decision-makers have access to relevant information. The system will include regular monitoring, evaluation and reporting on the overall state of the land, and progress toward achieving provincial and regional land-use outcomes. A key component of this system will be the province's Biodiversity Monitoring Program.

Strategy 7

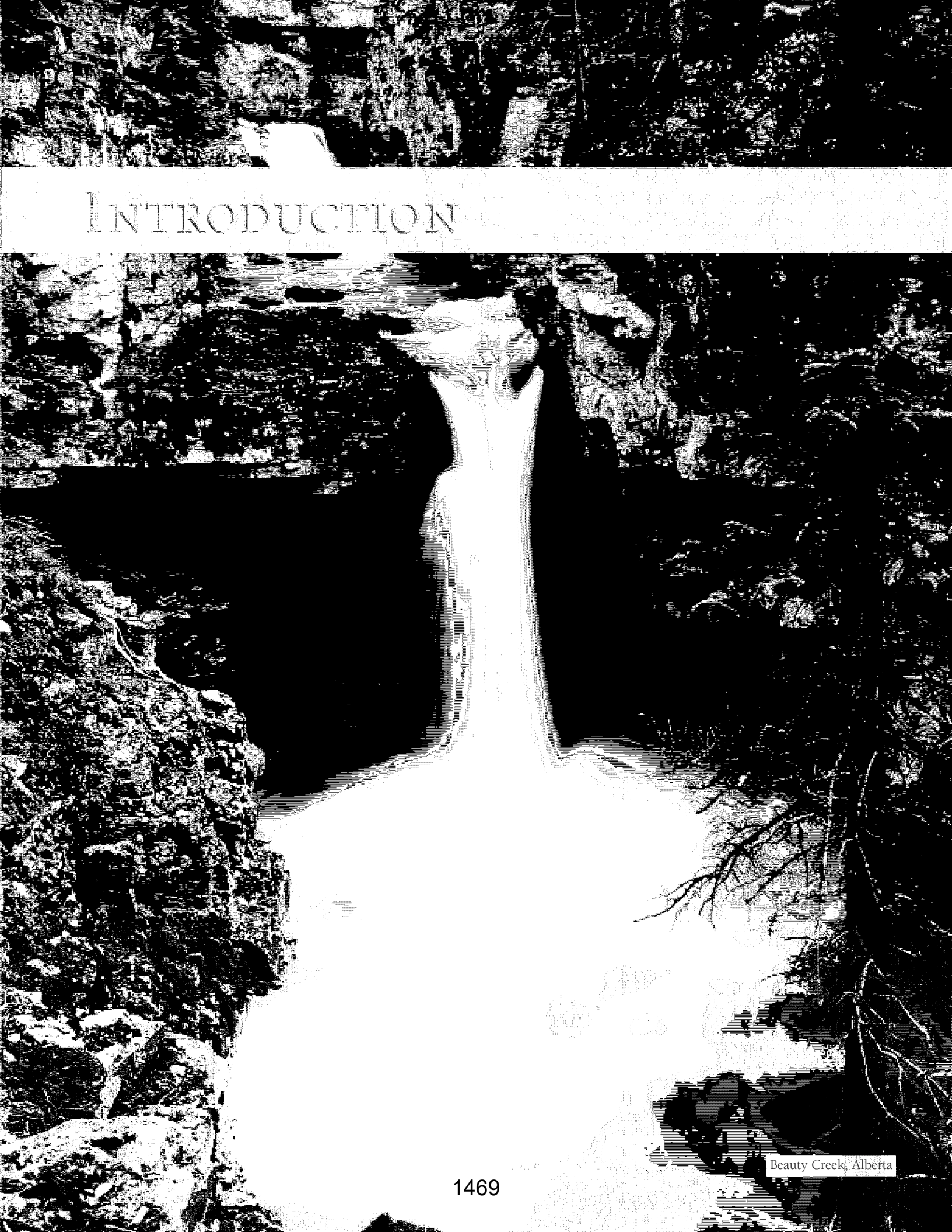
Inclusion of aboriginal peoples in land-use planning.

The provincial government will strive for a meaningful balance that respects the constitutionally protected rights of aboriginal communities and the interests of all Albertans. The Government of Alberta will continue to meet Alberta's legal duty to consult aboriginal communities whose constitutionally protected rights, under section 35 of the *Constitution Act, 1982 (Canada)*, are potentially adversely impacted by development. Aboriginal peoples will be encouraged to participate in the development of land-use plans.

Priority actions for the Land-use Framework.

There are five immediate priorities that the provincial government will support and implement on a priority basis. These are: legislation to support the framework, metropolitan plans for the Capital and Calgary regions, the Lower Athabasca Regional Plan, and the South Saskatchewan Regional Plan. In addition, a number of policy gaps and areas of provincial interest will be addressed by the provincial government in the short-term.

Introduction



Beauty Creek, Alberta

A. Why we need a Land-use Framework

Albertans have a special relationship with the land. Our prairies and parklands, our forests and foothills, the Northern Boreal and the majestic Rockies—each shape our communities and lives in unique and powerful ways. Our province is big, beautiful and bountiful, and we are grateful for the opportunities it has given us.

Over the past 10 years, the province has enjoyed record prosperity. But this prosperity has brought new challenges and responsibilities. Today's rapid growth in population and economic activity is placing unprecedented pressure on Alberta's landscapes. Oil and gas, forestry and mining, agriculture and recreation, housing and infrastructure are all in competition to use the land—often the same parcel of land. There are more and more people doing more and more activities on the same piece of land. This increases the number of conflicts between competing user groups and often stresses the land itself. Our land, air and water are not unlimited. They can be exhausted or degraded by overuse.

We need to ensure this land—and all the activities it sustains—is managed responsibly for those who come after us. This means developing and implementing a land-use system that will effectively balance competing economic, environmental and social demands. Our current land management system, which served us well historically, risks being overwhelmed by the scope and pace of activity.

What worked for us when our population was only one or two million will not get the job done with four, and soon five million. We have reached a tipping point, where sticking with the old rules will not produce the quality of life we have come to expect. If we want our children to enjoy the same quality of life that current generations have, we need a new plan.

The purpose of the Land-use Framework is to manage growth, not stop it. The Government of Alberta rejects the simplistic view that to save the environment, we must stop development. The best environmental regimes in the world are found in the wealthiest countries. And this is not by accident. Protecting the environment costs money—lots of money when an economy is resource-based such as ours. The goal of the Land-use Framework is to sustain our growing economy, but balance this with Albertans' social and environmental goals. This is what the Land-use Framework is about—smart growth.

B. What is a Land-use Framework?

It may appear that the Land-use Framework is something new. It is not. In the first hundred years of our province's history, far-sighted leaders such as Ernest Manning and Peter Lougheed responded to our growing population and economy by putting in place new land-use guidelines.

In 1948, Premier Manning responded to the growth spurt stimulated by the great Leduc oil discovery by dividing the province into two areas. Public lands in the Green Area were to be managed primarily for forest production, watershed protection, fish and wildlife management, and recreation. Permanent settlement was excluded, except on legally subdivided lands, as were agricultural uses other than grazing. The White Area was designated for settlement, including agriculture. Premier Manning's initiative was an early and enlightened form of land-use planning.

A more recent example is the *Policy for Resource Management of the Eastern Slopes*, introduced by Premier Lougheed in 1977, during the last period of rapid growth in the province. The Eastern Slopes Policy identified watershed integrity as the highest priority use for this region of the province, followed by public recreation and tourism. It stated that the management of renewable resources would be the priority, but that non-renewable resource development—primarily oil and gas—would be encouraged in areas where it was compatible. The policy also mandated detailed subregional and local integrated resource management plans (IRPs) for its subregions. These IRPs included multiple objectives—timber, minerals and agriculture in addition to watershed, wildlife, fisheries, and recreation—but noted that "not all objectives will necessarily be achieved in all areas."

The Land-use Framework thus represents continuity with past policy, not a break. There are precedents in which far-sighted leaders responded to our growing population and economy with new land-use guidelines.

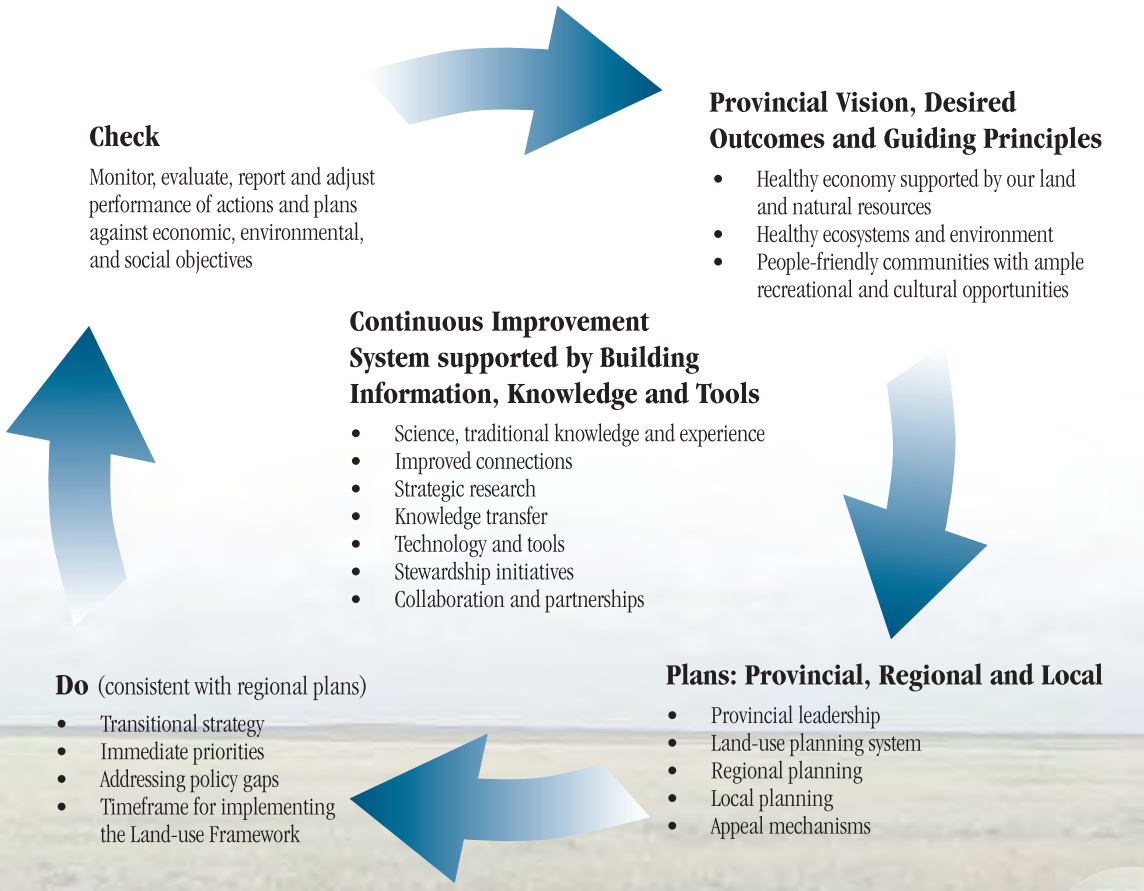
The Land-use Framework sets out an approach to manage public and private lands and natural resources to achieve Alberta's long-term economic, environmental and social goals. It provides a blueprint for land-use management and decision-making that addresses Alberta's growth pressures.

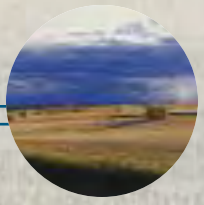
It complements the province's water and air policies—*Water for Life* (2003), the *Clean Air Strategy for Alberta* (1991) both of which have been updated, and *Alberta's 2008 Climate Change Strategy*. What uses are permitted on land—or more precisely, how they are done—clearly impact adjacent watersheds and airsheds.

It is just as important to recognize how land use is different from air and water policies. It is relatively easy to reach broad consensus on the appropriate standards for air and water; minimum standards must ensure that people, wildlife or plants are not harmed.

The scope of a Land-use Framework is not so easily defined. Is it about extending water and sewers from towns into adjacent rural communities? Or the proximity of feedlots to populated areas? Or addressing cumulative effects of development on the quality of our air, land and water on a region-by-region basis? Suffice to say, it is a more difficult topic to contain than air and water, and the implementation of the Land-use Framework will entail ongoing public discussion.

The diagram below shows the components of the systems approach, including outcomes-setting, planning, monitoring and improvement of land-use management and decision-making.





C. Consulting with Albertans

Land-use decisions affect all of us. The ideas and opinions of Albertans have played a vital role in developing the framework.

- **May 2006 to December 2006** — Input and advice was gathered from a broad spectrum of stakeholders (landowners; municipal leaders and planners; agricultural, forestry, transportation and energy associations; conservation and environmental groups; recreational groups; and academics) and members of First Nations, the Métis Settlement General Council and the Métis Nation of Alberta.
- **May 2007** — Seventeen provincewide public consultation sessions were held in 15 locations. Albertans provided their views on the future of land use in the province through a workbook questionnaire.
- **June 2007 to October 2007** — Four working groups of stakeholders developed strategies and actions for the government to consider in the following four primary policy areas: (1) growth and resource management, (2) planning and decision-making, (3) conservation and stewardship, and (4) monitoring and evaluation.
- **September 2007 to December 2007** — The Alberta government sought input from First Nations and Métis community organizations. They provided their views on the future of land use in the province in conjunction with their concerns on upholding their traditional and cultural values.
- **May 2008 to October 2008** — Four stakeholder working groups reviewed the Draft Land-use Framework released by the Government of Alberta on May 21, 2008. The government sought input from First Nations and Métis organizations on the draft framework. Public input was also received via a survey of Albertans.

Through these consultations, Albertans told us that they want the following improvements:

Provincial leadership to provide clear direction and parameters for regional, local and landowner decisions.

Integration and co-ordination of provincial policies governing air, water and land.

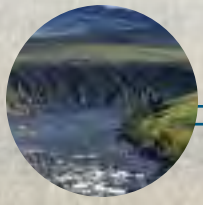
Clearer definitions of roles and responsibilities for land-use decisions at the provincial, regional and local levels.

Improved processes to deal with conflicts between land users, including surface and subsurface rights holders.

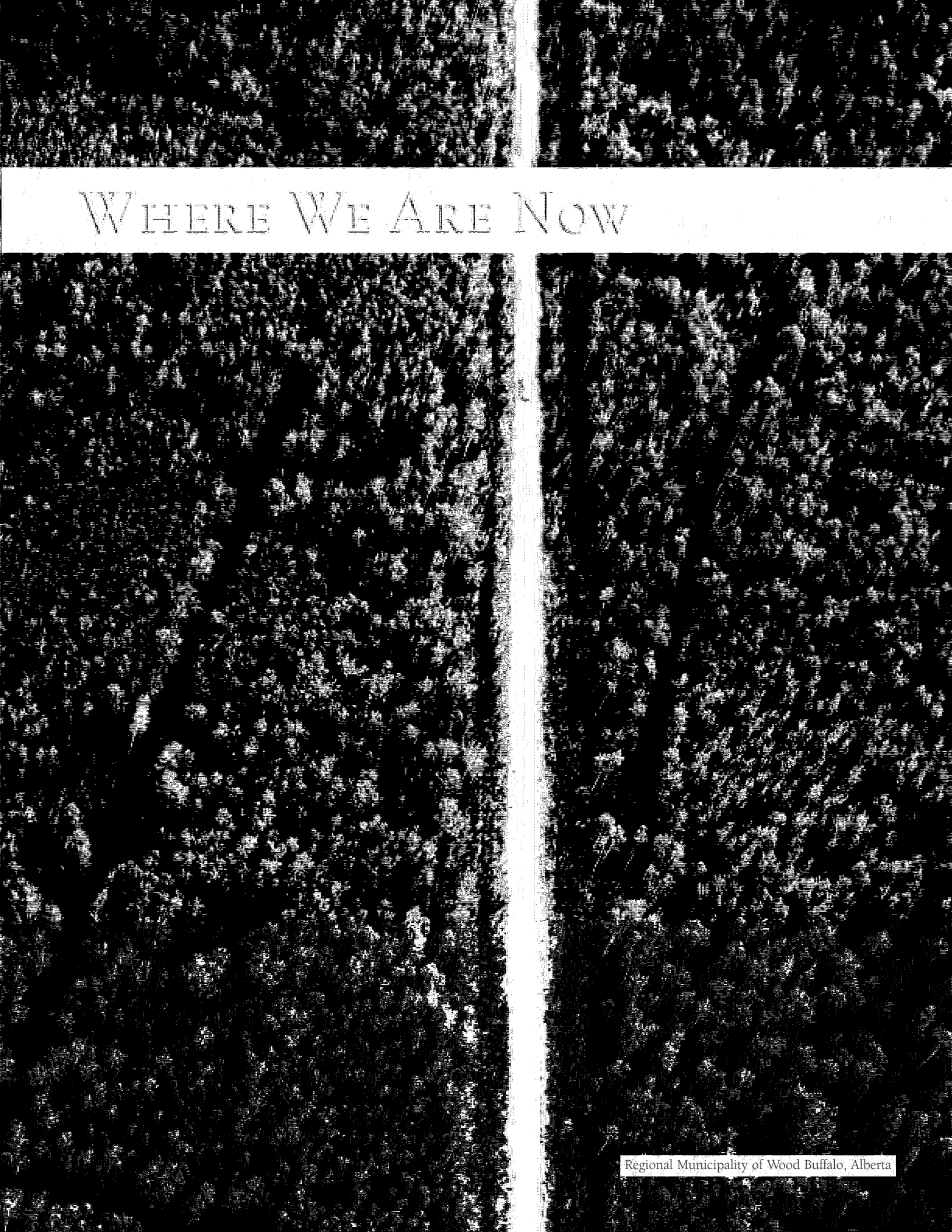
Enhanced conservation and stewardship on both private and public lands to promote ecological sustainability.

Improved information sharing about the condition of the land and the effects of activities on the land.

Increased consultation with First Nations and Métis communities, stakeholders and the public to ensure a fair opportunity to influence new policies and decisions.

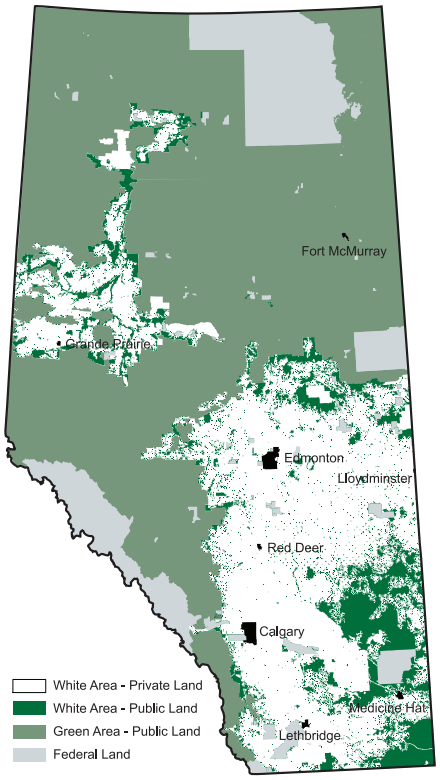


Where We Are Now



Regional Municipality of Wood Buffalo, Alberta

A. How land-use decisions are made today



Land-use decision-making in Alberta today is shaped by the government's 1948 decision to divide the province into the White and Green Areas.

1. White and Green Areas of Alberta

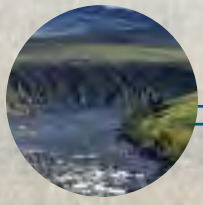
The White Area covers about 39 per cent of the province. It is largely comprised of land owned by individuals and groups (homeowners, farmers, companies, organizations, etc.). Generally, ownership rights are limited to the land surface and do not include subsurface non-renewable natural resources. While private landowners can make decisions about how to use and manage their land, they must follow laws, bylaws and regulations set out by municipal and provincial governments.

Note 1: There are approximately 1,330 quarter sections—and scattered small pockets—of private land within the Green Area public lands.

Note 2: The eight Métis settlements cover 1.23 million acres.

White and Green Areas of Alberta

White Area	Green Area
• **Settled** lands	• **Forested** lands
• Covers about **39 per cent of Alberta**	• Covers about **61 per cent of Alberta**
• Three-quarters **privately owned** – by more than 1.7 million individual title holders (50,000 own or use most of the land for agriculture)	• Nearly all **publicly owned**
• Primarily in the **populated central, southern and Peace River areas**	• Primarily in **northern Alberta**, some in the **mountains and foothills**
• Main land uses: **settlements, agriculture, oil and gas development, tourism and recreation, conservation of natural spaces, and fish and wildlife habitat**	• Main land uses: **timber production, oil and gas development, tourism and recreation, conservation of natural spaces, watershed protection, and fish and wildlife habitat**
• Authority to set regulations and make decisions is primarily with **municipal governments on private land and with the provincial government on public land**	• Authority to set regulations and make decisions is primarily with the **provincial government**



The Green Area covers about 61 per cent of the province, mainly in the north and along the Eastern Slopes. It is largely owned by the provincial Crown and is referred to as public lands. It is set aside primarily for renewable and non-renewable resource development, limited grazing, conservation, and recreational use. The provincial government has the mandate to manage how public land is used.

The federal government controls about 10 per cent of the total land base in the White and Green areas. This federal land is primarily comprised of national parks, Indian Reserves and military bases and installations. Alberta's land-use planning and decision-making authority does not ordinarily apply to federal land.

In 1938, Alberta set aside land for Métis use. In July 1989, the Government of Alberta and the Federation of Métis Settlement Associations signed the (Alberta) Métis Settlements Accord which provided the political foundation for the eventual transfer of land (1.23 million acres) to Métis settlements and provided for a co-management agreement for the management of subsurface resources under the settlement lands.

2. Responsibilities for land use

The Government of Alberta has a number of province-wide policy responsibilities across several departments and boards that set rules for land use.

Aboriginal Relations works with First Nations and Métis people to strengthen their participation in the economy, develop organizational and community capacity, and ensure their constitutional rights are respected. The ministry also advises and works with other ministries, industry and the federal government on policies and initiatives that affect aboriginal people.

Agriculture and Rural Development advises and works directly with other provincial ministries, municipal government, landowners, and industry organizations to sustain and expand the agriculture industry through policies, legislation and strategies. As such, the ministry has responsibility for legislation that affects agricultural land use on more than 52 million acres of land in the province.

Culture and Community Spirit is responsible for the protection of Alberta's historic places. The ministry regulates developments on Alberta's public and private lands by protecting designated historic places, archaeological and palaeontological sites, aboriginal heritage traditional use sites, and historic buildings. Conservation and stewardship incentives include grant programs and municipal partnerships.

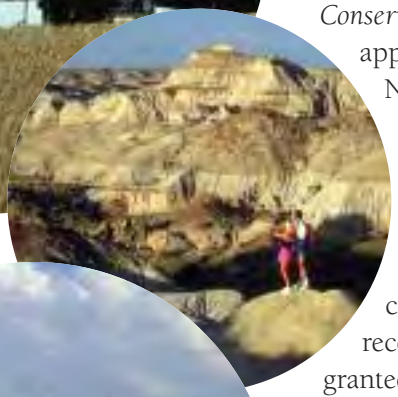
Energy manages the development of provincially owned energy and mineral resources through the sale of oil, gas and mineral rights. The ministry is also responsible for the assessment and collection of non-renewable resource revenues in the form of royalties, and freehold mineral taxes. Resources managed by the ministry include natural gas, conventional oil, oil sands, petrochemicals, electricity, coal and minerals, and renewable energy (wind, bio-energy, solar, hydro, geothermal, etc.).

Environment oversees policies and initiatives associated with air quality, water management, waste management, land use and climate change. The ministry manages the provincial environmental review process and co-ordinates public education on conservation and environmental protection. In addition, the ministry is responsible for environmental monitoring and compliance programs to enforce Alberta's environmental legislation and regulations.

Municipal Affairs provides authority and advisory services to municipalities for municipal planning, and subdivision and development control. Under the *Municipal Government Act*, municipalities may adopt plans and land-use bylaws and make planning decisions to achieve the most beneficial use of land within municipal boundaries.

Sustainable Resource Development manages the use of Alberta's public land, manages and protects Alberta's forest resource (wildfire, forest industry and forest health); and manages Alberta's fish and wildlife resources.

Tourism, Parks and Recreation has a range of responsibilities on Alberta's lands, which include managing Alberta's network of provincial parks and tourism industry development.



Energy Resources Conservation Board (ERCB) and the **Alberta Utilities Commission (AUC)** (formerly combined under the Energy and Utilities Board) are quasi-judicial agencies of the Government of Alberta that administer more than 30 pieces of legislation which regulate the province's energy resources and utility sectors. These agencies issue provincial approvals for activities such as coal and oil sands mines, oil and gas wells, electrical transmission lines and pipelines. Their approvals take priority over municipal plans and bylaws.

Natural Resources Conservation Board (NRCB) reviews non-energy projects and intensive livestock operations. It is governed by the *Natural Resources Conservation Board Act* and the *Agricultural Operation Practices Act*. Where appropriate, the NRCB co-ordinates its work with Alberta Environment. NRCB approvals take priority over municipal plans, bylaws and decisions.

Surface Rights Board is a quasi-judicial board charged with providing rights of entry to operators onto private and Crown lands for natural resource development and determination of land-owner compensation. These rights of entry are only given after operators have received approval to explore for subsurface resources or have been granted the rights to develop these resources.

3. Municipalities

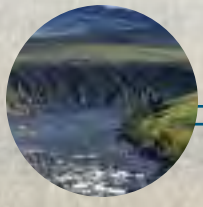
The provincial government provides direction to municipalities through the *Municipal Government Act*, its *Provincial Land-use Policies*, and the Subdivision and Development regulation. Municipalities have the authority for land-use planning and development on all lands within their boundaries. However, on public lands, the Crown is not bound by municipal decisions. Private development on Crown leases is subject to municipal planning approvals and those members of the public using Crown land (such as campers or all-terrain vehicle users) are bound by municipal bylaws and authorities. Some activities are exempt from municipal planning approval such as oil and gas well approvals, confined feeding operations, and provincial highway construction.

B. Growth indicators

While our current land management system served us well in the past, it now risks being overwhelmed by the scope and pace of activity.

Population

In the last 25 years, the population of Alberta has grown by more than a million people to approximately 3.5 million. By 2026, Alberta's population is projected to be five million. Two-thirds of Albertans live and work in the Edmonton-Calgary corridor, a pattern that is expected to continue.



Registered motor vehicles (cars and trucks)
In 1980, there were approximately 1.6 million registered vehicles in Alberta. In 2006, there were approximately 2.6 million registered vehicles—an increase of 64 per cent.

Recreational activities
Recreation activities have increased substantially. For example, the number of registered all-terrain vehicles has more than tripled from 19,000 in 1995 to 67,000 in 2006. The number of registered snowmobiles has increased from 19,000 to over 26,000 during the same period.

Oil and gas
Energy Resources Conservation Board statistics show that the number of oil and gas wells drilled annually increased from approximately 8,400 in 1995 to more than 16,500 in 2007. The number of coal bed methane wells increased from less than 1,100 wells in 2003 to a total of 12,500 in 2007.

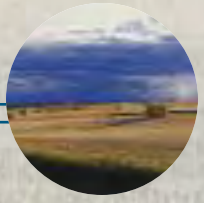
Forestry
The annual timber harvest in Alberta increased 4.6 times, from 5.93 million cubic metres in 1980 to 27.55 million cubic metres in 2005. In the early 1980s, Alberta's forest companies produced one billion board feet of lumber whereas, today, Alberta produces 3.2 billion board feet of lumber. By 2004, Alberta had become the third largest source of oriented strandboard in North America, with more than three billion square feet produced yearly.

Electricity generation and transmission
Since 1998, electricity demand has grown at a rate equivalent to adding two cities the size of Red Deer each year. In 2007, Alberta's load growth was equal to that of Ontario—a province with three times our population. As of 2006, there were over 194,000 kilometres of electrical transmission lines (250 and 500 kV)—double the number of kilometres in 1960.

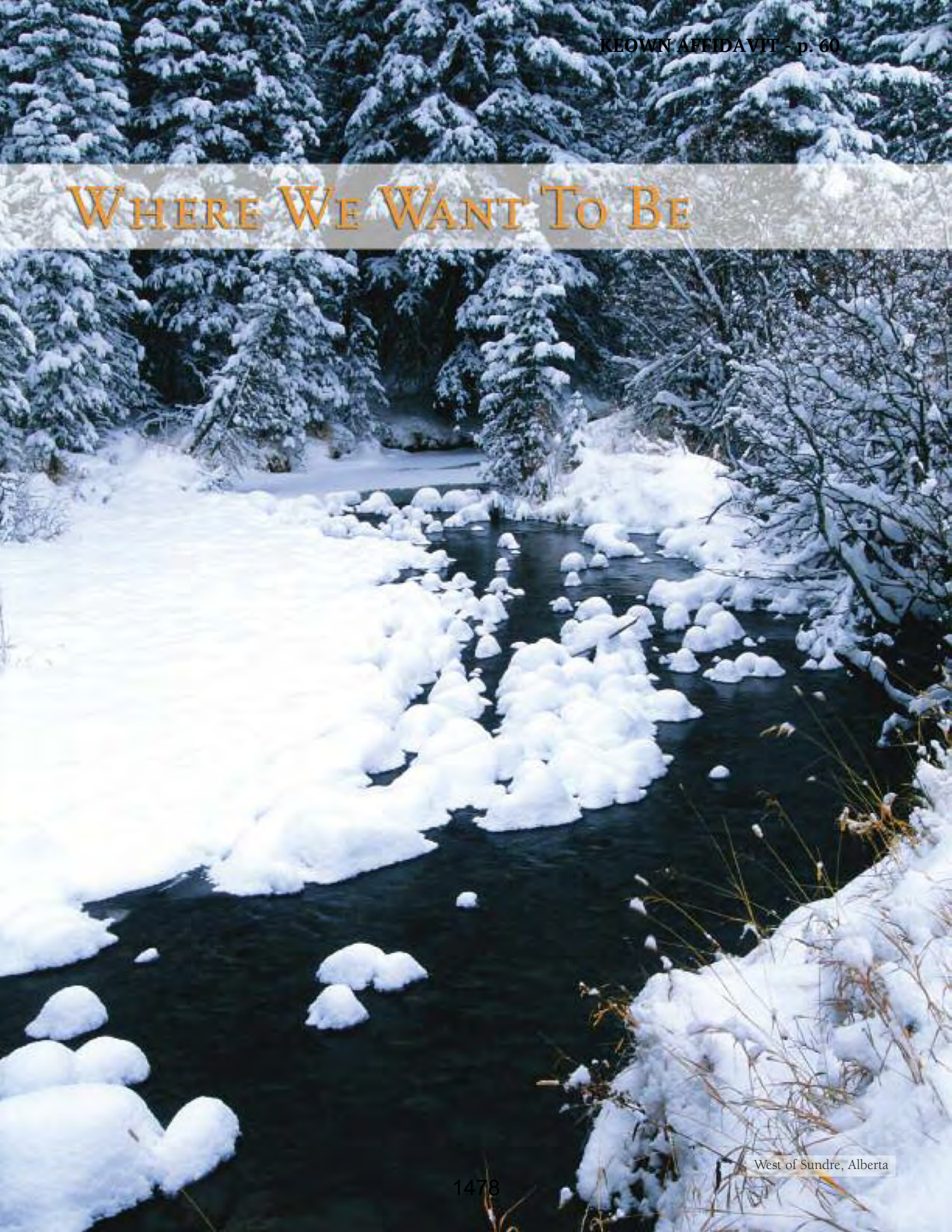
Agriculture
Alberta's farmers and ranchers own and use about one-third of the province's land. There are fewer farmers and ranchers today and it has become more cost effective for agricultural producers to have more land in production (i.e., the average size of farming operations has increased 63 per cent during the past 50 years). While the amount of land used for agriculture has been relatively stable across the province, agricultural land, particularly in areas like the Edmonton-Calgary corridor, Grande Prairie, and Lethbridge, has been increasingly divided into parcels too small to farm or ranch (i.e., fragmentation).

Rural and urban growth has resulted in the loss or conversion of some of the province's most productive farm and ranch lands to other uses. From 1960 to 2006, the number of cattle increased from 2.88 million to 6.37 million and the number of hogs increased from 1.47 million to 2.05 million. Over the past two decades, the number of confined feeding operations (i.e., feedlots) has increased significantly to over 2,400. The acres of improved cropland increased from 25,296,177 acres to 32,160,765 acres during the same time period.

While our population and number of activities on our landscape continue to grow, the size of our province does not. There are more and more people doing more and more activities on the same piece of land. We have reached a tipping point. What worked before will not work for our future. The time for change is now. We have the opportunity today to help shape the Alberta of tomorrow, but we must choose well. The Land-use Framework is about making the right choices now.



Where We Want To Be



West of Sundre, Alberta

No longer satisfied with the status quo, Albertans are looking for stronger provincial leadership to introduce the changes necessary to better balance our economic growth with our social and environmental values. The Government of Alberta welcomes this challenge, and the Land-use Framework proposes a path to the future that Albertans want.

To achieve this goal, we propose a vision that will guide and inspire our collective journey. To ensure that we can meaningfully measure successful progress, we propose three desired outcomes. To help achieve these outcomes, we adopt a set of guiding principles that will shape and inform our actions.

A. Our vision

Albertans work together to respect and care for the land as the foundation of our economic, environmental and social well-being.

We are grateful for the natural wealth and beauty that we have inherited and acknowledge our collective duty to pass this natural bounty on to the next generation—as good as, or better than, we received it. Our vision statement confirms that Albertans' well-being is more than just jobs and economic development. Our quality of life includes significant environmental, social and cultural dimensions. The vision also confirms the principles of sustainability and inter-generational responsibilities. The vision makes it clear that managing our land is a shared responsibility that involves all Albertans—including industry, landowners, aboriginal peoples, individual Albertans and governments.

B. Desired outcomes

To translate our vision into reality, we identify three outcomes. Actions taken to implement the Land-use Framework must contribute—directly or indirectly—to these outcomes. The outcomes are inter-related and of equal importance although trade-offs may be required.

Healthy economy supported by our land and natural resources
Includes current and future economic benefits realized by the use and enjoyment of our land and natural resources. Much of Alberta's prosperity is derived from the land and other natural resources. We must ensure our land and natural resources continue to provide economic benefits to Albertans over time.

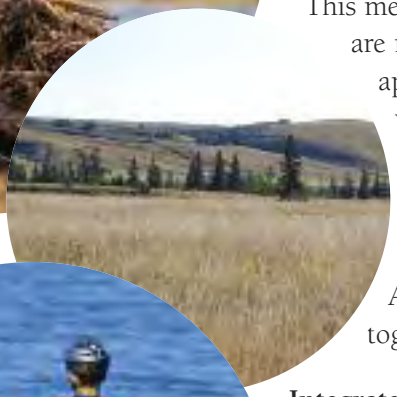
Healthy ecosystems and environment
Alberta lands should be managed to ensure healthy ecosystems. Albertans accept the responsibility to steward our land, air, water and biodiversity so that they pass on to the next generation in as good or better condition as we received them. The means to achieve this outcome may vary from region to region and be different on public and private lands, but the goal is the same.

People-friendly communities with ample recreational and cultural opportunities
Albertans live in communities. How we design, plan and recreate in and how we move through the communities, and how these communities grow, impacts the land and future land use in Alberta. We want our communities to be safe and healthy, and we want citizens of Alberta to have ready access to parks, forests and other areas to pursue outdoor recreational and cultural interests.

C. Guiding principles

The vision and the desired outcomes define where Albertans want to be when it comes to land use. But to reach this destination, we will have to make many practical decisions—decisions involving competing interests, conflicting values and complicated trade-offs. To help align these actions with our vision and desired outcomes, we are adopting a set of guiding principles that will shape and inform our actions. In Alberta, land-use decisions will be:

Sustainable
Development which meets the needs of the present without compromising the ability of future generations to meet their own needs. Contemporary



land-use decisions will balance current economic, environmental and social benefits with the consequences for future generations. This principle of inter-generational responsibility applies to all forms of human land use (residential and industrial, agriculture and forestry, energy and transportation).

Accountable and responsible
All levels of government, the private sector and the community at large will share accountability for responsible land use.

Supported by a land stewardship ethic
This means accepting the responsibility to ensure that our land-use decisions are mindful of consequences for future generations. This responsibility applies to urban planning, forestry and agriculture, habitat and wildlife, watersheds and riparian areas, and all other decisions affecting land use. Where appropriate, market mechanisms will be used to promote stewardship practices.

Collaborative and transparent
Albertans, landowners, land users and governments will work together.

Integrated
Policies, planning and decisions will integrate current and new land use on public and private lands and co-ordinate land, air, water, biodiversity, economic development and social objectives within the region.

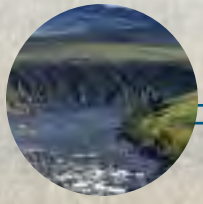
Knowledge-based
Government decision-making and choices will be informed by science, evidence and experience, including traditional knowledge of aboriginal peoples.

Responsive
Land-use decision-making processes will be responsive to changing economic, environmental and social factors over time and will be improved through periodic review. If there are negative unintended consequences, Cabinet will review policies for possible corrections or repeal.

Fair, equitable and timely
Decision-making criteria and processes will be clearly defined, consistently followed, and not subject to political expediency. Decision-making bodies will be provided with the capacity to perform their responsibilities in a timely manner.

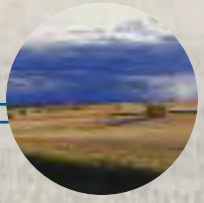
Respectful of private property rights
Decisions will respect the laws of property ownership and the positive role of free markets in making societal (public) choices.

Respectful of the constitutionally protected rights of aboriginal communities
The Government of Alberta will continue to work with aboriginal communities' governments, while respecting the special role and relationship of the federal



government regarding the aboriginal peoples. The Government of Alberta recognizes that consultation should take place on matters that impact treaty or constitutionally protected rights of First Nations and Métis peoples.

The Land-use Framework is both an end and a beginning. It is the end of 18 months of consultation and dialogue with Albertans about our collective future. It is the beginning of a time of action, a time to start putting in place new ways of making decisions about land use that will achieve the sustainability and balance that Albertans have told us that they want. This does not mean that consultation and dialogue will end. Both will be necessary to implement new laws and policies. But to get the process started, we need a plan, and this is it. The Land-use Framework constitutes the provincial leadership on land use that Albertans have told us they want.



Provincial Leadership

In any land-use policy, striking the right balance between centralized and local decision-making is crucial. Different jurisdictions do it differently, depending on their political cultures, size and relative capacity of different levels of government. In Canada and the other common law democracies, there is a strong and successful tradition of local decision-making.

Our consultations with Albertans indicate widespread support for greater provincial leadership on land-use issues. This does not mean creating a heavy-handed, centralized bureaucracy in Edmonton. It does mean that the Alberta government must provide the kind of policy guidelines and opportunities that the local levels of government cannot. The Land-use Framework leaves final decision-making authority with the same local officials who currently exercise it. However, in the future, these decisions will have to be consistent with regional plans.

The Land-use Framework consists of seven basic strategies to improve land-use decision-making in Alberta. These provide a strategic blueprint for the government to follow as we move from where we are today to where we want to be.

Strategy 1

Develop seven regional land-use plans based on seven new land-use regions.

The provincial government has numerous policies and strategies that affect land use. Most of these were developed independently from each other and at different times. While most are enabled through provincial legislation, responsibility for decision-making and enforcement may be vested in the provincial government, municipal governments, multi-stakeholder groups, industry, or a combination of all four. These processes have worked reasonably well in developing plans for a particular purpose. However, there is uncertainty about how plans in a particular geographic area should be linked and what planning process or plan takes priority over another.

Alberta does not currently have formalized regional-level planning. Nor is there any formalized co-ordination between Government of Alberta land-use decisions on Crown lands and municipal land-use decisions. Resolving these complexities will require clear provincial leadership and an integrated process for land, air, and water management.

The Government of Alberta will create seven land-use regions and will develop land-use plans for each of these regions. The regional plans will integrate provincial policies at the regional level, set out regional land-use objectives and provide the context for land-use decision-making within the region, and reflect the uniqueness of the landscape and priorities of each region. Municipalities and provincial government departments will be required to comply with regional plans in their decision-making.

Strategy 2

Create a Land-use Secretariat and establish a Regional Advisory Council for each region.

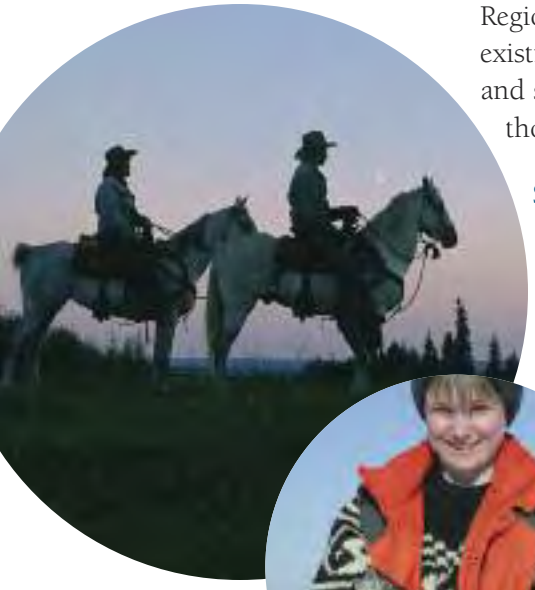
Strong provincial leadership and clear direction are critical elements for sound land-use planning and resource management in Alberta. Establishing a formal governance structure for implementing the Land-use Framework will be necessary for it to succeed.

To meet this need, the Land-use Framework creates a Land-use Secretariat to support implementation of the framework. The Secretariat will develop regional plans in conjunction with government departments and Regional Advisory Councils. Final decision on regional plans rests with Cabinet.

Strategy 3

Cumulative effects management will be used at the regional level to manage the impacts of development on land, water and air.

Our watersheds, airsheds and landscapes each have a finite carrying capacity. Alberta's system for assessing the environmental impacts of new developments has usually been done on a project-by-project basis. This approach worked at lower levels of development activity. However, it did not, in all cases, address the combined or cumulative effects of multiple developments taking place over time.



Regional plans will adopt a cumulative effects approach that includes the impacts of existing and new activities. It will reflect our understanding of environmental risks and socio-economic values in setting environmental objectives and managing within those objectives.

Strategy 4

Develop a strategy for conservation and stewardship on private and public lands.

Clean water and air, healthy habitat and riparian areas, abundant wild species and fisheries are all "public goods" that Albertans enjoy and value. The costs of supplying these goods on private lands are left largely on the shoulders—and pocketbooks—of our ranchers and farmers. This explains why much habitat and wetlands have disappeared in recent decades and why there has been an increase in the conversion of agricultural lands to other uses. Public lands are managed for a variety of uses and are also important in providing public goods. We have to find new ways to share the costs of conserving these public goods.

To do this, the Government of Alberta will develop new policy instruments to encourage stewardship and conservation on private and public lands. These could include: environmental goods and services; support for conservation easements and land trusts; "cluster development" through the transfer of development credits; and allowing land-trust tax credits to be sold to third parties.

Strategy 5

Promote efficient use of land to reduce the footprint of human activities on Alberta's landscape.

Land is a limited, non-renewable resource and so should not be wasted. Land-use decisions should strive to reduce the human footprint on Alberta's landscape. When it comes to land use, other things being equal, less is more—more choices for future generations. This principle should guide all areas of land-use decision-making: urban and rural residential development, transportation and utility corridors, new areas zoned for industrial development, and agriculture.

Strategy 6

Establish an information, monitoring and knowledge system to contribute to continuous improvement of land-use planning and decision-making.

Good land-use decisions require accurate, timely and accessible information. There needs to be greater collaboration and sharing of information between individuals and groups who have data and knowledge about land. A sound monitoring, evaluation and reporting system is needed to ensure the outcomes of the Land-use Framework are achieved.

The Government of Alberta will collect the required information to support land-use planning and decision-making and create an integrated information system to ensure decision-makers have access to relevant information. The system will include regular monitoring, evaluation and reporting on the overall state of the land and progress toward achieving provincial and regional land-use outcomes. A key component of this system will be the province's Biodiversity Monitoring Program carried out by the Alberta Biodiversity Monitoring Institute.

Strategy 7

Inclusion of aboriginal peoples in land-use planning.

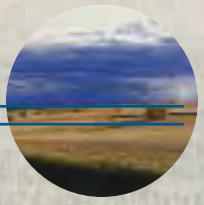
The provincial government will strive for a meaningful balance that respects the constitutionally protected rights of aboriginal communities and the interests of all Albertans. The Government of Alberta will continue to meet Alberta's legal duty to consult aboriginal communities whose constitutionally protected rights, under section 35 of the *Constitution Act, 1982 (Canada)*, are potentially adversely impacted by development. Aboriginal peoples will be encouraged to participate in the development of land-use plans.

Priority actions for the Land-use Framework

There are five immediate priorities that the provincial government will support or complete on a priority basis. These are: legislation to support the framework, metropolitan plans for the Capital and Calgary regions, the Lower Athabasca Regional Plan, and the South Saskatchewan Regional Plan. In addition, a number of policy gaps and areas of provincial public interest will be addressed by the provincial government in the short-term.

Timeframe for implementing the Land-use Framework

The Land-use Framework constitutes a significant change in how land-use decisions are made in Alberta. Implementing the recommended governance changes and developing individual plans for the seven new regions will take time. A timeframe for the implementation of the Land-use Framework is provided on page 47.



Land-use Regions and Plans

Poplar trees west of Sundre

The provincial government has numerous policies and strategies that affect land use, many developed independently and at different times to address changing circumstances. As a result, existing policies and strategies are not as well integrated as they could be and often do not provide an understanding of priorities.

The multiple processes that exist today have created considerable complexity in land-use planning and decision-making. Resolving these complexities will require provincial leadership and an integrated planning process. A single formalized and integrated process for regional-level planning currently does not exist in the province.

Establishing a formal regional planning system is the most effective way to implement provincial policy. A regional approach will establish land-use management objectives and determine land-use trade-offs. Regional planning will integrate economic, environmental and social factors and provide the context for future, more detailed planning. The regional plan will ensure that planning for land use, water and air quality are aligned with each other.

A. Provincial outcomes

The Alberta government has the primary responsibility for making decisions that meet the economic, environmental and social goals of all Albertans. Land-use decisions influence the ability of the government to meet these goals. Therefore, land-use planning and decision-making need to be guided by and consistent with defined outcomes and principles. This applies equally to municipal governments as well as government departments and agencies.

The desired outcomes for Alberta are;

- healthy economy supported by our land and natural resources,
- healthy ecosystems and environment, and
- people-friendly communities with ample recreational and cultural opportunities.

The provincial government will ensure that the following outcomes and principles are reflected in the land-use plans developed for each region.

Outcome
Healthy economy supported by our land and natural resources

- Alberta's natural resources are developed in a way that optimizes value for the broadest number of Albertans and reduces waste.
- Reasonable and timely access to these resources will be ensured.
- Innovation, value-added diversification, global competitiveness, and balanced and responsible use of natural resources are crucial to sustain the momentum of Alberta's economy.
- The interests of surface users and surface and subsurface developments are balanced and managed effectively.
- Land and resource use promotes diverse industries, stimulates environmentally sound economic activity, and leaves economic opportunities open for future Albertans.

Outcome
Healthy ecosystems and environment

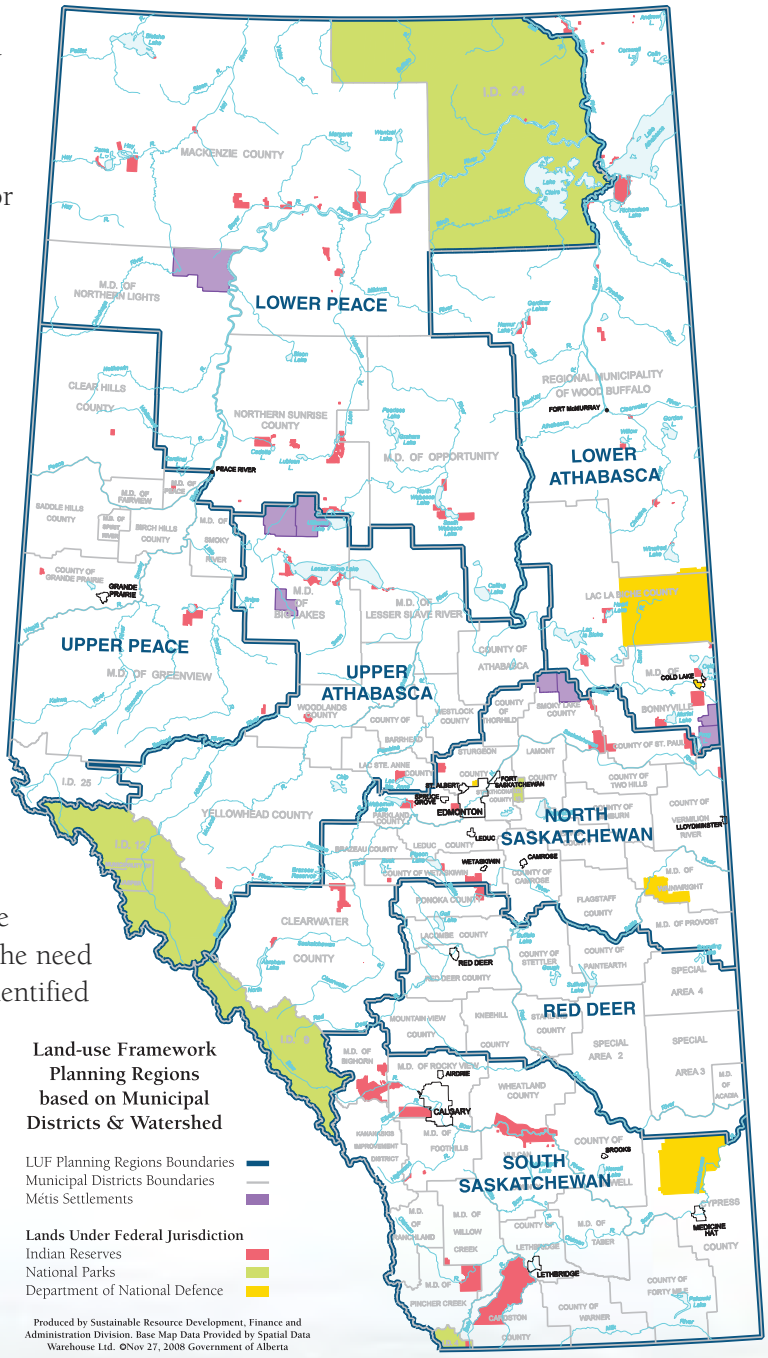
- The life-supporting capacity of air, water, land and biodiversity are maintained or enhanced, and the natural resources that form part of the environment are sustained.
- The intrinsic value of nature is respected.
- Soil and soil fertility are maintained and/or enhanced.
- The quality and quantity of ground and surface water are protected.
- Greenhouse gas emissions and air pollution are reduced, waste is minimized, and the biodiversity and abundance of native species and their natural habitats are maintained.
- Communities are prepared to respond to and adapt to a changing climate and environmental events (e.g., floods, drought).

Outcome
People-friendly communities with ample recreational and cultural opportunities

- Settlement development and land use will focus on efficient use of land, infrastructure, public services and public facilities.
- Significant historical resources are identified and protected, and potential impacts are managed effectively. Alberta's parks inspire people to value, enjoy and discover the natural world and the benefits it provides for current and future generations.
- Stakeholders are fairly engaged in planning processes, which in turn improves the quality of land-use decisions and builds confidence in the decision-making processes.

B. Regions defined

The Land-use Framework creates seven regions for Alberta based on the major watersheds, with boundaries aligned to best fit with existing municipal boundaries and the natural regions. These regions are large enough to work at the landscape level. However, the delineation of boundaries recognizes that not all important issues are completely addressed at one spatial scale. Where there are issues that cross regional boundaries, the need for linkages and compatible treatment will be identified in the relevant plans. For example, while the Red Deer Region will be considered a distinct region for land-use purposes, watershed management policy for the region will be aligned and set within the context of the planning for the greater South Saskatchewan River basin. The regional boundaries are illustrated on the map.

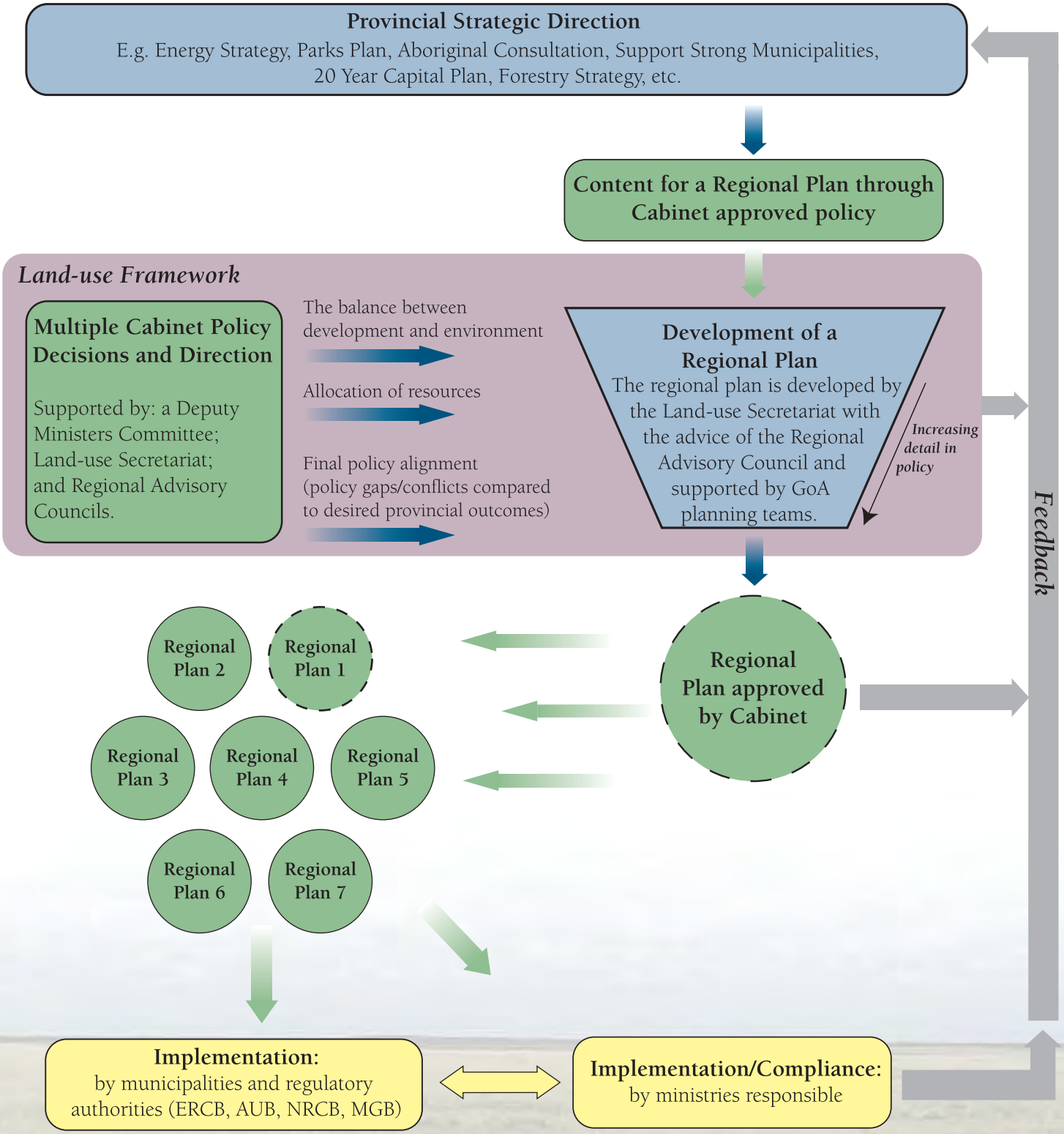


C. Establishing a model for regional planning

The diagram on the next page illustrates the model in which land-use planning and decision-making would be conducted within the Land-use Framework. It begins with provincial policy direction guiding the development of regional plans. At times, and depending on the issue, a region will be strongly directed by provincial interests. At the regional level, plans will set the economic, environmental and social outcomes for the regions. These

integrated regional plans will provide guidance to municipal and provincial planning and decision-making. For municipalities, this would include general development and area structure plans, and land-use bylaws; for provincial departments, this would include detailed integrated land and resource management plans.

Land-use Process



Regional plans will:

- reflect the vision, principles and outcomes of the Land-use Framework;
- define regional outcomes (economic, environmental and social) and a broad plan for land and natural resource use for public and private lands within the region;
- align provincial strategies and policies at the regional level;
- consider the input from First Nations and Métis communities, stakeholders, and the public;
- determine specific trade-offs and appropriate land and natural resource management for specific landscapes within a region;
- define the cumulative effects management approach for the region and identify targets and thresholds;
- provide direction and context for local plans within the region;
- recognize the authority and role of municipalities in local decision-making;
- be approved by Cabinet, thereby becoming government land-use policies for the regions; and
- will be subject to regular reviews and public reporting:
  - every five years – plan updates and reports on implementation; and
  - every 10 years – complete plan reviews.

Preparation of a regional plan may identify a need to refine provincial policy. Regional plans may also identify the need for more detailed plans to address specific needs and issues within the region. In addition, changes in provincial policy or direction will need to be reflected through amendments to regional plans to ensure that provincial policy and regional plans remain aligned.

D. Local planning

Planning and decision-making at the local level by municipalities and provincial agencies are often criticized for not reflecting higher level provincial policy directions and regional interests.

An effective land management system recognizes that planning and decision-making must take place at different levels and be integrated between levels. Alberta has a strong tradition of local government control that recognizes the diversity across the province. However, in the face of increasing pressures and conflicts, the Government of Alberta needs to ensure that provincial interests are addressed at a local scale.

1. Municipal planning

Municipalities will be required to ensure their plans and decisions are consistent with regional plans. The Government of Alberta will respect the existing land-use planning and decision-making authority of municipalities.

Municipalities will;

- prepare context statements outlining how their municipal development plans will align with and address provincial directions stated in regional plans, and
- amend municipal planning documents to adopt and align with regional planning directions.

2. Provincial planning carried out at the local level

Direction under regional plans will be defined and delivered on provincial Crown land through integrated land and resource management plans (e.g., access management planning, forest management planning, parks planning). These will further define access to and use of provincial Crown land and focus on operational activities that reflect the regional priorities and directions.

The Government of Alberta will be moving forward, in partnership with industry and other stakeholders, with the Integrated Land Management Program on provincial Crown land. The program promotes responsible use of provincial Crown land by influencing land-user behaviour, improving stewardship, and encouraging acceptance and adoption of integrated land management principles as a "way of doing business". The program aligns the operational processes and systems of land users and government to facilitate and enable integration of land-based activities.

E. Appeal mechanisms

The Land-use Framework creates a regional level of planning that does not currently exist in the province. Within the context of these regional plans, the provincial government and local governments will be making decisions. Decision-making bodies will be required to comply with regional plans and if any regional plan compliance issues arise, they will be resolved within existing review and appeal systems.

Albertans expect municipalities and provincial ministries to act in a way that is consistent with regional directions and plans. Because they are approved by Cabinet, regional plans are government policies and cannot be appealed.

Land-use Governance

Burrowing Owl
Photo Credit: Gordon Court

The provincial government will create a Land-use Secretariat and establish a Regional Advisory Council for each region. Final decisions on regional plans under the Land-use Framework are Cabinet-level responsibilities. Cabinet will:

- provide provincial oversight of regional planning,
- review and decide terms of reference for regional plans,
- review and make final decisions on regional plans,
- ensure integration of provincial land-use related policies, and
- ensure regional plans are implemented to achieve provincial outcomes.

A. Land-use Secretariat

A provincial Land-use Secretariat is established to support Cabinet decision-making. The Secretariat will:

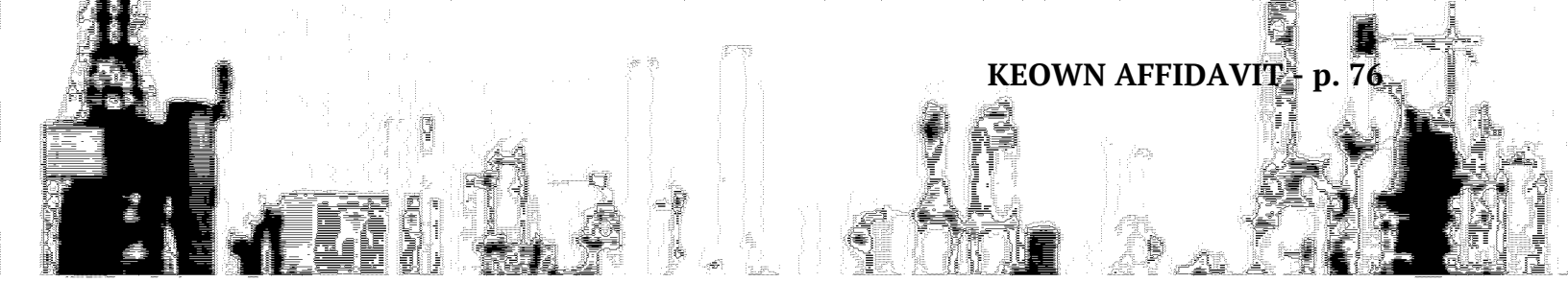
- support the development of a terms of reference for regional plans,
- lead the development of regional plans in conjunction with departments with an interest in land use (regional planning teams) and in consultation with the Regional Advisory Councils,
- communicate with local planning bodies to clarify and interpret regional plans,
- support policy reconciliation,
- provide advice to regional bodies on provincial policy,
- ensure effective management of cross-regional infrastructure and policy matters,
- assist provincial departments, municipalities and other local authorities in reconciling their respective roles to the Land-use Framework,
- provide administrative infrastructure and support to Regional Advisory Councils, and
- ensure application of cumulative effects models.

B. Regional Advisory Councils

The Government of Alberta will create Regional Advisory Councils for each region to provide advice and receive direction from the Cabinet and provide advice to the Land-use Secretariat on the development of the regional plan. Regional Advisory Councils will:

- consist of members representing the range of perspectives and experience in the region and who are able to appreciate the broad interest of the region and its place in the province. Members will be appointed by the provincial government and will include provincial and municipal government interests, industry, nongovernment groups, aboriginal community representatives, and other relevant planning bodies (e.g., Watershed Planning and Advisory Councils) within the region;
- have a mandate to advise on the development of regional plans;
- provide advice on addressing trade-off decisions regarding land uses and on setting thresholds to address cumulative effects; and
- advise and participate in public and stakeholder consultation for the planning process.

The Government of Alberta will ensure that the Land-use Secretariat and regional planning processes are sustained through appropriate resourcing.



Cumulative Effects Management

The Government of Alberta will use cumulative effects management at a regional level.

Cumulative effects denotes the combined impact of past, present and reasonably foreseeable human activities on a region's environmental objectives. The environmental objectives are established based on our understanding of environmental risks and socio-economic values. Once the objectives are set, cumulative effects systems manage those environmental outcomes.

A final caveat is in order. Cumulative effects management is an emerging practice, an art not a science. Accordingly, it should be used pragmatically not dogmatically.

Cumulative effects management recognizes that our watersheds, airsheds and landscapes have a finite carrying capacity. Our future well-being will depend on how well we manage our activities so that they do not exceed the carrying capacity of our environment.

Alberta's current regulatory system is based on a project-by-project approval and mitigation of the adverse effects of each project. Until now, the approach has been to control the impact of each project. While this may be acceptable for low levels of development, it does not adequately address the cumulative effects of all activities under the current pace of development.

Cumulative effects cannot be managed as an "add-on" to existing management approaches; nor is it about shutting down development. It is about anticipating future pressures and establishing limits; not limits on new economic development, but limits on the effects of this development on the air, land, water and biodiversity of the affected region. Within these limits, industry would be encouraged to innovate in order to maximize economic opportunity.

The Government of Alberta will develop a process to identify appropriate thresholds, measurable management objectives, indicators and targets for the environment (air, land, water and biodiversity), at the regional levels and, where appropriate, at local levels. Land-use planning and decision-making will be based on balancing these environmental factors with economic and social considerations.

Conservation and Stewardship

Photo Credit: Fisheries and Oceans
Jeremy Stewart
Bull Trout

Clean water and air, healthy habitat and riparian areas, abundant wild species and fisheries are all "public goods" that Albertans enjoy and value. The costs of supplying these goods on private lands are left largely on the shoulders—and pocketbooks—of ranchers and farmers. Most land-use decisions are economic decisions, and the old saying, "if it doesn't pay, it doesn't stay," explains why much habitat and wetlands have disappeared in recent decades and why there has been an increase in the fragmentation and conversion of agricultural lands to other uses. Public lands are managed for a variety of uses and are also important in providing public goods. If Albertans value these landscapes on private and public lands and the benefits they provide to all of us, we have to find new ways to share the costs of conserving them.

Stewardship is a shared responsibility. While Alberta landowners have a strong tradition of stewardship, current efforts need to keep pace with Alberta's rapid growth. Although land users and landowners have a primary role in land stewardship and conservation, the Government of Alberta has a responsibility to partner with Albertans, industry, and other levels of government to facilitate new stewardship opportunities and strategies to protect and enhance the environment.

There are a variety of economic and noneconomic tools and approaches used throughout the world. There has been a shift away from traditional regulatory mechanisms to market-based instruments. Both approaches will be used in Alberta to encourage stewardship.

Market-based instruments include:

- environmental fees, charges and taxes (green tax reform);
- specialty markets;
- deposit-refund systems;
- tradable permits;
- incentives for environmental actions (provider gets);
- liability (polluter pays); and
- information disclosure on environmental performance.

The Government of Alberta will develop a strategy for conservation and stewardship on public and private lands. This strategy will:

- identify and develop a toolkit of new best practices, market-based approaches and incentives to provide ecological goods and services;
- develop education and awareness programs;
- develop action plans for the conservation and sustainable use of Alberta's biodiversity that can be used to support and inform development of regional plans; and
- pursue innovative ways to raise both public and private funds to support conservation and stewardship initiatives.

The Government of Alberta will work with the Institute of Agriculture, Forestry and the Environment, and other provincial applied research institutes to advance this strategy.

A. Private land stewardship

The Government of Alberta will support and encourage stewardship of private lands in Alberta through the development of applicable incentives and market-based instruments. The government will also consider new funding opportunities at the municipal level for stewardship and conservation initiatives on private lands. These could include:

Transfer of development credits
This is a tool that can be applied to private lands to direct development away from specific landscapes. This approach has been used in some places to allow development but also to allow for the conservation of open spaces and agricultural land. Transfer of development credits allows the owners of both developed and undeveloped land to share equitably in the financial benefits of the developed lands.

Land trusts and conservation easements
A land trust is a non-profit, charitable organization that has as one of its core activities the acquisition of land or interests in land (i.e., conservation easements) for the purpose of conservation. Whether protecting riparian areas, wetlands, or critical habitats for native species, land trusts work with private landowners to conserve public goods (e.g., sensitive habitats, open spaces in settled areas). The Government of Alberta will examine steps to ensure that Eco-Gift tax credits are more widely utilized. The Government will consider alternatives including making the provincial portion of the Tax Credit refundable or extending the carry-forward period. Alberta will also encourage the Government of Canada to consider similar reforms to the Federal portion of the Tax Credit.

Other tools for maintaining ecological goods and services
Economic and social benefits are derived from the natural processes of a healthy environment and biodiversity. These are a benefit to all of society and essential to sustaining a healthy and prosperous way of life. They include groundwater recharge, flood and erosion control, wildlife habitat, productive soils, carbon sequestration and abundant clean air and water. Market-based incentives and tools can provide a way for private landowners to receive some monetary compensation for the ecological goods and services their lands provide.

B. Public land stewardship

The Government of Alberta will continue to manage public lands for a variety of purposes and values. An important aspect of this is to conserve sensitive lands and natural resources (e.g., sensitive habitats, watersheds, historical resources, heritage rangelands). The management of these lands will be supported by a regulatory framework. To further encourage the stewardship of these lands, the Government of Alberta will evaluate market-based incentives that are applicable in Alberta. These could include:

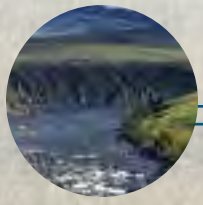
Tradable Disturbance Rights (TDRs)
TDRs is an instrument for cumulative effects management on public land. Its purpose is to minimize the overall disturbance footprint on the land, permitting the trading of "land disturbance" in a co-ordinated market. For example, a company that has been assigned a permit for development and does not use all the space can sell the unused space to someone else who needs more land. Both parties to the trade are encouraged to minimize their overall footprint.

C. Stewardship often transcends boundaries

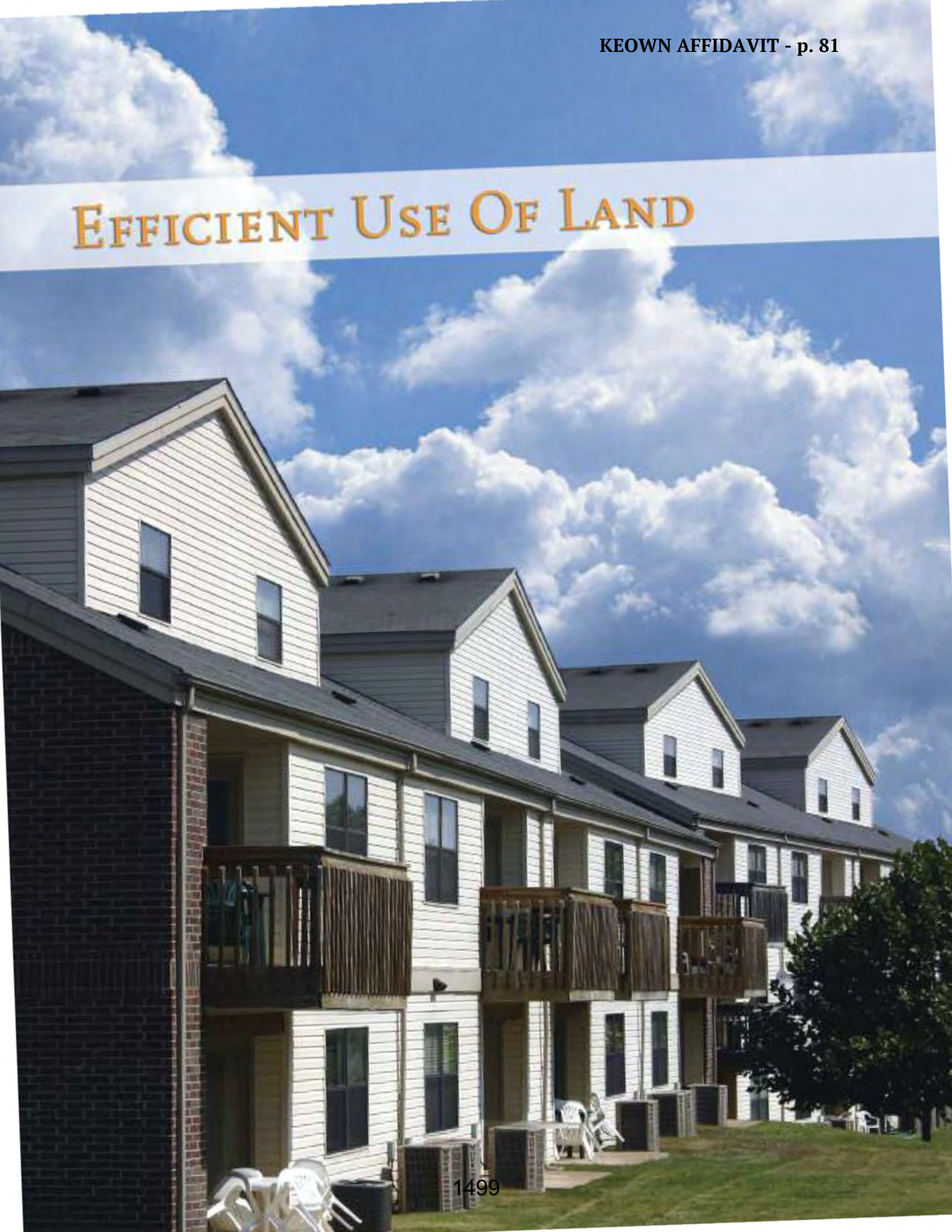
The following incentives will be further evaluated to identify their potential to be applied on both public and private lands:

Land conservation offsets
Land conservation offsets are compensatory actions that address biodiversity or natural value loss arising from development on both public and private lands. Compensation mechanisms include restitution for any damage to the environment through replacement, restoration, or compensation for impacted landscapes.

Lease-swapping and dealing with existing tenure rights in ecologically sensitive areas
Where high conservation values occur on public and private lands, new incentives could be developed to encourage the expeditious removal of industrial activities or hydrocarbon resources from legislated protected areas or lands with high conservation value.



Efficient Use Of Land



Land is a limited, non-renewable resource and so should not be wasted. Land-use decisions should strive to reduce the human footprint on Alberta's landscape. When it comes to land use, other things being equal, less is more — more choices for future generations. This principle should guide all areas of land-use decision-making; urban and rural residential development, transportation and utility corridors, new areas zoned for industrial development, and agriculture.

Examples of land-use decisions that promote efficient use of land.

- Minimize the amount of land that is taken from undeveloped or extensive use and placed in permanent use for residential, commercial, industrial, transportation, utility corridors or intensive recreational purposes.
- Use "green" technology in new development projects that will reduce the impact on natural systems.
- Encourage higher density where redevelopment opportunities occur.
- Support development where infrastructure capacity—water, sewer, road and other infrastructure—already exists.
- Planning land uses to reduce the frequency and length of travel for business and pleasure by promoting mixed-use development—industrial, commercial and residential.

Land-use efficiency should be commensurate with the level of activity in the region. On public lands where there are multiple users on the same landscape (e.g., forestry and oil and gas), integrated land management should be used to reduce the development footprint. In more densely settled metropolitan areas, the efficiency principle may require more complex strategies such as inter-municipal development plans or sub-regional plans such as the Capital Region Board and the Calgary Regional Partnership.

Monitoring, Evaluation And Reporting

Near Hinton, Alberta

Accurate, timely and accessible information is essential to good land-use planning and decision-making. There are many provincial government ministries, other levels of government, industries, groups and individuals that know a lot about the land—including farmers and ranchers, academics, researchers, and First Nations and Métis communities. Establishing stronger connections between these groups will help improve our understanding of how activities affect the land and develop new approaches to land use.

Currently, there is a general lack of accessible, integrated information. Greater collaboration and information sharing is needed between governments, industry and non-government organizations. A sound monitoring, evaluation and reporting system is also needed.

Successful land-use planning must respond to changing circumstances and risks—economic, environmental and social. The Land-use Framework will be based on a system for continuous improvement. Plans and actions may be adjusted and incorporate new technology or new information.

A. Information management

To ensure planners, decision-makers and Albertans have timely access to relevant information, the Government of Alberta will create an improved Integrated Information Management System that monitors the state of the land and the status of land use in the province. This will be done by:

- building on existing information sharing initiatives to ensure timely and practical access to information;
- reviewing and improving protocols for information sharing, taking into consideration proprietary and sensitive information; and
- incorporating scientific and traditional ecological knowledge to inform land and natural resource planning and decision-making.

B. Monitoring and evaluation system

A system of monitoring, evaluation and reporting is required to determine if our land-use policies are achieving desired outcomes. Monitoring programs need to use standardized data collection and analysis processes and standardized metrics so that the same information can be applied and shared across regions. A provincial monitoring and reporting system will be developed to ensure relevant timely and accessible information and ensure consistency across regional plans. This system will be guided by the following principles:

- comprehensive—monitor economic, environmental and social outcomes (cumulative effects),
- practical—results from monitoring must support decision-making,
- understandable—by government and the public;
- forward looking—reports on outcomes that are relevant now and in the future, and
- adaptive—framework can adapt to new knowledge and issues.

Initiatives such as the Alberta Biodiversity Monitoring Program that is being implemented through the Alberta Biodiversity Monitoring Institute is an example of a key program that will support the monitoring and evaluation of the Land-use Framework. This program is a joint undertaking of government, industry and non-government interests for the purpose of developing and implementing a credible, arms-length biodiversity monitoring and reporting system for the province. The Government of Alberta will need to provide sustained funding for the ongoing development and implementation of monitoring, evaluation and reporting programs.

C. Knowledge

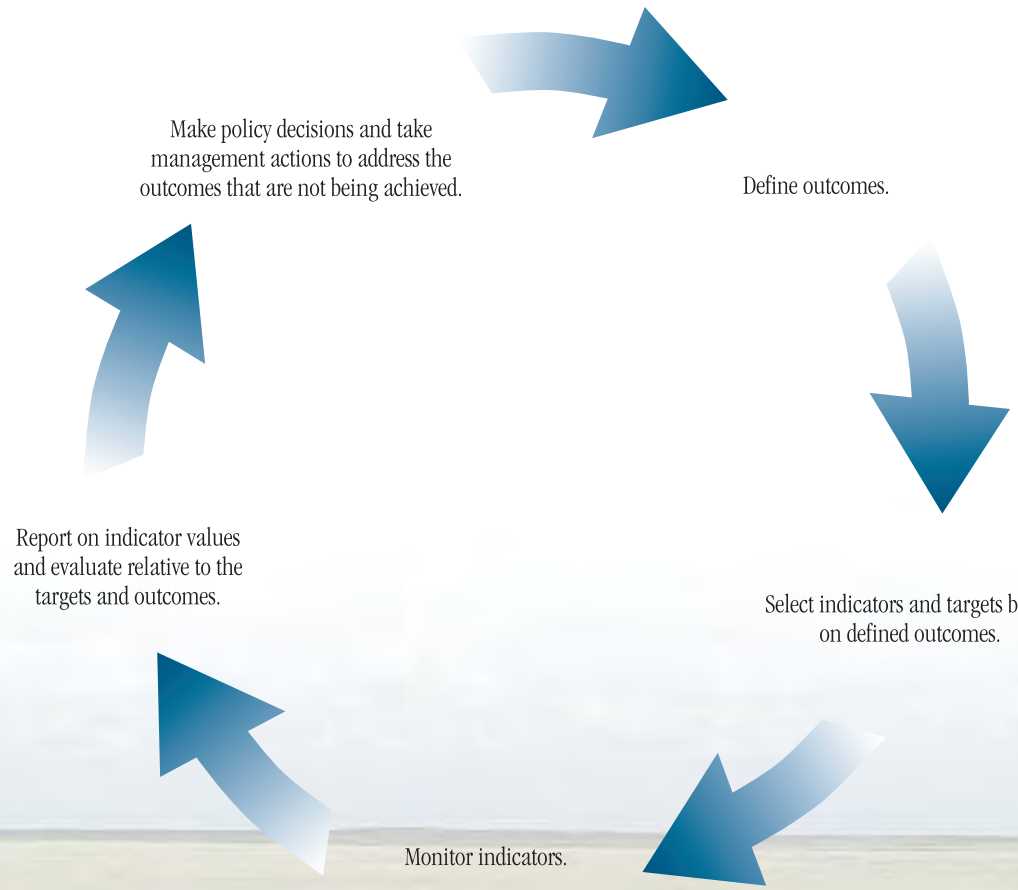
The Land-use Framework will foster the creation and sharing of knowledge for the continuous improvement of land management decisions and practices.

The Government of Alberta will facilitate the establishment of a network connecting researchers, practitioners, institutions and programs to address strategic needs and priorities for the Land-use Framework. This will include:

- establishing a virtual centre of excellence or other appropriate mechanism to provide a focal point for land-use knowledge and information,
- identifying research needs (e.g., economic, environmental, and social),
- improving technology and knowledge transfer,
- improving capacity for practitioners to use technology and be aware of best management practices, experience and knowledge,
- developing tools for continuous improvement (e.g., scenario models and other simulators for decision support, etc.), and
- exploring opportunities for using traditional knowledge along with scientific data.

D. Continuous improvement

Successful land-use planning must respond to changing circumstances. The Land-use Framework will be based on a system for continuous improvement. Plans and actions may be adjusted and incorporate new technology or new information. If there are unintended negative consequences, Cabinet may correct or repeal provincial policy as needed. The diagram below shows the components of the systems approach to monitor and improve land-use decision-making.



Aboriginal Peoples

The aboriginal peoples of Alberta have an historic connection to Alberta's land and environment. Alberta recognizes that those First Nations and Métis communities that hold constitutionally protected rights are uniquely positioned to inform land-use planning.

The Government of Alberta has the constitutional mandate to manage lands in the province for the benefit of all Albertans. However, the Government of Alberta will continue to meet Alberta's legal duty to consult aboriginal communities whose constitutionally protected rights under section 35 of the *Constitution Act, 1982 (Canada)* are potentially adversely impacted by development.

To support meaningful consultation in the province, Cabinet approved *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* in 2005. This policy is a key step towards engaging First Nations in land management decision-making. Ongoing review and monitoring of the policy with the intent of changing and improving it will ensure that it meets the needs of Albertans, First Nations and industry. To address specific implementation challenges, Alberta has created a "trilateral process" involving senior representatives from industry, First Nations and government.

Efforts to build First Nations capacity have been underway for several years and include programs such as the Traditional Use Studies Program and the First Nations Consultation Capacity Investment Program, which are administered by the Ministry of Aboriginal Relations. By investing in the gathering and maintenance of information on First Nations land uses, Alberta has also helped prepare First Nations for increased dialogue in regional planning.

Aboriginal peoples will be encouraged to participate in the development of the seven regional land-use plans.

Priority Actions For The Land-use Framework

West Bragg Creek area, Alberta
Rick Blackwood

The Land-use Framework constitutes a significant change in how land-use decisions are made in Alberta. Implementing the recommended institutional changes and developing individual plans for the seven new land-use regions will take time. This is normal and acceptable for policy change of this magnitude.

A. Immediate priorities

The Land-use Framework will be implemented in stages over the next four years. The first priorities are:

- the introduction and enactment of legislation required to support the implementation of the Land-use Framework. This legislation will be introduced in the Spring 2009 Session of the Legislature;
- the development of metropolitan plans for the Capital and Calgary regions. Both of these are scheduled to be completed in 2009; and
- the regional plans for the Lower Athabasca and South Saskatchewan regions. These are both scheduled to be completed in 2010.

While the specifics are different in each case, the scope and pace of development in these areas warrants their priority. Getting things right now will contribute to the future well-being of Albertans. Other regional plans will be completed by 2012.

1. Legislation to support the Land-use Framework

The Land-use Framework will create a new regional planning structure and affect many laws and policies that guide decisions by provincial ministries, municipalities and land users. Legislation to clarify roles, responsibilities and processes and give authority to plans and policies that emerge under the framework is needed. Developing that legislation and amending existing laws is a priority for the Government of Alberta.

The scope of the legislation will include;

- establishing the Land-use Secretariat and Regional Advisory Councils and defining their mandates,
- outlining the purpose, process and content for regional plans,
- defining the approach to cumulative effects management for the purpose of regional planning,
- supporting the use of conservation and stewardship tools, and
- defining the authority of regional plans, once approved.

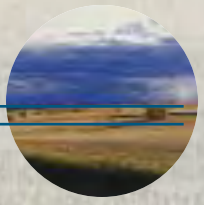
A significant number of consequential amendments to other legislation (*Municipal Government Act, Public Lands Act, Forests Act*, etc.) will also be required.

2. Metropolitan plans for the Capital and Calgary regions

While the Land-use Framework establishes regions to conduct its provincial interest planning on a broad landscape basis, the Government of Alberta recognizes that the Calgary and Edmonton metropolitan areas face intense growth pressures. Capital infrastructure requirements, information sharing, and collaboration require a more detailed planning approach.

These plans are already under development through ongoing planning initiatives of the Capital Region Board for the Edmonton Capital region and the Calgary Regional Partnership for the Calgary Region. Each metropolitan plan should consider and address:

- a vision of the region's pattern of development in the short-medium- and long-term;
- a transportation and utility plan that identifies the infrastructure and services that are of regional benefit and protect transportation and utility corridors from encroachment and development;
- a long-range regional perspective on the plans developed for key infrastructure, such as water and sewer systems, roads, and transit;
- complementary policies between municipalities to eliminate conflicts before they occur, and manage them where they already exist;



- support for higher-density infill development across the region which preserves the natural environment, conserves agricultural land and makes more efficient use of existing infrastructure; and
- future growth areas and areas where growth would be limited. An environmentally and fiscally sound infrastructure plan should be developed to support the type and scale of future development before that development occurs.

The framework supports the development of the Capital Region Plan that has been slated for completion by March 2009. In addition, the Land-use Framework supports the completion of the metropolitan planning initiative being undertaken by the Calgary Regional Partnership.

Given the urgency, it is recognized that metropolitan plans will be completed before regional plans are in place. Once completed, the regional plans will provide guidance to future updates of the metropolitan plans.

3. South Saskatchewan Regional Plan

Southern Alberta has the largest population but the least water. Most of Alberta's roads and rail lines within the province are concentrated in southern Alberta. The region grows much of Alberta's wheat, barley and canola, and contains the majority of feedlots.

The region also contains Alberta's largest city and over one-half of Alberta's total population. This region includes the most intensively developed and productive irrigation network in Canada and much of Alberta's native prairie landscape. Once known as the Palliser triangle, much of this region is semi-arid and water use is a critical issue.

All of southern Alberta depends on the ecological integrity of the Eastern Slopes for its water supply. But much of the Eastern Slopes are zoned for multiple-use. It is not uncommon to find oil and gas operations, grazing leaseholders, and forestry operations all active on the same lands. Often these are the same lands on which southern Albertans depend for their recreation. There is friction between different recreational groups when they all compete for the same area. Relations sometimes become more strained when one or more of the commercial users are also active on the same land. If done in careless or negligent ways, all of these uses have the potential for negative consequences on watersheds, fisheries, habitat and wildlife.

The breathtaking beauty of the landscapes for which southern Alberta is famous—especially along Highway 22, the "Cowboy Trail"—is also at risk from new oil and gas development, new power lines and pipelines, the demand for more acreages and country residential housing, and the fragmentation of traditional ranch and farm properties.

Historically, watershed and recreation were deemed the priority uses of the Eastern Slopes. These priorities should be confirmed, and sooner rather than later. A new land-use plan for southern Alberta will not mean an end to new oil, gas, timber or country residential development. It will mean paying closer attention to where they are done and how they are done.

4. Lower Athabasca Regional Plan

Northeastern Alberta has been the epicentre for economic growth in Alberta and Canada through the development of the oil sands. With over $100 billion in planned oil sands investment in the region, the environment and communities are under immense pressure from a variety of stakeholders, often with competing interests.

In addition to the unique challenges that oil sands development brings, the majority of the land is public owned. The region contains both urban and rural areas, many of which are remote and cannot be accessed by road on a year-round basis. These factors will require a unique cumulative effects management approach that focuses on responsible development and balances environmental, social and economic issues.

The Lower Athabasca Regional Plan will identify and set resource and environmental management outcomes for air, land, water and biodiversity, and guide future resource decisions while considering social and economic impacts. The plan will be guided by *Responsible Actions: A Plan for Alberta's Oil Sands*, which is based on extensive public input through the Radke Report: Investing in *Our Future: Responding to Rapid Growth In Oil Sands Development, the Multi-stakeholder Committee Report* and the *Aboriginal Consultation Final Report*. The plan will also link to other provincial strategies including the *Provincial Energy Strategy, Water for Life*, the *Biodiversity Strategy*, the *Climate Change Strategy*, and the *20-Year Strategic Capital Plan*.

B. Addressing provincial policy gaps and areas of provincial interest

There are a number of specific areas of provincial interest where clear provincial policy does not exist. The Government of Alberta is committed to addressing the following provincial policy gaps and areas of provincial interest.

Managing subsurface and surface activities within our province

Conflicts between subsurface and surface activities are increasing as activities intensify on the land. The policies that address surface and subsurface values are not well integrated. The Government of Alberta will complete the Upstream Oil and Gas Policy Integration Initiative and review the current process for identifying major surface concerns prior to public offering of Crown mineral rights.

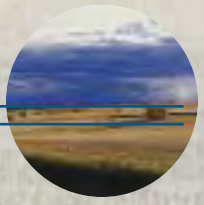
Reducing the fragmentation and conversion of agricultural land is an integral component of a successful Land-use Framework. Agriculture is a key contributor to the Alberta economy. Reducing the fragmentation and conversion of agricultural land to other uses is a key consideration, as is the proliferation of other land uses impacting agricultural land. The Government of Alberta may develop more effective mechanisms and approaches, such as market-based incentives, transfer of development credits, agricultural and conservation easements, and smart growth planning tools designed to reduce the fragmentation and conversion of agricultural land to other uses.

Developing a transportation and utility corridors strategy

While corridors can affect the land and other land uses, they also create an opportunity for consolidating a number of critical land-use functions within a pre-defined area, thereby reducing land fragmentation and environmental impact.

This is a priority for the following reasons:

- the cost of establishing a corridor in the future will be higher (i.e., land purchase and easements);



- the options for corridor alignment and siting will decrease with time as land is converted to or consumed by other long-term land uses. Corridor alignment would be one of the factors considered in the development of regional plans;
- there is an immediate need to address corridor needs in the Edmonton-Calgary corridor through a provincial corridor strategy, long-term environmental benefits will be delivered and land fragmentation issues with landowners will be minimized. Land-use efficiencies will also be obtained by consolidating transportation and utilities into provincial corridors; and
- the province has just released a 20-Year Strategic Capital Plan that identifies Alberta's immediate-, medium- and longer-term infrastructure needs, including several major transportation projects across the province. The plan identifies many new highways, as well as expansions and upgrades to existing highways, including ring roads around Calgary and Edmonton.

Managing recreational use of public lands.
The Government of Alberta is committed to working with members of the recreational communities and other key stakeholders to develop a comprehensive strategy to better manage growing recreational pressures and activities in Alberta. The strategy will:

- enable a variety of recreational opportunities,
- reduce impacts to public lands and natural resources,
- reduce conflicts and increase co-operation between land users, and
- improve public safety.

The Government of Alberta will continue to work with the Alberta Recreation Corridors Coordinating Committee to develop criteria, standards, policies and guidelines for establishing an Alberta Recreation Corridor Designation Program. After completion of the recreational strategy for public lands, the government will develop a broader strategy for the province that will include associated private land.

Conserving and protecting the diversity of Alberta's ecological regions
The Government of Alberta will address the gaps associated with conserving and protecting the diversity of Alberta's land base *(Natural Regions and Subregions of Alberta Report)*, accommodate population growth and improve quality of life opportunities through development of a plan for provincial parks.

Managing flood risk to protect human life, manage natural resources, and limit disaster damage faced by communities. The Government of Alberta will develop policy to minimize exposure of developments and settlements to flood risk.

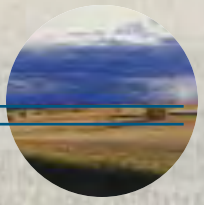
Timeframe For Implementing The Land-use Framework

Paradise Falls, Alberta

The Land-use Framework constitutes a significant change in how land-use decisions are made in Alberta. Implementing the recommended institutional changes and developing individual plans for the seven new regions will take time. A timeframe for the implementation of the Land-use Framework is provided in the table below.

The Government of Alberta will:	By 2010	By 2012
Land-use regions and plans		
Establishing regional planning		
• Develop regional plans for the seven regions of Alberta.	✔	✔
• Review and update existing provincial appeal processes for land-use decisions, where required.	✔	
Land-use governance structure		
Land-use Secretariat		
• Establish a provincial Land-use Secretariat to support the Cabinet.	✔	
Regional Advisory Councils		
• Create a Regional Advisory Council for each region to provide advice on the development of regional plans.	✔	✔
Cumulative effects management		
• Use cumulative effects management as a key component of the Land-use Framework.	✔	✔
Conservation and stewardship		
• Develop a strategy for conservation and stewardship on public and private lands.	✔	

	By 2010	By 2012
Monitoring, evaluation and reporting		
Information management		
• Create an improved Integrated Information Management System that monitors the state of the land and the status of land use in the province.		✔
Monitoring and evaluation system		
• Build a provincial monitoring and reporting system to ensure accurate, timely and accessible information is available to support land-use planning and decision-making.		✔
• Provide sustained funding for the ongoing development and implementation of the biodiversity monitoring program.	✔	✔
Knowledge		
• Support the establishment of a network connecting researchers, practitioners, institutions and programs to address strategic needs and priorities for the Land-use Framework.		✔
Aboriginal peoples		
• Encourage aboriginal peoples to participate in the development of land-use plans.	✔	✔
• Continue to work with First Nations to better understand and consider their traditional land uses.	✔	✔
Priority actions for the Land-use Framework		
Immediate priorities		
Legislation to support the Land-use Framework	✔	
Metropolitan plans for the Calgary and Calgary regions		
• Support the development and implementation of the Capital region metropolitan plan.	✔	
• Support the completion of the metropolitan planning initiative for the Calgary metropolitan region.	✔	
South Saskatchewan regional plan		
• Undertake and lead the development of a regional plan for southern Alberta.	✔	



	By 2010	By 2012
Lower Athabasca regional plan		
• Undertake and lead the development of a regional plan for northeastern Alberta.	✔	
Addressing provincial policy gaps and areas of provincial interest		
Managing subsurface and surface activities within our province		
• Complete the Upstream Oil and Gas Policy Integration Initiative and review the current process for identifying major surface concerns prior to public offering of Crown mineral rights.	✔	✔
Reducing the fragmentation and conversion of agricultural land		
• Evaluate more effective mechanisms and approaches to reduce the fragmentation and conversion of agricultural land to other uses.	✔	✔
Transportation and utility corridors		
• Create a transportation and utility corridor strategy for the province.	✔	
Recreational use of public lands		
• Develop a strategy to manage recreational use of public lands.	✔	
• Develop a province wide strategy to manage recreational use that will include associated private lands.		✔
Conserving and protecting the diversity of Alberta's land base		
• Address the gaps associated with conserving and protecting the diversity of Alberta's land base.	✔	✔
• Develop a plan for provincial parks.	✔	
Managing flood risk		
• Develop policy to minimize exposure of developments and settlements to flood risk.	✔	

Glossary

Aboriginal peoples of Alberta
Includes the First Nations and Métis people of Alberta.*

Archaeological sites
Places where objects or landscape features may be found that show evidence of manufacture, alteration or use by humans, the patterning of which is valuable for the information that it may give on historic human activities.

Biodiversity
The assortment of life on earth—the variety of genetic material in all living things, the variety of species on earth and the different kinds of living communities and the environments in which they occur.

Carrying capacity
The ability of a watershed, airshed and/or landscape to sustain activities and development before it shows unacceptable signs of stress or degradation.

Conservation
The responsible preservation, management and care of our land and of our natural and cultural resources.

Crown land
Crown land includes all provincial and federal government lands. Provincial parks (administered under the *Provincial Parks Act*) and public land (administered under the *Public Lands Act* and the *Mines and Minerals Act*) are examples of provincial Crown land. The Integrated Land Management Program applies to provincial Crown land; however, where existing legislation (e.g., *Municipal Government Act, Parks Act, Special Areas Act*, and *Public Highway Development Act*) dictates specific management intent, modified approaches to integrated land management will result.

Cumulative effects
The combined effects of past, present and reasonably foreseeable land-use activities, over time, on the environment.

Ecological goods and services
Economic and social benefits resulting from the natural processes of a healthy environment and biodiversity. These are available to all of society and are essential to sustaining a healthy and prosperous way of life. They include groundwater recharge, flood and erosion control, wildlife habitat, productive soils, carbon dioxide sequestration and abundant clean air and water.

Ecosystems
The interaction between organisms, including humans and their environment. Ecosystem health/integrity refers to the adequate structure and functioning of an ecosystem, as described by scientific information and societal priorities.

Economic
Relating to the wealth of a community or nation.

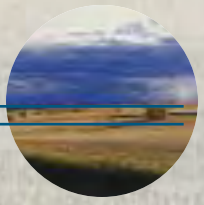
Environment
The components of the earth—including air, land, water, all layers of the atmosphere, all organic and inorganic matter and living organisms, and all of their interacting natural systems.

Forest Management Agreement
A large, area-based agreement between the Province of Alberta and a company. It gives a company the right to establish, grow, harvest and remove timber from a particular area of land.

Historical resources
Any works of nature or of humans that are primarily of value for their palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest.

Industrial development
In the context of land use, this term means natural resource development activities like exploration, harvesting and extraction of natural resources. It can also mean, in a municipal planning/zoning context, the use, infrastructure and activities associated with production (e.g., manufacturing, fabricating, warehousing, processing, refining or assembly).

* for the purpose of this document



Land
The entire complex of surface attributes including air, water, and the solid portions of the earth.

Land-use
All uses of land, such as crops, forestry, conservation, recreation, tourism, oil and gas, mining, utility corridors, transportation, cities and towns, industrial development, etc.

Market-based instruments
Market–based instruments provide financial incentives and disincentives to guide behaviour towards conservation and stewardship and mitigate undesirable activities in an effort to lessen adverse effect on the environment. Market forces play a key role, facilitated through regulation, in creating a price mechanism to motivate behaviour.

Municipalities
Cities, towns, villages, summer villages, municipal districts and specialized municipalities.

Natural region
A way of describing broad ecological variations in the landscape. Natural regions reflect differences in climate, geology, landforms, hydrology, vegetation, soils and wildlife. There are six natural regions in Alberta.

Natural resources
Resources that occur in nature, including non-renewable resources, such as timber, fish, wildlife, soil, water, oil sands, coal and minerals.

Non-renewable resources
Natural resources that are in fixed supply, such as coal, oil and minerals.

Palaeontological deposits
Rocks or soils containing evidence of extinct multi-cellular organisms.

Private lands
Land privately owned by individuals, groups, companies or organizations that make decisions about how it is used or managed within existing legislation.

Public lands
Land owned by the provincial government, which makes decisions about how it is used and managed, including for agriculture, forestry, resource development, habitat conservation and protection of watersheds and biodiversity.

Region
A geographical area or district having definable boundaries or characteristics. Regions can be based on natural regions, watersheds or administrative boundaries.

Renewable resources
Natural resources that are naturally replenished, such as fish, wildlife, water and trees.

Rural
Areas where there is a lower concentration of people and buildings than in urban areas. Rural areas typically include farms and resource extraction activity as well as low-density residential communities (i.e., parcels of an acre or more).

Social
Relating to society or its organization, including living in organized communities and related factors such as culture, health and well-being and safety.

Stewardship
An ethic whereby citizens, industry, communities and governments work together to responsibly care for and manage Alberta's natural resources and environment.

Subsurface
Subsurface is used to describe the resources (e.g., oil and gas, coal, metallic and industrial minerals such as limestone) identified under the *Mines and Minerals Act*. It also refers to the titles, rights and activities to access those resources below the ground. Subsurface resources do not include sand and gravel as these are considered surface materials.

Surface
Resources, activities and development that occur on the land e.g., sand, gravel, topsoil, roads and buildings. In land ownership, surface title includes the land and the space above and any sand, gravel, peat, clay or other substance that can be excavated through surface activities. Land titles usually carry a mineral reservation, which excludes subsurface resources; mineral titles for these resources are usually granted separately.

Sustainable development
Development that meets the needs of the present without compromising the ability of future generations to meet their needs.

Sustainability
Relates to understanding the interconnections and continuity of economic, environmental and social aspects of human society and the non-human environment.

Systems approach
An approach to integration that recognizes the interdependence and interaction of parts of a system. It views systems in a holistic manner.

Transportation corridor
A major highway and/or railway, including the associated land required for the right-of-way and buffer.

Urban
Areas where there is a concentration of people and buildings, such as cities or towns and including unincorporated communities such as hamlets.

Utility corridor
A linear strip of land that is used for pipelines (for oil, gas, water, etc.), electrical transmission lines and/or telecommunications (fibre optic) cables, including the associated land required for the right-of-way and buffer. In some places utility corridors are combined with transportation corridors.

Watershed
The area of land bounded by topographic features that drains water to a larger body of water such as a river, wetland or lake. Watersheds can range in size from a few hectares to thousands of square kilometres.

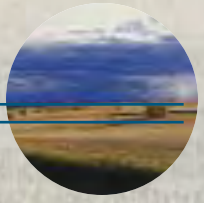


EXHIBIT C – UNDERSTANDING LAND USE IN ALBERTA

This is exhibit C referred to in the affidavit of

Neil Keown sworn before me on December 14, 2020.

Michael M. Wenig

A Notary Public in and for the Province of Alberta
Michael M. Wenig
Law Society of Alberta, Member # 11362

Understanding Land Use in Alberta

Alberta

April 30, 2007

Albertans have a special relationship with the land. Our prairies and parklands, our forests and foothills, our majestic Rockies — each shapes how we live and work on a daily basis. Our land is big, beautiful and bountiful, and we are grateful for the opportunities it has given us.

Over the last 10 years, we have enjoyed unprecedented prosperity. But with this prosperity have come new challenges and new responsibilities. Now is the time to ensure that this land — and all the activities it sustains — is managed responsibly so that our children and grandchildren can enjoy the same quality of life that we have.

Today's hyper-growth in population and economic activities is putting unprecedented pressure on Alberta's landscapes. There are competing demands for oil, gas, forestry, agriculture, industrial development, housing, recreation and conservation — often on the same lands.

While our land management processes and systems have worked in the past, we now face new challenges. In the past 25 years, our population has grown to 3.4 million from 2.3 million — an increase of nearly 50 per cent. If this rate of growth continues, we could see upwards of 5 million people living here 25 years from now. Every region of Alberta is being affected by this growth. These new realities call for new approaches to managing land, resources and our natural environment.

To manage these growth pressures, Premier Stelmach has identified the development of a Land-use Framework as one of his new government's priorities — and has made this my top responsibility as the new Minister of Sustainable Resource Development. The Land-use Framework will put a process in place for balancing the competing economic, social and environmental aspirations of Albertans.

The development of the Land-use Framework is a cross-ministry initiative. My team at Sustainable Resource Development is working closely with other departments — Energy; Environment; Municipal Affairs and Housing; Agriculture and Food; International, Intergovernmental and Aboriginal Relations; and Tourism, Parks, Recreation and Culture — to develop a provincewide land-use framework that reflects Albertans' vision for land use.

We will be consulting Albertans through a variety of ways, and I encourage each of you to become involved in the development of the Land-use Framework. This is your province, and this process will shape how Alberta grows over the next 100 years. So please take a little time to make your voice heard.

Learn more about the issues through this publication and have your say by responding to the questionnaire in the Land-use Framework Workbook. You can also provide feedback by completing the questionnaire online at www.landuse.gov.ab.ca.

Alberta's land is not only our future, but it is also the future of our children. They are counting on us to choose wisely.

Sincerely,

[Original signed by:]

Honourable Ted Morton
Minister of Sustainable Resource Development

The Land-use Framework Consultation Process to Date

Spring 2006. In the initial phase, an Ideas Group of prominent and knowledgeable Albertans was asked to identify the key elements needed for the development of a comprehensive Land-use Framework that accounts for the interests of all Albertans.

August-October 2006. Building on advice from the Ideas Group, stakeholder focus groups were held at a number of locations across the province involving individuals from a variety of land related sectors and organizations — oil and gas, mining, forestry, agriculture, transportation, recreation users, conservation and environmental groups, Aboriginal, municipal representatives and academics. Participants were asked to identify both the key issues that should be addressed by a land-use framework and the principles it should reflect. Some topics that were discussed included:

- agricultural land preservation,
- land-use decision making at the municipal level,
- growth pressures and the need for growth management strategies at all levels,
- land-use conflicts and competing land interests,
- integrated regional land use planning,
- pressures on municipal resources,
- comprehensive integrated resource management planning,
- cumulative effects management,
- long-term planning for transportation and utilities, and
- integration of land, air and water management.

December 2006. A Cross Sector Forum was held in Red Deer, and attendees included many who had taken part in the earlier sessions. Participants were asked to confirm key outcomes, issues and challenges, to identify possible actions and solutions, and to outline the key elements required in a framework.

Each phase of the Land-use Framework consultation process builds on what was learned from the earlier phases.

Reports from all of these sessions are posted under Reports on the website at www.landuse.gov.ab.ca

Learning More About Land Use, Its Management and Challenges

This booklet is intended to help Albertans understand the ways in which the land is used, the land-use issues, and the choices required to best manage and sustain land for Alberta's future.

The first section provides a broad overview of Alberta's land, its uses, management and challenges.

The second section provides more information about the many ways in which Alberta's lands are used and the contributions the land makes to our well-being. It includes information about agriculture, forestry, energy, tourism and recreation, settlements, First Nations, Métis Settlements, climate change, watersheds, biological diversity, fish and wildlife, and parks and protected areas.

The companion piece to this booklet is the *Land-use Framework Workbook*. The workbook questionnaire gives you the opportunity to provide your input on land-use issues.

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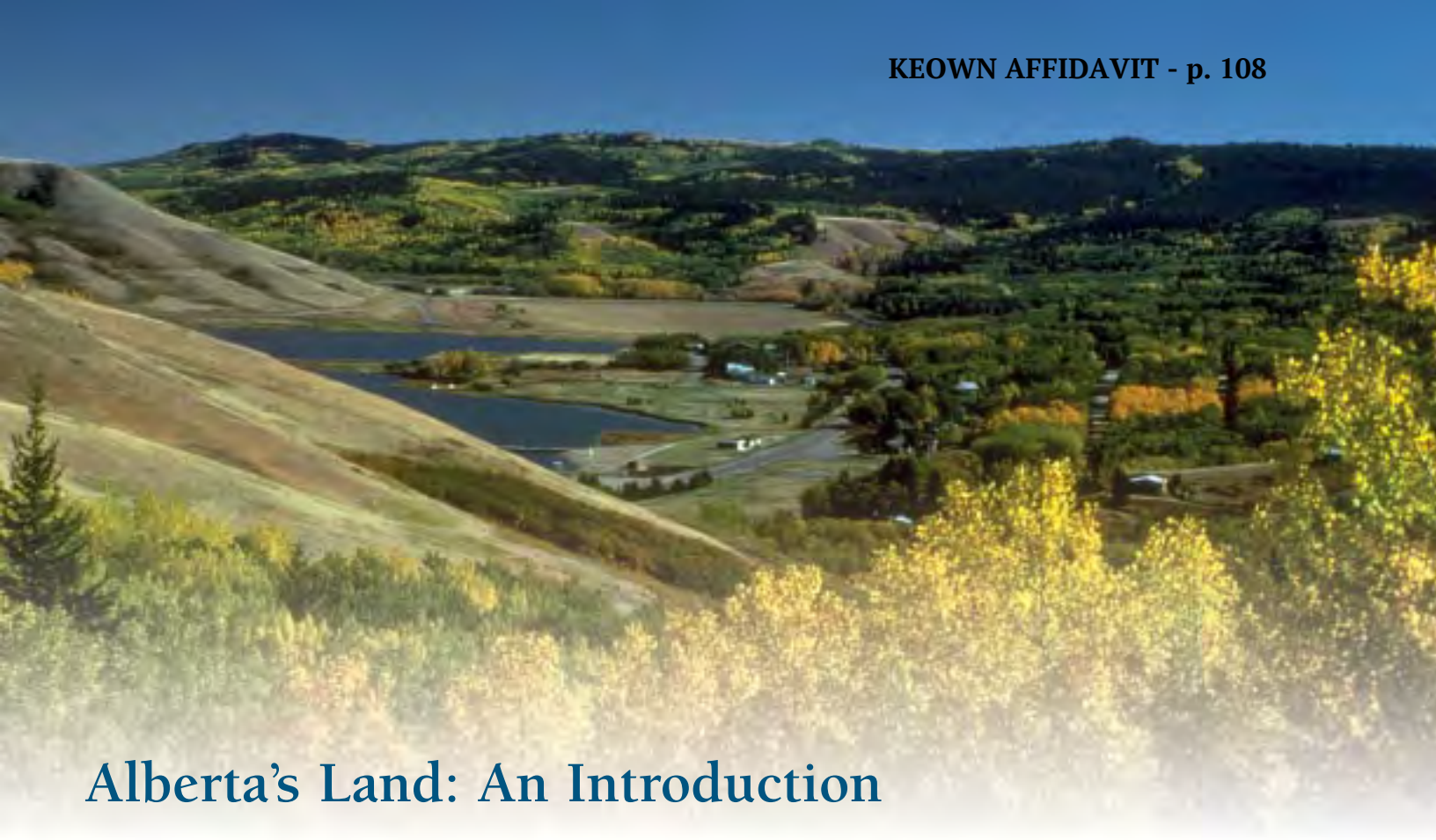


Alberta's Land: An Introduction

The Bounty of Our Land

As Albertans, we have a special relationship with the land. We take pride in our province's landscapes and in the opportunities the land gives us. Alberta's land provides the places where we live, work and play — from cities to rural areas, oil fields to agricultural lands, and the prairies to the boreal forest. It also provides the clean air, water and fertile soil that we depend on for our day-to-day lives.

The land and the choices we make about its use touch each and every Albertan in one way or another. The places where we live, work and visit are all affected — communities, recreational lands, industrial areas, farms, First Nations lands, Métis Settlements, archaeological resources, protected areas and tourist destinations.

Growing Pressures

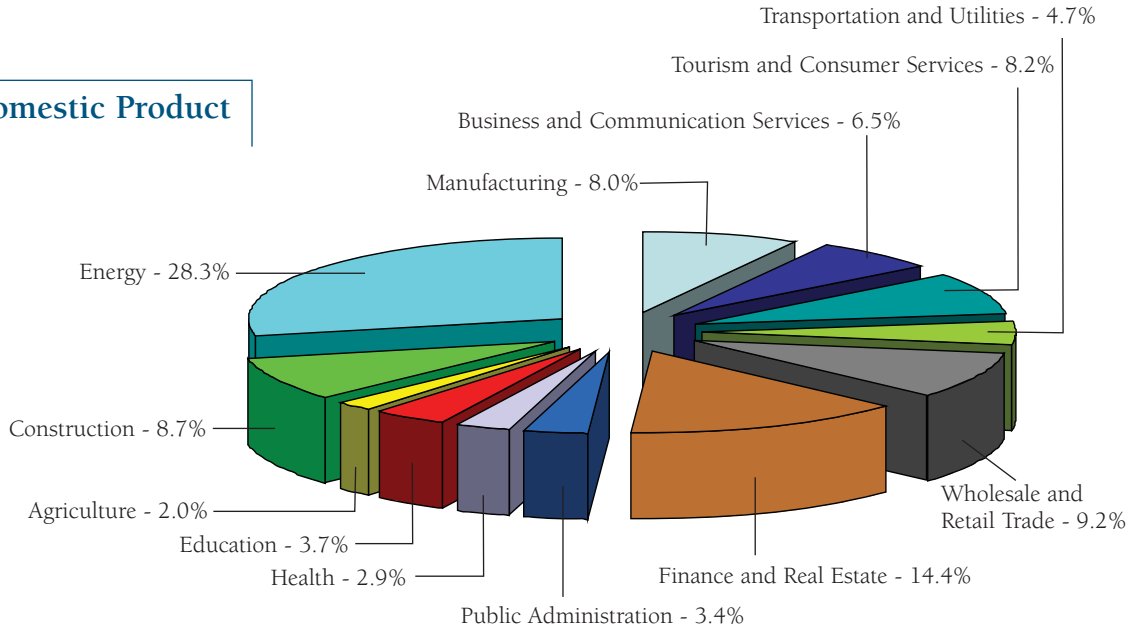
For nine of the last ten years, Alberta's population has grown faster than that of any other province. Over the same period, our economy has grown at an average rate of 4.3 per cent a year — the fastest growth rate in Canada. It is estimated that by 2010 an additional quarter million people will live in Alberta — most of them in urban areas. Our economic growth is expected to remain strong in the foreseeable future.

Alberta's abundance of natural resources contributes to our quickly growing economy. People come to Alberta for employment and business opportunities. While this is good news for our economy, there are consequences for Alberta's land. Cities and towns are expanding onto neighbouring areas. Land that was once used only for farming or ranching is being used for acreages and other urban developments. Resource companies, the agricultural industry and tourism developers often want to use the same land. This demand also creates pressures on Alberta's sensitive areas and natural habitats.

Increasingly, Alberta's landscape is a busy place. With oil and gas, forestry, mining, tourism, agricultural activities and many rapidly growing communities, the impact on public and private land is increasing. There are competing demands for land in many areas of the province — and these will intensify as Alberta's economy and population continue to grow.

Figure 1

Alberta's Gross Domestic Product by Industry 2005



Land-use Challenges

With all the demands on Alberta's land, we have reached a critical point.

Growth, Mounting Land-use Pressures and Cumulative Effects

Growth places demands on the landscape. As people move into the province, more land is needed for housing, transportation, utilities, community services and recreation. And as the global market for energy expands, there is increased need for access to energy resources and further exploration.

Growth usually enlarges the "human footprint" on the land. Over time, the impacts of additional land uses begin to accumulate — these are known as cumulative effects. But growth is inevitable. Our challenge is how to manage the effects that growth has on the landscape.

QUICK FACTS

- In the past 25 years, our population has grown to 3.4 million from 2.3 million — an increase of nearly 50%. If this rate of growth continues, we could see upwards of 5 million people living here 25 years from now.
- In 2005, Alberta's gross domestic product was over $218 billion in current dollars — an increase of about 15 per cent from 2004.

What are cumulative effects?

They are the changes to the environment caused by an activity in combination with other past, present, and reasonably foreseeable human activities. For instance, these might include all the effects on wildlife habitat from a range of land uses.

Competing Demands for Land

Often land is used for more than one purpose at the same time. This can result in competing interests, and a decision must be made as to which use has precedence. For instance, is it agriculture, housing, protection of habitat, natural resource development, or a combination of these? As there are more uses on a piece of land, the buffers between different types of land use diminish and conflicts increase.

Making decisions about land use involves careful consideration of the competing demands for the land. What is most important to protect? What are the consequences of the various uses? How do we balance our economic, social and environmental goals?

Ensuring Sustainability

We all want to ensure the benefits we realize from Alberta's lands continue — not just for our lifetime, but also for future generations. Sustainability involves protecting the natural environment and ensuring our economic and social well-being. To sustain our quality of life, decisions need to consider what is good for the environment, the economy and society.

Integrated Land-use Policies

As growth continues and demands for land increase, it becomes more and more important to integrate direction for land use. Alberta needs integrated land-use policies to help clarify priorities, assist with decisions, minimize conflicts and ultimately help ensure sustainability.

Looking Ahead

How do we anticipate and prepare for a future with six or eight million people? We need to consider where people would live, work and play. We need land for agriculture and forestry, yet we must balance that need with land required for energy and industrial developments, transportation and utilities, tourism and recreation, natural areas and habitat for a rich diversity of wildlife.

To ensure our children and grandchildren benefit from the land as we do today, we must manage the land and activities associated with it in a responsible manner. To this end, the Government of Alberta is developing a Land-use Framework. It will provide a vision for land use in Alberta and the overall direction needed to manage growth and activities on Alberta's landscape.

QUICK FACTS

What is industrial development?

In a public land-use context, it means natural resource development activities like exploration, harvesting and extraction of natural resources.

Alberta's Landscapes and Land Uses

Landscapes

Alberta includes an area of just over 164 million acres (660,000 square kilometres) — more than 97 per cent is land and the rest is water. As Albertans, we are fortunate to have a great variety of landscapes. We are the only jurisdiction in North America where the grassland, boreal forest and mountain regions converge.

Across the province there are six natural regions — each reflects differences in factors like climate, landforms and vegetation. These different factors generally influence the land-use activities and management practices that can occur in an area. For instance, the prairies and parkland support farming and ranching while the foothills and boreal forest are rich in forests. All six natural regions support and sustain a diversity of life and a wealth of ecological values including fish and wildlife.

In addition to the marketable goods and services provided by these natural regions, the landscapes provide clean air and water, productive soils, habitat, and flood and erosion control. They are also a source of inspiration and connection to the natural environment. Many of the social and economic benefits we enjoy as Albertans come from the use, development and protection of the natural resources in these regions.

QUICK FACTS

Acres and Hectares

An acre is 4,046 square metres. A hectare is 10,000 square metres or 2.47 acres. There are 100 hectares in a square kilometre. One hectare is about two football fields, side by side.

Figure 2

Alberta's Natural Regions

Natural regions are a way of describing broad ecological variations in the landscape. They reflect differences in climate, geology, landforms, hydrology, vegetation, soils and wildlife. There are six natural regions in Alberta:

Boreal Forest – This is Alberta's largest natural region, covering just over half the province with deciduous, mixedwood and coniferous forests interspersed with wetlands. Forestry, oil and gas, recreation and grazing are the primary land uses.

Canadian Shield – Many small lakes, sparsely vegetated granite bedrock and glacial deposits characterize this natural region. This area is less than 2 per cent of the province and land uses are limited to mineral extraction and recreation.

Parkland – This region includes patches of aspen and willow shrublands mixed with native grasslands. Much of this region has been cultivated. It is also the most densely populated natural region in Alberta and supports agriculture, settlement, oil and gas and recreation.

Grassland – Level to rolling land with native prairies, grassy foothills and cultivated croplands on vast plains are typical in this region. Agriculture (irrigation-based and grazing), oil and gas and recreation are the key land uses.

Foothills – The terrain varies from gently undulating to rolling hills and plateaus — deciduous trees grow in the lower elevations while coniferous forests are found at higher locations. The main land uses are recreation, forestry, oil and gas and grazing.

Rocky Mountain – Foothills, mountains and deep glacial valleys characterize this region — it includes the treeless alpine areas through to the forested valley bottoms. This region supports recreation and tourism, oil and gas, forestry and grazing.

Land Ownership and Use

Who Owns the Land in Alberta?

- **Private** – Just under 30 per cent of land in Alberta is privately owned by individuals, groups, companies or organizations. Private land provides habitat for wildlife, supports biological diversity and is used for farming, ranching, housing and industrial development.
- **Provincial** – More than 60 per cent of land is owned by the provincial government. This is called public land and it accommodates many uses including timber harvesting, livestock grazing, recreation, and the development and transportation of oil, gas, electricity and other natural resources. As well, public land plays a critical role in habitat conservation and the protection of watersheds and biological diversity.
- **Federal** – The federal government owns about 10 per cent of land in the province — most of it is national parks, Indian Reserves or military reserves. Alberta's Land-use Framework does not address federal land.

How Is Alberta's Land Used?

Almost a third of Alberta's land is used for agriculture and close to another third is used for forest management areas. Alberta's land is also used and valued for other purposes, such as energy and mineral development, tourism and recreation, rural development, transportation and utilities, wildlife habitat and biological diversity. That is one of the challenges — there are many demands for use of the same land. Some uses are compatible and can occur together while others are incompatible. This is one of the issues that will be raised throughout this booklet.

Land Administration

Both the nature of the landscape and its ownership affect how land is used and managed. For instance, grasslands are suitable for grazing and growing crops and over the years, these lands have been privately purchased for agricultural land. Most of the forested areas in the boreal forest are owned by the province, which provides rights for timber harvesting in these areas to forestry companies. The spectacular scenery of the Rocky Mountains, the world-famous badlands and beautiful northern lakes prompted creation of government-owned parks and protected areas — also popular places for tourism and recreation.

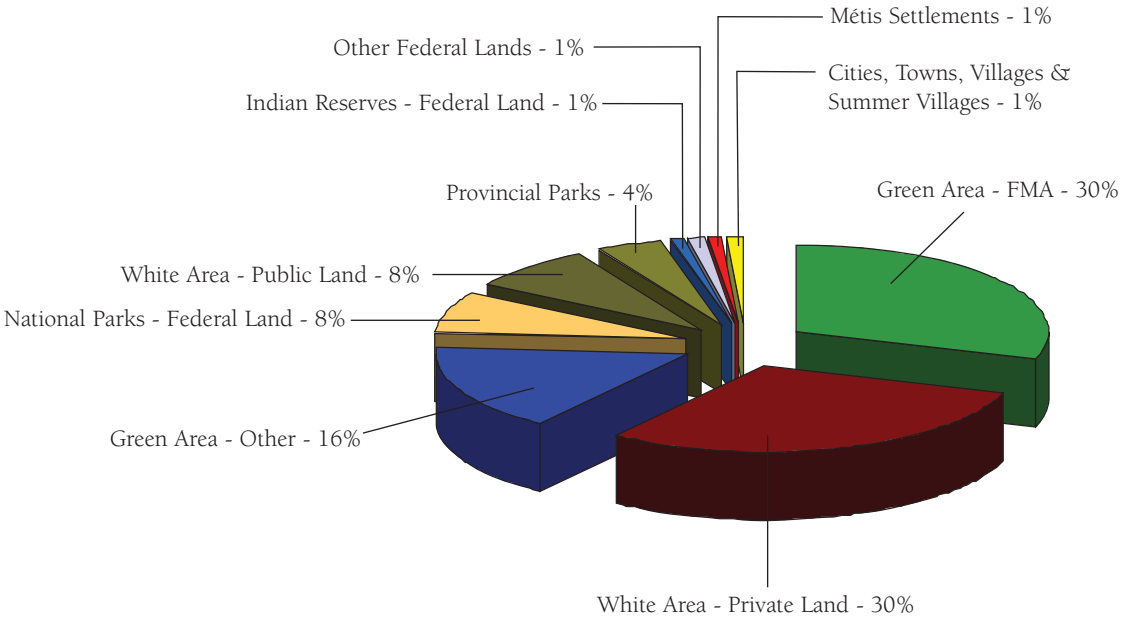
The White and Green Areas

Alberta has two major land designations — the White Area and the Green Area. These two areas were created in 1948 to guide development of the province and to deal, in part, with the failure of homesteads on lands unsuitable for agriculture. The White Area was set aside as land primarily suited for agriculture and settlement. The Green Area included forested land for forest management planning and protection of important watershed areas.

Today, Alberta's White Area and Green Area reflect differences in the landscape, land use and ownership. As well, there are differences in the way land in the two areas is planned and managed.

Figure 3

Land Use in Alberta (Per Cent of Total)



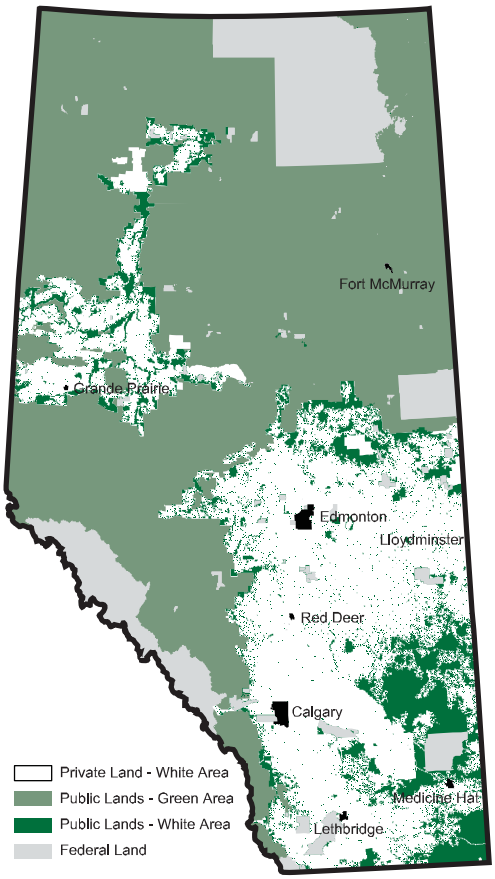


Figure 4

Green and White Areas Including Private and Public Lands

Table 1

Green and White Areas of Alberta

White Area	Green Area
• **Settled** lands	• **Forested** lands
• Covers about **39 per cent of Alberta**	• Covers about **61 per cent of Alberta**
• Three-quarters **privately owned** – by more than 1.7 million individual title holders	• Nearly all **publicly owned**
• Primarily in the **populated central, southern and Peace River areas**	• Primarily in **northern Alberta**, some in the **mountains and foothills**
• Main land uses – **settlements, agriculture, oil and gas development, tourism and recreation, conservation of natural spaces and fish and wildlife habitat**	• Main land uses – **timber production, oil and gas development, tourism and recreation, conservation of natural spaces, watershed protection and fish and wildlife habitat**
• Authority to set regulations and make decisions is primarily with **municipal governments on private land and with the provincial government on public land**	• Authority to set regulations and make decisions is primarily with the **provincial government**

Although there are differences in the primary land uses in the Green and White Areas, both areas support some of the same uses — recreation, natural resource development, conservation of soil and water, and protection of watersheds and habitat.

Making Decisions About Alberta's Land

Who Is Responsible for Land Decisions?

Generally, the provincial government regulates the planning and management of publicly owned lands, most of which are in the Green Area. The municipal governments regulate the planning and development of privately owned lands, most of which are in the White Area. About 10 million acres of public land in the White Area are managed by the provincial government in partnership with disposition holders, primarily grazing lessees.

The provincial government has some provincewide regulatory responsibilities. These include air and water quality as well as historical and natural resources such as fish and wildlife, minerals, oil and gas, timber, water, archaeological sites, palaeontological sites and traditional cultural sites.

QUICK FACTS

What are municipalities?

1. *Urban municipalities* – cities, towns, villages, summer villages
2. *Rural municipalities* – counties and municipal districts (which often contain hamlets within their boundaries)
3. *Specialized municipalities* – may include both urban and rural communities such as the Regional Municipality of Wood Buffalo (including Ft. McMurray) or Strathcona County (including Sherwood Park)

Because of the variety of land uses in Alberta, land holders, municipalities, provincial government departments and agencies, as well as a range of organizations, stakeholders and publics are involved in land-use decisions.

How Are Land Decisions Made?

One way to understand how land-use decisions are made is to consider the differences between publicly and privately owned lands.

Decisions About Private Lands

The province has given municipalities the authority for land-use planning on private land. Municipalities include cities, towns, villages, summer villages, municipal districts or specialized municipalities. Below are some of the authorities (policies and agencies) related to municipal decisions about private land use:

- The ***Municipal Government Act*** – This provides direction about the rights, responsibilities and powers of municipalities including their role in land-use planning. The *Provincial Land Use Policies*, developed according to this legislation, provide broad direction to guide municipalities in their decisions.
- **Municipal Planning** – Municipal plans and bylaws direct development and use of the land and help enhance the quality of life in the municipalities. While these plans and bylaws conform to the broad requirements of the *Municipal Government Act*, the province does not review or approve individual municipal plans and bylaws — this is the role of locally elected councils.
- **Development Permits and Planning Decisions** – Across Alberta, municipalities issue more than 50,000 development permits and planning decisions each year. In doing so, they must consider the social, economic and environmental impacts of these decisions.
- **Other Agencies** – The Alberta Energy and Utilities Board and the Natural Resources Conservation Board issue provincial approvals for activities such as oil and gas wells or pipelines and confined feeding operations. Municipal decisions must reflect approvals made by these provincial agencies.

Private Land Issues

- Through the *Municipal Government Act*, Planning and Subdivision regulations and the *Provincial Land Use Policies*, the government provides broad direction to municipalities — but it does not review or approve individual municipal plans or planning decisions. Some people believe the provincial government should be involved in assuring or monitoring compliance with these policies. Others have concerns with an increased provincial government role in the planning responsibilities currently delegated to municipalities.
- Local planning issues often involve many interests and a high degree of citizen involvement. While municipalities try to respond to issues raised by local citizens, they cannot respond to matters outside their Council's jurisdiction even when these involve land uses located within their boundary.

QUICK FACTS

The *Provincial Land Use Policies* deal with provincial and inter-municipal planning and cooperation, and specific aspects of planning. These include land-use patterns, the natural environment, resource conservation (agriculture, non-renewable resources, water resources, historical resources), transportation and residential development.

Decisions About Public Lands

The provincial government makes decisions about public lands, most of which are in the Green Area although about 10 million acres are in the White Area. When planning public land use, the provincial government follows these approaches:

- **Integrated Resource Management Philosophy** This philosophy recognizes that the use of any resource inevitably affects other resources and that we must consider those resources together when we make decisions. It also requires that we manage resources to realize both present and future benefits and that our management practices reflect a commitment to provide the same range of opportunities to future generations that we enjoy today. Integrated land management ensures that environmental, social and economic issues are considered and helps integrate industry, government and public uses of Alberta's land and resources. Cooperation and communication with stakeholder groups, local municipalities and the public are key components.
- **Integrated Resource Plans and Regional Strategies** These strategies and plans provide direction for land use in a specific area or region. They include an assessment of resource values and identify policies for long-term management and uses that address stakeholder and community needs. It is important to coordinate the direction in an integrated resource plan with that in municipal plans for the area. Some examples of strategies are the Northern East Slopes Strategy, the Eastern Slopes Policy and the Regional Sustainable Development Strategy for the Athabasca Oil Sands.
- **Dispositions** – These include land-use contracts such as agreements, easements, leases, letters of authority, licences, permits or quotas. Dispositions are a way that the government gives individuals, companies or organizations rights to use public land for a specific purpose — such as grazing, farm development, timber harvesting, surface access for oil and gas, commercial use or recreation. Applications for public land dispositions are referred to provincial government resource managers and municipalities who review and identify any concerns related to their mandate. Following this, the provincial government makes a decision based on the concerns raised.

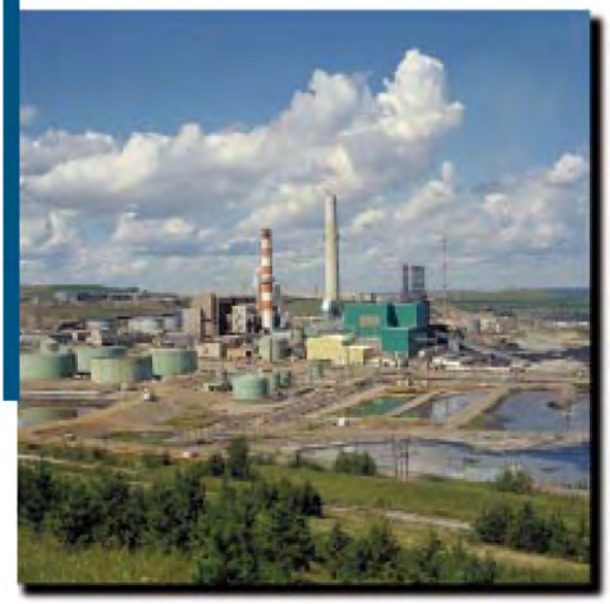
Public Land Issues

- Stakeholders have different, often conflicting expectations about how the various uses of public lands should be integrated. Resource management approval processes need to be better integrated to address natural resource developments, fish and wildlife habitat, watershed impacts and other factors.
- The growth in natural resource development has opened up new access to previously undeveloped public lands and increased access to existing areas.
- Increased and continued use of public lands is resulting in fragmentation and loss of habitat — this affects wildlife, natural vegetation and biodiversity.
- Population growth in centres next to public land in the Green Area (e.g., Fort McMurray, Canmore) has created a demand for more land to be made available for settlement and a corresponding need for recreational or commercial opportunities. Expanding

communities in the Green Area are spreading into places where timber production and oil and gas developments have been the primary land uses.

Issues Common to Private and Public Land

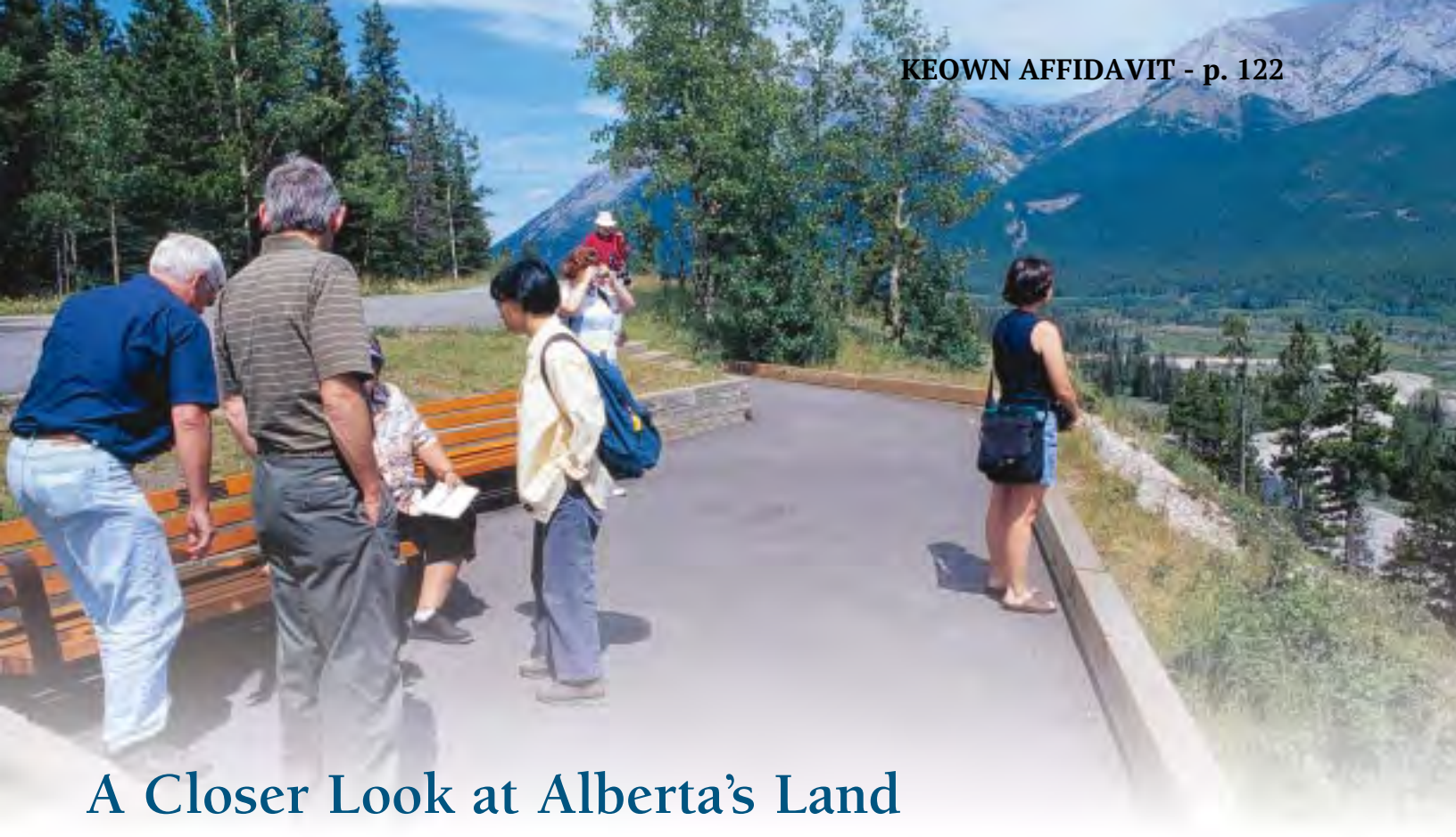
- Given the province's economic and population growth, it is becoming more and more challenging to manage the increasing pressures and conflicts among land uses in various parts of the province, as well as the cumulative effects from activities on the land.



Others Involved with Land-use Decisions

Although municipalities and the provincial government play a significant role in land-use decisions, many others are also involved. We all make decisions that affect the land. As individuals, we make decisions about the land we own or reside on, use for recreation, farming or other means of making a living. As members of organizations, we make choices about land related to the needs of our recreational clubs or land conservation groups.

Companies make decisions about ways to access the land or use the natural resources and also through their corporate environmental practices and policies. As well, when we become involved in land-use planning discussions or advocate changes in land-use policies or practices, we are shaping land-use decisions.



A Closer Look at Alberta's Land

Alberta's land is a mosaic of uses. The next section of this booklet provides more specific information about the many ways Alberta's lands are used and the contributions the land makes to our well-being. This booklet focuses on 11 key areas:

- Agriculture
- Forests
- Energy and Minerals
- Settlement
- First Nations
- Métis Settlements
- Tourism and Recreation
- Historical Resources, Parks and Protected Areas
- Watersheds
- Biodiversity, Ecological Goods and Services, and Fish and Wildlife
- Climate Change

For each area there is information about the current situation, important trends and the key land-use challenges. By reading about each area, we begin to see the "big picture" and understand some of the trade-offs that need to be considered.

Agriculture

Looking Back

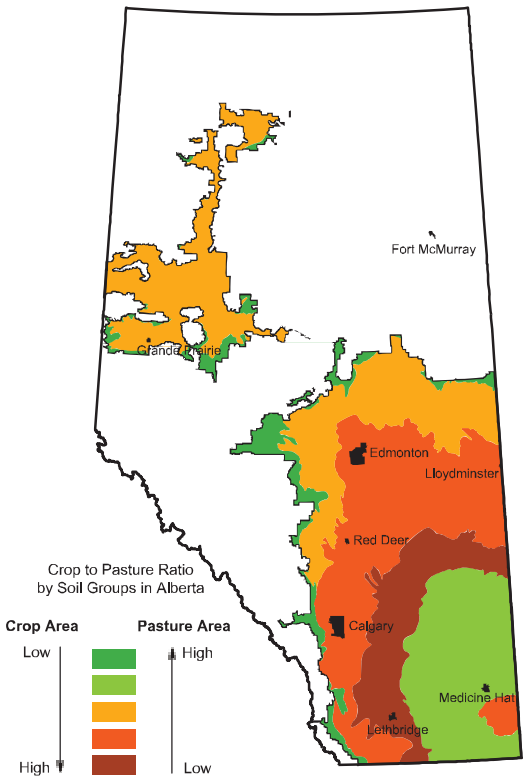
- Alberta's first record of cultivation dates back to 1779, when a fur trader named Peter Pond grew vegetables in a garden at his isolated post near Lake Athabasca. Early agricultural activities were limited to growing vegetables and wheat around forts and missions.
- The influx of settlers nearly 100 years later, after the Canadian Pacific Railway reached Alberta, started an agricultural land-use pattern that exists today. As settlers arrived, they chose lands that were easiest to cultivate and the most productive.

What We Know

- About 52 million acres of Alberta's land is used for agriculture, mostly in the White Area. This land is used for crop and livestock production (primary production), as well as for value-added products such as meat products, cereals, beverages, sugar, hides, pet foods and nutraceuticals. The vast majority of agriculture occurs on private land but about 15 per cent of livestock grazing occurs on public land.
- Alberta is the largest cattle-producing province in Canada.
- In 2006, agriculture and food industries employed 79,300 people. The industry generated $7.8 billion in farm gate revenue for producers while the food and beverage manufacturing sector contributed $9.6 billion to Alberta's economy.
- Over one million acres in Alberta are irrigated — about 65 per cent of the total irrigated area in Canada. Irrigation contributes to over 19 per cent of agriculture's gross primary production in Alberta.
- The *Provincial Land Use Policies*, adopted in 1996 pursuant to the *Municipal Government Act*, includes policies intended to help maintain and diversify Alberta's agricultural industry. The policies encourage municipalities to identify land where agriculture should be a primary use, limit fragmentation and premature conversion to other uses, direct development to areas where it will not constrain agricultural activities, and minimize conflict between intensive agricultural operations and other land uses.
- In 2002, the *Municipal Government Act* was amended to require that municipalities address the protection of agricultural operations in their municipal development plans and land-use bylaws. While this supports farmers in continuing their normal farming practices, municipalities are not required to protect or preserve agricultural land. If a landowner wishes to sell his or her land for non-farm purposes or wishes to change the use of his or her land, a municipality may

Figure 5

Profile of Agriculture in the White Area



decide that the land can be used for purposes other than agriculture. Factors that may influence this decision-making process include the desire of the municipality to diversify the municipal tax base or settlement development pressures.

- Rangelands and other agricultural lands are home to many species of wildlife and contribute to Alberta's biodiversity.

Trends

- Farm incomes have dropped as a result of increased expenses (e.g., fuel and fertilizer), unexpected events (e.g., the BSE crisis) and years of drought.
- Consolidation of agricultural operations has resulted in fewer but larger farms. As farms become larger, it becomes more cost effective to bring more farmland into production.
- Bio-diesel processors will consider using canola as a renewable energy source. Their interest could contribute to increased market opportunities for oilseed processors, which might increase the demand for land to grow canola.
- Alberta's farmers are aging — the current average age is about 48 years. Many farmers may want to retire in the next decade or two. If family members do not want to take over the farming operations, there is an increased likelihood that land close to major urban centres will be sold to developers.

Challenges

- Rural and urban growth has resulted in the loss or *conversion* of some of the province's most productive farm and ranch lands. *Fragmentation* of the land base — dividing land into smaller parcels — is also a significant problem. This is most notable in the vicinity of the Edmonton-Calgary and Canmore corridors, Lethbridge and Grande Prairie areas.

Conversion of Agricultural Land

- Alberta has monitored the conversion of agricultural land to other uses since 1976. Agricultural land that has been converted to other uses has usually been the most productive land in the province, while the land converted to agriculture has generally been less productive — more suited to forage and pastures.

- In some areas of the province, the market value of land for settlement development may exceed the value of land for agriculture. As a result, it is difficult to slow down or prevent conversion of agricultural land to other uses since sometimes conversion can make better economic sense than continuing to use the land for agriculture. And once land is converted to other uses, it may not be available for agricultural production or the remaining parcels of land may be too fragmented for intensive agricultural operations.
- Some landowners have expressed concern that restricting the sale of agricultural land for other purposes in high market value areas could limit their opportunities to sell their land for high market value to offset business losses, support retirement or leave the agricultural industry.

- When a municipality approves a landowner's request to use land for non-agricultural purposes, the impacts of the land conversion are considered from a municipal perspective. Cumulative effects of land conversion — across a region, landscape or watershed — may not be assessed.
- Although the *Provincial Land Use Policies* encourage municipalities to limit fragmentation or retain agricultural land, there is no mechanism for tracking conversion or preventing municipalities from rezoning the land to allow other land uses.

Fragmentation of Agricultural Land

- New subdivisions, urban and rural growth, transportation routes or energy and utility corridors can fragment land and result in pieces that are too small or unsuitable for some agricultural uses. This limits the kinds of agricultural uses and can reduce a producer's ability to farm. For instance, neighbour concerns or bylaws may restrict dust, light and noise but this may also limit farming operations to certain times of the day or week, posing problems for weather-dependent activities like seeding, spraying and harvesting. Small parcels of land also mean that confined feeding operations must expand to areas where there is enough land to accommodate buffers between their operations and other land uses.

More Information

Alberta Agriculture and Food:
www.agric.gov.ab.ca

Alberta Agriculture and Food's Loss and Fragmentation of Agricultural Land report:
www.agric.gov.ab.ca/farmland

Forests

Looking Back

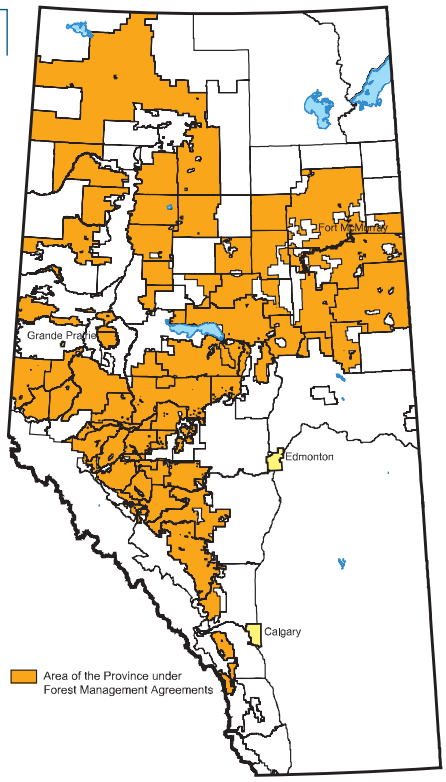
- In the early days of Alberta's settlement, forests were seen as covering up valuable farmland and needing to be cleared to make way for the railroads. Later, forests were valued as a source of timber and for their role in providing clean air and water.
- In 1930, Alberta took ownership of its forests and other natural resources from the federal government. In 1953, Alberta's first Forest Management Agreement was signed with North Western Pulp and Power in Hinton and the timber quota system was authorized in 1966.
- During the 1980s, new manufacturing facilities were developed throughout Alberta. This was the result of a government focus on industrial diversification and the discovery of a new use for Alberta's deciduous trees (oriented strand board).

What We Know

- Over half of Alberta's land base is forested — about 80 million acres (38 million hectares).
- In 2006, Alberta's forests contributed over $11 billion in revenues and supported more than 47,000 jobs. The forest industry is the third largest in the province, next to energy and agriculture.
- Forests are home to many species of wildlife and provide a range of tourism and recreational opportunities. They produce oxygen, control stream temperatures and preserve soil by preventing erosion.
- Most of Alberta's forested lands are publicly owned and in the Green Area. Only about 4 per cent of the total forested land in Alberta is privately owned.
- The right to harvest forests is managed through Forest Management Agreements (FMAs), quotas and permits.

Figure 6

Forest Management Agreement Map



QUICK FACTS

A Forest Management Agreement (FMA) is a large, area-based agreement between the province and a company. It gives a company the right to establish, grow, harvest and remove timber from a particular area of land. An FMA is granted for 20 years, with options for renewal. The FMA holder is responsible for forest management plan development, reforestation, and maintenance of a manufacturing facility.

A quota gives a company the right to harvest a per cent of the annual allowable cut of a particular forest management unit (Coniferous Timber Quota) or a set volume of timber (Deciduous Timber Allocation). This is a 20-year renewable agreement where the quota holder is usually responsible for reforestation and participates in the development of the management plan.

A permit is a short-term timber agreement used to satisfy local demand for timber (e.g., Christmas trees, firewood). It usually is for one year but can be longer.

- In the Green Area, the use of forests is guided by approved forest management plans, prepared either by the government or a company that holds an FMA. The use of forests on public lands in the White Area is guided by local integrated resource plans. There are few harvesting restrictions on privately owned lands.

Trends

- The forest industry is looking for new places to harvest timber. Purchasing privately owned woodlots or Crown land in the White Area, purchasing wood directly from landowners and leasing privately owned land are options.
- Competition for land that could be used for forestry is expected to increase. The bio-energy sector is interested in using White Area timber fibre for the production of heat and electricity while the agricultural industry views woodlots as potential cropland.
- Public pressure for sound forestry practices has increased and in response the forest industry has developed more environmentally friendly practices. Increasingly, companies are becoming certified and can advertise that their products come from sustainably managed forests.

Challenges

- Only a very small amount of Alberta's timber remains uncommitted through an FMA, quota or permit.
- The forested landscape is used by industries other than forestry. Coordination of various industry activities, including forestry, is important to protect the forests and ensure their sustainability. Working together helps reduce road clearings, wood wastage and the industrial footprint.
- Mountain pine beetle infestations kill trees and reduce the annual allowable timber cut. Although harvesting timber killed by the beetles can provide short-term economic gain, it may result in a long-term reduction

in the volume of forest that is harvestable. As well, additional roads may be necessary to harvest mountain pine beetle-susceptible stands or salvage trees that are already infected.

- In the White Area, timber sustainability is impacted by the lack of forested areas and the few private landowners committed to sustainable woodlot management through a woodlot stewardship plan. As well, most of the forested areas are small and separated by large tracts of private land.
- The agricultural industry is looking for expansion opportunities in forested areas. These include land in the Green Area — especially near settlements on the fringe of the Green and White Areas and privately owned land leased by timber companies.

More Information

Alberta Sustainable Resource Development: www.srd.alberta.ca/forests

Energy and Minerals

Looking Back

- Over 560 million years ago, carbohydrates and other organic materials produced by plants settled on the ground and in stream, lake and sea beds. As they became more deeply buried, they were transformed by heat and pressure into solid, liquid or gaseous hydrocarbons — fossil fuels.
- In 1788, Alexander Mackenzie wrote about bituminous seeps among Alberta's Athabasca tar sands, into which a six-metre pole could be inserted "without the least resistance." About 100 years later drilling began at the Athabasca oil sands — crews struck a reservoir of natural gas that blew wild for 21 years.
- After drilling 133 dry holes across western Canada, Imperial Oil struck oil at Leduc, Alberta in 1947, transforming Alberta into an oil-rich province.

What We Know

- In 2006, energy resources accounted for almost 70 per cent of the value of the province's total exports and more than one-quarter of its gross domestic product. Energy revenues from non-renewable resources made up about one-third of the total revenue collected by the province in 2005-06.
- Alberta's energy sector is the principal driver of the province's economy and a substantial contributor to the economy of the entire country. Nearly one in every six workers in Alberta is employed directly or indirectly by the energy sector.

QUICK FACTS

The Alberta government owns almost 81 per cent of the oil, natural gas and other mineral resources in the province. The remaining mineral rights are held by the federal government or are privately owned. Mineral title holders have a legal right to access their minerals.

- Alberta has a wealth of mineral, oil and gas resources: (Note: data current as of March 2007)
  - An estimated 1.6 billion barrels of established conventional oil reserves are remaining in the province.
  - Alberta's oil sands reserve is considered one of the largest in the world and brings Alberta's total oil reserves to the second-highest level in the world. To date, about 2 per cent of the initial established oil sands resource has been produced.
  - At the end of 2005, Alberta's remaining natural gas reserves totalled 41 trillion cubic feet.
  - The amount of natural gas in Alberta's coals (coal-bed methane) is estimated to be as much as 500 trillion cubic feet. It is not known how much of this gas may be economical to produce.
  - Canada is ranked tenth in the world for total proven coal reserves — Alberta has 70 per cent of Canada's total reserves. Eleven major coal mines operate in Alberta.
  - The vast majority of new wind generation in Alberta has been installed since 2000. Southwest Alberta near the Crowsnest Pass is a key area and there is also potential for wind energy in the Cypress Hills. As well, interest in on-farm bio-energy is growing.
  - There has been no significant investment in new electricity transmission over the last 20 years. With a growing economy, there is now an urgent need for transmission construction in all quadrants of Alberta. This may result in the need for increased land use through the widening of existing corridors and the construction of new ones.
  - World energy markets are strong and there is a growing demand for energy.
- The United States has been a main market for Alberta's energy products and will continue to be a major market. The worldwide demand for energy is now increasing as economies around the world continue to grow, with Asia becoming an important driver of global economic growth. Alberta's stable political and economic environment offers an attractive investment climate for the energy industry.

Figure 7

Areas of Potential Energy Growth

Challenges

- As energy development expands and intensifies, there are more concerns about land-use challenges and conflicts, the footprint of land that is being used for exploration, drilling and development, and potential impacts on other subsurface resources such as groundwater.

Access

- Many land-use challenges relate to access. Access to resources involves surface and subsurface rights while access itself relates to the physical and economic considerations and constraints involved with getting on to land for resource exploration and development.

Issues include:

- In some areas, residential expansion of cities, towns or acreage subdivisions is occurring on the land above existing oil and gas fields, coal and gravel deposits, or other subsurface resources. In other places, previously undetected oil and gas fields are being identified beneath existing urban and residential sites or new energy projects are being developed within expected growth areas. Accessing these resources increases the potential for conflict between industry, landowners and the public.
- Landowners, other sectors, and the public expect to be increasingly involved in resource access decisions.

Figure 8

Generalized Areas of Mineral Potential

- Access constraints, such as uncertainty or lack of timely access, may make energy industry investment and development less attractive. The potential for significant future natural resource development in the province makes resolution of access issues even more important.
- Access to land will be an important factor in further expansion of the electricity transmission and generation infrastructure needed to sustain the province's economic growth.

Planning and Approvals

- Various agencies, boards and departments are involved with energy resource approvals on private land, although their role may not always be clear to the public and other stakeholders.
- Licenses, permits and authorizations from the Alberta Energy and Utilities Board take priority over the direction in municipal plans and bylaws. This priority exists because of the recognition that:
  - Oil and gas development is important for the province and should not be subject to local bylaws that might vary from place to place.
  - Unlike other development, oil and gas resources occur where they occur and developments to extract the resource cannot be easily moved based on changes in local planning bylaws or goals.
- Resource development companies plan and seek approvals from the Alberta Energy and Utilities Board for extraction of energy resources such as oil and gas. Given that energy development is exempt from the *Municipal Government Act*, it is challenging to develop plans and planning processes that integrate municipal and energy development on the same landscape.

More Information

Alberta Energy: www.energy.gov.ab.ca

Settlement

Looking Back

- Records of First Nations living on land that is now in Alberta date back thousands of years.
- The earliest non-Aboriginals in Alberta were fur traders and explorers like Anthony Henday, Peter Fidler and David Thompson. Later, missionaries arrived in Alberta, followed by the early North West Mounted Police, which later became the RCMP.
- A few urban settlements were established around fur trading posts (like Fort Edmonton) or North West Mounted Police posts (like Fort McLeod). However, most of Alberta's towns and villages were established around railway stations in the late 1800s and early 1900s. During this time, the Canadian government was actively working with the railway companies to encourage the settlement of western Canada.
- Today, human settlements in Alberta include cities, towns, villages, summer villages and rural municipalities. They meet the social, recreational, commerce, and often the educational and health needs of Alberta's growing population.

What We Know

- Alberta has 356 municipalities, of which 278 are urban (cities, towns, villages and summer villages), 4 are specialized municipalities and 74 are rural municipalities including municipal districts.

QUICK FACTS

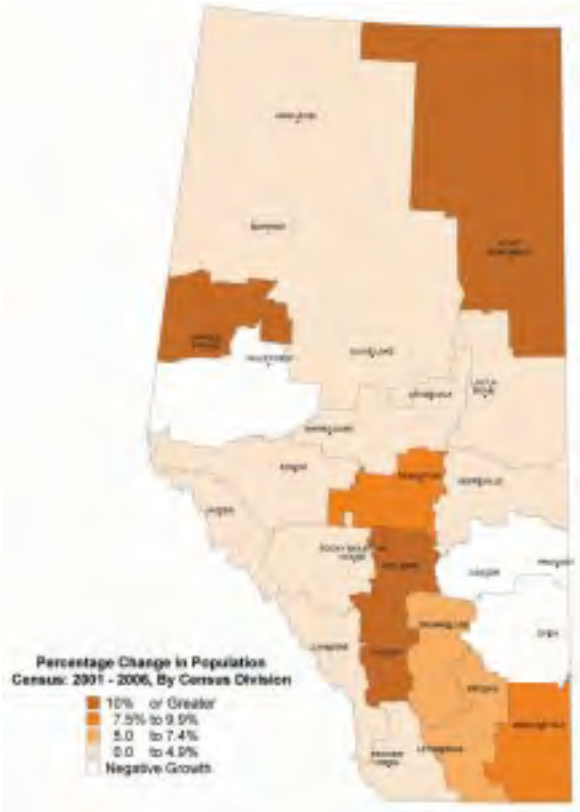
What is industrial development?

In the municipal planning/zoning context, industrial development means the infrastructure and activities associated with production e.g., manufacturing, fabricating, warehousing, processing, refining or assembly.

- In addition to municipalities, there are several other settlements including 3 Special Areas, 7 Improvement Districts, 8 Métis Settlements and 133 Indian Reserves. Of the total land in an urban municipality, typically two-thirds is used for residential, institutional or parks — industrial and commercial development, and land for future development account for the remainder.
- Municipalities are governed according to the *Municipal Government Act*.
- Over 80 per cent of Alberta's population lives in urban areas.
- Over the past five years, communities that are close to major urban areas or along growth corridors have increased in both population and area.

Figure 9

Percentage Change in Population



- Growth has pushed a number of municipalities such as the Regional Municipality of Wood Buffalo (which includes the community of Fort McMurray) beyond their planned development capacity and has strained human, financial and land resources.
- Because of population growth, housing starts increased in many communities between 2000 and 2004. Calgary and greater Edmonton had the highest number of units built between these years, consuming an estimated 11,800 acres of land in four years.
- Not all settlements are growing — some in the eastern parts of the province are declining.

Trends

- Over the next 20 to 25 years, substantial growth is forecast for the province's major urban centres and surrounding regions.
- Much new settlement growth is occurring within suburban neighbourhoods at increasing distances from the urban core. As well, development in suburban neighbourhoods continues to require extensive amounts of land.
- In most communities, residential lot sizes have decreased over the last decades and development is more compact, reflecting increasing land and servicing costs. Compared with one or two decades ago, there has been a substantial increase in the construction of multiple family types of housing (such as townhouses or condominium apartments) being constructed.
- In northeast Alberta, settlement and infrastructure needs have increased, primarily because of resource development.
- Communities are planning for longer horizons, sometimes for 100 years, and there is an increasing emphasis on planning for communities that are sustainable from an economic, social and environmental context.

Challenges

- Human settlement patterns not only influence land use and development but are also affected by these patterns. With high growth rates and strong projections for housing and development within Alberta's municipalities, it is critical that human settlement needs are considered in all land-use decisions.
- Residential, industrial and commercial development in rural areas is increasing the demand for land and services in rural municipalities and is changing the landscape.
- Traffic has increased as a result of business travel, tourism and commuters — particularly between Calgary and Edmonton and around major towns or cities close to the Highway 2 and 63 corridors. This has strained road capacity and resulted in more exhaust and particulate matter in the air.
- Water availability is a mounting concern, particularly in regions and areas that are growing.
- Strong population projections coupled with economic pressures for development will increase the land needed to meet settlement demands. Several major annexations are currently under consideration and will affect Calgary, the Municipal District of Rocky View, the City and County of Grande Prairie, the City and County of Red Deer and others.
- Recreational communities are growing, particularly in summer villages and areas close to the mountains. Balancing demands for growth with protection of the natural environment will become more challenging.
- Some citizens are concerned that municipalities are not giving proper consideration to environmental, social or community impacts of planning decisions.
- Some urban and rural communities compete with each other to attract new residents and business investment. As a result there may be inefficient land use and more widely spread development patterns (i.e. sprawl).

More Information

Alberta Municipal Affairs and Housing:
www.municipalaffairs.gov.ab.ca

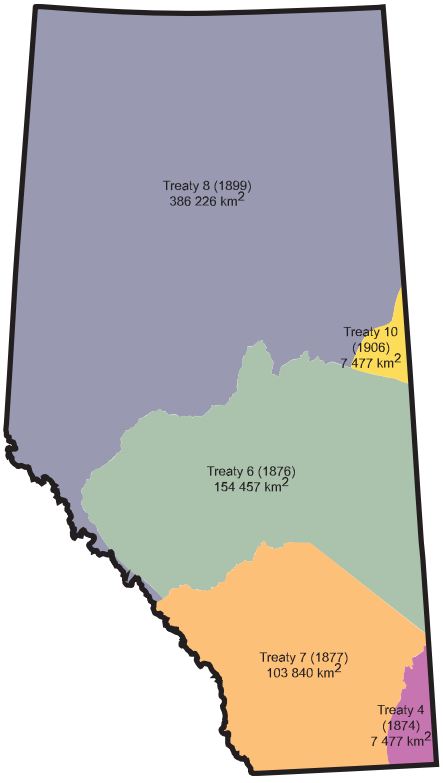
First Nations

Looking Back

- First Nations have lived on the land that is now in Alberta for thousands of years. Archaeological records dating back more than 10,550 years ago indicate camps on the shores of the Vermilion Lakes near Banff.
- Anthony Henday, the first European fur trader to reach Alberta, recorded meeting First Nations in 1754.
- Treaty 6 (1876), Treaty 7 (1877) and Treaty 8 (1899) were created, and cover most of what is now Alberta.

Figure 10

Treaty 6, 7 and 8 in Alberta



What We Know

- There are 47 First Nations in Alberta with a total population of 98,000. About two-thirds live on reserves, one-third live off reserves and a small number live on Crown land.
- Over the past decade, the growth of Alberta's First Nations population has increased consistently by 2.5 per cent to 3 per cent each year.
- Indian reserves in Alberta were set aside in accordance with the provisions of Treaty 6, Treaty 7 and Treaty 8. Reserves in Alberta cover about 1.6 million acres and range in size from a few acres to over 350,000 acres.
- All validated treaty land entitlement claims in Alberta are either settled or under negotiation.
- First Nations share a desire to identify, protect and preserve historical, spiritual and cultural sites on Crown land. Traditional-use studies identify these sites to help avoid infringement on First Nations rights as well as to reduce conflicts between government, industry and First Nations.
- Recent Supreme Court decisions indicate that consultation must occur when land management and resource development decisions may adversely impact First Nations' rights and traditional uses on Crown lands.
- Cabinet approved the Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development in 2005 and the corresponding consultation guidelines were released in the fall of 2006. The guidelines provide direction on how consultation for land management and resource development should occur in relation to activities such as exploration, resource extraction, and management of forests, fish and wildlife.
- Although some First Nations have signed a resolution concerning the consultation guidelines, the Alberta government is proceeding with implementation and continuous monitoring of these. This includes dialogue with First Nations and industry, accepting ongoing feedback and adjusting the guidelines as necessary.
- First Nations want to contribute to the growth of Alberta's economy. Through the First Nations Economic Partnerships Initiative, First Nations are developing partnerships with industry and strengthening the First Nations private sector.

Challenges

- Alberta has a responsibility to consult with First Nations where legislation, regulations or other actions infringe on treaty rights. The province wants to have a practical consultation process that avoids or minimizes impacts on First Nations' rights and traditional uses, and also creates greater certainty for industry.
- The cultural and environmental cumulative effects of land use — including concerns about access management and habitat considerations — require more consideration. Project-specific consultation often does not consider the broader impact of continued long-term development.
- Some sites of utmost importance to First Nations, such as gravesites, or areas of spiritual or ritual significance, are on private lands. Protecting these sites from development while allowing access for First Nations communities, is a priority for some First Nations. In some cases, the *Historical Resources Act* has been used to protect and manage sites of critical importance.

Métis Settlements

Looking Back

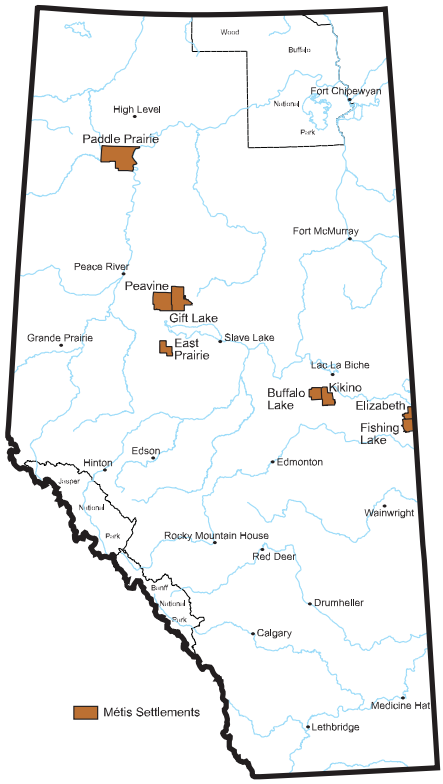
- Many of the first Métis communities grew up near fur trading posts but other communities developed as a distinct Métis culture emerged.
- In 1938, following the Ewing Commission of 1934, the Province of Alberta established Métis land bases in Alberta.

What We Know

- Alberta is the only province in Canada that has a recognized Métis land base. There are eight Métis Settlements in Alberta, all located north of Edmonton around the Lac La Biche-Bonnyville area and Lesser Slave Lake. The Métis Settlements cover approximately 1.3 million acres (528,000 hectares) of land and include Buffalo Lake, East Prairie, Elizabeth, Fishing Lake, Gift Lake, Kikino, Paddle Prairie and Peavine. About 6,950 Métis reside in the Settlements.
- In 1990, by Letters Patent, the Crown granted the Métis Settlements General Council ownership in fee simple of the lands within the eight Metis Settlements.
- There is a co-management agreement between Alberta and the Métis Settlements. This agreement provides for the co-management of exploration and development of subsurface minerals under Settlement lands.

Figure 11

Métis Settlements in Alberta



Tourism/Recreation

Looking Back

- In the fall of 1883, three Canadian Pacific Railway construction workers stumbled across a cave containing hot springs on the eastern slopes of Alberta's Rocky Mountains. That discovery resulted in the creation of Canada's first national park — Banff National Park — and the start of Alberta's tourism and recreation industry.

Current Situation

- Alberta's growing tourism industry generates almost $5 billion in annual revenues and about $2.3 billion in total taxation revenues, of which $635 million is credited to the provincial government. The industry provides over 103,000 person-years of employment in Alberta.
- This is in addition to the many health and social benefits associated with tourism and recreation. Non-monetary benefits — physical fitness, personal achievement, cultural exploration and a connection with the environment — contribute to the quality of life for Albertans and others who visit the province.
- While many people think of tourists as being visitors from distant lands, anyone travelling for non-work purposes is considered a tourist. Approximately two-thirds of provincial tourism revenues arise from residents of Alberta, British Columbia and Saskatchewan travelling throughout this province. Our other important markets include the rest of Canada, the United States, the United Kingdom, Germany and Japan.
- Half the tourism expenditures in Alberta occur in areas other than Edmonton and Calgary. Alberta's rural landscapes and natural environments also offer major tourist attractions.
- Alberta's rural landscapes provide a range of opportunities including agro-tourism, bed and breakfasts, campgrounds and heritage sites.
- Alberta's public lands provide the setting for a variety of pursuits and attractions ranging from less intensive backcountry camping, hunting, fishing and trail riding to more intensive land use through lodges, campgrounds and golf courses.

- Maintaining the esthetic quality of the natural environment and sustaining access to nature and the outdoors is becoming increasingly important for attracting visitors and Albertans.

Trends

- Significant growth is occurring in all forms of tourism and recreation — Aboriginal experiences, rural tourism, ag-tourism, recreational trail use, nature, culture and heritage tourism, hunting and fishing, urban tourism and sports tourism. The Alberta government and stakeholders are committed to continued expansion of tourism and recreation.
- The public's demand for a wide range of recreational opportunities continues to be on the rise.
- Interest in eco-tourism, nature-based and heritage tourism is rising.

- More and more individuals who live in the communities along the Calgary-Edmonton corridor want to use public land for recreation, particularly along the Eastern Rocky Mountain slopes. There are also increasing demands for recreation pursuits in more northern wilderness areas.

Challenges

- Many communities regard tourism as a way to diversify their economies. However, there are other interests competing for the same land base. For example, forestry, grazing, energy and mineral development interests often seek or need access to the same land base.
- Much of Alberta's landscape is already committed to use, including agriculture, residential, industrial and forestry. As a result, it is increasingly difficult to accommodate demands for tourism development and recreation use.
- Albertans' desires to pursue recreation activities are on the rise. It is challenging to adequately address the impacts of demands for greater access to private and public lands. This includes both increasing public safety concerns and cumulative effects on the land and on resources.
- The recreation community operates primarily with volunteers and lacks a common voice. This impacts its capacity to participate in planning and policy initiatives.
- Local municipalities, hospitals and emergency personnel resources are being challenged to respond to emergencies and manage hazards (e.g., fire) related to some recreational activities. This is a particular concern for activities that are becoming more "extreme," and for those located in more remote areas.
- Tourism and recreation activities are sustainable if managed appropriately. However, without appropriate management tools they have the potential to negatively impact other activities and the landscape.
- Increasing pressure for recreation access to public and private lands is producing more frequent conflict between recreation users themselves as well with private landholders and public land disposition holders.
- The anticipated long-term growth in tourism and recreation demand combined with the dramatic increase of Alberta's population stimulates the need for new products and destinations. Without new or enhanced destinations, Alberta has a limited ability to compete in the regional, national and global marketplace.

More Information

Tourism Development and Services; Tourism, Parks, Recreation and Culture:
www.alberta-canada.com/tourism

Travel Alberta consumer site:
www.travelalberta.com

Travel Alberta industry site:
industry.travelalberta.com

Historical Resources, Parks and Protected Areas

Looking Back

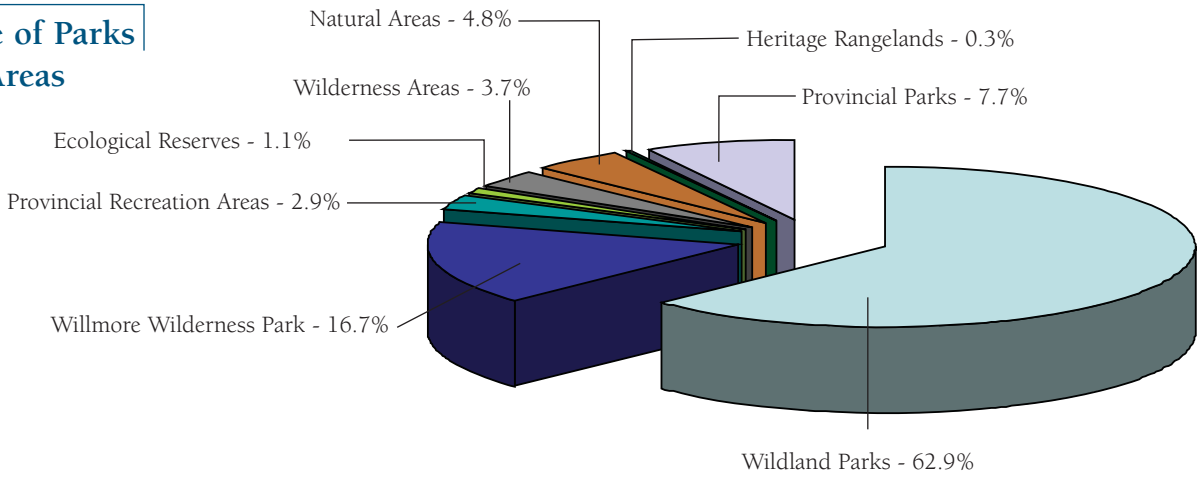
- The establishment of Aspen Beach Provincial Park in 1932 signalled the official beginning of Alberta's provincial park system. Early parks were small recreation sites that provided Albertans with scenic spots to swim and picnic.
- In 1964, Alberta's provincial parks network was expanded to include wilderness areas and natural areas. In 1980, the legislation was amended to allow establishment of ecological reserves.

What We Know

- Alberta's parks and protected areas network includes a spectrum of sites — from developed recreation areas to pristine wilderness. The network consists of more than 520 areas and protects almost seven million acres — just over 4 per cent of Alberta's land base. An additional 8 per cent of Alberta's land base is federal land protected as national parks.
- Parks and protected areas showcase each of Alberta's six natural regions, preserve our natural heritage and biodiversity, and protect habitats and watersheds. As well, they contribute to the province's environmental quality and provide many recreational opportunities.
- The full environmental diversity of the province's six natural regions is not yet represented in the parks and protected areas network. Some significant gaps exist, particularly in the Parkland, Foothills and Grassland Natural Regions.
- The province identifies, evaluates and protects Alberta's historical resources and operates 18 provincial historic sites, museums and interpretive centres. The enjoyment and protection of historical resources contributes to Alberta's identity and provides a sense of place.
- Protection of historical places allows Aboriginal people to practice their traditional cultural ways, which is central to their cultural identity.
- When a new park or protected area is established, the province honours existing commitments for resource development. However, new subsurface mineral rights that are sold after a park or protected area is established, must be developed from lands outside a park or protected area.
- Forest management in parks and protected areas includes pest management and FireSmart programs to reduce wildfire risk for adjacent communities.
- Alberta has identified Environmentally Significant Areas — landscapes with special biological diversity or other natural features. Inventories of these areas provide valuable information for the management of both private and public lands. Some, but not all, of these Environmentally Significant Areas are located within parks and protected areas.

Figure 12

Total Land Base of Parks and Protected Areas



Alberta's historical resources include archaeological sites, palaeontological deposits and historical buildings, and any other works of humans or nature that are of interest for Alberta's posterity. There are just over 33,000 archaeological sites recorded, with more than 30,000 known palaeontological sites estimated. These sites are protected by the *Historical Resources Act*. Historical structures are usually protected by a combination of legal designations and incentives.

Trends

- There is significant and growing public and media interest in archaeology and palaeontology, including preservation of these resources.
- As more baby boomers enter retirement, the demand for heritage tourism will increase, such as exploring historic resources and sites.

- First Nations are becoming more and more interested in the condition and preservation of sacred sites, as well as the location and nature of non-sacred archaeological sites. Consultation with these groups regarding their heritage will increase.
- There will continue to be public pressure to complete the parks and protected areas network as well as public concern about management and protection of individual parks and protected areas. At the same time, population growth will place more recreational pressure on these areas and more intensive use of lands surrounding them.

Challenges

- Parks and protected areas play a significant role in watershed management, particularly in headwater areas. However, many of Alberta's different wetland features are either not included in the existing parks and protected areas network or the current boundaries are insufficient to either properly represent or protect key wetland features.
- Private land could help protect and represent the province's natural diversity. However, the existing management tools for private conservation do not include resource protection comparable to that provided in a provincial protected area. Voluntary initiatives such as conservation easements cannot control subsurface activities that could result in surface disturbances.
- Most individual parks and protected areas are not large enough to ensure long-term preservation of biodiversity and therefore may be at risk of becoming ecological islands.
- Currently, when decisions are made about lands surrounding parks and protected areas, the impact on these areas is not considered. For instance, neighbouring parks and protected areas are not included in forest management planning.
- Existing incompatible activities in designated protected areas make it challenging to ensure these areas will continue to be representative of the lands and features they were set aside to preserve.
- In some provincial parks and protected areas, invasive alien plant species affect the integrity of the ecosystems and how well the area represents the province's natural diversity.
- It is a challenge to properly protect historical resources where they are affected by adjacent land-use activities. For example, noise levels or fumes in the vicinity of a sacred archaeological site such as a medicine wheel can affect its spiritual values.
- Some people are concerned that measures to help conserve historical resources prevent developers from accessing natural resources.

More Information

Parks and Protected Areas:
www.cd.gov.ab.ca/preserving/parks/

Watershed

What is a Watershed?

- A watershed, or basin, is the area of land that catches precipitation and drains it to a water body such as a marsh, lake, stream or river. Watersheds can range in size from a few hectares to thousands of square kilometres.
- Watershed management considers the whole landscape in a watershed — land, water, plants, animals and people — and how all these components interact to affect the watershed.

What We Know

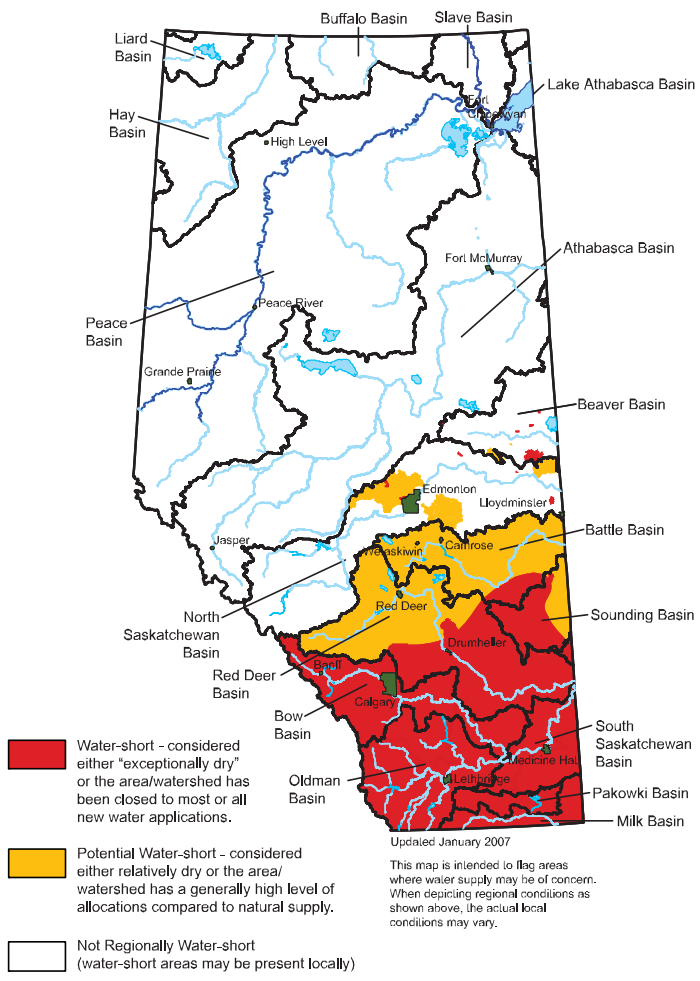
- Alberta has seven major watersheds — Milk River, South Saskatchewan, North Saskatchewan, Beaver River, Athabasca River, Peace/Slave River and Hay River.
- Healthy, functioning watersheds can provide clean and abundant water resources to agricultural, municipal, industrial and recreational users, help maintain healthy crops and crop yields, support wildlife habitat, and regulate natural processes such as soil erosion and sedimentation. Healthy watersheds contribute to the overall health of the environment.
- Water for Life is the Alberta government's strategy for addressing water quality and water quantity issues and the need for sustainability of water resources.
- Watershed Planning and Advisory Councils — multi-stakeholder groups that include governments as partners — provide leadership for watershed management planning and reporting on the state of the basin.
- The watershed planning process identifies issues, gathers information, evaluates management options and makes recommendations to provincial and local government decision makers, as well as to industry and communities.

Challenges

- Alberta is facing significant pressures on its water resources. Population growth, drought, agriculture and industrial development all put stress on the water supply and water systems.
- Watershed management is closely linked to land use. Activities on the land, such as agricultural, industrial or recreational activities, can directly affect water quality and quantity. Specific issues include:
  - Protecting riparian habitat (areas next to flowing or still waters) for biodiversity and addressing the pressures on this habitat from agricultural activities and reduced stream flows.

Figure 13

Water-Short Areas in Alberta



- Dealing with pressures on aquatic ecosystem health from the effects of various land uses.
- Addressing the effects of land uses that occur upstream, particularly source waters for municipalities.
- Managing water demand, especially in water-short areas.

- Better communication and coordination among the various planning and approval processes is needed. Watershed management and land-use planning are not undertaken at the same time in an area.

More Information

Alberta's Water Strategy: www.waterforlife.gov.ab.ca

QUICK FACTS

Water as an Ecological Good

An example from the City of New York shows the value of water as an ecological good. Increasing demands on the water supply and risks to it from pollution and human developments in the watershed led to the creation of a major plan for the continuing supply of potable water. The city determined that spending $300 million on land acquisition for conservation and protection of the watershed would save the two to eight billion dollars that would have been required for mechanical water filtration and treatment.

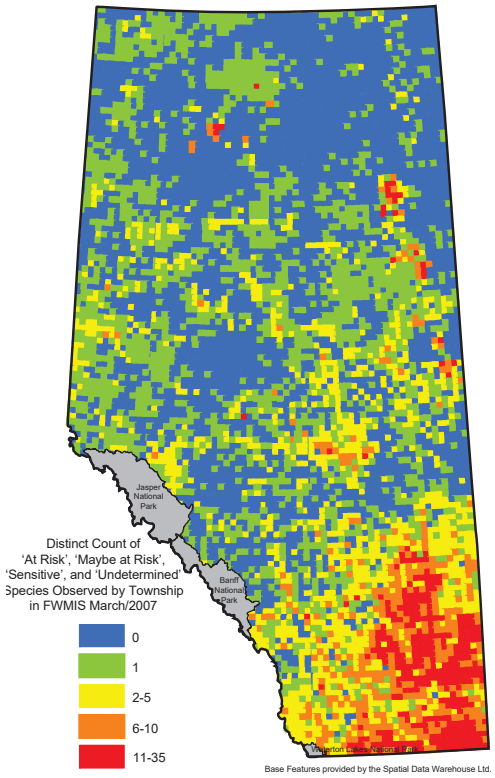
Biodiversity, Ecological Goods and Services, Fish and Wildlife

What Is Biodiversity?

Biodiversity refers to the assortment of life on earth. It is the variety of all animals, plants and microorganisms interacting in all types of environments found on the planet. Biodiversity includes the variety of genetic material in all living things, the variety of species on earth and the different kinds of living communities and the environments in which they occur.

Figure 14

Species at Risk in Alberta



What Are Ecological Goods and Services?

Ecological goods and services are the economic and social benefits resulting from the natural processes of a healthy environment and biodiversity. They are available to all of society and essential to sustaining a healthy and prosperous way of life. Ecological goods and services include groundwater recharge, flood and erosion control, wildlife habitat, productive soils, carbon sequestration, and abundant clean air and water. Unlike resource commodities, the marketplace usually does not place a value on ecological goods and services.

What We Know

- Alberta has a wealth of biological diversity on both public and private land — more than 80,000 wild species living in six natural regions. The majority of these species are small and seldom seen — like the 35,000 species of insects. Of the species Albertans are most familiar with, there are 93 species of mammals, 10 amphibians, 411 birds, 8 reptiles and 63 fish.
- Both public and private lands play critical roles in habitat conservation and the protection of biological diversity.
- Alberta has many types of aquatic habitats: small streams in the mountains and foothills; large rivers extending through the prairie, parkland and boreal regions; alpine lakes, prairie potholes and reservoirs, and large lakes of the northern boreal forest. These aquatic ecosystems contain fish populations made up of 65 species, of which 51 are native, 4 have been introduced intentionally by government agencies, and 10 have been introduced illegally or accidentally. Compared to most other provinces, and elsewhere in North America, Alberta has a relatively sparse fish fauna.
- Although it is hard to determine the full value of ecological goods and services, there is information about the economic benefits for nature-related activities. When this was last studied in 1996, Albertans spent $1.2 billion on nature-related activities —$171.6 million on wildlife viewing, $147.8 million on fishing, $71 million on hunting and most of the remainder on transportation, food and accommodation related to these activities. Nature-related activities supported 23,600 jobs and provided local and provincial governments in Alberta with $369 million in tax revenue.

- Biodiversity, environmental goods and services, and fish and wildlife have other non-monetary values:
  - Healthy fish and aquatic life are key indicators of the fresh, pure water that is needed by all life.
  - Healthy waterfowl populations are indicators of viable water sources including wetlands that supply and filter much of this water.
  - Biodiversity supports recreation and tourism and provides us with a source of beauty and inspiration.
- Biodiversity is an indicator of the status or health of landscapes or watersheds — changes in biodiversity may indicate cumulative effects of land uses and activities.
- Five species of vertebrates and one plant are known to no longer live in Alberta, but we know very little about the loss of most plant species or invertebrates. The Grassland Natural Region of southeast Alberta,

which has been largely altered by human settlement and agricultural development, is considered an area of concern for species at risk — most of the species considered legally endangered or threatened in the province occur in this region.

Challenges

- Human activity and many of the land uses considered valuable to Albertans — settlement, building roads, industrial development, agriculture, recreation and forestry — can affect natural processes of a healthy environment. As well, an increased human footprint on the land can threaten biodiversity through loss, degradation and fragmentation of habitat.
- Land reclamation is not keeping pace with the rate at which industrial land is being retired.
- Increased water demand for domestic, industrial and agricultural uses threaten aquatic ecosystems.
- Wild species and biodiversity respond to human activities and habitat alteration in different ways — populations of specialized, less adaptable species may decline and be displaced by less specialized, more adaptable species.
- The introduction of non-native exotic species has displaced some native species and may significantly disrupt local ecosystems.
- There is a lack of mechanisms to support conservation of ecologically important areas, outside the formal legalized parks and protected areas network.
- We take our clean air, clean water and nature for granted. We all enjoy these public goods and expect them to be sustained. And that poses a challenge — how to reward landowners for practicing sound land stewardship so that in the future we can continue to rely on clear air and water.
- As a society we are challenged to find ways to encourage landowners who provide ecological goods and services that benefit all of us. New ways of looking at the economics of stewardship are emerging, such as tax incentives and direct payments.
- Alteration of riparian areas (those bordering flowing or standing water) and fragmentation of watercourse and fish habitat are particular concerns:
  - Riparian areas are more biologically productive and support a greater variety of species than adjacent uplands. About 80 per cent of Alberta's wildlife use these areas for all or part of their life cycle. Cottage development, recreational use and agriculture have affected lakeshores, stream banks and riparian vegetation.
  - There are approximately 225,000 culvert crossings in the province, many of which have resulted in fragmentation of stream and river habitats and created barriers to fish migration and movement of other aquatic species. As roads continue to be built, the number of culvert crossings will increase.

More Information

A series of fact sheets on biodiversity is available from Alberta Sustainable Resource Development: www.srd.alberta.ca/fishwildlife/biodiversity.aspx

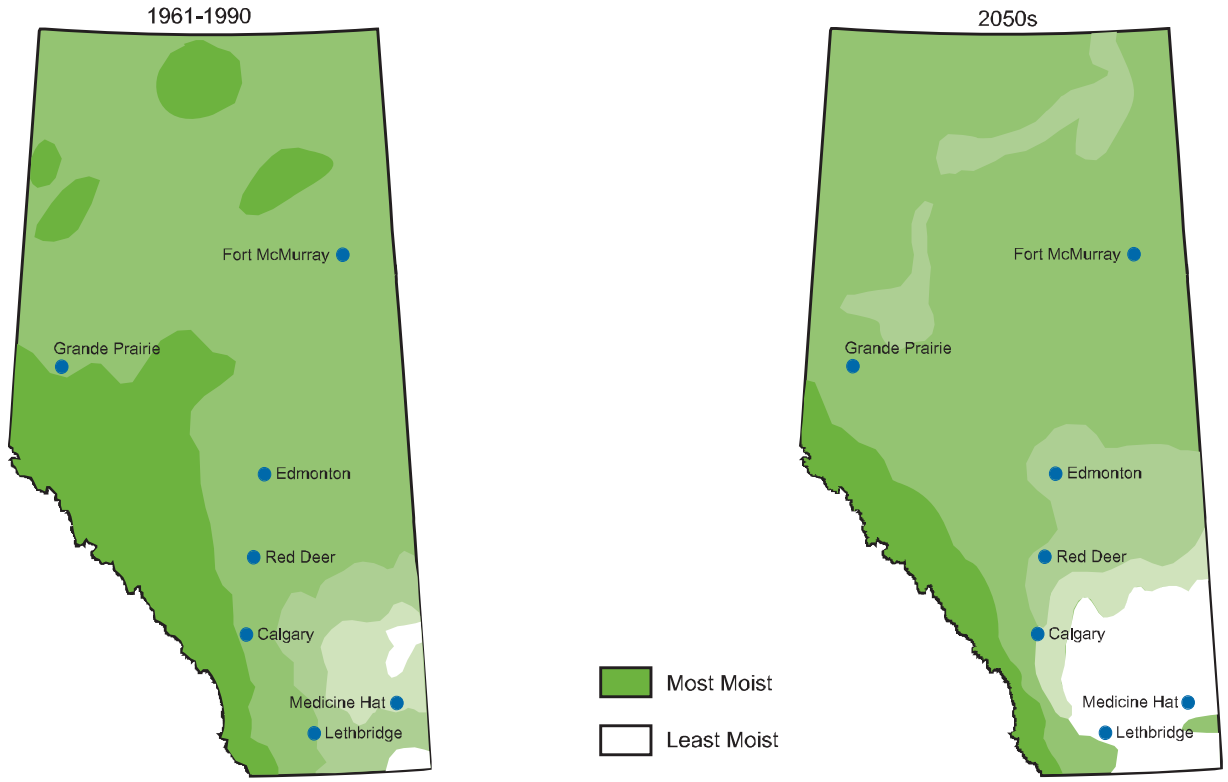
Climate Change

What is Climate Change?

- Weather is what we see on a day-to-day basis. Climate is average weather over at least 30 years. So, for example, if the amount of snow we get over 30 years is lower than the amount we had in the previous 30 years, that shows a change in our climate. If we see more serious weather events — like storms and hurricanes and unusual temperatures — not just one year but over a long period time, that could reflect a change in the climate. Year-over-year changes are just normal variations in weather — the kind we have all seen over many years.

Figure 15

Annual Moisture Index



- Our climate is warming and it is doing so at a faster rate than at any other time in our recorded history. There is considerable evidence that humans have contributed to this warming. Greenhouse gases, which trap heat in the atmosphere, include carbon dioxide, methane and nitrous oxide. Trapped heat causes global temperatures to rise — this is called "the greenhouse effect."
- According to the United Nations Framework Convention on Climate Change, the average temperature of the earth's surface has risen by 0.74 degrees Celsius since the late 1800s. By the year 2100, depending on the scenario, the possible range of increases are another 1.1 to 6.4 degrees Celsius. Even if the minimum predicted increase takes place, it will be larger than any century-long trend in the last 10,000 years.

What We Know

- Future climate models for Alberta have been developed using Global Climate Models downscaled to Alberta. These models include a median scenario that shows a temperature increase of about three degrees Celsius by the 2050s. Under this scenario, the climate now observed in southern Alberta would occur more northerly, and the climate now seen in lower elevations in the mountains and foothills would occur at higher elevations.
- The models also indicate that while annual precipitation may increase, moisture levels across the province, as shown in the maps in Figure 15, could decrease due to higher evaporation rates brought on by increasing temperatures. This could have large impacts on the availability of surface and groundwater which in turn would affect existing ecosystems and land uses as well as future development.

- Climate change may have a significant impact on the types of vegetation in both native ecosystems and managed land areas in Alberta.
- In particular, the agriculture and forestry industries could be impacted. For example, areas now considered dependable agricultural lands may be less so in 10 to 15 years. As well, approaches to respond to climate change such as water storage structures, increased irrigation and alternative cropping and livestock management will alter the landscape for farming.
- There may be a higher risk of wildfire, insects and disease — over time this could alter the pattern and distribution of forests in Alberta. Changes in available moisture in the forested area could lead to changes in forest composition and structure as well as shifts in vegetation patterns.
- Biodiversity conservation — species distribution and the survival of species in their native ranges — may be altered.
- Water supplies will likely be affected, particularly in the southern portions of the province. Declining stream flows, melting glaciers, changes in precipitation and longer drought periods may limit the potential for land development.
- Climate changes that have the potential to affect land use or water availability need to be considered as risks when planning future land use. Since we cannot really predict future climate, we need to use scenarios and assess the risks associated with these as part of policy decision making.

Challenges

- Since climate change issues emerged in the late 1980s and early 1990s, the Alberta government and partners in industry, academic institutions, municipalities and environmental organizations have been actively involved in the search for effective solutions.
- The Alberta Climate Change Action Plan (*Albertans & Climate Change – Taking Action*) identifies initiatives to reduce and manage greenhouse gases as well as adapt to a changing future climate. This plan focuses on improving energy efficiency, enhancing use of technology, seeking out new environmentally friendly energy sources and better managing our emissions today and in the future.
- In particular, two initiatives in the Taking Action plan will have an impact on land use in Alberta:
  - *Climate Change Adaptation* focuses on identifying and managing risks associated with a changing climate. Even with actions to control greenhouse gases, it is anticipated that climate warming will influence water availability, vegetation patterns and the sustainability of some land uses. A changing climate will affect the land and its use and we will need to adapt to the changes.
  - *Enhancing Biological Sinks* deals with promoting environmentally sustainable agriculture and forestry practices in order to reduce greenhouse gas concentrations and maintain or enhance ecosystem health and integrity.
- In 2002, Alberta established a target to reduce emissions intensity by 50 per cent below 1990 levels by 2020.
- An interim target of achieving a 30 per cent reduction in emissions intensity by 2010 was also set. As a result, by 2004 Alberta's emissions intensity decreased by 16 per cent from 1990 levels, but total emissions have increased by 40 per cent. This means that while Alberta's economy is growing, steps have been taken to reduce the growth in emissions.

More Information

Alberta Environment: www3.gov.ab.ca/env/climate/

Alberta's Land: Our Future

We have seen how the land supports us. It provides places for us to live and enjoy as well as ways to make a living. We enjoy the benefits of our province's healthy economic growth and we want to ensure that our way of life is sustainable. But there are many challenges facing Alberta's land.

How do we anticipate and prepare for a future with six or eight million people? How do we maintain land for agriculture and forestry, yet balance that with land for energy and industrial developments, transportation and utilities, tourism and recreation? What is most important to protect? How do we balance our goals for the economy, the environment and our way of life?

Each of us has a role in determining the future of Alberta's land. As Albertans, we need to talk about what is most important to us — and how that affects our land. What do you value most?

And each of us is also faced with a challenge — to manage our activities so that the land and the land uses we rely on can be sustained. Our actions will help ensure that the land continues to sustain us, our way of life, and all other forms of life.

The Government of Alberta wants Albertans to have the information they need to make decisions about the land. If you would like more information, please see the Land-use Framework website at **www.landuse.gov.ab.ca**.

Glossary

Archaeological Sites

Places where objects or landscape features may be found that show evidence of manufacture, alteration or use by humans, the patterning of which is of value for the information that it may give on historic human activities.

Biodiversity

The assortment of life on earth — the variety of genetic material in all living things, the variety of species on earth, and the different kinds of living communities and the environments in which they occur.

Conventional Oil

Hydrocarbons which occur in a liquid state and are found in underground rock reservoirs. Conventional oil can be extracted through drilling and is refined for use as energy or industrial materials.

Forest Fibre

All standing, fallen or harvested trees and woody shrubs used in the production of primary and secondary wood products.

Disposition

A way the government gives individuals, companies or organizations rights to use public land for a specific purpose such as grazing, farm development, timber harvesting, surface access for oil and gas, commercial use or recreation.

Ecological Goods and Services

Economic and social benefits resulting from the natural processes of a healthy environment and biodiversity. These are available to all of society and essential to sustaining a healthy and prosperous way of life. They include groundwater recharge, flood and erosion control, wildlife habitat, productive soils, carbon sequestration, and abundant clean air and water.

Forest Management Agreement (FMA)

A large, area-based agreement between the Province of Alberta and a company.

Headwater

The source for a stream, located in the upper tributaries of a drainage basin.

Historical Resources

Any works of nature or of humans that are primarily of value for their palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or esthetic interest

Industrial Development

When referring to land use, this term means natural resource development activities like exploration, harvesting and extraction of natural resources. But it can also mean, in a municipal planning/zoning context, the use, infrastructure and activities associated with production; e.g., manufacturing, fabricating, warehousing, processing, refining or assembly.

Municipal Districts

A form of government in rural areas of the province, also sometimes referred to as a county. Land in these areas includes working landscapes such as resource-based areas or farmlands as well as unincorporated communities such as hamlets and rural residential subdivisions.

Natural Gas

Hydrocarbons that occur in a gaseous state at original conditions. Methane, ethane and propane are the most common types. Nitrogen, carbon dioxide or hydrogen sulphide are also examples of natural gas. Natural gas can be extracted through drilling and is processed for use as energy.

Natural Region

A way of describing broad ecological variations in the landscape. Natural regions reflect differences in climate, geology, landforms, hydrology, vegetation, soils and wildlife. There are the six natural regions in Alberta.

Oil Sands

Oil sands are deposits of naturally occurring hydrocarbons that are very viscous and are known as bitumen. Bitumen is found predominantly in sandstone but in Alberta may also be found in carbonate rocks. Bitumen may be recovered by open cast mining techniques (digging) or by unconventional techniques such as injecting steam into the earth to bring the hydrocarbons to the surface. Bitumen is refined for use as energy.

Oriented Strand Board (OSB) and Waferboard

Panel products made of aspen or poplar strands or wafers bonded together under heat and pressure using a waterproof phenolic resin adhesive or equivalent waterproof binder.

Palaeontological Deposits

Rocks or soils containing evidence of extinct multi-cellular organisms.

Riparian

The lands adjacent to streams, river, lakes and wetlands, where the vegetation and soils are strongly influenced by the presence of water.

Rural Municipalities

Areas where there is a lower concentration of people and buildings than in urban municipalities, such as municipal districts. The designation “rural” should not be interpreted to include farm or resource-based areas only — some rural areas contain substantial country residential populations.

Specialized Municipalities

Unique municipal structures that can be formed without resorting to special Acts of the Legislature. Often, specialized municipalities allow urban and rural communities to coexist in a single municipal government.

Subsurface

Subsurface is used to describe the resources (e.g., oil and gas, coal, metallic and industrial minerals such as limestone) identified under the *Mines and Minerals Act* which are located underground. It also refers to the titles, rights and activities to access those resources below ground. Subsurface resources do not include sand and gravel — as these are considered surface materials.

Surface

Resources, activities, and development that occur on the land, e.g., sand, gravel, topsoil, roads, and buildings. This term can also be associated with land titles, e.g., the title to individual properties is for the ownership of the land surface (not the resources underneath the land unless expressly noted as including such).

Urban Municipalities

Areas where there is a concentration of people and buildings, such as cities or towns.

Watershed

A watershed is the area of land that catches precipitation and drains into a larger body of water such as a marsh, stream, river or lake. Watersheds can range in size from a few hectares to thousands of square kilometres.

Woodlot

Tracts of land of any size and shape that contain areas of trees either naturally occurring or planted.

Notes

EXHIBIT D – COMPLAINT UNDER ALSA

This is exhibit D referred to in the affidavit of

Neil Keown sworn before me on December 14, 2020.

Michael M. Wenig

A Notary Public in and for the Province of Alberta
Michael M. Wenig
Law Society of Alberta, Member # 11362

environmental • social • economic
LAND-USE FRAMEWORK

Alberta Government

Complaint of Non-compliance with a Regional Plan

Alberta Land Stewardship Act

Land Use Secretariat
9th floor, Centre West Building
10035 - 108 Street
Edmonton, AB T5J 3E1
TEL: 780- 644-7972 or Toll Free Rite Line at: 310-0000
FAX: 780- 644-1034
EMAIL: LUF@gov.ab.ca

Date Stamp - *(Land Use Secretariat office use only)*
Tracking Number *(Land Use Secretariat office use only)*

Prior to completing the form below, you are strongly encouraged to review the Frequently Asked Questions for Submitting a Complaint of Non-compliance with a Regional Plan document as well as section 62 of the Alberta Land Stewardship Act (ALSA); both are available on the Alberta Land-use website: www.landuse.alberta.ca.

Instructions

- Complete one form for each request for complaint being filed
- Please print clearly
- Legal representation is not required; however if representation has been retained, indicate this in Part 3 of the form
- Submit completed form with the original signature, and any supplemental information by personal service, registered mail, courier, fax or email to:

Land Use Secretariat
9th floor, Centre West Building
10035-108 street
Edmonton, AB T5J 3E1

Fax: 780-644-1034

Email: LUF@gov.ab.ca

PART 1: DETAILS OF COMPLAINT

A) Name of Regional Plan: South Saskatchewan Regional Plan (SSRP)

Specific provision(s) of the regional plan: Implementation Plan - Page 61. Please see attached supplement.

B) Legal land description (township, range, meridian) that is the subject of the complaint, if applicable:

N/A

C) The name(s) of the government agency, organization or person that your complaint is about:

Alberta Energy and Alberta Energy Regulator (AER)

D) Summarize what your complaint is about. Clearly identify the specific provision(s) (section) of the Regional Plan that you believe is not being complied with and explain the nature of the non-compliance.

Please see the summary on page 1 of the attached supplement.

E) Have you contacted any of the persons or authorities named in part C above regarding this complaint?

☑ **No**

☐ **Yes - List the dates, names, phone numbers, addresses (if possible) and the outcome of the interaction:**

F) List any steps you have taken to try to resolve the matter and the relevant dates, file or reference numbers:

Please see discussion in attached supplement regarding the judicial review application filed by other persons. We are not a party to that proceeding at this time, but we are planning to seek leave to intervene in the near future.

G) *Section 62(2)(b) of ALSA requires the Stewardship Commissioner to be satisfied that the matter complained of is not the subject or part of the subject of an application, process, decision or appeal governed by an enactment or regulatory instrument, or that there is not an adequate remedy under the law or existing administrative practices, and no other person should investigate the complaint.*
Did you file an appeal or apply for a review?

☑ **No**

☐ **Yes - Name of the government, agency or organization:**

What was the result of the appeal or review? Please see attached supplement.

☐ **A copy of the results of the review or appeal will be submitted with the form**

H) Describe the result or outcome you seek:

Please see attached supplement.

PART 2: APPLICANT INFORMATION

You are submitting the complaint as an: ☐ **Individual** ☑ **Corporation**

First Name: Neil **Last Name:** Keown

Company Name: Alberta Backcountry Hunters and Anglers

Professional Title: Chair

Email Address: alberta@backcountryhunters.org **Fax #:**

By providing an e-mail address, you agree to receive communications from the Land Use Secretariat by email.

Daytime Telephone #: 403-980-1191 **Alternate Telephone #:**

Mailing Address:

Apt/Suite/Unit#	Street Address	City/Town
	P.O. Box 10294	Airdrie

Province	Country (if not Canada)	Postal Code
Alberta		T4A 0H6

Signature: Neil Keown Digitally signed by Neil Keown Date: 2020.10.23 10:00:45 -06'00' **Date:** 23-10-2020

You must notify the Land Use Secretariat of any change of address or telephone number in writing.

Information on this form is collected under the authority of section 33(c) of the *Freedom of information and Protection of Privacy Act*, RSA 2000 c-F25, for the purpose of investigating complaints of non-compliance with a regional plan.

PART 3: REPRESENTATIVE INFORMATION (IF APPLICABLE)

I hereby authorize the named company and/or individual(s) to represent me:

First Name: Michael **Last Name:** Wenig

Company Name: Big Spruce Law

Professional Title : Lawyer

Email Address: mike@bigsprucelaw.ca **Fax #:** 403-398-4260

By providing an e-mail address, you agree to receive communications from the Land Use Secretariat by email.

Daytime Telephone #: 403-879-1006 **Alternate Telephone #:** 403-826-4442

Mailing Address: 6 (Apt/Suite/Unit#) Varbay Place NW (Street Address) Calgary (City/Town)

Alberta (Province) (Country (if not Canada)) T3A 0C8 (Postal Code)

PART 4: CONSENT

I, Neil Keown *(name)* consent to the information in this complaint form, including my personal information being disclosed to:

(a) the subject of this complaint so that he/she may respond; and

(b) other relevant persons, authorities, departments, agencies, boards or commissions who may have information relevant to this complaint

In accordance with section 40(1) of the *Freedom of Information and Protection of Privacy Act*.

Signature: Neil Keown Digitally signed by Neil Keown Date: 2020.10.23 10:01:06 -06'00' **Date:** 23-10-2020

If you are representing the complainant and are NOT a solicitor, please confirm that you have written authorization to act on behalf of the applicant. Confirm this by checking the box below.

☐ I certify that I have written authorization from the complainant to act as a representative with respect to this application on his or her behalf and I understand that I may be asked to produce this authorization at any time.

BACKCOUNTRY HUNTERS & ANGLERS ALBERTA

SUPPLEMENT TO COMPLAINT OF NON-COMPLIANCE WITH THE SOUTH SASKATCHEWAN REGIONAL PLAN

This is a supplement to the accompanying Form LUS – 05—Complaint of Non-compliance with a Regional Plan.

This complaint is submitted by the Alberta chapter of Backcountry Hunters and Anglers ("Alberta BHA"). Our chapter is a non-profit organization registered under the *Alberta Societies Act* (# 5020824412). We have roughly 820 dues paying members who generally use Alberta's public lands for outdoor recreation and to supply food for themselves and their families. Alberta BHA's purposes include working to protect Alberta's wildlands and waters to preserve Alberta's heritage of non-motorized hunting and fishing.

Summary

Our complaint relates to the rescission of A Coal Development Policy for Alberta (1976).[1] That rescission is contained in Alberta Energy Information Letter (IL) 2020-23 (copy attached), which was issued on May 15, 2020 and "authorized" by Energy Assistant Deputy Minister Martin Chamberlain, Q.C.

IL 2020-23 states that the 1976 Coal Policy "has been rescinded effective June 1, 2020" and that, with the rescission, "all restrictions on issuing coal leases within the former coal categories 2 and 3 have been removed." The IL does continue to restrict coal leasing, exploration and development within public lands formerly designated as coal category 1.

The "coal categories" referenced in IL 2020-23 were established in part 3.13 of the 1976 Coal Policy. That part classified Alberta lands with coal deposits into four categories and set varying restrictions on coal exploration and development in each of those categories. In Category 1 lands, the policy prohibited all coal "exploration or

[1] Online: https://open.alberta.ca/dataset/cc40f8f5-a3f7-42ce-ad53-7521ef360b99.

commercial development". For Category 2 lands, the policy allowed "limited exploration" under "strict controls," but stated that "commercial development by surface mining will not normally be considered at the present time." (By contrast, the policy permitted underground and in-situ coal operations "where the surface effects … are deemed to be environmentally acceptable.")

The South Saskatchewan Regional Plan (SSRP) and several sub-regional plans adopt those Coal Policy zoning categories by reference. In addition, the SSRP commits the government to review those categories through an *integrated* process that includes a review of sub-regional plans and that follows public consultation.

By contrast, the Coal Policy rescission was done on its own and without any public consultation.

If, due to the rescission, the Coal Policy's zoning categories are no longer in effect for purposes of the SSRP (and sub-regional plans), then the rescission is a violation of the SSRP's continuing reliance on the Coal Policy and the SSRP's commitment to an integrated review of that Policy.

However, we submit that the SSRP should be read as essentially keeping the Coal Policy's zoning categories in effect for purposes of the SSRP and sub-regional plans, even if the Coal Policy has been lawfully rescinded for general purposes. If this interpretation is correct, the Alberta Energy Regulator (AER) may be in non-compliance with the SSRP because the AER appears to be issuing permits for coal exploration on Category 2 lands within the South Saskatchewan region, without considering whether those permits meet the application restrictions in the Coal Policy.

Our conclusions are explained in more detail below.

The Coal Policy's link to the SSRP and Sub-regional Plans

Page 61 of the SSRP refers to several resource management tools, including sub-regional integrated resource plans (IRPs). The SSRP then states that these IRPs:

> will remain in effect until they have been reviewed for their relevance and incorporated as appropriate under the implementation strategies of this regional plan or future subregional or issue-specific plans within the region. This will include direction for key industrial sectors such as coal,

> oil and gas, industrial minerals and aggregates. As part of reviewing and incorporating the Integrated Resource Plans, the government will integrate a review of the coal categories, established by the 1976 A Coal Development Policy for Alberta to confirm whether these land classifications specific to coal exploration and development should remain in place or be adjusted. The review of the coal categories will only be for the South Saskatchewan planning region. The intent is for the SSRP and implementation strategies of the regional plan or future associated subregional or issue-specific plans within the region to supersede the coal categories for the purposes of land use decisions about where coal exploration and development can and cannot occur in the planning region.

The SSRP's reference to an "integrate[d …] review" of the Coal Policy's zoning categories with the sub-regional plans implies a process that includes full public consultation. This participation principle is reflected on page 62 of the SSRP, which states that an "integrated approach means there will be sharing of information and knowledge; coordination of assessments, analysis and planning approaches; coordination of engagement with other governments, industry, stakeholders and the public" (emphasis added).[2] This participation principle is also rooted in the government's 2008 Land-use Framework,[3] which provided key policy direction for the development of ALSA, and in section 5 of ALSA itself.

The 2018 Livingstone-Porcupine Hills Land Footprint Management Plan (LFMP) echoes the "integrated review" review process set out in the SSRP. Part 3.3 of the LFMP, titled "Detailed GoA Business Process and Implementation Mechanisms," includes a table listing several planning objectives, and strategies/actions, performance metrics, agency responsibilities, and timelines for each objective. One of these objectives is that

[2] See also *ibid.* (noting that the Alberta government "will provide leadership in the development of subregional and issue-specific planning. There will be coordinated involvement of other governments, aboriginal peoples, stakeholders, partners and the public.").

[3] See Land-use Framework, pp. 7 (noting that the Framework's implementation will "entail ongoing public discussion"), 15 (Vision statement noting that land management is a "shared responsibility that involves all Albertans"), 16 ("Guiding Principle" of "[c]ollaborati[on] and transparen[cy]"—that is, "Albertans, landowners, land users and governments will work together"), and 17 (noting that the Framework's adoption "does not mean that consultation and dialogue will end. Both will be necessary to implement new laws and policies").

"[r]elevant provisions in Sub-regional Integrated Resource Plans are effectively rescinded (see Appendix B)". One of the strategies or actions for achieving this objective states that, as part of "reviewing and incorporating the Integrated Resource Plans, the Government of Alberta will integrate a review of the coal categories for the South Saskatchewan Region (SSRP p. 61)." The plan adds that "[n]ew direction, consistent with footprint planning outcomes, will supersede the coal categories and may extend to all large-scale industrial surface disturbances, including coal." The plan stresses that this "new direction"

> should be consistent with an integrated approach. It will specify where surface exploration and development can and cannot occur based on the best and most recent biodiversity sensitivity data[.]

This sub-regional plan goes on to explain that the integrated review will be based on a "strategy," developed by the Alberta Energy Regulator and Alberta Environment and Parks, for "updating" the Coal Policy and IRPs, with respect to coal mining.[4]

Appendix B of the footprint management plan explains that the 1987 Livingstone-Porcupine Hills IPR "[c]urrently … sets the land use direction" for that sub-region, and that this IRP "will remain in effect" pending the integrated review.[5]

That IRP also references the Coal Policy. At page 26, the IRP states that "[a]ll proposals for coal exploration and development must be processed in accordance with A Coal Development Policy for Alberta, 1976." Similarly, the Ghost River IRP states (at p. 19) that "[a]ll proposals for coal exploration and development will be processed in accordance with" the 1976 Coal Policy."

In short, the above quotes from the SSRP and LFMP make it clear that the provincial government committed to review the Coal Policy's zoning categories through an "integrate[d]" process including review of the sub-regional and issue-specific plans within the South Saskatchewan region. Following that review, those SSRP-based plans will "supersede" the Coal Policy's zoning categories. The logical implication of this statement is that the SSRP intended the Coal Policy's zoning categories to remain in

[4] LFMP, p. 23.

[5] LFMP, p. 43.

effect, for the South Saskatchewan region, until that "integrated review" has been completed and the sub-regional and issue-specific plans have been amended.

The two IRPs provide express confirmation of this implied intent, by stating that coal mining proposals "must" or "will" be processed under the Coal Policy.

Page 61 of the SSRP is binding policy

Page 61 of the SSRP is part of that plan's Implementation Plan which is a statement of "policy". As such, it is "not intended to have binding legal effect."[6] As with any government policy, agencies have discretion to depart from the Implementation Plan's provisions, when considering whether to grant approvals for specific developments. This case-by-case discretion is consistent with the "fettering discretion" doctrine in administrative law.[7]

By contrast, *generic* changes to the Implementation Plan, like the Energy ADM's rescission, should be viewed as *amendments* to the SSRP. Under sections 4, 5 and 13 of the *Alberta Land Stewardship Act* (ALSA), only the provincial cabinet can amend a regional plan and, before cabinet does so, the Stewardship Minister must: provide "appropriate consultation" on the proposed amendment; present a post-consultation report to the Executive Council; and, lay the proposed amendment before the Legislature. To our knowledge, none of these three events has occurred.

Non-compliance with the SSRP

If the Coal Policy is no longer in effect in the South Saskatchewan region, the rescission of that policy was not in compliance with the SSRP (and its sub-regional plans) because the rescission essentially nullified

[6] SSRP, pp. 8 and 42.

[7] See, e.g. *Delta Air Lines Inc. v. Lukacs*, 2018 SCC 2, ¶ 18.

- Those plans' continuing reliance on the Coal Policy's zoning categories, and
- The SSRP's commitment to an *integrated* review of those zoning categories and sub-regional and issue-specific plans.[8]

While raising this non-compliance, we disagree with the underlying premise that the Coal Policy is no longer in effect. As explained above, the SSRP and accompanying sub-regional plans, collectively, essentially adopt the Coal Policy's zoning categories by reference. The Energy ADM has no authority to amend the SSRP, so the ADM cannot modify those Coal Policy references in the SSRP (and sub-regional plans).

The effect of the SSRP's reference to the Coal Policy is analogous to a permit that includes a condition requiring the permittee to comply with a specific version of an industry-established code of practice. The industry association likely has general authority to change or rescind its practice code, but any such change or rescission has no effect on the permit. The permittee remains obligated to comply with the practice code unless and until the permit itself is amended or cancelled.

If the Coal Policy zoning categories are still in effect in the South Saskatchewan region, permitting agencies are obliged to continue to apply those zoning categories (subject to the fettering discretion doctrine noted above).[9] However, it appears that the Alberta Energy Regulator (AER) is not following this approach. The AER's August 2020 Coal Development Manual 020 refers to Alberta Energy's rescission of the Coal Policy, without suggesting that the Policy's zoning categories are still in effect for the South Saskatchewan Region.[10] Recent AER decisions allowing coal exploration in that region also make no reference to the Coal Policy's zoning categories.[11]

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[8] Viewed in another sense, this nullification is essentially a de facto *amendment* of the SSRP, and sub-regional plan provisions quoted above. This amendment is a violation of sections 4, 5 and 13 of the *Alberta Land Stewardship Act* (ALSA).

[9] See ALSA s. 15(1) and (2) and SSRP, pp. 5 and 8.

[10] AER, *Manual 020 – Coal Development*, p. 12, online: https://static.aer.ca/prd/documents/manuals/Manual020.pdf.

[11] See AER Notices of Decision for: *Cabin Ridge Project Ltd.*, CEP 200001 (Sept. 25, 2020), and *Elan Coal Ltd.*, CEP 200002 (Sept. 10, 2020).

Requested outcomes

For the reasons given above, Alberta BHA requests that the Land-use Secretariat declare that, under the SSRP, the Coal Policy's zoning categories remain in effect in the South Saskatchewan region.

If the Secretariat agrees with that request, Alberta BHA requests that the Secretariat investigate whether the AER is in non-compliance with the SSRP, by issuing coal exploration permits on Category 2 lands without considering the applicable restrictions in the Coal Policy—namely, that exploration should be allowed only on a "limited basis" and under "strict controls," and exploration should be disallowed in "local areas of high environmental sensitivity."

Alberta BHA requests an alternative outcome if the Secretariat concludes that, due to the Coal Policy rescission, the Coal Policy's zoning categories are no longer in effect in the South Saskatchewan region. In this circumstance, Alberta BHA requests that the Secretariat declare that the rescission itself is in non-compliance with the SSRP, because the rescission nullifies the SSRP's cross-reference to the Coal Policy (and to the IRPs which in turn reference the Coal Policy), including the SSRP's commitment to review the Coal Policy through an *integrated* process that includes public consultation.

Blades v. Alberta (QB)

Under section 62(2)(b) of ALSA, the secretariat may investigate a complaint if the stewardship commissioner is satisfied that the subject of the complaint "is not the subject or part of the subject of an application, process, decision or appeal governed by an enactment or regulatory instrument, or that there is not an adequate remedy under the law or existing administrative practices…."

For purposes of this ALSA section, we advise that the Coal Policy rescission is the subject of a judicial review application filed recently in the Alberta Court of Queen's Bench.[12] We are currently not a party to this proceeding, but we are planning to seek leave to intervene.

[12] *E. Macleay Blades, Rocking P Ranch Ltd., John Smith, and Plateau Cattle Co. Ltd. v. Her Majesty the Queen in Right of Alberta and the Minister of Energy for the Province of Alberta*, Civil. No. 2001-08938 (Q.B.).

In our view, this judicial proceeding does not preclude an investigation under ALSA, for two reasons.

First, the central issues raised by the judicial review application overlap with, but are not the same as, those raised in this complaint. The judicial review application claims that the Coal Policy rescission effectively amended the SSRP and thereby violated the amendment requirements in ALSA. The application also raises a common law procedural fairness claim. By contrast, the focus of this complaint is on a violation of the SSRP.

Second, the judicial review application is not "governed by an enactment or regulatory instrument," for purposes of ALSA s. 62(2)(b). That provision appears to refer to other legislated appeal-type proceedings, rather than to the courts' general jurisdiction to review government decisions.

Petroleum Plaza - North Tower
9945 - 108 Street
Edmonton, Alberta
Canada T5K 2G6

May 15, 2020

INFORMATION LETTER 2020-23

Subject: Rescission of *A Coal Development Policy for Alberta* and new leasing rules for Crown coal leases

A Coal Development Policy for Alberta, more commonly known as the 1976 Coal Policy (Coal Policy), has been rescinded effective June 1, 2020.

The only mechanism left in effect from the Coal Policy before rescission was the land use classification system comprising four coal categories. Other mechanisms, such as provisions pertaining to royalties, labor requirements, environmental protection, and Crown equity participation, were superseded or not enforced.

The coal categories are no longer required for Alberta to effectively manage Crown coal leases, or the location of exploration and development activities, because of decades of improved policy, planning, and regulatory processes.

Those interested in acquiring Crown coal leases and pursuing exploration and development opportunities will now face the same restrictions as other industrial users. These restrictions include but are not limited to: the South Saskatchewan Regional Plan, including the subregional Livingstone-Porcupine Hills Land Footprint Management Plan; the Integrated Resource Plan zoning that remains in effect throughout much of Alberta's Eastern Slopes; and regulatory instruments (e.g., reservations and notations) applied under the *Public Lands Act*. Regulatory approval requirements to conduct coal exploration and development activities remain in effect.

Coal leases

With the rescission of the Coal Policy, all restrictions on issuing coal leases within the former coal categories 2 and 3 have been removed. Alberta will continue to restrict coal leasing, exploration and development within public lands formerly designated as coal category 1. This prohibition on coal activities is being continued to maintain watershed, biodiversity, recreation and tourism values along the Eastern Slopes of Alberta's Rocky Mountains.

Alberta Energy will be offering the right of first refusal to the holders of active coal lease applications. While Alberta Energy works through the coal lease applications, no new coal lease applications will be accepted for a 120-day period beginning May 15, 2020. Coal Information Bulletin 2020-02 provides details on this process.

For further information, please contact:

Micheal Moroskat, Director
Coal and Mineral Development
Telephone 780-638-4034

Kate Hovland, Director
Resource Access
Telephone 780-427-9081

Authorized by: Martin J. Chamberlain, Q.C.
Senior Assistant Deputy Minister
Energy Policy

EXHIBIT E -

NOV. 12, 2020 BHA LETTER TO AER AND AER'S NOV. 30, 2020 RESPONSE LETTER

This is exhibit E referred to in the affidavit of

Neil Keown sworn before me on December 14, 2020.

Michael M. Wenig

A Notary Public in and for the Province of Alberta
Michael M. Wenig
Law Society of Alberta, Member # 11362

BACKCOUNTRY HUNTERS & ANGLERS ALBERTA

BY EMAIL November 12, 2020

Laurie Pushor, Chief Executive Officer
Boal Talabi, Vice President, Regulatory Applications
Alberta Energy Regulator
Admin. Assistants' email: Sue.Donnelly@aer.ca; Amanda.Doherty@aer.ca

Dear Messrs. Pushor and Talabi:

Re: Request for clarification of continuing "restriction" in Information Letter 2020-23

This is a request for clarification of a statement, made in the Alberta Energy Information Letter 2020-23, which rescinded Alberta Energy's *Coal Development Policy for Alberta* (1976).

Information Letter 2020-23 was authorized by an Assistant Deputy Minister for Alberta Energy. However, because the Alberta Energy Regulator (AER) is responsible for issuing various types of authorizations for coal mining, your interpretation of this Information Letter is important.

The relevant statement in the Information Letter is that "Alberta will continue to restrict coal leasing, exploration and development within public lands formerly designated as coal category 1."

Our understanding of the word "restrict" in this statement is that it was intended to mean "prohibit," for purposes of coal leasing, exploration, and development, on former Category 1 lands.

This understanding is supported by the Information Letter's next sentence, which states that "[t]his *prohibition* on coal activities is being continued to maintain watershed, biodiversity, recreation and tourism values along the Eastern Slopes of Alberta's Rocky Mountains." (Emphasis added.)

Information Letter 2020-43 confirms our understanding, with respect to coal *leasing*, by stating that "[c]oal rights in areas formerly classified as coal category one will remain

unavailable for lease." We presume this refers to leasing of Crown coal rights under Part 2 of the *Mines and Minerals Act*.

However, we request confirmation that AER views Information Letter 2020-23 as also intending to *prohibit* the issuance of the following types of authorizations for coal mining activities on former Category 1 lands:

- Permits, under section 10 of the *Coal Conservation Act*, for coal exploration and development
- Licences, under section 11 of the CCA, for coal mining operations
- Approvals, licences and permits for coal exploration activities, under Part 8 of the MMA
- Dispositions for coal mining exploration and development under the *Public Lands Act*
- Approvals for coal mining exploration under the *Environmental Protection and Enhancement Act*
- Approvals and licences for coal mining activities under the *Water Act*

Alberta Energy's September 14, 2020 Information Bulletin 2020-03 states that a "protective notation" has been applied to all former Category 1 lands. If possible, please provide a copy of that protective notation.

If you have questions regarding this letter, please contact Michael Wenig, who is our legal counsel on this matter. Mr. Wenig's contact info is: 403-879-1006; mike@bigsprucelaw.ca

Thank you for your assistance.

Yours truly,

Neil Keown, Chair
Alberta Chapter, Backcountry Hunters and Anglers

cc: Charlene Graham – Exec Vice President and General Counsel, AER (Admin Assistant: Sue.Donnelly@aer.ca)
Martin Chamberlain, QC, Assistant Deputy Minister, Energy Policy Division, Alberta Energy (martin.chamberlain@gov.ab.ca)

Alberta Energy Regulator

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

November 30, 2020

Neil Keown, Chair
Alberta Chapter, Backcountry Hunters and Anglers
725 W Alder Suite 11
Missoula, MT 59802

By email only.

Dear Mr. Keown,

Thank you for your letter on behalf of the Alberta Chapter, Backcountry Hunters and Anglers.

Coal leasing is within the Government of Alberta's jurisdiction through Alberta Energy. As indicated in your letter, *Information Letter 2020-23* was issued through Alberta Energy. Therefore, we recommend you seek clarification from Alberta Energy regarding your concerns.

The Alberta Energy Regulator's (AER) process as it relates to coal exploration, development, abandonment, and reclamation has not changed as a result of the Government of Alberta's rescission of the *Coal Policy*. All applications for coal development projects continue to be considered through our existing process under applicable provincial legislation. This legislation includes the *Public Lands Act*, *Environmental Protection and Enhancement Act*, *Water Act*, *Coal Conservation Act and Regulation*, part 8 of the *Mines and Minerals Act,* and the *Responsible Energy Development Act.*

Applicants are required to obtain a coal lease, which ensures they hold the rights to the resource and that the proposed activity is safe, environmentally responsible, and meets all requirements. This review process is based on each project's merits, including its economic, social, and environmental impacts.

To encourage public participation in the application process, the AER posts public notices of applications on aer.ca. Anyone who believes they may be directly and adversely affected by an application can file a statement of concern (SOC). We review and consider all SOCs when making decisions on applications.

inquiries 1-855-297-8311
24-hour emergency 1-800-222-6514

As per your request for a protective notation, these are available through Alberta Environment and Parks.

Thank you for your interest in regulating this important industry.

Sincerely,

Bola Talabi
Vice President – Regulatory Applications

EXHIBIT F – GHOST RIVER INTEGRATED RESOURCE PLAN (Exceprts)

This is exhibit F referred to in the affidavit of

Neil Keown sworn before me on December 14, 2020.

Michael M. Wenig

A Notary Public in and for the Province of Alberta
Michael M. Wenig
Law Society of Alberta, Member # 11362

GHOST RIVER

SUB-REGIONAL

INTEGRATED RESOURCE PLAN

Approved by the Economic Planning
Committee of Cabinet on June 7, 1988

1988
Edmonton

PREFACE

This planning document was prepared by government agencies and public consultants in recognition of the need for improved management of Alberta's lands and resources. It applies only to public lands within the Ghost River Planning Area, not to private or federal lands.

The plan presents the Government of Alberta's resource management policy for public lands and resources within the area. It is intended to be a guide for resource managers, industry and the public with responsibility or interests in the area, rather than a regulatory mechanism. Resource potentials and opportunities for development are identified with a view to assisting in the economic progress of Alberta. The plan is sufficiently flexible so that all future proposals for land use and development may be considered. No legitimate proposals will be categorically rejected. Energy resource decisions are subject to the application of legal and approved regulatory processes under the jurisdiction of the Minister of Energy. This plan may influence regulatory decisions, but will not result in the categorical approval or rejection of energy proposals. The provincial government is committed to serving Albertans; should a proposal not be in keeping with the provisions of the plan, staff will work with the proponent to explore alternative means for accommodating the proposal in a more appropriate location, either in this planning area or on other public lands. The rejection of any proposal will be done only in writing by the minister or his designate.

A detailed outline for implementation will be provided for this sub-regional plan in order to identify the necessary implementation actions and roles. This implementation outline will also provide for the continuing review of the plan so that it may accommodate changing needs and situations. Wherever possible, the private sector will be provided the opportunity to be actively involved in the operational delivery of the plan.

Implementation is subject to the normal budgetary approval process. In establishing overall priorities, opportunities in other planning areas and areas currently outside the planning process will be considered.

While the plan identifies resource potentials and opportunities, the realization of these may require the dedication of major amounts of public funds. The plan will be used on the understanding that any actions required for implementation will only be undertaken as budgetary approvals are given in the normal way. The private sector will be given the first opportunity to provide any development required.

This plan has no legal status and is subject to revisions or review at the discretion of the Minister of Forestry, Lands and Wildlife.

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ILLUSTRATIONS

Figures

Tables

1. INTRODUCTION

1.1 The Planning Area

The Ghost River Planning Area (Figure 1) is located 50 km northwest of Calgary. The area encompasses approximately 2900 km^2 (1120 sq. mi.) and includes most of the Ghost River drainage basin and Burnt Timber and Fallentimber creeks, which are part of the Red Deer River drainage basin.

The boundaries of the planning area are as follows:

NORTH - northern divide of the Burnt Timber/Fallentimber Watershed Basin, and the boundary between Townships 30 and 31, Range 5 (W5M).

SOUTH - Bow Corridor and the northern boundary of the Forest Reserve south of the Stoney Indian Reserve.

EAST - boundary between Ranges 4 and 5, W5M, north of the Stoney Indian Reserve and the I.D. 8 boundary south of the Stoney Indian Reserve.

WEST - Banff National Park.

The planning area contains the settlements of Benchlands, Big Prairie, Waiparous Creek and Water Valley.

The eastern and southeastern portions of the area are used mainly for ranching. Grazing and timber production occur on much of the public land. The entire planning area is also used extensively for a variety of outdoor recreation activities, mainly by people from Cochrane and Calgary. Stoney Indian Reserves 142, 143 and 144 are located along the southern boundary of the Ghost River Planning Area and reserve 142 B is located entirely within the southeastern portion of the area.

Access to the planning area is provided by Highway 1, Highway 1A, Secondary Road 940 (Forestry Trunk Road) and other secondary roads.

1.2 Policy and Planning Context

A Policy for Resource Management of the Eastern Slopes Revised 1984 (Alberta 1984) states that integrated resource planning, conducted under a comprehensive interagency approach, is the key to effective management of Alberta's resources in the Eastern Slopes. The policy also explains that integrated resource plans implement its regional land use zoning priorities and guidelines. The Eastern Slopes Policy articulates further that integrated resource plans will allocate land uses for specific portions of a planning area, and identifies the need for possible changes in policy zone boundaries.

Integrated resource plans have been completed or are under preparation for selected areas of the Eastern Slopes Policy region. In March 1978, the Alberta Energy and Natural Resources/Recreation and Parks Interdepartmental Assistant Deputy Ministers Committee identified the Ghost River area (Figure 1) as a priority for the development of an integrated resource plan. The Ghost River Sub-Regional Integrated Resource Plan will serve to effectively mitigate conflicts between resource use objectives by determining resource priorities and allocating land uses for specific portions of the Ghost River Planning Area.

The Ghost River planning team consists of representatives from the Alberta Forest Service, Public Lands and Fish and Wildlife divisions of the Department of Forestry, Lands and Wildlife, and the Mineral Resources Division of the Department of Energy.

Consultative team members were identified and given the opportunity to present agency concerns and opinions at key stages of the planning process. They include agencies within the Alberta government, federal government and local authorities:

- Alberta government: Alberta Environment, Alberta Recreation and Parks, Alberta Transportation and Utilities, Alberta Culture and Multiculturalism, Alberta Tourism and Alberta Agriculture;

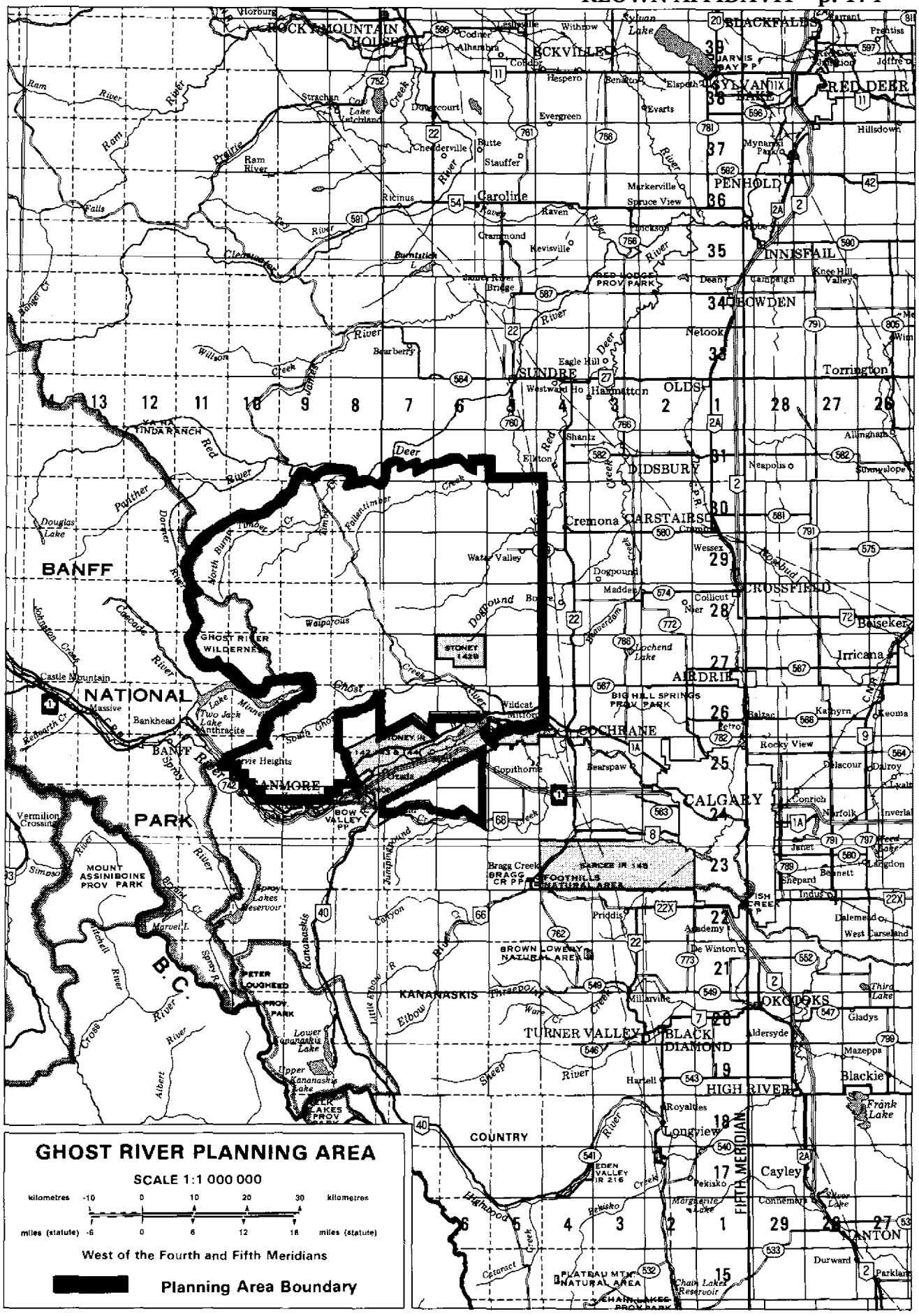


Fig. 1 **REGIONAL LOCATION**

- federal government: Canadian Parks Service; and

- local authorities and MLAs: MLA Banff/Cochrane, MLA Olds/Didsbury, M.D. 8, I.D. 8, M.D. 44, County 17, Red Deer Regional Planning Commission and Calgary Regional Planning Commission.

Throughout development of the plan, public interest groups and associations, industries and individuals have been invited to participate in the planning process. Participation involved submitting letters, briefs and information, reviewing plan documents and attending public meetings.

The final plan will apply only to land and resources vested in the Crown, in both the Green and White Areas. Patent land and private development on public land within the boundaries of the Calgary and Red Deer Regional Planning Commissions remain under the planning control of local municipalities and the planning commissions. In connection with these lands, the integrated resource plan reflects the philosophies of land management of the local authorities. The Alberta government will continue to make every effort to strengthen the existing co-ordination and co-operation with local planning authorities.

A Policy for Resource Management of the Eastern Slopes Revised 1984 (Alberta 1984) provides guidelines and objectives for integrated resource management and planning for the entire Eastern Slopes region including the Ghost River Planning Area. The Eastern Slopes Policy relies on regional land use zoning to designate large areas of land for varying degrees of protection, resource management and development. Table 1 lists the general intent for each of the following eight land use zones:

1) Prime Protection;

2) Critical Wildlife;

3) Special Use;

4) General Recreation;

5) Multiple Use;

6) Agriculture;

7) Industrial; and

8) Facility.

The overriding principle for all the zones is to protect the valuable water resources of the Eastern Slopes and to provide for public land and resource utilization in a manner consistent with principles of conservation and environmental protection. The zoning does not apply to privately owned lands in the planning area. Table 2 defines a range of compatible activities to enact the intent of the eight land use zones. The compatible activities table and regional zoning provide interim direction until sub-regional integrated resource plans are completed.

The Ghost River Sub-Regional Integrated Resource Plan supersedes the zoning configuration in the Eastern Slopes Policy. As a result, the zones have been refined and the regional zoning found in the Eastern Slopes Policy no longer applies in the planning area. Figure 2 shows the revised zoning. It also shows Resource Management Areas (RMAs) which are geographic units that have common resource management intents.

For a discussion of legislation and other associated direction directly related to this plan, refer to APPENDIX A (p. 70).

Table 1

INTENTS OF THE EASTERN SLOPES POLICY ZONES

#	ZONE	INTENT OF THE ZONE
1	Prime Protection	To preserve environmentally sensitive terrain and valuable ecological and aesthetic resources.
2	Critical Wildlife	To protect ranges or terrestrial and aquatic habitat that are crucial to the maintenance of specific fish and wildlife populations.
3	Special Use	To recognize historical resources, lands set aside for scientific research and any lands which are required to meet unique management requirements or legislative status, which can not be accommodated within any of the other zones.
4	General Recreation	To retain a variety of natural environments within which a wide range of outdoor recreational opportunities may be provided.
5	Multiple Use	To provide for the management and development of the full range of available resources, while meeting the objectives for watershed management and environmental protection in the long term.
6*	Agriculture	To recognize those lands within the Eastern Slopes which are presently utilized or are considered suitable for cultivation and/or improved grazing.
7	Industrial	To recognize existing or approved industrial operations such as coal mines, gas processing plants, cement plants and large forest product mills.
8*	Facility	To recognize existing or potential settlement and commercial development areas.

* Not applied in the Ghost River Sub-Regional Integrated Resource Plan.

TABLE 2. COMPATIBLE ACTIVITIES BY LAND USE ZONE

ZONE / ACTIVITY	1 PRIME PROTECTION	2 CRITICAL WILDLIFE	3 SPECIAL USE	4 GENERAL RECREATION	5 MULTIPLE USE	6 AGRICULTURE	7 INDUSTRIAL	8 FACILITY
Non-motorized recreation								
Fishing								
Hunting								
Scientific study								
Trapping								
Trails, non-motorized								
Transportation & utility corridors								
Primitive camping								
Intensive recreation								
Off-highway vehicle activity								
Logging								
Domestic grazing								
Petroleum and natural gas exploration & development								
Coal exploration								
Coal development								
Mineral exploration & development								
Serviced camping								
Commercial development								
Industrial development								
Residential subdivisions								
Cultivation								

Compatible Use — Uses that are considered to be compatible with the intent of a land use zone under normal guidelines and land use regulations.

Permitted Use — Uses that may be compatible with the intent of a land use zone under certain circumstances and under special conditions and controls where necessary.

Not Permitted Use — Uses that are not compatible with the intent or capabilities of a land use zone.

These activities are only representative of the range of activities that occur in the Eastern Slopes. For these and any other activities, the possibility of whether they should or should not take place in a particular area must always be measured against the fundamental management intentions for that zone. Since economic opportunities are not all known in advance, site-specific developments may be considered in any zone.

INTEGRATED RESOURCE PLAN

RESOURCE MANAGEMENT AREAS

AREA A Ghost Wilderness
AREA B Upper Ghost
AREA C Fallentimber
AREA D Waiparous
AREA E Little Red Deer
AREA F Water Valley
RMA Boundary

REVISED EASTERN SLOPES ZONING
1 Prime Protection
2 Critical Wildlife
3 Special Use
4 General Recreation
5 Multiple Use
6 Agriculture
7 Industrial
8 Facility

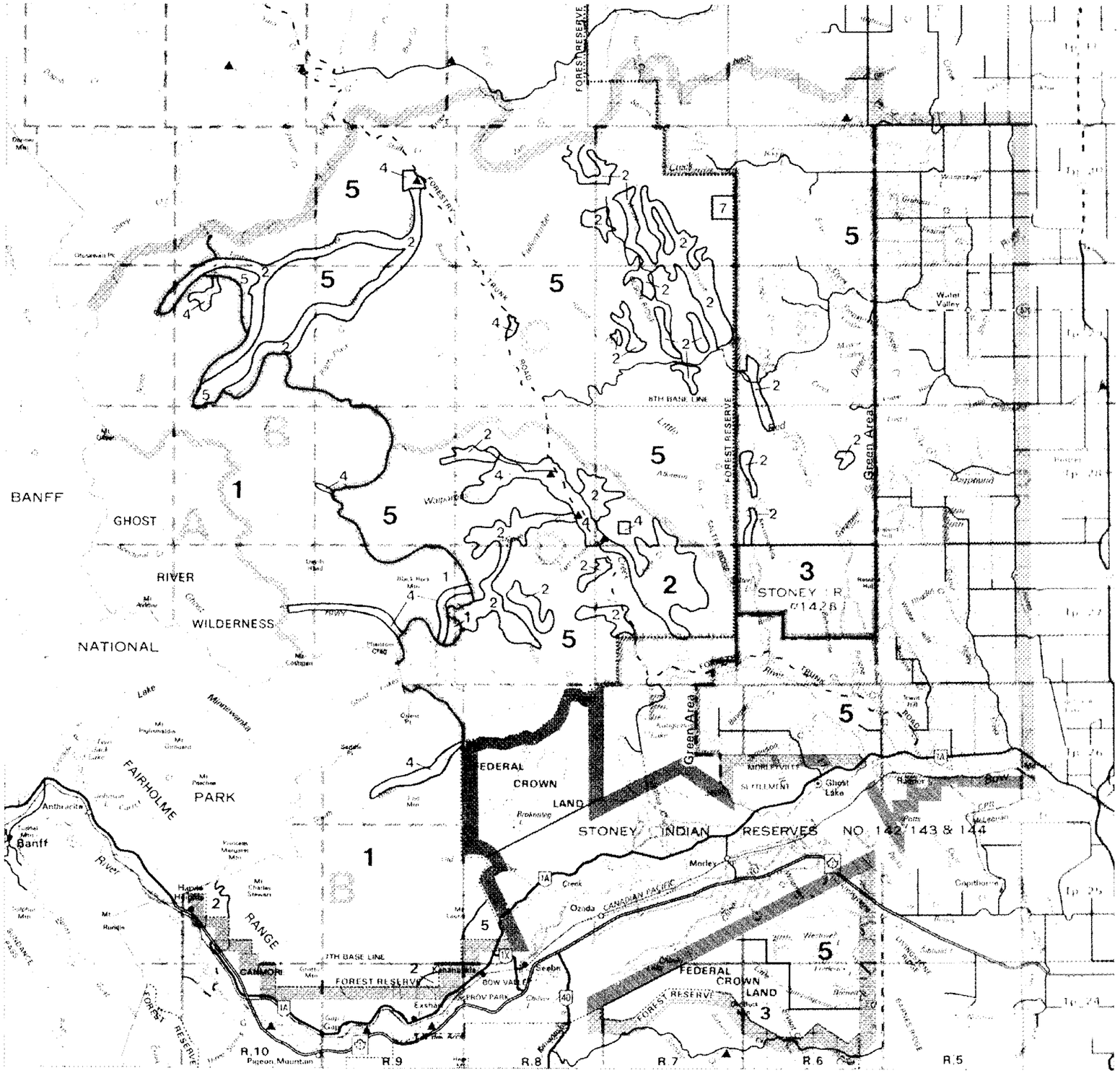


Fig 2 Refined Eastern Slopes Zoning and Resource Management Areas

2. BROAD RESOURCE MANAGEMENT OBJECTIVES AND GUIDELINES

This chapter consists of a statement of intent for resource management within the planning area plus a set of broad resource objectives and guidelines that apply to the entire planning area. A resource summary is also provided for each sector.

The primary intent for resource management within the Ghost River Planning Area is as follows:

> To allow for the development and use of the full range of available resources while minimizing adverse environmental impacts on watershed and renewable resources.

The Ghost River plan was developed within the scope of the broad resource objectives identified at the plan policy stage of the planning process by participating agencies. These broad objectives provide future standards which participating agencies will strive to attain. They reflect government priorities for the Ghost River sub-region within the context of the Eastern Slopes region, and are expressed as they relate to a particular resource. Following the broad objectives for each resource are the common resource management guidelines.

2.1 Watershed

The Ghost River Planning Area includes a portion of the headwaters of the Bow and Red Deer rivers that eventually flow into the South Saskatchewan River. The water supplied by the Bow and Red Deer rivers is used downstream for irrigation, hydro-electric generation, and industrial and municipal purposes in south and south-central Alberta. The major drainages in the planning area include Fallentimber and Burnt Timber creeks and the Little Red Deer River of the Red Deer River drainage basin, and Waiparous Creek and the Ghost and Bow rivers of the Bow River drainage basin. These drainages are locally important for their fisheries, wildlife and recreation values.

The lower elevations (900 to 1200 m or 3000 to 3900 ft. asl) of the eastern portion of the planning area are mainly composed of Aspen Parkland with mixed lodgepole/aspen forests in northern areas. Intermediate elevations are dominated by the Montane Ecoregion to the south and the Subalpine Ecoregion through the remainder of the area. Lodgepole pine, Douglas fir and grasslands dominate the Montane Ecoregion. Engelmann spruce occurs at the higher elevations of the mountains in the western portion of the planning area dominated by Subalpine forests, and the Alpine Ecoregion occurs above tree line (approximately 2100 m or 7000 ft. asl). The Alpine Ecoregion is mainly composed of rock, alpine meadows, sedges, shrubs and herbs.

The topography of the planning area is mountainous to the west, giving way to foothills east of the McConnell Thrust Fault and changing to gently rolling topography in the eastern portions. The majority of the surficial deposits in the planning area consist of glacial deposits with areas in the northwest unglaciated. Terrain sensitivity varies throughout the planning area. Stream channels are well armoured with rock material in the western portions of the planning area. Also in these portions, soils are less developed and slopes are steeper with the result that disturbances become more difficult to reclaim. Although soils are more developed in the east, disturbance can cause erosion on some slopes. Precipitation throughout the planning area is high, generally increasing in the west at higher elevations. Fifty to 60 per cent of the annual precipitation occurs as snow. In addition, streamflow peaks in spring as the result of snowmelt.

Current uses of public land in the planning area do not seriously affect water quality or quantity in the Bow or Red Deer drainage systems. However, local impacts (e.g., industrial, agricultural and recreational) have influenced and continue to influence stream conditions in the planning area.

Objectives

1. To maintain an optimum water yield of streams in the planning area to satisfy both increasing downstream and on-site demands.

2. To prevent vegetation changes that could cause extreme fluctuations in streamflow,

resulting in erosion of channel materials, high sediment loads, property damage or water supply problems.

3. To maintain, and where possible improve, the water quality of streams and lakes.

4. To prevent or minimize soil erosion associated with land use activities.

5. To proceed with proposed reclamation projects on vacant public land where unacceptable environmental conditions exist.

6. To ensure that reclamation guidelines and standards are adhered to on surface and subsurface dispositions and on land disturbances from natural and man-made causes.

Guidelines

1. Alberta Environment and the Alberta Forest Service will monitor water yield and quality in the planning area to ensure the maintenance of a high-quality water resource.

2. The Ghost River Planning Area will be included in a watershed management plan prepared for the Bow/Crow Forest by the Alberta Forest Service.

3. Land or resource uses that may alter water quality, quantity and flow regime of surface water and groundwater should be brought to the attention of Alberta Forestry, Lands and Wildlife, and Alberta Environment so that adverse impacts on the water resource can be assessed and co-operatively minimized as required.

4. Fluctuations in water yield and streamflow will be minimized by adhering to operating ground rules for timber harvesting and existing forest protection policies.

5. The frequency of stream crossings will be minimized to lessen point sources of sedimentation.

6. Soil erosion associated with land use activities will be addressed through ground rules established for individual developments and the internal referral systems of the provincial government.

7. Reclamation projects will be initiated and completed based on provincial reclamation policies, approval of an access management plan and availability of funds where the responsibility rests with the provincial government.

8. Reclamation of land use disturbances will proceed progressively to reduce erosion and sedimentation. Reclamation will be included as a condition of surface disposition approvals and completed according to provincial standards.

2.2 Wildlife

The planning area has the capability to support a wide variety of wildlife species including a number of big game species, upland game bird species and furbearers generally sought for consumptive use. The capability of the area to support big game species depends greatly on the availability of certain factors, such as protective cover near available food sources. Mule deer are currently the most extensively distributed big game species in the area. Significant numbers of moose, bighorn sheep and grizzly bear also inhabit the area. Moose use shrublands located on the floodplains of major creeks and bighorn sheep populations are present in the mountainous areas. The capability of the area to support grizzly bear populations depends on the availability of undisturbed feeding areas and territories. Other big game species present include elk, white-tailed deer, black bear, cougar, wolf and mountain goat.

The area has the capability to support productive populations of furbearing animals such as red squirrel, marten, lynx, coyote and beaver. The areas which have the best capabilities for many of these species change with forest succession and the availability of prey and riparian habitat.

The area also has the capability to support upland bird species such as ruffed grouse and spruce grouse. The areas which have the best capabilities for supporting these species change with forest succession and are largely dependent on forest management.

Present use of these wildlife species is both non-consumptive (e.g., viewing) and consumptive

the range resources. Range management plans are subject to watershed and wildlife assessments.

3. Range improvement programs will be considered to maintain long-term forage productivity. All improvements will preserve the intent of the zone in which they are conducted.

4. A detailed assessment of range improvement requirements will be undertaken to determine the degree of range improvement on allotments, permits and leases required to achieve range management objectives. Range improvements will be accomplished considering wildlife habitat enhancement as a complementary benefit.

5. Range improvements will generally be conducted on suitable areas of brush or aspen vegetation with minimal disturbance to coniferous growing stock. Improvement efforts will be concentrated on areas where vegetation succession has reduced grazing capacities. Treatments may include mechanical removal of vegetation species and the use of prescribed burns for range management purposes.

6. Opportunities for stocking increases based on sound range management practices will be considered on an operational basis during the development of range management plans.

2.9 Minerals

The most important mineral resource of the planning area is natural gas found in 11 gas fields located along the foothills and Front Ranges of the Rocky Mountains. The 1985 total production of natural gas was 1.25 billion m^3, while gas reserves were about 29 billion m^3. This is just over one-and-one half per cent of Alberta's production and reserves of natural gas. There is no production of petroleum here although the Lochend oil field now extends into the area and has potential for discovery of oil.

Coal-bearing strata of the Upper Cretaceous Edmonton Formation occur in the planning area and there is potential for coal resource development. Limited coal exploration has resulted in the identification of two small deposits at Silver Creek and Grand Valley. Several very small mines operated in the first part of this century at these two locations. There is coal potential in a large part of the area.

The area has substantial volumes of limestone and sandstone. At present there is one quarry mining Rundle stone in the Harvie Heights area and one quarry mining sandstone in the Yamnuska area. There are several limestone quarries on the periphery of the planning area, in the Bow Corridor.

Objectives

1. To encourage industry to define the extent of, develop or produce minerals where reserves have been proven or where productive formations exist.

2. To encourage the exploration for mineral resources in previously unexplored areas and formations.

Guidelines

1. All proposals for coal exploration and development will be processed in accordance with A Coal Development Policy for Alberta (1976). Mining and siting of processing facilities will be considered on a site-specific basis in response to Preliminary Disclosures.

2. Renewable resource values are high in Critical Wildlife and General Recreation Zones, and any mineral exploration or development must mitigate any potential resource conflicts.

3. Mineral activity will be governed by Eastern Slopes zoning through normal referral processes.

4. In most cases, mineral activity will be allowed in Zone 2 if the following criteria are met:

   - avoidance, if possible, of key habitat areas by the project;

- where avoidance is not possible, development should be designed to minimize disturbance of wildlife habitat and provide mitigative measures to maintain habitat capability throughout the project; and

- reclamation plans should have wildlife habitat as a high priority and retain the pre-disturbance wildlife capability of the project area whenever possible.

2.10 Historical Resources

The Ghost River area has not been subjected to intensive investigation of its prehistoric past, but over 100 archaeological sites have been identified. It is likely that the area was used for at least the last 12 000 years, but its use was likely less intensive than in surrounding areas associated with major watercourses. The most intensive use would have been along the Ghost, Dogpound, Waiparous and Fallentimber drainage systems.

Sites representing the material remains of hunters who frequented the region in the past 12 000 years have been identified in, or adjacent to, the planning area. The area is considered to have a high potential for the discovery of additional sites particularly along terraces above streams and rivers, along lakeshores or the margins of wetlands, and in areas where bedrock or cobbles of material suitable for the manufacture of stone tools have been exposed.

The Ghost River area first became readily accessible in the 1880s with completion of the railway to Cochrane. This opened markets for ranchers who had moved into the area in the 1870s. Logging was one of the first commercial activities, occurring along the Burnt Timber, Fallentimber, Ghost and Waiparous basins. Access to the area was mainly by foot or horseback until 1953, when the Forestry Trunk Road was completed and oil and gas exploration intensified through the 1950s, 1960s and 1970s. The waters of the North Ghost River were diverted into Lake Minnewanka in 1942.

The area is within the disturbed belts comprising the Rocky Mountain Front Ranges. The foothills belt (Little Red Deer River and Water Valley RMAs) is underlain by Upper Cretaceous clastic units. Formations include the Blackstone, Cardium, and Wapiabi formations of the Alberta Group and Brazeau Formation. The fossils present in these units include such organisms as foraminifera, pelecypods, gastropods, cephalopods and rare fish bones. Dinosaur bones have been recovered from equivalent units in the Nordegg area of Alberta. At the present time most of this foothills region is covered by thick conifer forests. The outcrops of bedrock, usually occurring along streams, are areas of maximum impact. At times construction of roads in the area has exposed these units and they have provided some fossil material. In the subsurface there should be units of the Blairmore Group (Lower Cretaceous), Kootenay Formation (Upper Jurassic - Lower Cretaceous) and Fernie Formation (Jurassic). These units are exposed both north and south of the Ghost River area and may be close to the surface within the area. All three units are fossiliferous in other areas of the foothills belt, and the Kootenay has been extensively mined for fossils in the Bow River Valley.

Once within the Rocky Mountain Front Ranges (Ghost Wilderness, Upper Ghost, Fallentimber and Waiparous RMAs), the sequence of units changes drastically. The sequence is entirely Palaeozoic with units of Cambrian, Devonian and Carboniferous ages mapped in the area. Invertebrate fossils are common in a large number of the formations and there are probably a number of undescribed potential palaeontological sites in the region. The Cambrian units include the Eldon, Pika and Arctomys formations, and the Lynx Group. Trilobites and brachiopods have been recovered from these units in the vicinity.

The Devonian units include Yahatinda (oldest plants in western Canada and fish bones), Cairn, Southesk, Alexo and Palliser formations.

These contain corals, stromatoporids, brachiopods, crinoids, bryozoa, etc. The Carboniferous units encountered include the Exshaw and Banff formations and Rundle Group which have cephalopods, brachiopods, corals, crinoids, bryozoa, pelecypods and gastropods. Thus, all these units are to some extent fossiliferous. The Front Ranges have excellent exposures not only along streams but

also along the exposed eastern faces of the mountains.

Objective

1. To protect historical resources (historic, prehistoric and palaeontological) from potential or actual impact related to future resource development and to manage these resources for future generations.

Guidelines

1. Resource uses in the planning area involving land surface disturbance may require Historical Resources Impact Assessments before development, as outlined under Section 33(2) of the Historical Resources Act.

2. The Archaeological Survey of Alberta, Resource Management Section, will participate in the land use referral process to review proposed development projects within those areas considered to have high historical resource potential.

2.11 Ecological Resources

Ecological resources are unique or representative features or systems that have been identified in the planning area. One Wilderness Area, two Natural Areas and one significant ecological area are located in the planning area. The Ghost River Wilderness Area is located in the headwaters of the Ghost River. Ole Buck Mountain Natural Area (Section 5, pt. Section 7-25-6 W5) is located in the Westover Lake area south of Indian Reserves 142, 143 and 144, and Wildcat Island Natural Area (SW 15-26-3 W5, the island only) is located in the Bow River near Beaupre Creek. One ecologically significant area is located near Winchell Lake south of Water Valley (Winchell Creek, NW 2-29-5 W5).

Objectives

1. To preserve selected unique or representative ecosystems or features.

2. To provide for the recreational, scientific and educational uses of ecological resources.

Guidelines

1. Existing land use reservations will be maintained to protect ecologically significant areas until further protection, such as natural area or ecological reserve designations, is approved and established.

2. For any areas approved as Ecological Reserves or Natural Areas, a management plan will be prepared with interdepartmental and public participation. The plan will outline purpose, boundaries and permitted uses in keeping with guidelines in the Ghost River Sub-Regional Integrated Resource Plan.

APPENDIX A

LEGISLATION AND ASSOCIATED DIRECTION

Numerous government directives must be considered while developing an integrated resource plan. The most significant directions to the Ghost River plan are discussed below.

A.1 A Policy for Resource Management of the Eastern Slopes Revised 1984

A Policy for Resource Management of the Eastern Slopes Revised 1984 (often cited as The Eastern Slope Policy) provides guidelines and objectives for integrated resource management and planning for the entire Eastern Slopes region including the Ghost River Planning Area. The Eastern Slopes Policy relies on regional land use zoning to designate large areas of land for varying degrees of protection, resource management and development. Table 1 lists the general intent for each of the following eight land use zones: 1) Prime Protection; 2) Critical Wildlife; 3) Special Use; 4) General Recreation; 5) Multiple Use; 6) Agriculture; 7) Industrial; and 8) Facility. The overriding principle for all the zones under A Policy for Resource Management of the Eastern Slopes Revised 1984 is to protect the valuable water resources of the Eastern Slopes and provide for public land and resource use in a manner consistent with the principles of conservation and environmental protection. The zoning does not apply to privately owned lands in the planning area. Table 2 defines a range of compatible activities to enact the intent of the eight land use zones. The compatible activities matrix and regional zoning found in the Eastern Slopes Policy provide interim direction until sub-regional integrated resource plans are completed.

The Ghost River Sub-Regional Integrated Resource Plan supersedes the zoning configuration set down in the Eastern Slopes Policy. As a result, the zones have been refined and the regional zoning found in the Eastern Slopes Policy no longer apply in the planning area. Figure 2 shows the revised zoning.

A.2 A Coal Development Policy for Alberta

A Coal Development Policy for Alberta, released in 1976, guides the exploration and development of coal resources throughout the province. Under the Coal Policy, exploration and development of coal deposits are permitted only under strict control to ensure environmental protection and satisfactory reclamation of any disturbed land. It classifies the province into four categories of suitability for different levels of exploration and development. The western portion of the planning area is Category 1 where no exploration or development is permitted. The north-central area is Category 2, where "limited exploration is desirable and may be permitted under strict control". Commercial development by surface mining "will not normally be considered at the present time" because "the preferred land or resource use remains to be determined". The eastern portion of the planning area is mostly Category 4 where "exploration may be permitted under strict control" and where commercial development "may be considered subject to proper assurances respecting protection of the environment and reclamation of disturbed land".

A.3 Fish and Wildlife Policy for Alberta

The Fish and Wildlife Policy for Alberta was approved by Cabinet and released in October 1982. This policy provides general direction regarding outdoor recreation, wildlife resources, fisheries resources and regulatory aspects of fish and wildlife use. The Fish and Wildlife Policy calls for preparation of comprehensive 10-year fish and wildlife resource plans. Meeting the objectives stated in this plan will achieve a portion of the overall fish and wildlife projected demand targets identified in the Status of the Fish and Wildlife Resource in Alberta (1984).

APPENDIX B

GLOSSARY

Access Management Plan	A plan to manage recreational off-highway vehicle access in the entire planning area outside of the Ghost River Wilderness Area will be co-ordinated by the Bow Crow Forest, Alberta Forest Service, with participation from concerned government agencies, local authorities and the public. The plan will consist of a network of selected routes and trails suitable for recreational off-highway vehicle use. The access management plan will maintain a range of recreational OHV trails and address such items as types of vehicles, seasonal use of routes and trails, and limits to motorized recreational access in the area.
Animal Unit Month (AUM)	Measure of forage or feed required to maintain one (AUM) animal unit (a mature cow of 455 kg [1000 lbs]/ or equivalent) for 30 days (Resource Conservation Glossary, Soil Conservation Society of America, 1976).
Annual Allowable Cut (AAC)	Total volume of timber that may be harvested yearly under sustained yield management.
Auto Touring Route	Existing roads in the planning area which are either major travel corridors or travel through cultural or aesthetic features of sufficient significance to warrant greater visitor awareness, education and enjoyment. The development of suitable visitor information (e.g., interpretive brochures, road signage) and non-serviced road facilities such as pull-off areas and viewpoints are appropriate on these roadways.
Archaeological Resource	"...a work of man that (i) is primarily of value for its prehistoric, historic, cultural or scientific significance, and (ii) is or was buried or partially buried in land in Alberta or submerged beneath the surface of any watercourse or permanent body of water in Alberta". (Historic Resources Act, Revised Statute of Alberta [henceforth abbreviated RSA] 1978, H-8).
Commercial Development	All activities and infrastructure associated with the development of facilities for the use of the general public, including fixed-roof recreation accommodation, such as hunting, fishing, skiing and backcountry lodges; hotels, motels, apartments, townhouses and cottages; and commercial recreational activities involving facilities such as ski hills and golf courses, whether owned and/or operated by the private or public sector.
Commercial Timber Permit	Authorization for the permittee to harvest timber and which identifies lands on which timber may be harvested, the period of time within which the timber may be harvested, the actual timber to be harvested and the terms and conditions on which the permit is issued (Forest Act, RSA 1980, c. F-16).
Consumptive Use	Those uses of resources that reduce the supply such as hunting, logging and mining (Wildland Planning Glossary, USDA Forest Service).

	Conversely, non-consumptive use does not reduce the supply (e.g., wildlife viewing.)
Country Vacation Farm or Vacation Ranch	A working farm or ranch which provides overnight accommodation for a minimum of four guests and offers organized participation in, and/or observation of, actual farm/ranch activities as part of the vacation experience.
Crown Land	Land titled to her Majesty the Queen in the right of the Province of Alberta.
Domestic Grazing	All activities associated with the production and use of forage for domestic livestock.
Extirpated Species	Wildlife species no longer found in their historical ranges but are not extinct.
Eastern Slopes Zones	The Eastern Slopes Policy document, first issued in 1977, identified three policy areas and eight corresponding regional land use zones: **A. Protection** - 1) Prime Protection, 2) Critical Wildlife and 3) Special Use; **B. Resource Management** - 4) General Recreation, 5) Multiple Use and 6) Agriculture; **C. Development** - 7) Industrial and 8) Facility. The primary objectives of regional zoning are: a) to provide resource management intents for broad units of land; b) to recognize opportunities and allocate resources at a broader regional scale; c) to provide background and direction for more detailed integrated resource planning; and d) as a consequence of the latter, to resolve land use conflicts (A Policy for Resource Management of the Eastern Slopes Revised 1984, Alberta 1984).
Fixed Roof Accommodation	Permanent accommodation other than campgrounds (e.g., hotels, motels, backcountry lodges or rental cabins).
Flow Regime	Distribution of streamflow over time (usually one year).
Forest Land Base	Land considered to be capable of contributing to the social and economic welfare of the province if it is predominantly maintained under forest management. Includes provisions for production of wood and wood products on a sustained yield basis, wildlife, grazing, recreation, and protection and production of water supplies.
Forest Management Unit (FMU)	An area of forest land designated by the minister for the purposes of administration (Forest Act, RSA 1980, c. F-16). The annual allowable cut of timber is determined with respect to forest management unit boundaries.
Forest Reserve	Approximately two-thirds of the Ghost River Planning Area is within the Rocky Mountain Forest Reserve. It includes lands in the Province of Alberta set aside by the Forest Reserves Act (1964) primarily to maintain good watershed conditions and obtain high water yields. This is done through the management of vegetative cover as an insurance against soil erosion and to minimize the danger of flash floods. Other

benefits of the forest reserve are timber production, grazing, recreational use and use of fish and wildlife (Alberta's Forests, Alberta 1971).

Grazing Allotment

Synonymous with range allotment. A rangeland area based on natural or watershed boundaries designated for use by a prescribed number of cattle, managed by permittee(s) and directed by a range management plan prepared by the Alberta Forest Service (Range Management Section, Forest Land Use Branch).

Grazing Lease

Crown grazing-land disposition issued on an area of land which is suitable for supporting livestock. Leases are legislated under the Public Lands Act (RSA 1980, P-30) and are issued for public lands in the Green Area and White Area, outside the Rocky Mountain Forest Reserve, usually for a term of five or 10 years. The lease allows the lessee exclusive use of the land for grazing (Range Management Section, Forest Land Use Branch, Alberta Forest Service).

Grazing Permit

Official written permission to graze a specific number, kind and class of livestock for a specific period on a defined range allotment (Wildland Planning Glossary, USDA, Forest Service, 1976).

Green Area:
Permits are issued on an annual basis by the forest superintendent for the Green Area, pending the preference quota for each permittee and the available animal unit months (AUM) in each allotment. Grazing permits are legislated pursuant to the Forest Reserves Act (RSA 1980, F-15) (Range Management Section, Forest Land Use Branch, Alberta Forest Service).

White Area:
Grazing permits are issued on an annual basis, frequently on lands under reservation for another purpose or on lands for which it is not considered in the public interest to grant long-term dispositions. Grazing permits are legislated through Alberta Regulation 64/70 found under the Public Lands Act (RSA 1980, P-30).

Green Area

The Green Area, established in 1948 by Alberta Order-in-Council 213/48, consists of the non-settled forest lands and covers 53 per cent of the total area of the Province of Alberta. Public lands in the Green Area are managed primarily for forest production, watershed protection, fish and wildlife management, recreation and other multiple uses. Permanent settlement, except on legally subdivided lands, as well as agricultural uses other than grazing, have been excluded (Alberta Public Lands, Alberta, 1981a).

Historical Resource

Any work of nature or of man that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest (Historical Resource Act, RSA 1979, H-8).

Historical Resource Impact Assessment

Projects normally conducted when development programs are anticipated to cause ground surface disturbance within the Province of Alberta. The purposes of such projects are to locate all historical resource sites to be affected by the development, evaluate the worth

	of such sites relative to Alberta historical resources as a whole, determine the nature of the impact of the development on individual sites and propose conservation procedures for those sites to be affected by the development. (Archaeological Survey of Alberta).
Historic Site	"...any site which includes or is comprised of an historical resource of an immovable nature or which cannot be disassociated from its context without destroying some or all of its value as an historical resource and includes a prehistoric, historic or natural site or structure." (Historic Resources Act, RSA 1979, H-8).
Integrated Resource Management (IRM)	Co-ordinated, interagency approach to comprehensive planning and shared decision-making in the overall management of diverse natural resources and their use. A basic principle of IRM is consultation before action; concerned agencies consult and discuss implications of possible courses of action so mutually acceptable solutions can be determined. Integrated resource management is a comprehensive, co-ordinated approach to planning and administering Alberta's resources as efficiently as possible, with the goal of producing the greatest benefits for present and future Albertans (Resource Planning Branch; Alberta Forestry, Lands and Wildlife).
Miscellaneous Timber Unit Area	Land set aside within a forest management unit to provide timber for local use. The area represents a portion of the annual allowable cut for the total forest management unit. Timber is allocated for local use through Local Timber or Commercial Timber permits.
Multiple Use	The use of land for more than one purpose (e.g., watershed management, timber production, domestic livestock grazing, wildlife production and recreational and industrial uses). A combination of uses may not necessarily yield the highest economic return or the greatest unit output considering the optimal use of available resources (adapted from Resource Conservation Glossary, 3rd Edition. Soil Conservation Society of America, 1976).
Off-Highway Vehicle	Motorized vehicle used for cross-country travel on land, water or snow, including four-wheel-drive vehicles, motorcycles, track vehicles and snow vehicles, but not motorboats (Off-Highway Vehicle Act, RSA 1980, c. 0-4). In the context of this plan, off-highway vehicles do not include helicopters.
Operational Plans	Provincial government resource management agencies prepare long- and short-range plans for the management of resources under their jurisdiction. These specific resource management plans generally deal exclusively with the resource(s) for which a management responsibility has been delegated. Wildlife management plans, timber management plans, range management plans and recreational management plans are examples.
Palaeontological Resource	"...a work of nature consisting of or containing evidence of extinct multicellular beings and includes those works or classes of works of nature designated by the regulations as palaeontological resources." (Historic Resources Act, RSA 1979, H-8).

Point Source Of Sedimentation	Term used to denote where sedimentation occurs as a result of land use which is in direct contact with the stream (e.g., road crossings). Conversely, a non-point source of sedimentation is used to denote sedimentation arising from a land use within the watershed but not adjacent to the stream (e.g., timber harvest cutblocks may change the quantity and timing of run-off which may lead to higher flows and erosion of stream banks downstream).
Preliminary Disclosure	Means by which both the private and public sectors may make major development proposals, on a confidential basis, to government. Through preliminary review, the government may indicate whether it has objections "in principle" to a proposal's form, timing, location or any other essential feature. No objection in principle of a major development proposal (resulting from preliminary disclosure) constitutes approval for the filing of necessary applications and documents as required under controlling legislation (A Policy for Resource Management of the Eastern Slopes Revised 1984 [Alberta, 1984]).
Primary Range	An area which animals prefer to use and over which they will graze when management is limited (Wildland Planning Glossary, USDA, Forest Service). The primary range will be overused before the secondary range is used when animals are allowed to shift for themselves (A Glossary of Terms Used in Range Management, Society for Range Management, 1974).
Productive Geological Structure	Types of geological situations which contain economically viable amounts of naturally occurring minerals such as petroleum and natural gas (e.g., traps), coal (e.g., seam formations) and metals (e.g., igneous intrusives).
Program	Plan of procedure; a schedule or system under which action may be taken toward a desired goal.
Project	Specific plan or design intended to meet desired program goals. A work item definable in terms of plans and specifications.
Public Land	Land which is under the administration of the Minister of Forestry, Lands and Wildlife. Title to the beds and shores of all rivers, streams, water- courses, lakes and other bodies of water is declared to be vested in the Crown in right of Alberta and under the administration of the Minister of Forestry, Lands and Wildlife (Public Lands Act, RSA 1980, P-30) unless the title specifies otherwise.
Rangeland	Land on which the (climax or natural potential) plant community is dominated by grasses, grass-like plants, forbs or shrubs suitable for grazing or browsing and present in sufficient quantity to justify grazing or browsing use. Land on which the native vegetation (climax or natural potential) is predominantly grasses, grass-like plants, forbs or shrubs suitable for grazing or browsing use. This includes lands revegetated naturally or artificially to provide a forage cover that is managed like native vegetation. Rangelands include natural grasslands, savannahs, shrublands, most deserts, tundra, alpine, communities, coastal marshes

	and wet meadows (A Glossary of Terms Used in Range Management, Society for Range Management, 1974).
Recreation	Extensive Recreation: The recreational use of trails, natural lakes, rivers, streams and generally undeveloped or minimally developed areas. The term includes such activities as off-highway vehicle use, random camping, hiking, backpacking, hunting, fishing, snowmobiling, horseback riding and cross-country skiing. Intensive Recreation: High-density recreational use such as developed staging areas and camp and picnic grounds, and other sites or areas requiring continuous recreational management and services to maintain recreational opportunities.
Referral Systems	The Alberta government has established formal mechanisms for the internal review of land-use applications originating from within itself and the private sector. Government management agencies concerned or affected by the provisions of an application participate in its review. Each management agency subsequent to the review files its recommendation for the approval or rejection of the application. These positions are co-ordinated by a lead agency (i.e., "one window" approach) which, in turn, provides the proponent with a comprehensive decision.
Regional Resource Management Committee (RRMC)	A group of regional directors representing each of the involved divisions of Alberta Forestry, Lands and Wildlife and other agency representatives on an occasional and "as needed" basis. The RRMC reviews planning documents and has the primary responsibility for the implementation stage of the planning process.
Reserve Block	Area of timber exempted from harvest. The coniferous reserve block is usually harvested after the initial cut area has been reforested with coniferous regeneration to a height of 1.8 m (6 ft.) to 2.4 m (8 ft.). It is expected that coniferous regeneration will reach a height of 2.0 m (7 ft.) within 20 years.
Residential Subdivisions	All activities and infrastructure associated with permanent housing subdivisions for residents.
Resource	Any part of the natural environment which society perceives as having value.
Resource Integration Committee (RIC)	An approvals body responsible for supervising and monitoring the integrated resource planning program.
Resource Management Area	A geographical unit which has a common resource management intent (e.g., wildlife habitat protection, multiple use, extensive and intensive recreation).
Resource Management Guidelines	Measures which prescribe or define: a) conditions, requirements or standards which may be imposed upon those activities which have a direct or indirect effect on resources or resource uses; b) information collection activities and responsibilities;

c) decision-making activities and responsibilities; and
d) procedures for making decisions about activities.

Resource Management Implication	A statement in an integrated resource plan that attempts to outline: a) benefits to accrue to the public as a result of the policy decisions made through the plan's resource management objectives, guidelines and zoning; b) resource management costs incurred (generally in qualitative terms) to implement the proposed resource management actions; and c) potential trade-offs between mutually exclusive resource uses.
Resource Management Objective	A frame of reference that provides a degree of measure in reaching designated goals. Specifically, resource management objectives: a) document desired conditions that spell out ends rather than means; b) are cast as infinitives rather than in the imperative mood or future tense; c) are presented in a general to specific fashion which demonstrates continuity in detail; and d) are quantifiable and can be achieved with existing technology or knowledge.
Restricted	Any activity which will not be permitted until stricter than normal conditions are defined through an integrated decision-making process such as integrated resource planning and referrals.
Route	Usually a mapped but unsigned primitive travel way for motorized or non-motorized use which has a low standard of maintenance. Summer routes may not have an evident tread.
Salvage Cutting	A cutting to remove dead, downed and injured trees before the timber becomes unmerchantable.
Sanitation Cutting	A cutting made to remove dead, diseased, infested, damaged or susceptible trees to reduce or prevent the spread of insects or pathogens.
Secondary Range	An area which is unused or lightly used by livestock under minimal management and will ordinarily not be fully used until the primary range has been overused (Wildland Planning Glossary, USDA, Forest Service, 1976).
Staging Area	A site developed to provide access to trails.
Step-Out Well	A proposed well that, in the judgment of the Mineral Resources Division, Alberta Department of Energy (based on geophysical, geological or engineering technical data), has a reasonable chance of penetrating the same hydrocarbon-bearing structure discovered by a well drilled prior to July 1977 (Mineral Resources Division, Alberta Energy).
Surface Disturbance	Because historical resources generally exist on the surface or are shallowly buried in the upper components of the soil horizon, surface disturbance can include any mechanical activity that affects the distribution of near-surface or buried sediments. In the case of open prairie, even extensive vehicular activity over the surface is considered

	disturbance. In the case of forested conditions, any activity that displaces soil horizons immediately below forest litter or deeper is considered surface disturbance. In the case of a significant known historical resource containing stratified or layered occupations, compaction of sediments as a result of heavy vehicular activity is considered disturbance (Archaeological Survey of Alberta).
Sustained Yield	The yield that a forest can produce continuously at a given intensity of management without impairment of the productivity of the land. Sustained yield timber management therefore implies continuous production of timber so planned that at the earliest practical time there is a balance between timber growth and cutting (Wildland Planning Glossary, USDA, Forest Service, 1976).
Timber Quota	Coniferous Timber Quota: A percentage of the volume of the annual allowable cut, as it relates to coniferous timber, that a quota holder may harvest. Deciduous Timber Quota: The volume or area of deciduous timber that a quota holder may harvest. (Forests Act, RSA 1980, c. F-16).
Trail	A signed, mapped travel way for motorized or non-motorized use that has an evident tread (in summer) and is developed and maintained to a prescribed standard.
Tourism	The action and activities of people taking trips to places outside their home communities for any purpose except daily commuting to and from work.
Tourism Attractions	A physical feature of interest or significance which can either be natural or man-made. There may or may not be facilities constructed in conjunction with it to increase the enjoyment of visitors. The attraction can be of international, national, provincial, regional or local significance, depending upon the degree of market appeal.
Tourism Facility	A man-made development whose purpose is to offer or enhance a particular service or recreational activity to the tourist.
Water Quality	Quantity of solid and dissolving material carried out by a stream (Resource Conservation Glossary, Soil Conservation Society of America, 1976).
White Area	The White Area is the region of the province settled initially and includes nearly 40 per cent of the total area of Alberta. Available public lands in this region, suitable for settlement and agriculture and not required for conservation, watershed, forestry, recreational uses or wildlife habitat, for example, may be applied for pursuant to the Public Lands Act (RSA 1980, P-30).
Wildland Recreation	In relative terms, extensive recreation occurring on lands that are on the less used and less altered side of a continuum from totally developed to completely untouched lands. The term is not exact in that the land may be under a low level of management for several land uses and is therefore not truly wild.

Wildlife Depredation	Use of lands and/or land products by wildlife for their survival which is determined by human land occupants to be in direct competition with a proposed or existing use. Examples include wildlife use of agricultural crops, hay stacks and domestic livestock ranges.
Wildlife Management Unit	An area of Alberta designated in the Wildlife Act (RSA, 1980) for the purpose of administration.

GHOST RIVER
INTEGRATED RESOURCE PLAN

BASE MAP LEGEND

HARD SURFACE all weather - primary
- secondary
LOOSE or STABILIZED SURFACE all weather - primary
- secondary
- tertiary
LOOSE SURFACE dry weather
TRUCK TRAIL
SEISMIC LINE or TRAIL
RAILWAY
TRANSMISSION LINE
PIPE LINE
GAS PLANT / COMPRESSOR STN.
CANAL (dish)
FOREST HEADQUARTERS/RANGER STATION/CABIN
RECREATION AREA, developed/undeveloped
LOOKOUT, primary/secondary/crawl tower or point
FLOATPLANE LANDING
AIRSTRIP LENGTH and ELEVATION (amsl) in hundreds of feet
- regular maintenance
- occasional maintenance
HELIPORT/HELIPAD
LOCAL NAME
- not recognized by the Geographical Names Board.
MINE (gravel pit)
FORD

PROVINCIAL LOCATION KEY MAP

SCALE 1:100 000

UNIVERSAL TRANSVERSE MERCATOR PROJECTION

Kilometres 2 1 0 2 4 6 8 10 Kilometres
Miles 1 0 1 2 3 4 5 6 Miles

WEST OF THE FIFTH MERIDIAN

Alberta
FORESTRY, LANDS AND WILDLIFE
Land Information Services Division

JANUARY
1989

Planning Area Boundary

Proposed Green Area Boundary

Forest Reserve Boundary

Patent Land

RESOURCE MANAGEMENT AREAS

- A Ghost Wilderness
- B Upper Ghost
- C Fallentimber
- D Waiparous
- E Little Red Deer
- F Water Valley

Resource Management Area Boundary

REVISED EASTERN SLOPES ZONING

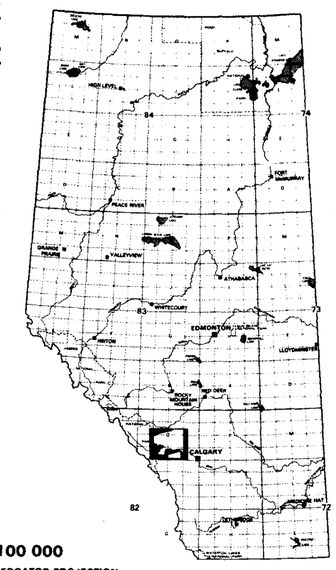
1. Prime Protection
2. Critical Wildlife
3. Special Use
4. General Recreation
5. Multiple Use
6. Agriculture (not applied)
7. Industrial
8. Facility (not applied)

GHOST RIVER
INTEGRATED RESOURCE PLAN

BASE MAP LEGEND

- HARD SURFACE all weather - primary (1)
- HARD SURFACE all weather - secondary (5XX)
- LOOSE or STABILIZED SURFACE all weather - primary (1A)
- LOOSE or STABILIZED SURFACE all weather - secondary (11)
- LOOSE or STABILIZED SURFACE all weather - tertiary
- LOOSE SURFACE dry weather
- TRUCK TRAIL
- SEISMIC LINE or TRAIL
- RAILWAY
- TRANSMISSION LINE
- PIPE LINE
- GAS PLANT / COMPRESSOR STN.
- CANAL (ditch)
- FOREST HEADQUARTERS/RANGER STATION/CABIN
- RECREATION AREA, developed/undeveloped
- LOOKOUT, primary/secondary/crawl tower or point
- FLOATPLANE LANDING
- AIRSTRIP LENGTH and ELEVATION (amsl) in hundreds of feet (35 17) - regular maintenance - occasional maintenance
- HELIPORT/HELIPAD
- LOCAL NAME ( ) not recognized by the Geographical Names Board.
- MINE (gravel pit)
- FORD

PROVINCIAL LOCATION KEY MAP



SCALE 1:100 000

UNIVERSAL TRANSVERSE MERCATOR PROJECTION

Kilometres 2 1 0 2 4 6 8 10 Kilometres

Miles 1 0 1 2 3 4 5 6 Miles

WEST OF THE FIFTH MERIDIAN

Alberta

FORESTRY, LANDS AND WILDLIFE
Land Information Services Division

October 1991

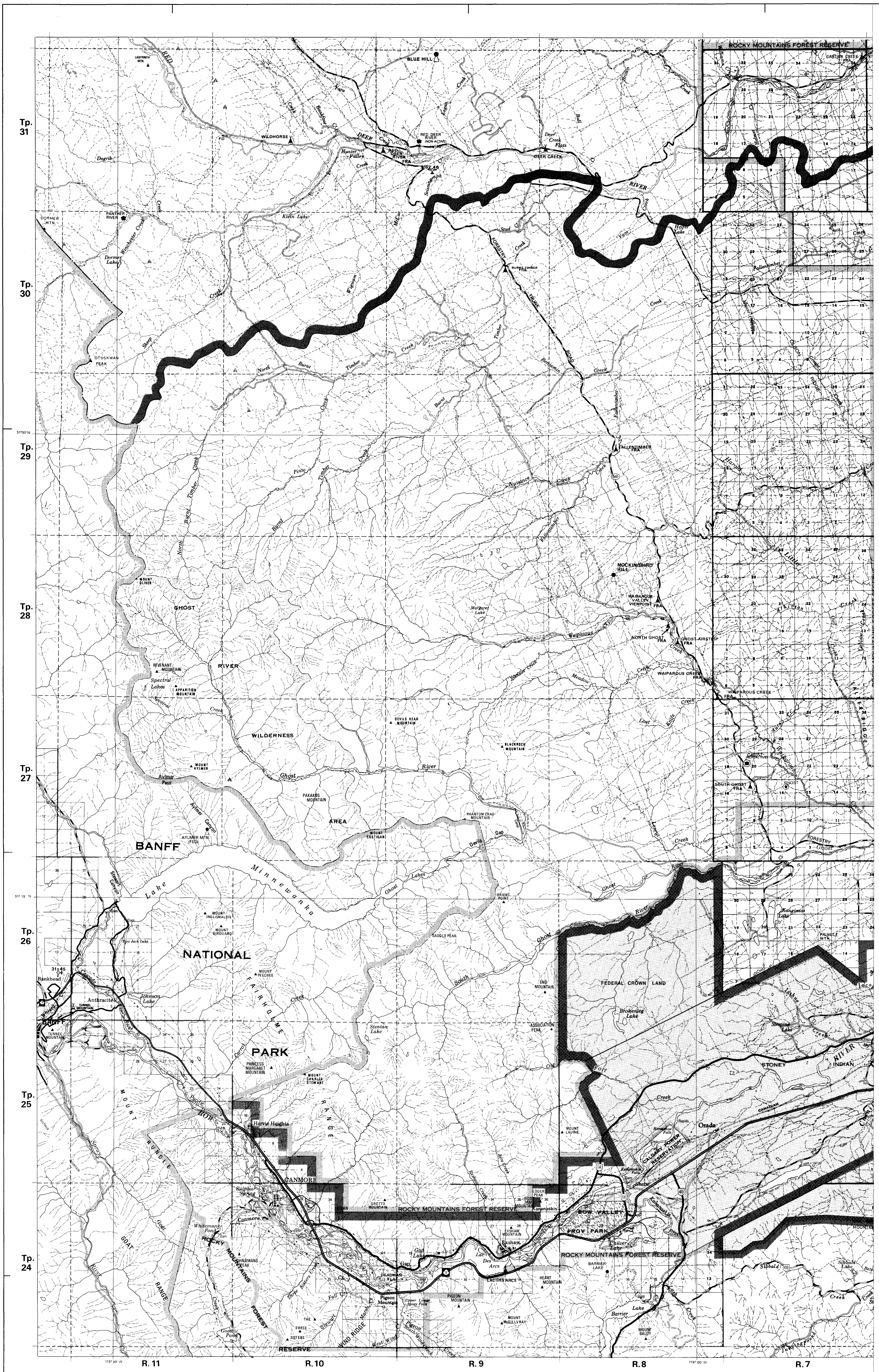
Planning Area Boundary

Forest Reserve Boundary

TRIM LINE

R. 7 R. 6 R. 5

114°30' W



Tp. 31
Tp. 30
Tp. 29
Tp. 28
Tp. 27
Tp. 26
Tp. 25
Tp. 24
R. 11
R. 10
R. 9
R. 8
R. 7
51°30'N
51° 15' N
115° 30' W
115° 00' W
ROCKY MOUNTAINS FOREST RESERVE
CARTIER CREEK FRA
LABYRINTH MTN
BLUE HILL
RED DEER RIVER (NON-ACTIVE)
WILDHORSE
RED DEER RIVER FRA
DEER CREEK
RIVER
Hunter Valley Creek
Deer Creek Flats
Dogrib
DORMER MTN.
PANTHER RIVER
Winchester Creek
Dormer Lake
Klein Lake
Heyer Lake
OTUSKWAN PEAK
North Burnt Timber Creek
BURNT TIMBER FRA
FORESTRY TRUNK ROAD
Benjamin Creek
Fallentimber
FALLENTIMBER FRA
Nuisance Creek
Pinto
MOCKINGBIRD HILL
WAIPAROUS VALLEY VIEWPOINT FRA
NORTH GHOST FRA
GHOST AIRSTRIP FRA
WAIPAROUS CREEK FRA
Waiparous Creek
Margaret Lake
Meadow Creek
Johnson Creek
Lost Knife Creek
DIXON RIDGE
Harold Creek
Atkinson Creek
GHOST (NON-ACTIVE)
SOUTH GHOST FRA
MOUNT OLIVER
GHOST RIVER WILDERNESS AREA
REVENANT MOUNTAIN
Spectral Lakes
APPARITION MOUNTAIN
Spectral Creek
DEVILS HEAD MOUNTAIN
BLACKROCK MOUNTAIN
MOUNT AYLMER
Aylmer Pass
Aylmer Canyon
AYLMER MTN (FED)
PAKAKOS MOUNTAIN
MOUNT COSTIGAN
PHANTOM CRAG MOUNTAIN
Devils Gap
Ghost Lakes
Ghost River
BANFF NATIONAL PARK
Lake Minnewanka
Stewart Canyon
MOUNT INGLISMALDIE
MOUNT GIROUARD
Two Jack Lake
ORIENT POINT
SADDLE PEAK
South Ghost
MOUNT PEECHEE
FAIRHOLME RANGE
Bankhead
Anthracite
Johnson Lake
TUNNEL MOUNTAIN
BANFF
Cascade River
END MOUNTAIN
ASSOCIATION PEAK
FEDERAL CROWN LAND
Brokenleg Lake
Kangienos Lake
PRINGLE MTN
Jacob Creek
Sleeping Lake
STONEY INDIAN RESERVE
RIVER
Old Fort Creek
Stenton Lake
Carrot Creek
PRINCESS MARGARET MOUNTAIN
MOUNT CHARLES STEWART
MOUNT RUNDLE
BOW
Pacific
Harvie Heights
CANMORE
Sulphur Spring
Canmore Cr.
GROTTO MOUNTAIN
MOUNT LAURIE
Horseshoe Falls
Rapids
Ozada
CALGARY POWER RESERVATION
Kananaskis Falls
Seebe
LODER PEAK
Kananaskis
BOW VALLEY PROV PARK
EXSHAW MOUNTAIN
Exshaw
Lac Des Arcs
LAC DES ARCS
Gap Lake
Gap
DEADMAN FLAT
Chilver Lake
BARRIER LAKE
HEART MOUNTAIN
PIGEON MOUNTAIN
Pigeon Mountain
Upper Lower Spray Falls
MOUNT McGILLVRAY
Barrier Lake
MOUNT BALDY
Sibbald Creek
Sibbald Lake
Jumpingpound
Whitemans Pond
CHINAMANS PEAK
GOAT RANGE
Goat Creek
Goat Pond
Spray River
THE THREE SISTERS
Three Sisters Creek
Stewart
WIND RIDGE
West Wind
Marsh Cr.
RESERVE

TAB 78

Anggi Chen

Subject: Complaint re non-compliance with the South Sask. Regional Plan

From: Kelly Ness <Kelly.Ness@gov.ab.ca> **On Behalf Of** LUF
Sent: Tuesday, December 22, 2020 3:44 PM
To: LUF <LUF@gov.ab.ca>; Michael Wenig <mike@bigsprucelaw.ca>
Cc: Alberta Chapter <alberta@backcountryhunters.org>
Subject: RE: Complaint re non-compliance with the South Sask. Regional Plan

Good afternoon,

We have reviewed the complaint, and have found that the matter complained of is the subject or is part of the subject of several applications for judicial review currently before the Alberta Court of Queen's Bench challenging Alberta Energy's decision to rescind the 1976 Coal Policy. You indicated in your complaint your intention to intervene in one of those judicial review applications. Therefore, under section 62(2)(b) of the *Alberta Land Stewardship Act,* the Secretariat will not investigate the complaint at this time.

Sincerely,

Land Use Secretariat
Petroleum Plaza South Tower
12th Fl. 9915 - 108 Street
Edmonton, Alberta, T5K 2G8
Phone: 780-644-7972
https://www.landuse.alberta.ca

Classification: Protected A
From: LUF <LUF@gov.ab.ca>
Sent: Thursday, December 03, 2020 11:02 AM
To: Michael Wenig <mike@bigsprucelaw.ca>
Cc: Alberta Chapter <alberta@backcountryhunters.org>
Subject: RE: Complaint re non-compliance with the South Sask. Regional Plan

Hi Mike,
Please accept our apology for the delay responding to your submission. This email is to serve as confirmation that the Land Use Secretariat has received the e-mail copy of your complaint of non-compliance with a regional plan including the completed form and supporting materials.

Your complaint is currently under review. The Secretariat will response to you as soon as possible.

Sincerely,

Land Use Secretariat
Petroleum Plaza South Tower
12th Fl. 9915 - 108 Street
Edmonton, Alberta, T5K 2G8
Phone: 780-644-7972
https://www.landuse.alberta.ca

From: Michael Wenig <mike@bigsprucelaw.ca>
Sent: Tuesday, December 01, 2020 11:26 AM
To: LUF <LUF@gov.ab.ca>
Cc: Alberta Chapter <alberta@backcountryhunters.org>
Subject: RE: Complaint re non-compliance with the South Sask. Regional Plan

CAUTION: This email has been sent from an external source. Treat hyperlinks and attachments in this email with care.

Dear Sir/Madam –

I just left a phone message with your office asking about the status of the complaint we submitted in October, per the email below. We haven't received any response to our complaint, so we'd appreciate an update.

Thanks very much.

Yours truly,

Mike Wenig

Michael M. Wenig, Lawyer
Big Spruce Law
mike@bigsprucelaw.ca
403-879-1006
403-826-4442 (m)
www.bigsprucelaw.ca

This communication is intended for the use of the recipient to which it is addressed, and may contain confidential, personal and/or privileged information. Please contact me immediately if you are not the intended recipient of this communication, and do not copy, distribute, or take action relying on it. Any communication received in error, or subsequent reply, should be deleted.

From: Michael Wenig
Sent: Friday, October 23, 2020 10:32 AM
To: LUF@gov.ab.ca
Cc: Alberta Chapter <alberta@backcountryhunters.org>
Subject: Complaint re non-compliance with the South Sask. Regional Plan

Dear Sir/Madam –

Attached is a complaint from the Alberta chapter of the Backcountry Hunters and Anglers. The complaint is submitted under section 62 of the Alberta Land Stewardship Act.

The complaint consists of the signed complaint form and the accompanying supplement. (Because of the form's special formatting, I was unable to combine the two pdf files into a single file.)

Please confirm receipt of this email.

Yours truly,

Mike Wenig

Michael M. Wenig, Lawyer
Big Spruce Law
mike@bigsprucelaw.ca
403-879-1006
403-826-4442 (m)
www.bigsprucelaw.ca

This communication is intended for the use of the recipient to which it is addressed, and may contain confidential, personal and/or privileged information. Please contact me immediately if you are not the intended recipient of this communication, and do not copy, distribute, or take action relying on it. Any communication received in error, or subsequent reply, should be deleted.

TAB 79

Court of Queen's Bench of Alberta

Citation: Keller v. Municipal District of Bighorn No. 8, 2010 ABQB 362

2010 ABQB 362 (CanLII)

Date: 20100527
Docket: 0701 09911
Registry: Calgary

Between:

Rod Keller

Applicant

- and -

Municipal District of Bighorn No. 8 and Wild Buffalo Ranching Ltd.

Respondents

Reasons for Judgment
of the
Honourable Madam Justice Sandra L. Hunt McDonald

---

[1] This is an application for Judicial Review of three bylaws, enacted by the Respondent Municipal District of Bighorn ("the Municipality") in June and August 2007. The combined effect of the bylaws would permit the Respondent Wild Buffalo Ranching Ltd. ("Wild Buffalo") to transfer "density credits" from one parcel of land owned by Wild Buffalo to another. An arrangement by which subdivision rights, or density, may be transferred from one parcel of land to another is often referred to as a "transfer of subdivision density" or a "transfer of development credits" scheme ("TDC scheme"). The TDC scheme implemented by the Municipality would permit Wild Buffalo to proceed with a proposed residential development called Carraig Ridge. The site proposed for Carraig Ridge is directly adjacent to lands owned and maintained as a nature preserve by the Applicant, Rod Keller.

Background

[2] In 1989, Mr. Keller purchased a 406-acre parcel of ranch land in the Bow River Corridor, 20 kilometres west of Cochrane, Alberta ("the Keller lands"). He built a house on the property and has resided there ever since. In 2006, Wild Buffalo purchased an adjacent 662-acre parcel of land ("the Carraig Ridge lands"). Wild Buffalo and/or its principal, Mr. Ian McGregor, also owns land north of the Carraig Ridge and Keller lands ("the Jamison Road lands").

[3] The Keller, Carraig Ridge and Jamison Road lands are located in an area designated a "Small Holdings Area" within the Municipal District of Bighorn No. 8. Under the Municipal Development Plan ("MDP") as it existed prior to June 2007, these lands could each be subdivided into 40-acre lots with one residence per lot. Wild Buffalo's plan for the Carraig Ridge lands was to build a residential development consisting of 45 homes, but under the MDP subdivision would be limited to 16 lots.

[4] In February 2007, Wild Buffalo applied to the Municipality for the enactment of three bylaws. Bylaw 06/07 would amend the MDP as follows:

1. To Section 3.3 Municipal Goals, the following new goal is added:

   3.3.1 xv) To provide opportunities to apply innovative land use planning and environmental conservation concepts that improve municipal efficiencies and reduce rural sprawl.

2. To Section 15.6, Small Holdings, add Policies 15.6.14 through 15.6.18 as follows:

   15.6.14 Notwithstanding the subdivision limitations established elsewhere in section 15.6, landowners wishing to redistrict (rezone) and subdivide land in the Small Holdings Policy area may undertake a "Transfer of Subdivision Density (TSD)" program as an optional planning technique to concentrate subdivision into a smaller human footprint and to reduce the amount of land that would otherwise be fragmented within the Small Holdings area.

   15.6.15 The TSD option allows gathering and transferring of subdivision density potential (as identified in policy 15.6.3) from one or more Sending Parcels within the Small Holdings area and concentrating it into one or more Receiving Parcels, also located in the Small Holdings area.

   15.6.16 In order to prevent future subdivisions of a Sending Parcel after the transfer of its subdivision density to a Receiving Parcel, a conservation easement must be registered on the title of the Sending Parcel at the time

2010 ABQB 362 (CanLII)

> of subdivision approval. The Sending Parcels may only send the number of lots that are allowed under policy 15.6.3.
> 15.6.17 Landowners choosing to undertake the TSD option shall be required to prepare an Area Structure Plan and shall apply the Transfer of Subdivision Density (TSD) District of the Land Use Bylaw to the land that is the Receiving Parcel.
>
> 15.6.18 Similarly, a Conservation Easement (CE) District shall be applied through the Land Use Bylaw to those Sending Parcel lands that are subject to a Conservation Easement in accordance with policy 15.6.16.

Bylaw 07/07 would provide for the approval of the Area Structure Plan prepared by Wild Buffalo ("the Carraig Ridge ASP"). Bylaw 08-Z/07 would amend the Land Use Bylaw ("LUB") by adding several definitions:

> "Transfer of Subdivision Density (TSD)" means a land use policy that reduces or eliminates subdivision potential in one or more parcels while increasing, by the same number, subdivision potential in one or more other parcels. The technique gathers a base development density assigned to all parcels in an area and divides the land into Sending Parcels and Receiving Parcels as defined elsewhere in this section.
>
> "Sending Parcels" means land that is restricted from future subdivision and/or development as part of a comprehensive Transfer of Subdivision Density program. Sending Parcels require the registration of a Conservation Easement on the certificate of title to ensure the terms of development restrictions remain in effect in perpetuity.
>
> "Receiving Parcels" means land that is granted the benefit of more subdivision and/or development than the base density allows as the result of a comprehensive Transfer of Subdivision Density program implemented in accordance with Municipal Development Plan policy.

Bylaw 08-Z/07 would also add the new districts of "Transfer of Subdivision Density District (TSD) and Conservation Easement District (CE) to the LUB, and rezone the subject lands from Agriculture Conservation District to Transfer of Subdivision Density District.

[5] Collectively, these bylaws would permit Wild Buffalo to transfer subdivision rights from the Jamison Road lands to the Carraig Ridge lands. In exchange, the registration of a conservation easement against the Jamison Road lands would restrict Wild Buffalo's right to subdivide there. Ultimately, Wild Buffalo would be able to apply to subdivide the Carraig Ridge lands into a total of 45 lots.

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[6] First reading was given to the three bylaws on February 13, 2007. Section 692 of the *Municipal Government Act*, R.S.A. 2000, c.M-26 ("MGA") provides:

> 692 (1) Before giving second reading to
> (a) a proposed bylaw to adopt an intermunicipal development plan,
> (b) a proposed bylaw to adopt a municipal development plan,
> (c) a proposed bylaw to adopt an area structure plan,
> (d) proposed bylaw to adopt an area redevelopment plan,
> (e) a proposed land use bylaw, or
> (f) a proposed bylaw amending a statutory plan or land use bylaw referred to in clauses (a) to (e),a council must hold a public hearing with respect to the proposed bylaw in accordance with section 230 after giving notice of it in accordance with section 606.
>
> (2) Despite subsection (1), if a proposed development relates to more than one proposed bylaw referred to in subsection (1), the council may hold a single public hearing.

[7] In accordance with s.692 of the MGA, a public hearing for each of the Bylaws was held on April 19, 2007. The minutes of the April 19 2007 public hearing indicate that after a presentation by Wild Buffalo, a number of parties spoke and submitted materials in favour and opposed to the bylaws. Mr. Keller attended the April 19 2007 meeting, spoke in opposition to the bylaws and submitted an 89-page report.

[8] On June 12 2007, the Municipality passed second and third reading for Bylaw 06/07. After second reading was passed, but before third reading, the Municipality passed a motion:

> Moved by Councillor Dunki that Council direct staff to undertake a public consultation process regarding the transfer of subdivision density policy, with the intention of seeking improvements to the policy as set out in the draft Bylaw 06/07 by determining such things as the values that the community wants to protect and their ranking relative to one another.

[9] After the June 12 2007 Council meeting, Councillor Maria Dunki circulated a letter to her constituents. Entitled "June Bighorn Update", the letter referred to the Carraig Ridge proposal and indicated:

> To facilitate the Land Use Bylaw changes (or "rules" document) Council also asked Administration to set up a community consultation process "with the intention of... determining such things as the land values that the community

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> wants to protect and their ranking relative to one another." No date has been set, but I will give you lots of notice. Most area residents will recall a similar process a few years ago that was well received. Council recognizes the importance of the opportunity to discuss, share, learn together and thus provide Council with direction. The Public Hearing process is mandated by the Municipal Government Act but is only one way of finding out the public view. Consultation is the other way and Council recognizes this.

[10] No additional public consultation took place between June 12 and August 14, 2007, when second and third reading was given to Bylaw 07/07 and Bylaw 08-Z/07. However, the Municipality held community workshops the following year, on May 29 and June 19, 2008, to discuss the transfer of subdivision density policy with landowners. Though Mr. Keller attended both of these workshops, the Bylaws he seeks to challenge had already been passed. He filed the Originating Notice challenging the three bylaws on October 3, 2007.

Issues

[11] The issues are as follows:

1. Does s.537 of the *Municipal Government Act* apply to the challenge to Bylaw 06/07?

2. What is the appropriate standard of review?

3. Should the Bylaws be declared invalid on the basis that:
   (a) The bylaws are ultra vires the Municipality; or
   (b) The bylaws are void for uncertainty; or
   (c) The bylaws were conditional upon a public consultation process which did not occur;

4. Should Bylaws 08-Z/07 and 07/07 be declared invalid on the basis that:
   (a) Mr. Keller was not given prior notice of the Municipality's consideration of the Bylaws on August 14, 2007;
   (b) The bylaws that were passed was materially different from the bylaw presented for the public hearing in April, 2007.

5. Should Bylaw 07/07 be declared invalid on the basis that:
   (a) The Area Structure Plan fails to comply with Bylaw 08-Z/07 and sections 9.1.11, 3.3.1(XV), 15.6.14, 15.6.15, and 15.6.16 of the amended Municipal Development Plan.

6. The Effect of the Alberta Land Stewardship Act

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[12] The Municipality points out that while Mr. Keller has raised the issue of the *vires* of Bylaw 07/07 in argument, he did not do so in the Amended Originating Notice. In argument, counsel for Mr. Keller submitted that his contention in this regard is that Bylaw 07/07 is part of "scheme that is *ultra vires*", insofar that if either Bylaw 06/07 or Bylaw 08-Z/07 are struck down, Bylaw 07/07 would lack a legislative foundation. In my view, notwithstanding the failure to include reference to the *vires* of Bylaw 07/07 in the Amended Originating Notice, it is appropriate to consider the issue in this context.

Analysis

1. Section 537 of the Municipal Government Act

[13] Sections 536 to 538 of the MGA provide:

> 536 (1) A person may apply by originating notice to the Court of Queen's Bench for
>
> (a) a declaration that a bylaw or resolution is invalid, or
>
> (b) an order requiring a council to amend or repeal a bylaw as a result of a vote by the electors on the amendment or repeal.
>
> (2) A judge may require an applicant to provide security for costs in an amount and manner established by the judge.
>
> 537 A person who wishes to have a bylaw or resolution declared invalid on the basis that
>
> (a) the proceedings prior to the passing of the bylaw or resolution, or
>
> (b) the manner of passing the bylaw or resolution
>
> does not comply with this or any other enactment must make an application within 60 days after the bylaw or resolution is passed.
>
> 538 Despite section 537, a person may apply at any time
>
> (a) for a declaration that a bylaw is invalid if
>
> (I) the bylaw is required to be put to a vote of electors and the vote has not been conducted or if the bylaw was not given the required approval in such a vote,

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(ii) the bylaw is required to be advertised and it was not advertised, or

(iii) a public hearing is required to be held in respect of the bylaw and the public hearing was not held,

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[14] I agree that s.537 would limit the Applicant's ability to argue that Bylaw 06/07 was conditional upon further consultation. At the hearing of this matter, the Applicant limited the argument in this regard to Bylaws 07/07 and 08-Z/07. I disagree with Wild Buffalo that, because the Applicant has referred to ss. 536 to 538 in his Originating Notice of Motion, s.537 bars his application in respect of Bylaw 06/07 in its entirety. I agree with the Applicant that a bylaw enacted without jurisdiction is a nullity and therefore subject to challenge notwithstanding the passage of the 60-day limit in s.537. Moreover, to the extent that the Applicant has raised the issues set out in s.538, it is proper to consider them.

2. Standard of Review

[15] The standard of review with respect to a Municipal Council's jurisdiction to make bylaws is correctness: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485. The Applicant also challenges the process followed by the Municipality in passing the bylaws, in particular with respect to statutory notice requirements, and I am satisfied that it is appropriate to determine whether the Municipality correctly complied with its statutory obligations in this regard.

[16] In his supplementary materials, the Applicant has also challenged the reasonableness of the Municipality's decisions, assuming that they are found to have been *intra vires*. Interestingly, the Applicant contends that the appropriate standard of review in this regard is patent unreasonableness, while the Municipality argues that the proper standard for assessing an *intra vires* decision of a Municipal Council is "reasonableness, with a high degree of deference being afforded to the Council's decision."

[17] All parties are aware of the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, wherein the Court collapsed the previous categories of patent unreasonableness and reasonableness into one category, thereafter to be known as reasonableness. In the wake of *Dunsmuir*, it is unusual for a party seeking judicial review to argue or concede that the appropriate standard of review for an *intra vires* decision is patent unreasonableness, but understandable confusion arises as a result of s.539 of the *Municipal Government Act*, which provides:

539 No bylaw or resolution may be challenged on the ground that it is unreasonable.

[18] Prior to *Dunsmuir*, s.539 was interpreted to mean that the appropriate standard of review for *intra vires* municipal actions should be patent unreasonableness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 at para.38._With the patent unreasonableness standard effectively collapsed into the reasonableness standard, the question raised by s.539 is whether it operates to preclude judicial review of *intra vires* bylaws or resolutions altogether, or merely evidences an intention on the part of the Legislature to provide significant but not complete privative protection, thereby weighing in favour of a high degree of deference within the reasonableness standard.

[19] Since the Municipality has argued for the latter interpretation and the Applicant has argued for a patent unreasonableness standard, and because of my determination with respect to the reasonableness of the bylaws implementing the TSD scheme, it is not necessary to resolve the question of whether s.539 would operate to bar judicial review of an *intra vires* bylaw altogether. I agree with the Municipality's assertion, however, that the first step in the standard of review analysis mandated by *Dunsmuir* is to determine whether the degree of deference is well settled by the case law, and that the case law strongly suggests that a high degree of deference is appropriate. This was made clear by the Supreme Court of Canada in *Nanaimo*, at para.35:__

> ...Municipal Councilors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing intra vires decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the intra vires decisions of municipalities should be reviewed upon a deferential standard.

See also *Montreal (Ville) v. 2952-1366 Quebec Inc*. [2005] 3 S.C.R. 141, at para.47; *St. Paul (County) No. 19 v. Belland*, 2006 ABCA 55, [2005] A.J. No. 152, at paras. 13-16.

3. Are the Bylaws Ultra Vires and/or Unreasonable?

[20] Part 17 of the MGA sets out the authority of a municipality for planning and development. Section 617 of the MGA provides:

> 617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted
>
> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and

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(b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta, without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

[21] Section 632 of the MGA sets out the list of items which must, and which may, be addressed in a Municipal Development Plan:

632 (1) A council of a municipality with a population of 3500 or more must by bylaw adopt a municipal development plan.

(2) A council of a municipality with a population of less than 3500 may adopt a municipal development plan.

(3) A municipal development plan

(a) must address

(I) the future land use within the municipality,

(ii) the manner of and the proposals for future development in the municipality,

(iii) the co-ordination of land use, future growth patterns and other infrastructure with adjacent municipalities if there is no intermunicipal development plan with respect to those matters in those municipalities,

(iv) the provision of the required transportation systems either generally or specifically within the municipality and in relation to adjacent municipalities, and

(v) the provision of municipal services and facilities either generally or specifically,

(b) may address

(I) proposals for the financing and programming of municipal infrastructure,

(ii) the co-ordination of municipal programs relating to the physical, social and economic development of the municipality,

(iii) environmental matters within the municipality,

(iv) the financial resources of the municipality,

(v) the economic development of the municipality, and

(vi) any other matter relating to the physical, social or economic development of the municipality,

(c) may contain statements regarding the municipality's development constraints, including the results of any development studies and impact analysis, and goals,

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objectives, targets, planning policies and corporate strategies,

(d) must contain policies compatible with the subdivision and development regulations to provide guidance on the type and location of land uses adjacent to sour gas facilities,

(e) must contain policies respecting the provision of municipal, school or municipal and school reserves, including but not limited to the need for, amount of and allocation of those reserves and the identification of school requirements in consultation with affected school authorities, and

(f) must contain policies respecting the protection of agricultural operations.

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[22] Section 639 of the MGA provides that every municipality must pass a land use bylaw. Section 640(1) sets out a list of items that must, and may, be considered in an LUB:

640 (1) A land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality.

(2) A land use bylaw

(a) must divide the municipality into districts of the number and area the council considers appropriate,

(b) must, unless the district is designated as a direct control district pursuant to Section 641, prescribe with respect to each district,

(I) the one or more uses of land or buildings that are permitted in the district, with or without conditions, or

(ii) the one or more uses of land or buildings that may be permitted in the district at the discretion of the development authority, with or without conditions,

or both;

(e) must establish the number of dwelling units permitted on a parcel of land.

(4) Without restricting the generality of subsection (1), a land use bylaw may provide for one or more of the following matters, either generally or with respect to any district or part of a district established pursuant to subsection (2)(a):

> (o) the density of population in any district or part of it;...

[23] Section 633(2) of the MGA sets out the list of items that a municipality must and may address in an Area Structure Plan:

> 633 (2) An area structure plan
>
> (a) must describe
>
> (ii) the land uses proposed for the area, either generally or with respect to specific parts of the area,
> (iii) the density of population proposed for the area either generally or with respect to specific parts of the area,
>
> and
>
> (b) may contain any other matters the council considers necessary.

[24] The Applicant submits that a transfer of development rights is not included in s.632, s.640 and s.633(2) and therefore an amendment to an existing MDP, LUB and/or ASP to allow for a transfer of subdivision density is *ultra vires*. In the alternative, the Applicant submits that, if the Municipality has jurisdiction to implement a transfer of subdivision density scheme, it does not have the power under any of these provisions to "randomly and arbitrarily" transfer subdivision rights and may only do so for conservation purposes.

[25] The parties are agreed that the law mandates a broad and purposive approach to the interpretation of municipal authority under the MGA: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary*, [2004] 1 S.C.R. 485; *Keyland Development Corporation v. Cochrane (Town of)*, [2007] A.J. No. 275 (Q.B.). Both the Respondent Municipality and the Applicant have directed me to an article in the Journal of Environmental Law and Practice: Kwasniak, Arlene: *The Potential for Municipal Transfer of Development Credit Programs in Canada*, (2004) 15 J.E.L.P. No.2, at pps. 47-70, wherein Professor Kwasniak notes, at p.60, that, because of this broad and purposive approach, municipalities likely have implied authority to develop systems for the transfer of density. Professor Kwasniak relied in this regard upon the decision of the Alberta Court of Appeal in *698114 Alberta Ltd. v. Banff (Town of)*, [2000] A.J. No. 992 (C.A.). In that case, the Court considered a bylaw that allocated commercial development rights according to a lottery scheme and expressly approved the Chambers Judge's conclusion that, while the lottery scheme was not expressly authorized by the MGA, "the broad powers of regulation and control" therein provided the municipality with the authority to implement the lottery system.

[26] Under s.632(a)(ii), an MDP must address the manner of future development within the municipality. Under s.632(b)(iii) and s.632(3)(b)(vi), it may address environmental matters and

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the physical, social and economic development of the municipality. Though the legislation does not refer specifically to a TDC scheme, in my view such a scheme clearly falls within the broad powers of regulation and control provided to the municipality under these sections of the MGA. Similarly, s.640(4)(o) very clearly provides authority to the municipality to provide for density in its LUB, and s.633(2)(a) requires a municipality to address issues of land use and population density in any ASP. The Applicant may disagree with how the Municipality has chosen to exercise its powers in this regard, but the legislation clearly extends to the Municipality the authority necessary to amend its MDP and LUB and to approve an ASP that includes the components necessary for the transfer of subdivision density from one part of the municipality to another.

[27] The Applicant's argument in the alternative is that, if the Municipality has the authority to implement a TDC scheme, it must do so only for conservation purposes. He has directed me to a number of articles and materials from the United States, where such schemes are apparently common, in support of the proposition that a TDC scheme is a tool to achieve conservation only. (See: Pruetz, Erica: *Transfer of Development Rights Turns 40*: American Planning Association and Planning & Environmental Law, 2007; *Fact Sheet: Transfer of Development Rights*, American Farmland Trust, 2001.) He also points out that Professor Kwasniak writes, at p.49-50:

> In rural settings the objectives of TDC programs typically are to preserve landscape features such as agriculture, open space, wildlife habitat, or important ecological features as well as to prevent fragmentation... a TDC program meets these objectives by shifting permissible densities from areas where development is less desirable to areas where it is more desirable.

[28] Aside from these indicators of how such schemes are typically implemented in the United States, the Applicant has cited no authority for the proposition that the broad powers conferred upon a municipality under s.632 and s..640 of the MGA to address development and population density should *prima facie* be limited to a conservation purpose. A TDC scheme implemented by a municipality in the Province of Alberta does not depend for its validity upon the rationale for such schemes in other jurisdictions; it is sufficient if the scheme falls within the jurisdiction of the municipality under the MGA.

[29] Moreover, "conservation purposes" may be very much in the eye of the beholder. Obviously, in Mr. Keller's view, it is more important to limit development at the Carraig Ridge site than to limit development on the Jamison Road lands. In preventing any further subdivision on the Jamison Road lands, however, it appears that the Municipality may achieving at least two of the objectives described by Professor Kwasniak: the prevention of fragmentation and the preservation of agriculture on the Jamison Road lands. This may advance a conservation objective, though not the conservation objective that Mr. Keller would like. In essence, Mr. Keller would prefer to see the Carraig Ridge site remain low density at the potential expense of further subdivision on the Jamison Road lands. The municipality has evidenced a preference to increase the density at Carraig Ridge in favour of preserving the Jamison Road lands. The

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question of which lands are better preserved is not a jurisdictional one, it is instead a question that goes directly to the reasonableness of the Municipality's decision.

[30] The reasonableness standard is described in *Dunsmuir*, at para.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 lent 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.

[31] The Applicant contends that the decision to implement the TDC scheme was unreasonable because no conservation group supported it, because the scheme failed to include the process by which sending and receiving lands would be assessed, and because it is "patently unreasonable to use a conservation tool for an anti-conservation purpose." In my view, there are any number of reasons why a municipality might consider a TDC scheme beyond conservation purposes, so long as the scheme fits municipal objectives and falls within the municipality's jurisdiction. Moreover, as noted above, the municipality has not implemented this particular TDC scheme wholly without regard to conservation. The scheme would significantly and perhaps permanently limit further development on the Jamison Road lands. Those lands are presently used for agricultural purposes and, on the Applicant's own submissions, the preservation of agricultural lands has been recognized as a valid objective for TDC schemes.

[32] Nor am I satisfied that the decision made by the Municipality is unreasonable because, as the Applicant submits, it is missing the essential component of how to identify and assess the lands to be preserved and the capacity of the receiving parcel. As the Municipality points out, under the TDC scheme, the receiving lands must be suitable for the proposed density in order to be approved for subdivision, regardless of the TDC policy, and the criteria for suitability (which are set out in further detail below) are clearly established. Similarly, the lands to be preserved must meet the criteria established for a conservation easement, which are again discussed below but are clearly set out in legislation.

4. Are the Bylaws Void for Uncertainty?

[33] The Applicant contends that Bylaw 06/07 is void for uncertainty because it fails to identify and rank the criteria used to assess what land is to be preserved and what land is to receive the transfer of subdivision density.

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[34] Uncertainty, in the context of a municipal bylaw, was addressed by Beetz J. in *Montreal (City) v. Arcade Amusements Inc*., [1985] 1 S.C.R. 368, at para.87:

> Each case is practically unique, and the Courts have to determine each time whether the true meaning of the by-law in question can be understood by the persons to whom it applies.

[35] Difficulty in interpretation is not should not be confused with uncertainty to point of invalidity: *Montreal Amusements*, at para.83; *698114 Alberta Ltd.*, 2000 ABCA 237, [2000] A.J. No. 992, at para.30. In *698114 Alberta Ltd*. the Alberta Court of Appeal upheld an amendment to the Land Use Bylaw even where that amendment imposed a lottery scheme whereby a landowner could not predict when a proposed commercial development that was permitted could proceed. The Court of Appeal agreed with the Chambers Judge's conclusion that, "while the outcome of the random draw was uncertain, the machinery governing the lottery is understandable by those who are affected by it."

[36] Bylaw 06/07 establishes the goal of promoting innovative land use planning and environmental conservation and proposes the TDC scheme as one means to do so. It requires the registration of a conservation easement upon the sending parcel. The conservation easement cannot be registered unless it meets the requirements of s.22 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.E-12, which means that protection of the sending parcel must meet the objectives of protecting, conserving or enhancing the environment or providing for, *inter alia*, recreational use or open space use in a manner that is consistent with the protection, conservation and enhancement of the environment. The Municipality further points out that the application of the TDC policy does not alleviate its statutory obligation under s.654 of the MGA to only approve a subdivision application where the proposed land is suitable for the intended purpose of the subdivision. At the time the application for subdivision is put to the Municipality for approval, the Municipality must consider, *inter alia*, the topography, soil characteristics, potential for flooding, subsidence or erosion, accessibility, availability of water supply and sewage disposal, and the use of land in the vicinity of the subject land. Consequently, I am satisfied that the bylaws are sufficiently certain to be understood by those who would be affected by them.

5. Were the Bylaws Conditional Upon Further Public Consultation?

[37] The Applicant's claim that Bylaw 06/07 was conditional upon further public consultation was filed more than 60 days after Bylaw 06/07 was passed by Municipal Council and is out of time pursuant to s.537 of the MGA. The Applicant's challenge to Bylaws 08-Z/07 and 07/07 was brought within the period set out in s.537 and may be considered on the merits.

[38] The statutory requirement for a public hearing is set out at s.692, and a public hearing to consider all three bylaws took place on April 19, 2007. The Applicant was present and made fulsome submissions. The Applicant points out that no environmental groups supported the three

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bylaws at the public hearing, and a number of residents in the vicinity of the Carraig Ridge lands attended and stated their objections. Some neighbours opposed the development proposal that would be facilitated by the bylaws, while others supported it.

[39] The Applicant contends that the Municipality committed itself to further public consultation on June 12, 2007 when, in between second and third reading of Bylaw 06/07, Municipal Council passed the motion directing its staff to undertake a public consultation process "with the intention of seeking improvements to the policy as set out in draft Bylaw 06/07 by determining such things as the values that the community wants to protect and their ranking relative to one another." Municipal Council immediately thereafter proceeded to third reading and passage of Bylaw 06/07.

[40] In my view, the motion passed on June 12, 2007 did not commit the Municipality to a course of public consultation upon which further passage of Bylaws 06/07, 08-Z/07 and 07/07 was conditional. While the Municipality was committed to implementing a process by which the policy might be improved, there is nothing in the language of the motion to suggest that passage of the Bylaws would be conditional upon such a process, or that further public consultation would necessarily result in a change to the Bylaws.

6. Are Bylaws 08-Z/07 and 07/07 invalid on the basis that the Applicant was not given prior notice of the Municipality's consideration of the Bylaws on August 14, 2007?

[41] Section 692 requires a Municipality to hold a public hearing in accordance with s.230 of the MGA, after giving notice of it in accordance with s.606, prior to second reading. The Applicant has not challenged the sufficiency of the April, 2007 hearing, at which all three proposed bylaws were considered. There is no further statutory obligation imposed upon the Municipality to give further notice that it intends to consider and give third reading to a bylaw. The Municipality correctly complied with its statutory obligations.

7. Are Bylaws 08-Z/07 and 07/07 invalid on the basis that they are materially different from the bylaws presented for the public hearing?

[42] The Applicant has challenged both bylaws on this basis, but in argument referred only to Bylaw 08-Z/07. The Applicant contends that the bylaw is invalid because as ultimately passed, it allows for freehold titles as well as bareland condominiums.

[43] I agree with the Municipality that the addition of freehold titles does not constitute a material change to the bylaw, because it does not, in any way, impact the use of the Carraig Ridge lands. I further agree with the Municipality that s.230(5)(b) of the MGA permits the municipality to make any amendment to a bylaw or resolution it considers necessary to pass it, after second reading, without further advertisement or hearing.

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8. ASP Compliance with sections 9.1.11, 3.3.1(XV), 15.6.14, 15.6.15, and 15.6.16 of the MDP., and Bylaw 08-Z/07.

[44] The relevant portions of s3.3.1 and s.9.1.11 of the MDP provide:

> 3.3.1 The Mission Statement indicates, in a broad sense, the direction in which the residents of the MD of Bighorn want to see the municipality develop, and towards which Council will strive. The following goals are adopted in order to elaborate upon the Mission Statement and to clarify the MD of Bighorn's intentions:
>
> (xv) to provide opportunities to apply innovative land use planning and environmental conservation concepts that improve municipal efficiencies and reduce rural sprawl.
>
> 9.1.11 In some instances, before subdivision or development of land is allowed, the MD of Bighorn may require that the proponent of the subdivision or development prepare an Area Structure Plan (ASP), at the expense of the proponent. The ASP will normally include the following:
>
> Generally required for large parcels of land on which little or no development has taken place, this plan will provide direction for the MD of Bighorn to guide how subdivision and development of these lands might occur.
>
> I) site suitability;
> v) impact on adjacent uses;
> vi) location of utilities.

[45] As the Municipality points out, the language of s.9.1.11 of the MDP is discretionary. There is no mandatory requirement that a developer provide an ASP, nor any mandatory components for an ASP set out in the MDP. I further agree with the Municipality that site suitability, impact on adjacent uses and location of utilities are all expressly addressed in the ASP in any event. Moreover, in my view the TDC scheme implemented by the Municipality by way of the three bylaws is "innovative land use planning" per s.3.3.1, and though it has regard to "environmental conservation concepts" that the Applicant does not share (ie. the preservation of the Jamison Road lands), it falls squarely within that section of the MDP.

[46] With respect to Bylaw 08-Z/07 and sections 15.6.14 and 15.6.15, the Applicant argues that the ASP fails to comply because it would increase fragmentation and fails to properly identify sending and receiving parcels.

[47] With respect to s.15.6.14, the Applicant's contention notwithstanding, the ASP does not increase fragmentation in the Small Holdings Area on the whole; it concentrates fragmentation into a relatively small area at Carraig Ridge and reduces the fragmentation that might otherwise

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occur on the Jamison Road lands. Though the Applicant argues that s.15.6.15 requires the developer to specifically identify the sending parcels, there is no such requirement in the language of s.15.6.15 itself. Instead, it is necessary only that the sending and receiving parcels both be located in the Small Holdings Area. The Applicant further argues that the ASP does not comply with s.15.6.16, but that section mandates the filing of a conservation easement at the time of subdivision approval. Until that time, I do not see how the ASP can be said to violate s.15.6.16.

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9. The Effect of the Alberta Land Stewardship Act

[48] On June 4, 2009, the Legislature enacted *the Alberta Land Stewardship Act*, S.A. 2009, c.A-26.8 ("ALSA"). ALSA, which was proclaimed in force on October 1, 2009, establishes a legal framework for increased Provincial oversight of land use planning and development. It provides for the development, by the Province of regional plans, described at s.13 as "expressions of the public policy of the Government" and binding upon municipalities, that would address planning and development in seven planning regions within the Province. Sections 48 to 50 of ALSA provide for a Transfer of Development Credits scheme. Section 48 provides:

> 48 (1) A TDC scheme may be established only in accordance with this Division.
>
> (2) A TDC scheme may be established by
>
> (a) a regional plan,
> (b) a local authority if the scheme is first approved by the Lieutenant Governor in Council, or
> (c) 2 or more local authorities in accordance with an agreement or arrangement among them, with or without other persons, if the agreement or arrangement is first approved by the Lieutenant Governor in Council.

[49] Section 49 sets out a list of components which every TDC scheme must include. A TDC scheme must designate an area of land as a conservation area, for environmental, scenic, aesthetic, agricultural or historic purposes and it must designate an area of land as a development area, and any terms and conditions of that designation. The Lieutenant Governor in Council is given broad regulatory power over TDC schemes under s.50.

[50] The Applicant contends that Bylaws 06/07, 08-Z/07 and 07/07 are of no effect because the TSD scheme they implement has not been approved by the Lieutenant Governor in Council. Section 13 of ALSA provides:

> 13 If there is an inconsistency between a Bylaw and this or another enactment, the Bylaw is of no effect to the extent of the inconsistency.

[51] It is important to consider s.13 in the context of a number of other provisions in ALSA. Section 18 provides:

> 18 (1) The stewardship commissioner may apply to the Court of Queen's Bench for an order under this section if, in the opinion of the stewardship commissioner, non-compliance with this Act, a regulation under this Act or a regional plan cannot be remedied or rectified under another enactment.
>
> (2) On application by the stewardship commissioner, if the Court is satisfied that this Act, a regulation under this Act or a regional plan has not been or is not being complied with, the Court may make an order to remedy or rectify the non-compliance.
>
> (3) The Court may make any interim or final order it thinks fit, including, without limitation, any or all of the following orders:
>
> (a) to stop something being done, to require something to be done or to change the way in which something is being done;
>
> (b) to manage the conduct of a person who is non-compliant;
>
> (c) declaring that any regulatory instrument of a local government body does or does not comply with a regional plan and, if necessary, ordering compliance;
>
> (d) to take any action or measure necessary to remedy or rectify non-compliance with a regional plan and, if necessary, an order to prevent a reoccurrence of the contravention;
>
> (e) to amend or repeal a regulatory instrument of a local government body that does not comply with a regional plan.

[52] I agree with the Municipality that, by excluding references to individuals or persons other than the Stewardship Commissioner, the Legislature intended to exclude anyone other than the Stewardship Commissioner from bringing an application for judicial review on the basis of non-compliance with ALSA. This interpretation is consistent with s.15(3) of the Act, which expressly limits the ability to bring any action concerning compliance with a Provincial Regional Plan to the Stewardship Commissioner, and s. 62 of the Act, which provides the mechanism by which individuals may make a written complaint to the Stewardship Commissioner. In short, ALSA taken as a whole implements a scheme whereby the Province assumes a greater role in local planning and the power to determine whether there has been compliance with the Act and with Provincial dictates as expressed in regional plans. Individual recourse is limited to the complaint provision at s.62.

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[53] This is sufficient reason to conclude that ALSA has no impact upon the disposition of this matter. However, the parties have also addressed the issues of retroactivity and vested rights, and in my view it is appropriate to address these issues briefly.

(a) Retroactive Effect

[54] Section 5 of the *Interpretation Act*, R.S.A. 2000, c.I-8 provides:

> 5(1) An enactment has effect immediately at the beginning of the day on which it comes into force.

[55] In *Sullivan and Driedger on the Construction of Statutes*, 4th.ed., at p.546, the presumption with regard to the retroactive application of statutes is described as follows:

> It is presumed that the legislature does not intend new legislation to be given a retroactive application - that is, to be applied so as to change the past legal effect of a past situation.
>
> This presumption is strong. Normally it can be rebutted only if the statute or regulation in question contains language clearly indicating that it, or some part of it, is meant to apply retroactively.

[56] ALSA was not in effect at the time the Bylaws were passed by the Municipality. Absent express language to the effect that the Legislature intended the provisions of ALSA to apply to a TDC scheme implemented prior to the ALSA coming into force, the presumption that ALSA does not operate so as to retroactively invalidate an existing TDC scheme applies.

(b) The Impact of ALSA Upon the Existing TDC Scheme

[57] The Municipality contends that the use of the term “may” in s.48(2) of ALSA suggests that the list of ways to establish TDC schemes is not exhaustive. Because “may’ is to be interpreted as “permissive and empowering” while “must” is to be interpreted as “imperative”, per s.28 of the *Interpretation Act*, the Municipality suggests that it is reasonable to interpret the “may” as referencing any TDC schemes established prior to ALSA.

[58] I am not convinced that this is the proper interpretation of s.48(2). That section provides that a local authority may implement a TDC scheme if the scheme is first approved by the Lieutenant Governor in Council. It is not imperative insofar as municipalities are not compelled to implement TDC schemes, but it is clear from the language of s.48(2) that a municipality may implement a TDC scheme *only if* it has the approval of the Lieutenant Governor in Council. To put the matter another way, had the Legislature included express language to the effect that ALSA would retroactively impact an existing TDC scheme, it is clear to me that s.48 would apply and the Municipality’s TDC scheme would be rendered invalid. It is because the Legislature did not do so that it does not.

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(c) Vested Rights

[59] Mr. MacGregor provided an affidavit setting out Wild Buffalo's expenses in respect of the Carraig Ridge development. The affidavit indicates that land purchase expenses exceeded $11 million. An accounting printout provided at the cross examination on this affidavit indicates that development costs are in the range of $2.6 million. The Applicant has taken issue with a number of the expenses, but for the purposes of this decision it is necessary to find only that, at a minimum, costs associated with the development of the Carraig Ridge lands, after the passage of the bylaws, exceeds $1 million.

[60] Wild Buffalo argues that it has acquired vested rights as a result of the passage of the bylaws. It is important to distinguish this issue from the question of the retroactivity of ALSA. In *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530, Bastarache J. pointed out, at para.30, that "In general it will be purely prospective statutes that will threaten the future exercise of rights that were vested before their commencement."

[61] The issue, therefore, is not whether the s.13 of ALSA would adversely affect Wild Buffalo's rights by retroactively invalidating the bylaws in question, but whether the provisions of ALSA would negatively affect Wild Buffalo's right to pursue subdivision on the Carraig Ridge lands going forward. In my view, in the absence of a regional plan purporting to limit the right to subdivide, there is no provision in ALSA that would have this effect. There is, in short, nothing in ALSA that purports to limit Wild Buffalo's right to apply for subdivision under the existing TDC scheme. Consequently, it is not necessary to determine whether the rights acquired by Wild Buffalo are vested because they are not effected by ALSA in any event.

Conclusion

[62] Bylaws 06/07, 07/07 and 08-Z/07 were intra vires, reasonable, and passed after the Municipality followed the proper procedures and are therefore valid. The *Alberta Land Stewardship Act* does not retroactively invalidate these bylaws, and in any event, only the Stewardship Commissioner, and not the Applicant, may challenge the bylaws on the basis of inconsistency with that Act. The application to declare the bylaws invalid is dismissed.

[63] If the parties are unable to agree in respect of costs, they may bring the issue before me within 60 days of this Judgment.

Heard March 9th, 10th and 12th, 2010.
Dated at the City of Calgary, Alberta this 27th day of May, 2010.

2010 ABQB 362 (CanLII)

Sandra L. Hunt McDonald
J.C.Q.B.A.

Appearances:

K. Staroszik, QC, Wilson Laycraft
for the Applicant

L. M. Sali, QC, Bennett Jones
for the Respondent, Wild Buffalo Ranching Ltd.

J. Klauer, Brownlee LLP
for the Respondents, Municipal District of Bighorn

2010 ABQB 362 (CanLII)

TAB 80

In the Court of Appeal of Alberta

Citation: Weir-Jones Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA 49

Date: 20190206
Docket: 1703-0218-AC
Registry: Edmonton

2019 ABCA 49 (CanLII)

Between:

Weir-Jones Technical Services Incorporated

Appellant
(Respondent/Plaintiff)

- and -

Purolator Courier Ltd., Purolator Inc. and Purolator Freight

Respondents
(Applicants/Defendants)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Jo'Anne Strekaf

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Chief Justice Fraser
Concurred in by the Honourable Mr. Justice Watson
Concurred in by the Honourable Madam Justice Strekaf

Reasons for Judgment Reserved of the Honourable Mr. Justice Wakeling
Concurring in the Result

Appeal from the Judgment by
The Honourable Madam Justice D.L. Shelley
Dated the 10th day of August, 2017
Filed the 19th day of September, 2017
(2017 ABQB 491, Docket: 1114 00276)

2019 ABCA 49 (CanLII)

> adjudicate it on its merits. On a summary judgment motion, a judge has the duty to take "a hard look" at the merits of a claim: ***Knee v Knee***, 2018 MBCA 20 at para. 33.

As the Court noted in ***Hryniak v Mauldin*** at paras. 27-8, a fair and just summary dismissal procedure is " … illusory unless it is also accessible - proportionate, timely and affordable", and that summary procedures are "no less legitimate" than trials.

[45] While the law does not have to be beyond doubt before summary judgment can be granted, there are occasions when the law is so unsettled or complex that it is not possible to apply the law to the facts without the benefit of a full trial record: e.g. ***Tottrup v Clearwater*** at para. 11; ***Cardinal v Alberta Motor Association Insurance Co***., 2018 ABCA 69 at para. 10, 66 Alta LR (6th) 15; ***Condominium Corp. No. 0321365 v Cuthbert***, 2016 ABCA 46 at para. 29, 33 Alta LR (6th) 209, 612 AR 284; ***Axcess Mortgage Fund Ltd. v 1177620 Alberta Ltd.***, 2018 ABQB 626 at para. 49. Where the case presents complex factual issues, such as those based on highly technical scientific and medical evidence, summary disposition will often be inappropriate. There are other occasions where there will be a genuine issue requiring a trial.

[46] Procedural and substantive fairness must always be a part of the summary disposition process. Considerations of fairness need not be a threshold requirement, nor should they only arise at the conclusion of the application. The chambers judge is entitled to take into consideration the fairness of the process, and its ability to achieve a just result, at all stages. Thus considerations of fairness will always be in the background, including during the fact-finding process, in determining whether the moving party has proven its case on a balance of probabilities, in deciding if there is a genuine issue requiring a trial, and in deciding if, considered overall, summary disposition is a "suitable means to achieve a just result". The ultimate determination of whether summary disposition is appropriate is up to the chambers judge: ***Hryniak v Mauldin*** at para. 83. As stated in ***Hryniak v Mauldin*** at para. 50 and ***Nelson v Grande Prairie (City)***, 2018 ABQB 537 at para. 47, 75 Alta LR (6th) 36, whether a summary disposition will be fair and just will often come down to whether the chambers judge has a sufficient measure of confidence in the factual record before the court. In practical terms, that level of confidence will not often be reached in close cases.

V. Summary of the Application of the Principles

[47] The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

2019 ABCA 49 (CanLII)

a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[48] There is no policy reason to cling to the old, strict rules for summary judgment. This can only serve to undermine the shift in culture called for by ***Hryniak v Mauldin***. Summary judgment should be used when it is the proportionate, more expeditious and less expensive procedure. It frequently will be. Its usefulness should not be undermined by attaching conclusory and exaggerated criteria like "obvious" or "high likelihood" to it.

[49] In closing, it is helpful to note that the judge who dismisses an application for summary adjudication may still be in a position to advance the litigation. The judge may be able to isolate and identify issues that can be tried separately under R. 7.1. The summary judgment materials may form a suitable platform for a summary trial, as happened in ***Vallard Construction Ltd. v Bird Construction***, 2015 ABQB 141, 41 CLR (4th) 51. While serial applications for summary judgment are not to be encouraged, a second application for summary judgment may be appropriate later in the proceedings when the record is clarified and the issues are perhaps narrowed: ***Milne v Barnes***, 2013 ABCA 379 at para. 6, 561 AR 256.

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TAB 81

In the Court of Appeal of Alberta

Citation: Warman v Law Society of Alberta, 2015 ABCA 368

Date: 20151126
Docket: 1503-0124-AC
Registry: Edmonton

2015 ABCA 368 (CanLII)

Between:

Richard Warman and Amir Attaran

Respondents
(Respondents in this Application/Applicants)

- and -

The Law Society of Alberta

Appellant
(Applicant in this Application/Respondent)

The Court:

The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment of the Honourable Madam Justice Picard and the Honourable Mr. Justice Costigan

Dissenting Memorandum of Judgment of the Honourable Mr. Justice Wakeling

Appeal from the Order by
The Honourable Madam Justice D. Pentelechuk
Dated the 9th day of April, 2015
Filed on the 15th day of May, 2015

(2015 ABQB 230, Docket: 1403 12178)

2015 ABCA 368 (CanLII)

[6] In *Mitten*, this Court confirmed that a party who has a statutory right to appeal a decision dismissing a complaint has standing to seek judicial review if the appeal process is conducted in a fundamentally unfair manner. Mr. Warman's argument is not that, by virtue of exercising his statutory right of appeal, he has standing to question any downstream procedure as stated by Wakeling J.A. at paras 4 and 35. Rather, he argues that he has standing to seek judicial review of the fairness of the specific procedure which effectively reversed the results of his previous statutorily mandated appeal without his participation. While the modern test for summary judgment is to determine, based on the record, if a disposition that is fair and just to both parties can be made without the need for a trial, the intent is not to summarily prevent novel arguments on unsettled law from going forward: *Windsor v Canadian Pacific Railway Ltd*., 2014 ABCA 108 at para 13, 572 AR 317; *Hyrniak v Mauldin*, 2014 SCC 7 at paras 4-5, [2014] 1 SCR 87; *Tottrup v Clearwater (Municipal District No. 99)*, 2006 ABCA 380 at para 11, 401 AR 88. Mr. Warman's argument, although novel, is not foreclosed by any previous decision of this Court nor by the *Act* and is not devoid of merit. Counsel were unable to cite any authority on point and we were unable to find one. Therefore, Mr. Warman's application should not be summarily dismissed.

[7] Mr. Attaran's position rests on somewhat different footing. He did not have to exercise a statutory right of appeal because his complaint was not dismissed at an earlier stage. Nonetheless, his position is linked, to a certain degree, to that of Mr. Warman because the Law Society elected to consider the complaints in tandem, given their similarities, and both were dismissed by the Conduct Committee at the same hearing. In our view, Mr. Attaran's application should not be summarily dismissed either.

[8] The application of the law to the unique facts of this appeal is unsettled: *Tottrup* at para 11. The positions of both parties have sufficient merit to resist summary dismissal. The parties advance several issues, which are intertwined. In the circumstances, it is not appropriate to consider whether some issues have more merit than others. The application for judicial review in its entirety should proceed to a full hearing.

[9] The appeal is dismissed.

Appeal heard on October 9, 2015

Memorandum filed at Edmonton, Alberta
this 26th day of November, 2015

Authorized to sign for: Picard J.A.

Costigan J.A.

2015 ABCA 368 (CanLII)

TAB 82

Court of Queen's Bench of Alberta

Citation: LNR v Mountview Pharma Corp, 2017 ABQB 730

Date: 20171206
Docket: 1510 00925
Registry: Red Deer

2017 ABQB 730 (CanLII)

Between:

L.N.R. and C.S. Inc.

Plaintiffs
(Respondents)

- and -

Mountview Pharma Corp. operating as Sproule's Mountview IDA Drug Store, Ian Hollingshead, Bryon Wright and John Doe

Defendants
(Appellants)

Notice Regarding Publication

The Court has used initials regarding certain parties as a result of this judgment making reference to medical information of such parties or their principals.

Reasons for Judgment
of the
Honourable Madam Justice C.S. Phillips

Appeal of Master Farrington's Decision
Filed on the 28th day of February, 2017
Dated the 27th day of February, 2017

(iv) To trigger protection from liability under section 6(2) of Schedule 19 to the *HPA*, is the only condition precedent that a generic drug or brand name equivalent be "given" to a patient? If the Appellants' argument on this is accepted, does it mean that if, for example, a pharmacist who dispenses with the wrong directions or disregards a disclosed patient's allergies with respect to a non-medicinal ingredient found in a certain generic drug substituted for another generic drug, without qualification, is afforded the protection of section 6(2) such that no action may be commenced by a plaintiff against that pharmacist?

(v) Or is it that everything else being equal, and after exercising due diligence, a pharmacist who dispenses a generic drug in substitution for a brand name drug or another generic drug, is then and only then afforded the protection from liability found in section 6(2)? and

(vi) Does it mean that the risk of liability is greater to a pharmacist when dispensing exactly what is prescribed, than when a pharmacist dispenses a drug equivalent (i.e. a generic drug) and who falls within the protection from liability under section 6(2)?

[38] In the result, I conclude that the legal and factual issues are so intertwined that they cannot be fairly decided on a summary record. To use the words of the majority of the Court in ***Warman v Law Society of Alberta***, 2015 ABCA 368 paragraph 1. "It is appropriate and important that the legal issues raised be dealt with by a court that has the benefit of a complete record."

[39] Furthermore, as noted above, much of this calls for a statutory interpretation. As a judge sitting on an appeal from a Master, I decline to resolve the dispute regarding the interpretation and meaning of section 6, and in particular section 6(2) of Schedule 19 of the *HPA* as it relates to the facts of this case. In my opinion, the law is very much unclear on this and any determination by me would require this Court to make new law. I am not prepared to do so based on the summary record before me.

[40] Although, it is not necessary for a determination of this Appeal, I should add that in my opinion the Master's interpretation of sections 6(1) and 6(2) of Schedule 19 of the *HPA* appear to be unpersuasive. I do not believe it necessary for section 6(1) to be met in order to trigger section 6(2). In my view, they operate independently. However, I will not further comment because I leave it to the trial judge to decide this issue with the benefit of a full record.

Conclusion

[41] Accordingly, the appeal is dismissed.

[42] Since I have dismissed this Appeal and therefore upheld the Master's decision to dismiss the Appellants' summary dismissal applications, albeit for somewhat different reasons than that of the Master's, I see no need to deal with the issue of whether the corporate Appellant Mountview is statutorily protected by section 6(2) of Schedule 19 of the *HPA* on the facts of this case. I leave that to the trial judge to decide.

[43] The parties may contact my assistant to arrange a time mutually convenient to all to speak to the matter of costs, if necessary.

2017 ABQB 730 (CanLII)

TAB 83

In the Court of Appeal of Alberta

Citation: Hannam v Medicine Hat School District No. 76, 2020 ABCA 343

Date: 20200925
Docket: 1901-0002-AC
Registry: Calgary

2020 ABCA 343 (CanLII)

Between:

Angelina Hannam and
Her Majesty the Queen in Right of Alberta

Respondents
(Plaintiff)

- and -

Medicine Hat School District No. 76

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment of the Honourable Mr. Justice Thomas W. Wakeling and the Honourable Mr. Justice Kevin Feehan

Dissenting Memorandum of Judgment of the Honourable Mr. Justice Brian O'Ferrall

Appeal from the Order by
The Honourable Mr. Justice D.K. Miller
Dated the 7th day of December, 2018
Filed the 30th day of September, 2019
(Docket: 1508 00014)

satisfied that they are fairly heard and accept the outcome as the product of a rational process. The fact that they are willing to return to the private forum is the best proof that they are satisfied with the protocol.

[183] But some disputes are of such a nature that the parties must be allowed to access every procedural stage that the civil process offers and make unlimited use of it to ensure that justice is done. Disputes on complex material facts and those in which one or both of the parties do not abide by the rules or court orders[256] are two obvious examples of this type of dispute.

[184] The crucial questions are these.

[185] What are the stages of the civil process that a dispute must pass through to be fairly and accurately assessed?

[186] Who is entitled to make that decision? The litigators or the courts?

[187] And when should that decision be made?

[188] Historically, litigants made most of the important litigation decisions and determined individually the stages of the civil process that a litigant would utilize and when.[257]

[189] That is not the case anymore.

[190] Our *Alberta Rules of Court*[258] now assign the courts a major role in determining the pace of litigation and the stages of the litigation process that a party may access.[259]

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arbitration may be very similar to that applicable to proceedings in the larger and more complex cases that come before the court, with full oral hearings, strict adherence to the rules of evidence, pleadings, extensive disclosure of documents, and factual and expert witnesses. At the other extreme, it may be agreed that the tribunal should decide the dispute on the basis of a limited range of documents, with no hearings, pleadings or submissions (oral or written). Between these extremes procedures may be modified or mixed as desired").

[256] E.g., *Dreco Energy Services Ltd. v. Wenzel*, 2006 ABQB 356, ¶ 41; 399 A.R. 166, 177 ("I conclude ... that the destruction of these computer files was intentional and deliberate. The Defendants gave undertakings to provide computer records. There was a Court Order ... that required these records be produced by May 12, 2004. The records were not produced. Instead, they were destroyed when, after February 27, 2004 the assets of KW Downhole Tools Inc. were sold to Wenzel Downhole Tools Ltd. ... . I find that the purpose for their destruction was to destroy evidence which would have been relevant and admissible in these proceedings").

[257] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 91; 91 C.P.C. 7th 73, 111 per Wakeling, J.A. ("Common law civil procedure is based on the adversarial system that places some limits on the role of the judiciary and values party autonomy. Under traditional common law regimes, the parties make many important litigation decisions").

[258] Alta. Reg. 124/2010.

2020 ABCA 343 (CanLII)

TAB 84

Court of Queen's Bench of Alberta

Citation: Alberta's Free Roaming Horses Society v Alberta, 2019 ABQB 714

2019 ABQB 714 (CanLII)

Date: 20190913
Docket: 1801 12480
Registry: Calgary

Between:

Alberta's Free Roaming Horses Society and John Ticknor

Applicants

- and -

Her Majesty the Queen in Right of Alberta

Respondent

Decision
of the
Honourable Mr. Justice B.A. Millar

Introduction

[1] Alberta has legislation governing wild horses through the *Stray Animals Act* and the *Horse Capture Regulation*. Together these pieces of legislation allow for the capture of wild horses either to protect or conserve lands, or for public safety, or the horses' safety. Under the legislation, the Minister can designate that portions of public lands are available for licensees to capture wild horses, and then confine, transport or dispose of the horses.

[2] The Applicants in this case are Alberta's Free Roaming Horses Society and John Ticknor. The Society aims to preserve and protect Alberta's wild horses and to promote their ethical treatment. They allege that wild horse capture has been going on for years without the government properly coming to an opinion that the removals are necessary before making land designations and issuing licenses. They seek a declaration that the government must make the

requisite opinion before authorizing the removal of the horses. They also seek a declaration that the current public land designation is void as are any extant and active licenses that were issued pursuant to it (the "Application"). Finally, the Applicants seek an order of mandamus requiring the government to prepare the opinion in writing and make it publicly available before designating any lands.

[3] The Respondent, the Province of Alberta, takes the position that the public land designations and associated licenses have all been issued under proper authority. The Province also argues that the Application is limitation barred as the designations in question were made over 12 years ago. Further, the Province argues that the Applicants should not be granted standing to bring the Application. Based on these grounds, the Province asks that the Application be summarily dismissed. Additionally, the Province brought a cross-application to strike the Application in its entirety (the "Cross-Application") on similar grounds. The Application and Cross-Application were heard at the same time.

2019 ABQB 714 (CanLII)

Background

[4] The legislation at issue is s 9 of the *Stray Animals Act,* RSA 2000 c S-20, which allows the Minister to designate public land for which a licence may be issued to capture, confine, transport or dispose of horses. The Minister can designate the land if, in the Minister's opinion, the designation is needed to protect, maintain or conserve the land, wildlife habitat, or for the safety of the public or the horses. Once the land is designated, the Minister can issue licenses to license holders to confine, transport or dispose of the horses:

> 9(1) The Minister responsible for the administration of the Public Lands Act may designate public land for which a licence under this section may be issued if, in the opinion of the Minister, it is necessary to protect, maintain or conserve the range, forage, soil, reforestation, wildlife habitat or other resource or for the safety of the public or of horses or as provided for in the regulations.
>
> (2) The Minister responsible for the administration of the Public Lands Act may, in accordance with the regulations, issue licences that authorize the licence holder to capture horses on public land designated under subsection (1) and to confine, transport and dispose of those horses.

[5] The Record of Proceedings shows that the Minister has made designations of public land pursuant to the *Act* three times: August 24, 1994, January 29, 1996, and October 13, 2005, with each designation replacing its predecessor. Therefore, the only designation being challenged in this case is the October 2005 designation.

[6] The Record of Proceedings contains a Ministerial Order with an Appendix for each of these dates. The orders recite that a land designation is being made, then the accompanying appendix contains multiple pages with legal descriptions of the land affected. The orders are simple and do not contain any commentary on the need for the designation, for example the 2005 Order states the following:

> I, David C. Coutts, Minister responsible for the administration of the *Public Lands Act*, pursuant to section 9.1 of the *Stray Animals Act*, hereby designate the public land described in the Appendix to this order as public land for which a licence under section 9.1 of the *Stray Animals Act* may be issued.

> Ministerial Order 06/96 is hereby revoked and replaced by this Ministerial Order.
>
> DATED at the City of Edmonton, in the Province of Alberta, this 13 day of October, 2005.

[7] The Record of Proceedings from the government contained only the Orders and accompanying appendices from 1994, 1996, and 2005 when it was originally filed.

[8] The Applicants filed an affidavit sworn by Mr. Ticknor that provides more background and context to the legislation and how it has been implemented (the "Affidavit"). He provides excerpts from Hansard regarding the amendment of the *Stray Animals Act* to provide protection for wild horses back in 1993. He also details the various requests he made (through counsel) to the Province relating to land designations. Mr. Ticknor was aware of a Memorandum of Understanding between the Province and the Wild Horses of Alberta Society (WHOAS), which permits the society to capture horses for an adoption program and contraception program. Mr. Ticknor wanted to track down the Minister's "opinion" which supported the land designations and the Memorandum of Understanding. He made requests to a number of different government departments, but none of them were able to provide him with the information in the form he sought.

[9] In addition, the Affidavit includes correspondence with Alberta Environment and Parks. That department confirmed some of the details regarding the horse capture program, including that licenses had issued in the past for horse capture on a seasonal basis (November to March), but that the last license program ended in spring 2015. Outside of that, licences had been issued from time to time to organizations such as WHOAS for capture on the designated lands. Finally, since there had been no capture season for a number of years, there was no extant "opinion".

[10] I note that the Province has challenged the admission of Mr. Ticknor's Affidavit, or at least the permitted uses of it in this proceeding, which will be dealt with later in this decision. The Province however is not disputing the history in the Affidavit relating to licences.

[11] The Applicants filed their Application on August 31, 2018, seeking the aforementioned declarations and mandamus remedy due to the absence of a Minister's opinion to support any land designations or licenses.

[12] The Province filed its own application to strike or for summary dismissal on February 4, 2019, arguing the allegations were out of time and made for an improper purpose. The applications were ordered to be heard concurrently, with a date set for March 26, 2019.

[13] Shortly before the hearing, the Province amended their Record of Proceedings and provided government documents relating to the expansion of the horse capture area in 2005. More detail will be provided later, but the documents include a Briefing Note and Memorandum to the Minister regarding the rationale for the expansion, and a draft Minister's Order. These documents did not change the Applicant's position that there is still no written opinion from the Minister and the applications proceeded on March 26, 2019.

Issues

1. Do the Applicants have standing to bring this Application?
2. Should this Court permit the Applicants to rely on the Ticknor Affidavit when reviewing the Minister's decisions?

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3. Is declaratory relief available in these circumstances or is the Application filed outside of the time limit for applications for judicial review?
4. Did the Minister satisfy the requirement in section 9 of the *Act* to form an opinion before proceeding with designating public lands and issuing licenses?

Decision

Standing

[14] A preliminary issue on this Application is whether the Applicant society and Mr. Ticknor, who is a director of that society, should be granted standing to bring this judicial review. The test for public interest standing requires a court to weigh the following three factors:

a. Is there a serious justiciable issue?
b. Does the party bringing the action have a real stake or genuine interest in the outcome?
c. Is the proposed action a reasonable and effective means to bring the case to court?

> ***Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General),*** 2012 SCC 45, at para 2, citing *Canadian Council of Churches v R*, [1992] 1 SCR 236.

[15] I note that the Province admitted the Ticknor Affidavit was admissible for the purpose of arguing standing.

[16] The Province argues that there is no justiciable issue here because the Applicants have a collateral purpose for bringing this Application. It argues that the Applicants' true purpose in seeking the Minister's opinion is to determine if it was done on a satisfactory basis and compel the Province to seek the input of the Applicants before making land designations. It argues that this application is a preliminary step in the Applicants' end-game.

[17] The Province further argues that the Applicants have no real stake in the outcome as the only party affected by a decision that the land designations were invalid would be licence holders. Finally, the Province argues that this Application was brought for the collateral purpose of compelling the Minister to publicize its opinion or consult with the Applicants before taking any steps under the *Act*. This would also be an abuse of process as there is nothing in the legislation requiring consultation or publication of the Minister's opinion.

[18] The Applicants disagree, noting that they have a genuine interest in the welfare and protection of Alberta's wild horses given their mandate. They submit that someone must act on behalf of the horses, as "no animal ... can start an action on its own": ***Reece v Edmonton (City)***, 2011 ABCA 238, at para 179, citing Fraser CJ, in dissent. They argued that the question of the Minister's jurisdiction is a matter between the government and the public and that limits on governmental authority are serious.

[19] I have decided to grant the Applicants standing to bring their application. There was no challenge of Applicants' genuine interest for Alberta's wild horses. Mr. Ticknor's Affidavit shows the multiple efforts made by he and the society to determine whether the Minister issued an opinion in support of the section 9 land designations. Further, there nor does there appear to be another way for this matter to come before the court, considering that the party with the most

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at stake in this case are the horses themselves. There do not appear to be any current license holders, so that is not of concern either.

[20] I also agree with the Applicants that determining whether the government has complied with the law and is acting with authority is a serious justiciable issue: ***Reece***, at paras 173-174 (Fraser CJ in dissent).

[21] Although there was some difficulty in determining what the Applicants sought from this Application, there was no support in the evidence for the Province's position of a collateral or improper motive here such that it would be an abuse of process. The Applicants withdrew their original position that the Province should consult or seek input from groups such as the society before making a designation. The Province chose not to cross-examine Mr. Ticknor on his affidavit, and so questioning his and the society's motives is purely speculative.

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The Ticknor Affidavit

[22] The Province argues that the evidence in the Ticknor Affidavit should not be admissible for the purpose of considering the Minister's decision to grant the land designations. It submits that the general rule is that only evidence before the decision-maker is admissible, which is generally the Record of Proceedings, citing rule 3.22 of the *Rules of Court*:

> Evidence on judicial review
>
> 3.22 When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
>
> (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
>
> (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
>
> (c) anything permitted by any other rule or by an enactment;
>
> (d) any other evidence permitted by the Court.

[23] The Province explained the rationale behind the restricted approach is that a court's role is to review the decision below. It does not consider the matter anew. The court must determine if the decision is reasonable based on the information that was before the decision maker, not on further evidence that is presented on judicial review: ***Alberta Liquor and Gaming Commission***, 2006 ABQB 904, at paras 38-43.

[24] The Province accepts that there are limited exceptions to the general rule, such as when evidence is needed to show bias or to show a breach of natural justice, but asserts that those circumstances do not exist here. It submits that the questions here, which relate to exceeding jurisdiction and whether relevant considerations were taken into account, should only be answered through reference to the documents contained in the Record of Proceedings. Information in the Ticknor Affidavit is submitted to be "padding the record with irrelevant information."

[25] Although the Province is correct that affidavit evidence is usually not admissible on a judicial review, I find that the Applicants submissions on why I should use my discretion under

rule 3.22 (d) to be persuasive. This is not a typical judicial review case where the Record of Proceedings shows the materials submitted and considered by a tribunal, along with their reasons for decision. The question here is whether the Minister properly exercised his jurisdiction in making the land designation. The Record of Proceedings contains only the decision (the Order) and the briefing note and memorandum. No actual reasons from the Minister exist. This is similar to one of the exceptions mentioned in ***Alberta Liquor and Gaming***, namely where the decision maker makes no record of, or an inadequate record of, its proceedings.

[26] Without the Ticknor Affidavit, the background and context necessary to understand the Application would be absent. It would also be challenging to understand the effect of a declaration without the material explaining the licensing system in place. The material in the Ticknor Affidavit assists the court and is not akin to admitting new evidence on the merits of the decision. Therefore, for the purpose of providing context to the Application, the Ticknor Affidavit is admissible on this judicial review.

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Can the Applicants Pursue Judicial Review?

[27] The parties disagree over whether judicial review is the appropriate proceeding and if so whether the Application was filed out of time. Although there was some confusion about what the Applicants' sought prior to the hearing, it became clear that they seek the "opinion" that supports the land designation, which they say is missing. They also seek a declaration that the Minister is obligated to prepare a written opinion before making a land designation. They do not challenge the Minister's discretion to designate public land, or the 2005 Order itself, or which lands should be designated. Nor do they challenge any licences that have been or may be issued.

[28] Further, the Applicants say that if they are correct that the Minister acted without jurisdiction as there is no opinion, the public land designation and any existing licenses are nullities and void *ab initio*, and the Applicants seek declarations to that effect. They also seek an order of mandamus that the opinion be made publicly available, such as being posted on a website, for public transparency and accountability.

[29] The Province argues that what the Applicants are seeking falls under rule 3.15 of the *Rules of Court*, as they seek a remedy to set aside a decision or act of the Minister, being the land designation, which is subject to a six-month limitation period in 3.15(2):

> 3.15(1) An originating application must be filed in the form of an originating application for judicial review if the originating applicant seeks from the Court any one or more of the following remedies against a person or body whose decision, act or omission is subject to judicial review:
>
> (a) an order in the nature of mandamus, prohibition, certiorari, quo warranto or habeas corpus;
>
> (b) a declaration or injunction.
>
> (2) Subject to rule 3.16, an originating application for judicial review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act, and rule 13.5 does not apply to this time period.

[30] Rule 13.5 gives the court the power to enlarge or abridge time under the Rules, but as is stated in rule 3.15 (2), the six-month limitation period for judicial review is exempted from being changed.

[31] As this Application was filed in 2018, it was filed almost 13 years after the 2005 land designation, thus the Province argues it was out of time and must be dismissed or struck.

[32] The Applicants respond that what they seek is a declaration in relation to an omission by the Minister, the lack of the opinion, and that omissions are specifically excluded from the time limit under rule 3.15(2). They argue the time limit applies only to decisions or acts of a person or body, not to omissions.

[33] Further, even if they were challenging an act or decision by the Minister, the Applicants argue that the declaration would result in the designation being found a nullity, which is different from setting aside a decision or act.

[34] The Applicants submit that if the Province's argument is accepted, it would mean that the Minister could avoid complying with the requirement of an opinion under s 9(1) unless that omission was caught within six months. If more than six months had passed the lack of compliance could never be challenged.

[35] In support of their respective positions, the parties relied on and distinguished two main cases, with the Province relying on *Athabasca* and the Applicants relying on *Mammoet*, two decisions that both went to the Alberta Court of Appeal.

[36] ***Athabasca Chipewyan First Nation v Alberta (Minister of Energy)***, 2009 ABQB 576, aff'd 2011 ABCA 29, leave to appeal to SCC refused [2011] SCCA No 128, concerned a First Nations group who sought declarations that certain oil sands leases granted by the Minister of Energy on their reserve lands were defective due to a failure to consult. They argued the Minister was under a continuing duty to consult and sought declarations that the leases should be quashed, or alternatively suspended or stayed. The Minister alleged that that the First Nation was out of time because their claim was filed past the six-month time limit for judicial review and asked for summary judgment. The leases were granted between November of 2006 and March of 2007, and the claim was filed on December 10, 2008. The First Nation responded that the six-month limitation period does not apply to declaratory relief.

[37] The Court discussed the limitation period applicable to judicial review applications and noted the *Rules* specifically prevent courts from enlarging or abridging the time limit, noting that fact "is a clear signal that the six-month time period is intended to be fixed and cannot be extended", at para 18, citing *Urban Development Institute v Rocky View (Municipal District No 44)*, 2002 ABQB 651. It also explained the important policy reasons behind limitation periods, which are to bring finality and certainty to events, which is especially important in administrative decisions where rights and responsibilities are affected by the decisions, at para 19:

> There are good policy reasons behind the adoption of limitation periods. They are necessary to bring finality and certainty to events because without them, the conduct of affairs of state and business would be chaotic: Babiuk v. Calgary (City) (1992), 133 A.R. 21 (Q.B.) ("Babiuk"), at para. 25. This rationale was articulated further by Veit J. in Johannesson v. Alberta (Workers' Compensation Appeals Commission) (1995), 175 A.R. 34 (Q.B.) at para. 34:

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> The Rules establish a 6 month limit within which a motion for judicial review must be brought. This limitation reflects a policy decision to the effect that, ordinarily, when a properly constituted tribunal makes a decision, that decision is binding; any challenge to that decision must be made promptly because the rights and responsibilities of many persons may be affected by the decision. All of those people who are directly and indirectly affected by such a decision cannot be left in limbo indefinitely. There must be closure, finality, so that every one can move on. It is therefore important to move to set aside or challenge a decision within 6 months of the day when the decision is issued.

[38] The Court also noted that in some situations where a party seeks a declaration the six-month time limit does not apply, such as a declaration that a municipal bylaw is invalid due to lack of jurisdiction. However, where the effect of the declaration is to set aside an administrative decision, the time limit does apply.

[39] In order to determine what is being sought when declarative relief is claimed, the court must look to the remedy being requested. If the effect of the judicial review remedy is to quash a delegate's decision, the time limit applies, ***Athabasca*** at para 21. The same is true of a declaration seeking to challenge the validity of a decision, at para 23. The Court summarized the law on this point succinctly as follows, at para 24:

> Based on the law expressed above, one must look to the nature and substance of the relief requested, and not merely to whether the relief is framed in the form of a declaration, in order to determine whether the application for judicial review is subject to the six-month limitation set out in Rule 753.11 [now rule 3.15].

[40] Applying the law to the declarations sought for the leases at issue, the Court determined that all of the declarations sought were tied to specific administrative decisions made by the Minister through the granting of the leases. The declarations did not allege invalidity of a bylaw or regulation due to a lack of jurisdiction, nor was the validity of the legislation or regulatory regime being challenged. The relief sought, that the Minister was under a duty to consult, was not merely advisory because the effect of such a declaration would be to challenge the validity of the leases. Similarly, the requests to stay or suspend the leases were tied to the administrative decisions to grant the leases and were time-barred, at paras 37-39.

[41] The Alberta Court of Appeal affirmed the findings outlined above: 2011 ABCA 29.

[42] The Province argues that ***Athabasca*** is directly on point as the Applicants, despite asking for declarations, in effect seek to set aside decisions that were made by the Minister pursuant to the *Stray Animals Act*.

[43] ***Mammoet 13220-33 Street NE Ltd v Edmonton City***, 2013 ABQB 663, was an example of a case where the time limit did not apply. The applicant was a developer who obtained a development permit in 2006, and purchased land in 2007, but only found out about significant levies for roads that were being put on the property in 2012. The levies were placed pursuant to a 2006 bylaw. The developer believed the bylaw allowing the levies was invalid because it failed to conform to its governing regulation. It challenged the bylaw through judicial review, seeking a declaration of invalidity. The municipality of Edmonton argued that because the bylaw was

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passed in 2006, the six-month time limit applied and the levies under the bylaw could no longer be challenged.

[44] The Court reviewed the regulation at issue. It agreed with the developer that the bylaw appeared to be invalid on its face because it did not incorporate certain requirements for municipalities that were set out in the regulation, such as a term relating to the city negotiating levies with affected parties.

[45] Edmonton did not argue about the validity of the bylaw but focussed its argument on the time limit applying to the bylaw challenge. It relied on a case from the Alberta Court of Appeal which it argued stood for the proposition that challenges to municipal bylaws are subject to the six-month limitation period for judicial review. Much of the Court's time in the case was spent attempting to understand and potentially distinguish that case from another Court of Appeal case that came to the opposite finding.

[46] Ultimately, the Court sided with the authority from the *United Taxi* case, which held that the limitation period does not apply in cases where a bylaw is being challenged as void based on a lack of jurisdiction to enact it.

[47] The Applicants rely on the following passage from ***Mammoet*** to support their position that if a decision is challenged as void for not meeting statutory pre-conditions, the limitation period does not apply, at para 48:

> And both United Taxi and Wiswell do appear to stand squarely for the proposition that a challenge to an arguably invalid bylaw will not fail owing to an expired limitation period. The latter court adopted the comment by Rogers in The Law of Canadian Municipal Corporations, vol. 2, at p. 893:
>
> > ... A voidable by-law is one that is defective for non-observance or want of compliance with a statutory formality or an irregularity in the proceedings relation to its passing and is therefore liable to be quashed whereas a void by-law is one that is beyond the competence to enact either because of complete lack of power to legislate upon the subject matter or because of a non-compliance with a prerequisite to its passing.

[48] The Court of Appeal affirmed the decision and confirmed that the time limit does not apply when a statutory pre-condition for a bylaw has not been met: 2014 ABCA 229, at para 29:

> ... the respondents are arguing that the Bylaw does not meet certain statutory pre-conditions which would render it void. It follows that the respondents can make this argument without concern for the limitation period found in Rule 3.15(2), although any issue of delay may go to the exercise of discretion in the grant of a remedy.

[49] The Applicants argue that as the statutory pre-condition of the Minister's "opinion" was not met, the land designation is void.

[50] Having considered the two cases and their application, I agree with the Province that the limitation period applies in this case. The Applicants have attempted to frame their case as one seeking a declaration that an opinion is a statutory prerequisite to a land designation, however, they do not actually challenge the validity of the legislation.

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[51] The facts in this case are akin to ***Athabasca***, where the applicant sought to have the leases quashed, and is not akin to ***Mammoet*** where the applicant sought to have legislation declared invalid. The Applicants admittedly are not attempting to have the *Act*, or even a section of the *Act,* declared invalid.

[52] As this is not a case where legislation such as a bylaw is being challenged, the Applicants' reliance on that line of cases is misplaced. Municipal bylaws are not administrative decisions, ***Mammoet*** at para 89. In the decision of ***Urban Development Institute v Rocky View (Municipal District No 44)***, 2002 ABQB 651, which is cited both by the trial judge and appellate court in ***Mammoet***, as well as in ***Athabasca***, the Court makes it clear that challenges to legislation are treated differently than challenges to administrative decisions. Challenges to legislation are not caught by the limitation period, at paras 15-16:

> ...I have found that the Bylaw before the Court here is a form of subordinate legislation that must be interpreted by the Court. It is not a decision of a tribunal to be set aside.
>
> Finally, this matter seems to have been conclusively resolved by the Alberta Court of Appeal in the recent United Taxi Drivers Fellowship of Southern Alberta decision, supra. In finding that Rule 753.11(1) did not apply to a request for a declaration that a Calgary city bylaw was invalid, the Court stated at paragraph 162:
>
> > No relief is sought to set aside "a decision or act". What is sought is a declaration of invalidity of parts of a bylaw due to lack of jurisdiction. In such cases, [the time limit set out in] R.753.11(2) does not affect the ability of a court to decide the municipality lacked the jurisdiction under its constituent legislation.

[53] Again, here the Applicants do not challenge the legislation, only the "decision or act" taken by the Minister under the legislation. It is agreed by all parties that the Minister may designate land pursuant to s. 9 of the *Act*.

[54] Ultimately, the Applicants are asking this Court to quash the land use designations that the Minister made pursuant to s 9 of the *Act,* along with any related licenses. The true nature of their request is not simply a declaration, but the added consequence of setting aside the Minister's decision and any licenses which have issued past or present.

[55] The Applicants seek the following declarations:

a) The Minister has not come to any opinion as required under section 9 of the *Stray Animals Act*; and/or
b) The Minister has not designated public land for which licenses may be issued;
c) Any extant designation of public land made ostensibly pursuant to section 9 of the *Stray Animals Act* is void *ab initio* and of no force and effect;
d) Any extant and active licenses issued ostensibly pursuant to section 9 of the *Stray Animals Act* and its *Horse Capture Regulation* are void ab initio and of no force and effect; and
e) The Minister and any delegates have no jurisdiction to designate public land or issue licences pursuant to section 9 of the *Stray Animals Act* and its *Horse*

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> *Capture Regulation*, until the Minister has satisfied the necessary pre-condition under section 9(1) of the *Stray Animals Act*.

[56] The relief requested is determinative, not the framing of the question: ***Athabasca***.

[57] I find that the Applicants are challenging an administrative decision by the Minister well outside of the limitation period in rule 3.15 and dismiss their application on this basis. Consistent with this finding, the Province's application for summary judgment is granted.

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What is required of the Minister under s 9(1) of the Act?

[58] Although the previous section disposes of this matter, I note that I was not convinced by the Applicants that a written "memorialized" opinion was required by the Minister in this case. There is no requirement in the legislation for the two-step process advocated for by the Applicants, whereby the Minister would first demonstrate in writing that he or she had come to an opinion that a land designation was necessary, then secondly create a land designation such as those we see in the Record of Proceedings. Nor did the Applicants' case law support such a position, it only demonstrated that there are occasions where Ministers in unrelated cases had issued letters containing their opinions. However, requirements for a valid "opinion" were not at issue in those cases.

[59] Based on my finding that a written opinion from the Minister is not required, I would have declined the Applicants' request that the Minister's opinion be made public.

[60] Finally, regarding the opinion itself, I do agree with the Applicants that the Minister must personally come to the required opinion and that this task may not be delegated, absent legislation permitting such delegation: ***Edgar v Canada (Attorney General),*** 46 OR (3d) 294 (Ont. C.A.), at para 43. However, when one looks at the Memorandum from the Deputy Minister to the Minister in October 2005, it provides the information that the Minister would have needed to form such an opinion. The Memorandum explains in a letter the need for the expansion of the land designation in 2005 to the Minister. It also attaches a Briefing Note prepared on the topic for the Minister's Department. The Memorandum reads in part "[t]he designated horse capture area is being expanded to allow horses to be captured where herds are increasing and are known to cause safety problems along roads and highways outside the existing designated area. Expansion of the designated area will provide the mechanism to enable licensed, humane horse capture in these areas to improve safety along the roads and highways..." Accompanying the Memorandum was a Ministerial Order for the Minister to sign.

[61] Considering that the Minister was provided with this information and signed the Ministerial Order designating the lands, I find an inference can be made that the Minister agreed with the research done by his department in support of the land designation. The fact that the Minister did not research the topic on his own does not mean he could not form an opinion based on appropriate information being provided. I agree with the Province that in this circumstance the Minister is owed deference and that his decision falls within a range of possible, acceptable outcomes based on the information before him: ***Kolody v Alberta (Environment and Sustainable Resource Development)***, 2016 ABQB 360. I therefore would not have disturbed the land designation.

Conclusion

[62] The Province's application for summary judgment is granted.

[63] Costs may be spoken to within 30 days.

Heard on the 26th day of March, 2019.
Dated at the City of Calgary, Alberta this 13th day of September, 2019.

B.A. Millar
J.C.Q.B.A.

Appearances:

Ben Frenken
for the Applicants

Melissa N. Burkett
for the Respondent

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TAB 85

Court of Queen's Bench of Alberta

Citation: Manson (Estate) v Obsidian Energy Ltd, 2020 ABQB 370

Date: 20200618
Docket: 1810 00434
Registry: Red Deer

2020 ABQB 370 (CanLII)

Between:

Estate of Melba Manson and Scott Manson, Freehold Mineral Owners

Respondents / Plaintiffs

- and -

Obsidian Energy Ltd. Formerly Known As Penn West Petroleum Ltd. Formerly Known As Penn West Energy Trust and Formerly Known As Penn West Exploration, of Suite 200, 207 9th Avenue S.W., Calgary, Alberta, T2P 1K3, Phone: 403-777-2500 and Canetic Resources Ltd Formerly Known As Canetic Energy Inc., of Suite 200, 207 9th Avenue S.W., Calgary, Alberta, T2P 1K3, Phone: 403-777-2500 and Her Majesty the Queen in Right of Alberta, Also Known As the Provincial Government of Alberta, of 1710, 639 5th Avenue S.W., Calgary, Alberta, T2P 0M9, Telephone: 403-297-3790, Fax: 403-662-3824 and Todd J Burke (#33586B)

Applicants / Defendants

Memorandum of Decision
of the
Honourable Mr. Justice J.W. Hopkins

I. Introduction

[1] On April 17, 2018, Scott Manson [Mr. Manson], acting for himself and also as the self-appointed representative for the Estate of Melba Manson (Mr. Manson's mother) [the Estate],

filed a Statement of Claim that named as Defendants Obsidian Energy Ltd. [Obsidian], a petroleum resource company, Her Majesty the Queen in Right of Alberta [Alberta], and an Ontario lawyer, Todd J. Burke [Mr. Burke]. Obsidian is the successor of the other petroleum resource corporations identified in the action's style of cause.

[2] The allegations in the Statement of Claim against Obsidian are not readily summarized, nor are their details particularly relevant to this decision. In brief, Mr. Manson alleges that Obsidian and its precursors illegally obtained petroleum from land where Mr. Manson and the Estate had a property interest. The Plaintiffs allege they were denied large payments that they were due, and on that basis sue Obsidian for $15 million, "... that may be doubled or trebled at law."

[3] The complaints against Alberta relate to prior litigation. These claims are best illustrated by quoting the relevant passages from the Statement of Claim:

> ... This Statement of claim further alleges that at all mineral times, Her Majesty the Queen in right of Alberta knew or ought to have known through various legal notices sent by the Plaintiffs not only to be the Provincial Government of Alberta but also the former Premier and Minister of Justice that in fact the Government of Alberta was knowingly allowing the rules of Court to not only be violated and trashed by certain judges but in addition some case decisions were so flawed under law that it clearly violated the Honorable wisdom and intention of the Alberta legislature and senate who are ultimately responsible for the rules of Court of queen's Bench to be specifically adhered to under law and followed precisely by the court and the appointed judges.
>
> ... The Provincial Government of Alberta has known or ought to have known that it has additionally damaged the Plaintiffs by permitting rogue judges to trash the Alberta Rules of Court and not adhere under law to the intentions of the Alberta Legislature and Alberta Senate who are ultimately responsible for the conduct and liability of the damages done against the collective Plaintiff's and the Provincial Government of Alberta is enriched every month by a royalty off this producing mineral title.
>
> [Sic]

[4] On this basis Mr. Manson and the Estate seek $5 million in damages, again "... that may be doubled or trebled at law."

[5] The allegations against Mr. Burke are found in one of the headings of relief:

> This Statement of Claim further alleges damages against Todd J. Burke (#33586B) in the amount of $1,500,00.00 (one million five hundred thousand dollars) which include elder abuse where Mr. Burke physically approached the Plaintiffs in court by extending his arm and waiving it in Melba Manson's face who is 87 years of age while uttering financial threats on behalf of his clients, Canetic, Penn West and the Alberta government, collusion and conflict of interest. [Sic]

[6] The Defendants deny liability. Each applied to have the claims against themselves struck out. In addition, Obsidian asked the Court to impose prospective court access restrictions against the Plaintiffs by what is sometimes called a "vexatious litigant order".

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[7] The Defendants appeared before Bast J on January 25, 2019. Mr. Manson did not appear. Justice Bast ordered the striking out and court access restriction applications to be heard in a special chambers hearing set for June 6, 2019.

II. The June 6, 2019 Hearing

[8] The Defendants appeared before me on June 6, 2019. Mr. Manson was not present. The Court adjourned for 30 minutes in case Mr. Manson was in some way delayed. He never arrived. I then concluded Mr. Manson was properly served notice of the Defendants' applications.

A. Submissions

[9] The Defendants each prepared a written brief, but also made oral submissions.

1. Alberta

[10] Alberta took the position that the claims against it were hopeless on three separate bases. Those allegations should be struck out per *Rule* 3.68(2)(b) of the *Alberta Rules of Court*, Alta Reg 124/2010, since the Plaintiffs' claims against Alberta:

1. fail to recognize the constitutional separation between government and the Court, the principle of judicial independence, and that complaints against federally appointed judges are properly adjudicated before the Canadian Judicial Council;
2. in relation to alleged misapplication of the *Rules of Court,* are not particularized; and
3. are statute barred by the *Limitations Act*, RSA 2000, c L-12.

2. Mr. Burke

[11] Mr. Burke argued that the Statement of Claim provided no reasonable basis for the Plaintiffs to sue Mr. Burke. During a *Rule* 3.68 analysis the facts pled are presumed to be true, however all that the Plaintiffs had claimed was that Mr. Burke was an Ontario lawyer, and the bald allegations of "elder abuse". The latter purportedly involved arm waving, unspecified "financial threats", and bald allegations of collusion and conflict of interest. These claims are not an adequate basis for a lawsuit, let alone the claimed $1.5 million in damages.

[12] Counsel for Mr. Burke also argued that the fact the substantive allegations against Mr. Burke were in the prayer for relief is also fatal, since information in that part of a statement of claim are not facts alleged.

[13] Mr. Burke concluded that when evaluated in the context of the ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87 civil litigation "culture shift", the appropriate steps are to strike Mr. Burke from the Statement of Claim, and award costs against the Plaintiffs on a full indemnity or elevated basis.

3. Obsidian

[14] Obsidian argued both that the Statement of Claim should be struck out pursuant to *Rule* 3.68, and also that Mr. Manson and the Estate should be subject to court access restrictions. The factual basis for both remedies in certain senses overlaps, since the same factors favour both remedies.

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[15] Obsidian submitted that a critical factor to understand the present action is that the current Statement of Claim has a series of historical antecedents. Obsidian and its precursors had indeed leased property owned by Mr. Manson and his mother, but that relationship ended in 2014. Obsidian and its precursors made payments to Mr. Manson and his mother while that lease was underway.

[16] In 2007-2008 Obsidian became a third-party to a dispute over ownership of the mineral rights in question. While that dispute was underway, Obsidian, per a court order (***Penn West Petroleum Ltd v Manson*** (13 May 2008), Calgary 0801 04488 (Alta QB)), paid royalties into Court. The Mansons launched an appeal of that decision, which was struck as non-compliant with the *Rules* (***Penn West Petroleum Ltd v Manson*** (2 November 2010), Calgary 0801 04488 (Alta QB)).

[17] Despite this, Mr. Manson and his mother alleged that Obsidian had no lease, was misappropriating funds, and "... this action is very underhanded and extremely unprofessional and unethical". The Court ordered that distribution of royalty funds continue while the Mansons continued these complaints.

[18] In 2014, Mr. Manson and his mother renewed their litigation challenges to the 2008 Order, alleging that Obsidian had engaged in fraud, that counsel for Obsidian had lied to the court to further that fraud, and that $18 million should be paid into Court on that basis. Rawlins J dismissed the application as a duplicate proceeding and therefore futile (***Penn West Petroleum Ltd v Manson*** (10 September 2015), Calgary 0801 04488 (Alta QB)). Justice Rawlins also imposed court access restrictions on Mr. Manson and his mother:

1. Mr. Manson and his mother must obtain leave of the Court of Queen's Bench of Alberta prior to bringing proceedings against Obsidian's precursor Penn West Petroleum Ltd, and

2. Mr. Manson and his mother may only make applications or seek leave after they paid $5,000.00 in costs to Obsidian's precursor Penn West Petroleum Ltd.

[19] Obsidian indicates that costs award has not been paid.

[20] The Mansons then filed an appeal. Instead of naming Obsidian, the appeal identifies Obsidian's lawyer as the Respondent: ***Manson v Sharpe*** (23 November 2015), Calgary 1501 0276AC (Alta CA). The Mansons claimed Justice Rawlins was biased, and "clearly displayed favouritism" for Obsidian and its lawyer. The appeal was subsequently struck as abandoned: ***Manson v Sharpe*** (24 March 2016), Calgary 1501 0276AC (Alta CA).

[21] Obsidian explains that in addition to this unsuccessful Alberta litigation, on September 12, 2012, the Mansons initiated a lawsuit in Ontario, which Obsidian indicates made essentially the same complaints as the then still ongoing Alberta litigation. That lawsuit sought $15 million from Obsidian, alleging illegal conduct, trespassing, slander, and fraud, all part of "... an illegal sleazy, defence strategy to continue stealing and defrauding the Manson plaintiffs of their oil and gas assets": ***Manson v Canetic Resources Ltd*** (12 September 2012), 12-55468 (Ont SCJ).

[22] Alberta was added as a Defendant to that lawsuit, with allegations that largely parallel those made in the present Statement of Claim. The Mansons sought $5 million in damages from Alberta.

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[23] An Endorsement issued by Justice Smith set deadlines to bring the matter forward, and also imposed a communications restriction that prohibited Mr. Manson from communicating with the former counsel for Obsidian in light of Mr. Manson "... leaving abusive and lengthy verbal messages": ***Manson v Canetic Resources Ltd***, 2013 ONSC 5533. Mr. Manson disobeyed that prohibition, was found in contempt of court, and fined: ***Manson v Canetic Resources Ltd***, 2013 ONSC 7613. The Ontario action was ultimately dismissed because the Ontario Court had no jurisdiction over the matter: ***Manson v Canetic Resources Ltd***, 2014 ONSC 261. Substantial indemnity costs were subsequently awarded: ***Manson v Canetic Resources Ltd***, 2014 ONSC 532; ***Manson v Canetic Resources Ltd***, 2014 ONSC 1480.

[24] Obsidian argues that it and its precursors should also be struck from this lawsuit. The current action is an abuse of process, barred by the *Limitations Act*, and simply false.

[25] Obsidian notes that in relation to court access restrictions, this Court may proceed to take steps to manage abusive litigation under both the *Judicature Act*, RSA 2000, c J-2, ss 23-23.1 and via its inherent jurisdiction. The Court evaluates gatekeeping steps on a prospective basis, by assessing what kinds of future litigation misconduct are plausible. The Court may examine a wide range of potentially relevant information for "indicia" of abusive conduct.

[26] Obsidian argues Mr. Manson and the Estate are now engaged in abusive litigation. The current action is a collateral attack on the 2008 Order and its appeals. The same was true for the Ontario litigation.

[27] The amounts claimed are excessive and without any basis in law.

[28] The Mansons have not paid the costs awarded against them in 2015.

[29] The Mansons' litigation is expanding. The Ontario litigation added Alberta as a Defendant. Now Obsidian's lawyer is being sued, as well.

[30] Obsidian reviewed how the communications received from Mr. Manson are highly relevant to understand his motivation to conduct abusive litigation. He threatens to commence criminal proceedings and additional lawsuits. Mr. Manson uses inappropriate, abusive, and derogatory language.

[31] Obsidian asks the Court to impose broad court access restrictions in all Alberta Courts, and asks for a provision that the Plaintiffs be required to retain counsel and pay all outstanding cost awards prior to being required to seek leave to initiate or continue litigation. Obsidian seeks full indemnity costs for this action and its applications.

B. The June 6, 2019 *Rule* 3.68 Oral Decision

[32] After the Applicants' oral submissions on June 6, 2019, I gave an oral decision in which I concluded that the Applicants' *Rule* 3.68 applications should be granted. As a result, the Statement of Claim was entirely struck out. I reserved on the question of whether the Plaintiffs should be subject to indefinite court access restrictions. These are my reasons for striking the Statement of Claim.

[33] At the oral hearing I reserved on the question of whether the Plaintiffs should be subject to indefinite court access restrictions. I did impose interim court access restrictions on the Plaintiffs, as reviewed in ***Unrau v National Dental Examining Board***, 2019 ABQB 283 at paras 551-553 (***Unrau #2***).

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[34] While my decision was on reserve, the Alberta Court of Appeal released its decision in ***Jonsson v Lymer***, 2020 ABCA 167 (***Lymer***). In ***Lymer*** the Court of Appeal held that the primary jurisdiction for awarding court access orders, or vexatious litigant orders, is under the *Judicature Act*. Further, applications for these types of orders must be brought on notice to the Attorney General.

[35] Given these developments, I invite further submissions from the parties, specifically addressing the relevant sections of the *Judicature Act*, on whether the Plaintiffs should be subject to indefinite court access restrictions. The Court will also provide this decision to the Attorney General, to afford the required notice.

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III. The Statement of Claim is a Futile and Abusive Proceeding

[36] A pleading may be struck out in whole or in part per *Rule* 3.68(1)(a) if:

1. the court has no jurisdiction (*Rule* 3.68(2)(a));
2. the pleading discloses no reasonable claim or defence (*Rule* 3.68(2)(b));
3. the pleading is "frivolous, irrelevant or improper" or "an abuse of process" (*Rules* 3.68(2)(c-d)); or
4. an irregularity is "so prejudicial to the claim that it is sufficient to defeat the claim" (*Rule* 3.68(2)(e)).

[37] In relation to the application of *Rule* 3.68, I generally accept the arguments of the Applicants. I also accept Obsidian's review and summary of the history of the dispute between the Mansons and Obsidian and its precursors.

[38] The Mansons' Statement of Claim should be struck out on multiple bases.

[39] In relation to Alberta, the Statement of Claim is factually hopeless and provides no reasonable claim. As Alberta indicates, the complaint that Alberta has failed to adequately control the conduct of judges is contrary to the constitutional division of authority. Second, the current action's Statement of Claim essentially duplicates the allegations and claims advanced against Alberta in the Mansons' Ontario litigation. The Statement of Claim is therefore a collateral attack, which is prohibited (***British Columbia (Workers' Compensation Board) v Figliola***, 2011 SCC 52 at para 28, [2011] 3 SCR 422), and should be terminated, immediately (***Alberta v Pocklington Foods Inc***, 1995 ABCA 111 at para 14, 123 DLR (4th) 141).

[40] Furthermore, I conclude that the allegations against Alberta are not adequately pled, and are therefore an abuse of the Court's processes:

> Inadequate pleadings are an indicium of abusive litigation. This Court has adopted the reasoning in [***kisikawpimootewin v Canada***, 2004 FC 1426, 134 ACWS (3d) 396], at paras 8-9, that litigation is an abuse of court processes when a "... defendant cannot know how to answer, and a court will be unable to regulate the proceedings ...", "bare assertions and bald statements" leave the defendant "... both embarrassed and unable to defend itself ...", and the court is unable to identify the intended argument and/or specific material facts. As Gill J observed in ***Arabi v Alberta***, 2014 ABQB 295 at paras 85-86, 589 AR 249, there is no need

> for a court or responding litigant to answer claims that are "gibberish", which "simply make no sense", or which are "illogical, impenetrable claims".
>
> (***Unrau #2***, at para 629).

[41] I will not, however, strike out the Statement of Claim on the basis it was filed outside the relevant limitations period. The allegations against Alberta are simply too vague to evaluate that question, and therefore this is an instance where Alberta simply cannot establish on a balance of probabilities that the Mansons' action is out of time, except perhaps with evidence, but that is prohibited per *Rule* 3.68(3). In any case, that vagueness is, in itself, a reason to terminate the lawsuit in relation to this particular Defendant. How can a defendant be expected to answer allegations that do not provide the defendant a way to test if the claim is barred by legislation and out of time?

[42] The allegations in relation to Mr. Burke fail for similar reasons. I accept the argument that the facts alleged simply are not a possible basis for a $1.5 million claim. Second, the allegations against Mr. Burke are ill-defined and little more than bald allegations, thus offending the principle in ***kisikawpimootewin v Canada***. Mr. Burke and this Court cannot make a meaningful response on the basis of these allegations.

[43] I however reject the argument of counsel for Mr. Burke that the fact that the substance of the allegations against Mr. Burke were in a prayer for relief is a fatal defect, per *Rule* 3.68(2)(e). At the time the Statement of Claim was filed, Mr. Manson was an unrepresented person, and therefore the rules of procedure and evidence do not apply to him in the same manner as represented litigants: ***Pintea v Johns***, 2017 SCC 23, [2017] 1 SCR 470; *Statement of Principles on Self-represented Litigants and Accused Persons (2006)*. In particular, Principle B(2) of the latter document instructs that:

> Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.

[44] This is an instance where the Statement of Claim could readily be amended, without surprise to Mr. Burke, and relocate the allegations against him to the body of the Statement of Claim. That would not make those allegations any more valid - they still would fail due to providing inadequate particulars - but I conclude this formal irregularity is not a kind that would be fatal to the allegations against Mr. Burke in the post-***Pintea v Johns*** era.

[45] Finally, I conclude the allegations which involve Obsidian are both hopeless and an abuse of process. To the degree that any specific allegation may be dissected from the Statement of Claim, I conclude that the allegations are a collateral attack on:

1. both the original 2008 Alberta Court of Queen's Bench Order and its subsequent appeal,
2. the 2015 decision of Justice Rawlins, and
3. the Ontario litigation.

[46] The Mansons are effectively attempting to re-litigate the same complaints, in multiple forums, and via duplicative lawsuits.

[47] I therefore conclude the Statement of Claim is a futile, and abusive proceeding, and should be struck out, entirely.

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IV. Court Access Restrictions

[48] With respect to Obsidian's application to have Mr. Manson and the Estate made subject to court access restrictions by what is sometimes called a "vexatious litigant order", pursuant to the recent ***Lymer*** decision, I invite further submissions from all parties on the issue of court access restrictions for Mr. Manson. Any further submissions must be received by the Court by July 15, 2020.

[49] The Court will also provide a copy of this decision to the Attorney General, in compliance with the notice requirement in ***Lymer***.

V. Costs

[50] While the Defendants had made submissions on costs at the June 6, 2019 hearing, the Defendants and I then further discussed how to address costs. The Defendants agreed that written submissions would be submitted on this issue.

[51] In accordance with the Defendants' subsequent written submissions, costs were awarded in my Order dated December 3, 2019 as follows:

a. $10,000 lump sum to Obsidian
b. $5,500 lump sum to Her Majesty the Queen in right of Alberta
c. $6,000 lump sum to Todd J. Burke.

VI. Conclusion

[52] The Statement of Claim is struck out entirely as a hopeless and abusive proceeding.

Heard on the 6th day of June, 2019.
Dated at the City of Red Deer, Alberta this 18th day of June 2020.

J.W. Hopkins
J.C.Q.B.A.

Appearances:

No one
for the Plaintiffs

Frances Gropper
Branch MacMaster LLP
for the Applicant Her Majesty the Queen in Right of Alberta

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Tyler McRobbie
Gowling WLF (Canada) LLP
for the Applicant Todd J. Burke

Michael Deyholos
Burnet, Duckworth & Palmer LLP
for the Applicant Obsidian Energy Ltd

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TAB 86

In the Court of Appeal of Alberta

Citation: Kniss v Stenberg, 2014 ABCA 73

Date: 20140224
Docket: 1301-0107-AC
1301-0108-AC
Registry: Calgary

Q.B. Number: 0901-06538

Between:

Trevor Kniss

Appellant
(Plaintiff)

- and -

Eric Stenberg, Ros Maddren, and Martin Amour

Respondents
(Defendants)

Gary Trolley, Family Guidance Group Inc., operating as FGI World, FGI World, Shepell FGI GP Inc. operating as Shepell FGI, Shepell FGI Limited Partnership operating as Shepell FGI, WSC GP Inc. and Shepell FGI

Not Parties to the Appeal

Q.B. Number: 1001-01164

And Between:

Trevor Kniss

Appellant
(Applicant)

- and -

Telecommunications Workers Union (TWU) and Telus Corporation (Telus)

Respondent

2014 ABCA 73 (CanLII)

(Respondent)

David C. Elliott

Not a Party to the Appeal

2014 ABCA 73 (CanLII)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Peter Costigan

Memorandum of Judgment

Appeal from the Orders by
The Honourable Mr. Justice A.D. Macleod
Dated on the 19th day of December, 2012
Filed on the 4th day of April, 2013
Dated on the 19th day of December, 2012
Filed on the 20th day of March, 2013
(Docket: 0901-06538; 1001-01164)

Memorandum of Judgment

The Court:

[1] The appellant appeals from orders which struck his application for judicial review and parts of his statement of claim alleging defamation: 2012 ABQB 732, 554 AR 55. He says the chambers judge erred in concluding the court has no jurisdiction to consider either proceeding.

BACKGROUND

[2] The appellant was employed by the respondent Telus Corporation (Telus) under a collective agreement between Telus and the respondent Telecommunications Workers Union (the Union). He was injured in an automobile accident. Various attempts were made by Telus to accommodate his injuries. The appellant received some counseling from Shepell FGI (FGI), which was hired by Telus to provide counseling to Telus employees. It was alleged that, during a conversation with a FGI counselor, the appellant made an unspecified threat towards Telus personnel or property.

[3] Gary Trolley, a FGI employee, told the respondent Martin Armour, a Telus labour relations consultant, about the threat. Armour communicated the threat to other Telus employees, including the respondent Ros Maddren, an occupational health advisor, and the respondent Eric Stenberg, a corporate security investigator. Stenberg conducted an investigation to determine whether the appellant posed a safety risk in the workplace. It was decided that the appellant should undergo a psychiatric assessment.

[4] Armour advised John Carpenter, a Union executive, about the threat and the assessment. Maddren sent a letter to the appellant's physician, with whom she had previous contact, advising of the threat and the assessment. The appellant did not attend the assessment. A second assessment was arranged and the appellant was advised that his employment would be terminated if he did not indicate his willingness to attend the assessment. The appellant refused to attend the second assessment and his employment was terminated.

[5] The Union filed an accommodation grievance and a termination grievance on the appellant's behalf. Both sides were represented by counsel before the arbitrator. It was agreed between counsel that they would proceed with the termination grievance first. The arbitration lasted several days. Documents the appellant provided to the Union's counsel were not introduced into evidence. The arbitrator heard evidence concerning the involvement of Armour, Stenberg and Maddren (the Telus employees) in the matter. After the arbitration concluded, but before the arbitrator rendered his decision, the appellant filed a statement of claim alleging defamation against the Telus employees, Trolley and FGI.

[6] The arbitrator dismissed the termination grievance and retained jurisdiction over the accommodation grievance without deciding it. He held that Telus had reasonable and probable grounds to require the appellant to attend a psychiatric assessment. He concluded that Telus was

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obliged by law and common sense to deal with what appeared to be credible information that there was a potential threat to the workplace and that Telus' reaction was measured and appropriate. The Union decided not to apply for judicial review of the arbitrator's decision after receiving two legal opinions that there was no basis for judicial review.

[7] The appellant filed a complaint with the Canada Industrial Relations Board (CIRB) alleging the Union breached its duty of fair representation under section 37 of the *Canada Labour Code,* RSC 1985, c L-2. He claimed the Union had acted in an arbitrary, discriminatory and bad faith manner in failing to properly represent him at the arbitration hearing, refusing to seek judicial review of the arbitrator's decision and failing to pursue the accommodation grievance. The CIRB dismissed the complaint. It declined to second guess the various tactical decisions the Union's counsel made during the arbitration; conduct a detailed analysis of how the Union's counsel handled the grievances; or evaluate the competence of the Union's counsel. It concluded that the Union was not simply going through the motions; the Union made a reasoned decision not to seek judicial review; and, once the termination grievance was dismissed, there was no labour relations purpose in pursuing the accommodation grievance. The appellant applied for reconsideration of the CIRB's decision. His application was dismissed.

[8] The appellant also filed complaints with the Office of the Privacy Commissioner of Canada (OPC) regarding the communications FGI and Telus employees had about the threat. The OPC concluded that the FGI and Telus employees acted appropriately and dismissed the complaints. Applications by the appellant for judicial review of the OPC's decisions were dismissed by the Federal Court.

[9] The appellant filed complaints with the Canadian Human Rights Commission (CHRC) as well. He alleged discrimination and retaliation by Telus. The CHRC refused to deal with the complaints because the arbitrator had considered and addressed the substance of all the appellant's allegations. The appellant filed an application for judicial review of the CHRC's decision. After missing a procedural deadline, he applied for an extension of time. The Federal Court dismissed his application for an extension of time on the basis that his judicial review application was doomed to fail. The appellant's judicial review application was dismissed accordingly.

[10] The appellant filed an application for judicial review of the arbitrator's decision. Telus applied to strike the judicial review application on the basis that the appellant has no standing to seek judicial review of an arbitrator's decision. The Telus employees applied to strike the appellant's statement of claim against them on the basis that the dispute is within the sole jurisdiction of the arbitrator under the terms of the collective agreement between Telus and the Union.

[11] A Master held that, as an employee, the appellant would only have standing to seek judicial review of the arbitrator's decision if there was an applicable exception to the principle that, once an employee is represented by an association in collective bargaining, he loses his right of self-representation. In concluding there was no applicable exception, the Master said

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there was no evidence of inadequate or unfair representation by the Union. Thus, the appellant's judicial review application was struck for lack of standing. As to the statement of claim, the Master was satisfied that the Telus employees' alleged defamatory comments concerned the appellant's character and capacity as an employee and were made by people whose job required them to communicate workplace problems. He struck the statement of claim against Stenberg and Armour because their alleged defamatory comments were made to people who would be expected to be informed of workplace problems and were, therefore, work related and within the exclusive jurisdiction of the arbitrator. Part of the statement of claim against Maddren was struck on the same basis. However, the Master concluded there was a triable issue as to whether the appellant's physician was a person to whom information about the threat should have been conveyed. Thus, he declined to strike the other part of the statement of claim against Maddren.

[12] The appellant appealed the Master's decision and adduced fresh evidence. Maddren cross appealed. The chambers judge concluded the Master properly struck the appellant's judicial review application, albeit for different reasons. He concluded the appellant could not seek standing to pursue judicial review of the arbitrator's decision by alleging a reasonable apprehension of unfair or inadequate representation by the Union. Applying *Gendron v Supply & Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 SCR 1298 [*Gendron*], the chambers judge concluded that, where the *Canada Labour Code* applies, the CIRB has exclusive jurisdiction to hear claims of inadequate representation. He found that the appellant had sought and been denied a finding of inadequate representation by the CIRB. He concluded the appellant could not ask the court to make a new finding on essentially the same issue.

[13] On Maddren's cross appeal, the chambers judge noted that, under section 57 of the *Canada Labour Code*, arbitration is the exclusive forum for matters arising under a collective agreement. Applying *Weber v Ontario Hydro*, [1995] 2 SCR 929 [*Weber*], the chambers judge analyzed whether the dispute arose out of the collective agreement between Telus and the Union by considering the dispute and the ambit of the collective agreement. He noted the evidence showed that one of Maddren's responsibilities included helping Telus employees seek medical treatment where it appeared that a health issue was impacting their ability to perform their job; she had a history of communicating with the appellant's physician in the course of her work responsibilities; and the appellant had consented to those communications. He also noted Maddren's evidence was that she was acting in the course of employment when she sent the impugned letter to the appellant's physician and she sent the letter as part of Telus' response to the alleged threat. He found the dispute over the letter arose within the ambit of the collective agreement and Telus' response to a potential safety threat. He concluded that whether the communication amounted to defamation was a matter for the arbitrator to determine. Therefore, contrary to what the Master found, the court did not have jurisdiction. The remainder of the appellant's statement of claim against Maddren was dismissed accordingly.

[14] Finally, on the appellant's appeal from the striking of his statement of claim against Stenberg and Armour, the chambers judge held the Master was correct to conclude that the

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alleged defamatory comments were within the exclusive jurisdiction of the arbitrator. He said that, like Maddren, Stenberg and Armour were acting to ensure the safety of other Telus employees.

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GROUNDS OF APPEAL

[15] On his appeal from the striking of his judicial review application, the appellant argues the chambers judge erred in concluding the CIRB has exclusive jurisdiction to adjudicate allegations of inadequate representation. In the alternative, he argues the CIRB did not exercise its jurisdiction because it failed to conduct a detailed analysis of how the Union's counsel handled the grievances or evaluate the competence of the Union's counsel. Therefore, the court has jurisdiction to consider whether the Union's representation was deficient or gave rise to a reasonable apprehension of inadequate representation.

[16] On his appeal from the striking of his statement of claim against the Telus employees, the appellant says the chambers judge applied the wrong test for an application to strike. He asserts that, when an application to strike is based on a lack of jurisdiction, the allegations in the statement of claim are presumed to be true and the statement of claim should not be struck if it raises a serious issue of fact or law. The appellant concedes that the comments the Telus employees made to other Telus employees in the course of investigating the alleged threat were within the ambit of the collective agreement between Telus and the Union and are outside the court's jurisdiction. However, he asserts that the comments the Telus employees made to individuals outside of Telus (Trolley, Carpenter and the appellant's physician) were motivated by a desire to terminate his employment and were not in Telus' best interests. Therefore, those comments were outside the ambit of the collective agreement and the court retains jurisdiction over them.

STANDARDS OF REVIEW

[17] Absent an error of law, a decision to strike pleadings is reviewed on a reasonableness standard since it requires an exercise of the chambers judge's discretion. Extricable questions of law are reviewable on the correctness standard: *Eastaugh v Halat*, 2009 ABCA 122, 448 AR 377 at para 14.

ANALYSIS

The Judicial Review Application

[18] The appellant was employed under a collective agreement between Telus and the Union. The collective agreement was subject to the provisions of the *Canada Labour Code*. The arbitration was conducted pursuant to the provisions of the collective agreement and the *Code*. At common law, an employee has no standing to seek judicial review of an arbitrator's decision unless he can establish a recognized exception, such as a reasonable apprehension of unfair or inadequate representation by his union.

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[19] Section 37 of the *Canada Labour Code* prohibits a union from acting in a manner that is arbitrary, discriminatory or in bad faith in representing an employee. Where, as here, the *Code* applies, the common law duty of fair representation is ousted and the CIRB has exclusive jurisdiction to adjudicate allegations of unfair or inadequate representation. An action in the courts for a breach of the duty of fair representation is not permitted; the courts have no jurisdiction over such allegations: *Gendron* at 1318-19, 1321 and 1326-27; *Koenig v Marsh*, 2005 ABCA 118, 363 AR 269 at paras 8-9 and 14. Therefore, the chambers judge did not err in concluding that the CIRB has exclusive jurisdiction to consider the appellant's allegations of inadequate representation.

[20] The appellant argues the court has jurisdiction over his inadequate representation allegations because the CIRB declined to conduct a detailed analysis of how the Union's counsel handled the grievances or evaluate the competence of the Union's counsel. This is an argument about the adequacy or correctness of the CIRB's adjudication of the appellant's complaint. It cannot displace the exclusive jurisdiction of the CIRB or vest jurisdiction in the court. The appellant's application for reconsideration of the CIRB decision was dismissed. An application for judicial review of the arbitrator's decision is not an available avenue for reviewing a decision the CIRB rendered in the exercise of its exclusive jurisdiction. Therefore, the chambers judge did not err in relying on the exclusive jurisdiction of the CIRB to conclude that the appellant could not seek standing to apply for judicial review of the arbitrator's decision by alleging a reasonable apprehension of unfair or inadequate representation by the Union. Accordingly, he was correct to strike the appellant's judicial review application.

The Statement of Claim

[21] The appellant says the chambers judge applied the wrong test for striking a statement of claim pursuant to Rule 3.68 of the *Alberta Rules of Court*, Alta Reg 124/2010. The appellant relies on law that applies when it is alleged that a pleading discloses no reasonable claim (or cause of action): Rule 3.68(2)(b). When an application to strike is made on that basis, no evidence can be submitted on the application and the court must assume that every fact pleaded is true: Rule 3.68(3). The Telus employees' application to strike the appellant's statement of claim against them was not made on the basis that the pleading discloses no reasonable claim. It was made on the basis that the court has no jurisdiction because the dispute is within the sole jurisdiction of the arbitrator under the terms of the collective agreement between Telus and the Union: Rule 3.68(2)(a). Evidence can be admitted on such an application and the court will not assume that every fact pleaded is true. The statement of claim should only be struck if it is plain and obvious that the court has no jurisdiction. This can only be determined by evidence of all the surrounding facts: *Young Estate v TransAlta Utilities Corp*, 1997 ABCA 349, 209 AR 89 at paras 17-18. The appellant says the chambers judge erred by determining the key issue. Where the record is sufficiently clear to fairly decide an issue, there is no need to defer the issue to trial: *Reece v Edmonton (City)*, 2011 ABCA 238, 513 AR 199 at para 14. The chambers judge did not apply the wrong test.

[22] Section 57 of the *Canada Labour Code* requires every collective agreement to contain a provision for final settlement by arbitration of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention. This provision gives rise to an exclusive jurisdiction model under which disputes arising from a collective agreement must proceed to arbitration even if the facts could give rise to a tort action. The core issue is whether the dispute arises out of the collective agreement. The issue is resolved by considering the essential character of the dispute and the ambit of the collective agreement: *Weber* at paras 50-52.

[23] The appellant concedes that the comments the Telus employees made to other Telus employees in the course of investigating the alleged threat were within the ambit of the collective agreement and are outside the jurisdiction of the court. However, he says the comments the Telus employees made to non-Telus employees were outside the ambit of the collective agreement because they were motivated by a desire to terminate his employment and were not in Telus' best interests. He argues the comments have a separate tortious character that removes them from the exclusive jurisdiction of the arbitrator and places them within the jurisdiction of the court.

[24] The essential character of the dispute is determined on the basis of the facts surrounding the dispute, not on the basis of the legal issues which may be framed. What must be determined is whether the essential character of the dispute concerns a matter that is covered by the collective agreement: *Regina Police Assn Inc v Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 SCR 360 at para 25 [*Regina Police*]. While aspects of the alleged conduct may arguably extend beyond the ambit of the collective agreement, this does not alter the essential character of the dispute: *Weber* at para 73. Indeed, matters arising from the collective agreement may occur off the workplace: *Weber* at para 52.

[25] The essential character of this dispute concerns the appropriateness of the actions taken and comments made by the Telus employees in the course of their employment, including comments made to other Telus employees and to Trolley, Carpenter and the appellant's physician, while investigating and responding to an alleged threat to workplace safety from an employee under the collective agreement.

[26] The collective agreement must be examined to determine whether it contemplates this factual situation. If the essential character of the dispute arises either expressly or inferentially from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of the arbitrator: *Regina Police* at para 25.

[27] The collective agreement between Telus and the Union provides the terms and conditions of the appellant's employment. It is subject to the provisions of the *Canada Labour Code*, such as section 124 which requires every employer to ensure that the health and safety at work of every employee is protected. The collective agreement governs disciplinary action, dismissal, transfers, change of assignments and health and safety. It governs working conditions and prohibits discrimination. It contemplates that actions will be taken and comments will be made by Telus employees in order to investigate and respond to an allegation of a threat to workplace

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safety made by another employee under the collective agreement. It implicitly contemplates that the investigation and response will involve contact with Union representatives and persons not employed by Telus who may have relevant information. Therefore, it is clear that the dispute in its essential character arises from the interpretation, application, administration or violation of the collective agreement. This is so even if some aspects of the alleged conduct arguably extend beyond the ambit of the collective agreement and even if some of the matters occurred off the workplace.

[28] Indeed, evidence was led at the arbitration of the impugned actions taken and comments made by the Telus employees. The appropriateness of those actions and comments was at the heart of the issues before the arbitrator. The arbitrator ruled that Telus' reaction to the situation was measured and appropriate. He found that Telus was obliged by law and common sense to deal with what appeared to be credible information that there was a potential threat to the workplace. The chambers judge did not err in concluding that the alleged defamatory comments of the Telus employees were within the exclusive jurisdiction of the arbitrator.

[29] Although courts of inherent jurisdiction have the power to grant remedies not available to an arbitrator, in this case the arbitrator could have fashioned a remedy had he been persuaded that any of the impugned actions or comments were inappropriate. Therefore, there is no deprivation of remedy in this case: *Weber* at para 57.

[30] Accordingly, the chambers judge was correct to strike the appellant's statement of claim against the Telus employees.

RESULT

[31] The appeals are dismissed.

Appeal heard on January 15, 2014

Memorandum filed at Calgary, Alberta
this 24th day of February, 2014

Authorized to sign for: Conrad J.A.

Berger J.A.

Costigan J.A.

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Appearances:

C.B. Newcombe
for the Appellant

J.R. Gilmore, and S. Beernaert
for the Respondents Eric Stenberg, Ros Maddren, and Martin Amour

A.J. Landry, Q.C.
for the Respondents Telecommunications Workers Union (TWU) and Telus Corporation (Telus)

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TAB 87

In the Court of Appeal of Alberta

Citation: Alberta (Attorney General) v Malin, 2016 ABCA 396

Date: 20161212
Docket: 1503-0325-A
Registry: Edmonton

2016 ABCA 396 (CanLII)

Between:

The Attorney General of Alberta

Applicant
(Respondent)

- and –

The Honourable Judge L. Malin

Respondent
(Appellant)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Sheila Greckol

Memorandum of Judgment

Application to Dismiss for Want of Jurisdiction

III. Why the Judge Has No Standing to Appeal the Decision

[18] The courts have historically recognized that limitations on who can sue about an issue are required: ***Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society***, 2012 SCC 45 at para 22, [2012] 2 SCR 524 [***Downtown Eastside***]. Legal standing is the vehicle courts have used to determine who is entitled to bring a case for a decision: ***Downtown Eastside***, *supra* at para 1. This includes who can appeal a decision. Generally speaking, legal standing is grounded on either (a) a personal basis where one's legal rights have been or are likely to be affected; or (b) on a public interest basis where the person claiming standing can be seen as a genuine representative of a larger class of individuals intent on bringing matters of public interest and importance before the courts: ***Downtown Eastside***, *supra* at para 22. The Judge does not satisfy the test for either.

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A. The Judge Does Not Satisfy the Test for Private Interest Standing

[19] There are several compelling reasons why the Judge does not satisfy the test for private interest standing.

1. Proceedings Are Criminal in Nature and Have No Personal Implications for the Judge

[20] We begin with this. While counsel for the Judge attempted to characterize these proceedings as "civil", they are not. It is indisputable that they have arisen in the course of criminal proceedings. The Judge was asked to issue a production order under s 487.014 of the *Code*. He declined to do so. The Queen's Bench quashed his order and directed him to issue the production order.

[21] It is important not to conflate the distinct civil and criminal jurisdictions given the caution expressed in ***Kourtessis v MNR***, [1993] 2 SCR 53 [***Kourtessis***] at 80 against courts manufacturing a right of appeal in the criminal law by invoking civil law notions. To do so risks creating an "unpredictable mish-mash" of civil and criminal proceedings. This ought not to be permitted.

[22] The Judge here was proceeding only under Part XV of the *Code*. He had no other jurisdiction to exercise, nor was any given to him by any other source. He was not a trial judge. He and his Court do not have inherent jurisdiction as does a superior court judge under s 96 of the *Constitution Act, 1867*. Provincial Court judges execute purely statutory functions under the criminal law, such as the conduct of preliminary inquiries. Where the Provincial Court judge transcends the jurisdictional boundaries of such a function, the decision is subject to review by *certiorari* for lack of jurisdiction. But in such event, the application of *certiorari* and *mandamus* is still criminal, not civil, law.

[23] The critical point is this. The Decision that the Judge purports to appeal relates entirely to a criminal matter. It has no implications for the Judge in any personal capacity. A judge, imbued with the power to preside in court, makes decisions as a member of the judiciary, acting in an

institutional role rather than a personal one. Indeed, that is the basis on which the Judge has argued his standing to appeal the Decision.

2. The Code Does not Authorize the Judge's Putative Appeal

[24] As a matter of criminal law, the Judge has no right to appeal the Decision under the relevant *Code* provisions. Read correctly, the provisions of the *Code* could not be clearer on this point.

[25] Appellate courts are statutory bodies: ***R v Mian***, 2014 SCC 54 at para 50, [2014] 2 SCR 689. Thus, their jurisdiction and powers must be grounded in statute: ***R v Bichsel***, 2013 BCCA 164 at para 9, 336 BCAC 104. This means there is no right of appeal unless provided for by statute: ***R v Litchfield*** (1995), 174 AR 171 (CA) at para 3. Since criminal appeals are part of the law of criminal procedure, both rights of appeal and rights to seek leave to appeal in criminal law fall within Parliament's jurisdiction under s 91(27) of the *Constitution Act, 1867*. Parliament has defined and delimited these largely, although not exclusively, in the *Code.* Accordingly, this Court is not empowered to invent either a route of criminal appeal or a form of criminal law remedy that Parliament has not provided for in the *Code* or elsewhere in statute: see, for example, ***Dagenais v Canadian Broadcasting Corp.***, [1994] 3 SCR 835 [***Dagenais***]; ***Kourtessis***; ***R v Meltzer***, [1989] 1 SCR 1764. See also ***R v Ciancio***, 2006 BCCA 311, 232 BCAC 1 and ***Angel Acres Recreation & Festival Property Ltd v British Columbia***, 2006 BCCA 285, 227 BCAC 302.

[26] With respect to indictable offences (and there is no dispute that this would apply here), appeals can only be taken as authorized under s 674 of the *Code* and, to the limited extent identified, s 784 of the *Code*. Section 674 of the *Code* provides as follows:

> 674 No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences. [underline added]

[27] In turn, under Part XXVI (Extraordinary Remedies), ss 784(1) and s 784(2) of the *Code* provide as follows:

> 784 (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of *mandamus*, *certiorari* or *prohibition*.
>
> (2) Except as provided in this section, Part XXI applies, with such modifications as the circumstances require, to appeals under this section. [underline added]

[28] What flows from the inter-relationship between these sections and Parts XXI and XXVI is the following. In accordance with s 784(2), the terms of Part XXI apply to Part XXVI to the extent necessary. In turn, under Part XXI, criminal appeals are limited to authorized parties only. The

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limited statutory rights of appeal defined by Parliament under Part XXI cannot be broadened in favour of the Judge's position merely because the case involves a Crown motion for *certiorari* and *mandamus* taken against his ruling. Sections 674 and 784 are by Parliament's direction to be read together. Thus, the only parties authorized to appeal a prerogative writ under s 784(1) are those who could launch an appeal under Part XXI. As to who is "authorized" to appeal under Part XXI, the parties with a right of appeal or a right to seek leave to appeal are the Attorney General and a "person" who is convicted, found not criminally responsible, subject to certain types of orders, or sentenced. Nowhere is a criminal court judge identified as *a party* capable of launching an appeal in his or her own personal capacity within the meaning of either s 674 or s 784 of the *Code*.

[29] Admittedly, the *Code* confers rights of appeal on third parties under some sections in Part XXI, such as those dealing with forfeiture of crime-related property. But third parties in this category have a right to appeal because that right has been expressly granted to them, no doubt because they have an identifiable interest of a real nature. However, nothing in these provisions supports the Judge's claimed right to appeal the Decision. In addition, there may be instances in which individuals other than those who are parties to the criminal proceedings may be given standing. For example, in ***Dagenais***, the media was given standing to seek *certiorari* as against a criminal court publication ban order. Plainly in ***Dagenais***, the media was actually affected in a *Charter* cognizable capacity. However, no such impact on the Judge is recognizable here.

[30] It is this simple. Judges are not parties authorized to appeal in either Part XXI or Part XXVI of the *Code*. It therefore follows that the Judge has no statutory right of appeal and no right to seek leave to appeal; both are barred. By itself, that defeats the putative appeal.

3. The Criminal Rules Do Not Authorize or Justify the Judge's Putative Appeal

[31] Counsel for the Judge asserted that the Judge nevertheless has a personal stake in the Decision sufficient to qualify for private interest standing because of Rule 835. This *Criminal Rule* provides for automatic civil immunity for a Provincial Court judge who is made subject to a *mandamus* order. Counsel for the Judge suggested that because *certiorari* is not mentioned, this therefore implies that the Judge may be personally liable civilly in the *certiorari* application if his original order is overturned. According to the Judge's counsel, this thereby gives the Judge a personal stake in the proceedings and hence private interest standing.

[32] This is a red herring for two reasons. First, s 9.51 of the *Provincial Court Act*, RSA 2000 c P-31 is a complete answer to a concern about claimed personal liability in these circumstances. It expressly provides in subsection (1) that:

> No action may be brought against a judge for any act done or omitted to be done in the execution of the judge's duty or for any act done in a matter in which the judge has exceeded the judge's jurisdiction unless it is proved that the judge acted maliciously and without reasonable and probable cause.

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The notion that the Judge might face civil proceedings here is fanciful.

[33] Second, in any event, in accordance with the constitutional principle of judicial independence, judges are immune from suit and prosecution: see ***Slansky v Canada (Attorney General)***, 2013 FCA 199 at paras 134-137, 364 DLR (4th) 112. This ensures that judges are free to make decisions independently and impartially. As the Federal Court of Appeal noted at para 135, quoting Lord Denning in ***Sirros v Moore*** (1974), [1975] QB 118 (Eng CA) at 136:

> Each [judge] should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?"

[34] There is nothing in the *Criminal Rules* that justifies granting the Judge private interest standing to pursue the putative appeal.

4. The Common Law Does Not Support the Judge's Putative Appeal

[35] The Judge's counsel also contended that, at common law, a tribunal subject to *certiorari* had a right to be made a party and was therefore entitled to be a full party in the *certiorari* proceedings. This argument too is without merit.

[36] It rests on the claim that "... neither Parliament nor any judicial authority has taken away the unfettered common-law right of a justice or magistrate to have standing in criminal judicial review proceedings": Memorandum of Argument of the Respondent at para 16, relying on ***R v Batchelor***, [1978] 2 SCR 988 [***Batchelor***] at 1006-1007 and ***Brewer v Fraser Milner Casgrain LLP,*** 2008 ABCA 160 at para 16, 432 AR 188, leave to appeal to SCC refused, 32695 (30 October 2008) [***Brewer***].

[37] But ***Batchelor*** does not support the Judge's position. To the contrary. It contradicts it. ***Batchelor*** did not confirm the existence at common law of an "unfettered right" on the part of a judge to "standing" in *certiorari* proceedings. Moreover, ***Batchelor*** explained why, in Canada, the writ of *certiorari* had been abolished long ago and replaced instead by the simplified procedure of a notice of motion. This simplified process reduced the already limited role of the judge subject to *certiorari* proceedings.

[38] In reviewing the historical record, Laskin J noted that, at one time, it had been necessary to apply to a superior court for a writ of *certiorari*. If issued, the inferior court would then be directed to return the record of the challenged proceedings to the superior court. After the record was returned, the superior court would issue an order (sometimes called a rule *nisi*) requiring the judge of the inferior court to show cause why the application to quash should not succeed. Thereafter, a hearing on the merits would finally follow to determine whether the rule *nisi* would be discharged or made absolute in favour of the applicant. But this unnecessarily complicated procedure was

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changed in Canada more than a hundred years ago. There is no longer any need for an order or rule *nisi*: see ***Batchelor***, *supra* at 1007, citing Tremeear, *Criminal Code* (6th ed. 1964) at 1286-1289. Instead, a notice of motion for *an order in the nature of certiorari* will do: see Rule 826 of the *Criminal Rules*.

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[39] In Alberta, that change dates back to at least 1914. The *Consolidated Rules of the Supreme Court of Alberta* (Calgary: Burroughs, 1914) of that year provided in Rule 1 of "Crown Practice" that in all cases where it is desired to move to quash "...the proceeding shall be by notice of motion in the first instance instead of by *certiorari* or by rule or by order *nisi*". This Rule, which effectively abolished the *writ* of *certiorari* without affecting the substantive remedy of *certiorari*, was validly made under the rule-making authority conferred on superior courts and appellate courts by s 576 [now s 482] of the *Code*: see ***R v Titchmarsh*** (1914), [1915] 22 DLR 272 (Ont SC(AD)).

[40] In the result, since then, when a notice of motion seeks an order in the nature of *certiorari* to quash a decision of a judge of the Provincial Court, notice is provided to the Provincial Court purely for the purposes of obtaining the "record" of the proceedings below: see ***Brewer***, *supra* at paras 23-26, which confirms that, in the context of tribunals, they are not parties in the traditional sense. The same holds true for judges in the criminal context.

[41] Moreover, whatever the scope under the common law for a judge of an inferior court to "defend" against the *certiorari* application, we are unaware of any persuasive authority showing that it extended to judges *appealing* the superior court's decision (as the Judge has purported to do here). In any event, the need for *tribunals* to participate in *certiorari* proceedings in 19th century England because of concerns about personal liability has not traveled to Alberta, given the constitutional principle of judicial independence embodied in the preamble to the *Constitution Act, 1867*. As noted, a judge is immune from liability.

[42] Therefore, even if there were some argument buried deep in the common law that might have leant any support to the Judge's argument at one time, there remains no vestige of it today given the provisions in the *Code* and in Rule 833, which is effectively legislation under s 63 of the *Judicature Act*, RSA 2000, c J-2. More important, whatever the common law might once have been, the *Code* now governs. The common law of criminal procedure must yield to the *Code* to the extent there is a conflict. That is in the nature of the *Code* and Parliament's sovereignty over the criminal law under s 91(27) of the *Constitution Act, 1867*. On the key point in dispute here, the *Code* could not be more explicit. The Judge has no private interest standing to appeal the Decision.

5. Administrative Law Does Not Support the Judge's Putative Appeal

[43] Nor does administrative law provide any supplementary jurisdiction to expand the administration of criminal justice in the manner the Judge suggests. The concerns militating against importing civil law notions into the administration of criminal justice apply equally to administrative law notions. There is no benefit in creating an uncertain hodgepodge of criminal and administrative law proceedings.

[44] Admittedly, the administrative law has come some distance in recognizing that tribunals might be allowed to participate in judicial review proceedings launched by affected parties: see ***Ontario (Energy Board) v Ontario Power Generation Inc.***, 2015 SCC 44 at paras 41-62, [2015] 2 SCR 147 [***Ontario Energy***]. However, whatever latitude may now be given to tribunals to make submissions on judicial review, they have no application whatever to the Judge. Why? The Provincial Court is not an administrative tribunal; it is a court of record: see *The Provincial Court Act*, s 2(3); see also s 10(b)(i) of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3.

[45] Nor does the mere fact that a judge is named as a respondent on a motion for *certiorari* mean assigning party status to the judge. As noted, this is done purely for the purposes of obtaining the "record" of the proceedings below, a qualification that applies with even more force where it is a court that is subject to the prerogative writs.

[46] Further, none of the policy considerations involved in allowing a *tribunal* to make submissions on judicial review launched by a "party" support a direct appeal by the Judge here. These considerations were summarized in ***Pruden v Metis Settlements Appeal Tribunal***, 2014 ABCA 288 at paras 22-26, 580 AR 306, leave to appeal to the SCC refused, 36158 (9 April 2015) [***Pruden***]; see also ***Ontario Energy***, *supra*. They include making sure there is a full *lis* and that the reviewing court is properly informed about jurisdiction. But while the judicial review court *may* allow the tribunal to speak to the public policy concerns underlying the exercise of its jurisdiction, even then, the judicial review court may regulate such participation. In this regard, rarely are tribunals allowed to speak to the merits of the case.

[47] In any event, none of the rationales for the judicial review court allowing participation by a tribunal in administrative law proceedings have any application to the Judge's appeal. The Decision is a matter of criminal law, purely adjudicative in nature concerning as it does the statutory investigative powers of state agents. It is not imbued with polycentric policy considerations as in administrative law.

[48] In addition, if the Decision is later challenged by either a target of such an order or the institution subject to the order, both would be able to raise, whether under the *Charter* or otherwise, a question as to the *effect* of the order on *them*. In particular, the target of the investigation, if charged criminally, may be able to contend there has been a *Charter* breach which gives rise to a need to provide a just and appropriate remedy.

[49] Administrative law principles do not support this putative appeal.

B. The Judge Does Not Satisfy the Test for Public Interest Standing

[50] The Judge has failed to establish any basis for granting him public interest standing to pursue the putative appeal.

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TAB 88

Finlay v. Canada (Minister of Finance)

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Beetz, McIntyre, Chouinard, Wilson, Le Dain and La Forest JJ.

1985: February 22 / 1986: December 18.

File No.: 17775.

[1986] 2 S.C.R. 607 | *[1986] 2 R.C.S. 607* | *[1986] S.C.J. No. 73* | *[1986] A.C.S. no 73* | *1986 CarswellNat 104* | Also reported at *33 D.L.R. (4th) 321*

The Minister of Finance of Canada, the Minister of National Health and Welfare of Canada and the Attorney General of Canada, appellants; v. Robert James Finlay, respondent.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Actions — Standing — Non-constitutional challenge by private individual to the statutory authority for federal public expenditure — Person in need within the meaning of the Canada Assistance Plan seeking a declaration that cost-sharing payments by Canada to Manitoba pursuant to the Plan are illegal and an injunction to stop the payments because of provincial non-compliance with the conditions and undertakings imposed by the Plan — Plaintiff claiming to be prejudiced by the provincial non-compliance — Whether plaintiff has standing to seek the declaratory and injunctive relief — Whether statement of claim discloses reasonable cause of action.

The respondent alleges that he is a resident of Manitoba and a person in need within the meaning of the Canada Assistance Plan ("the Plan") whose sole support is the social allowance he receives under the Manitoba Social Allowances Act; that for a period of forty-six months an amount was deducted from his monthly social allowance in payment of a debt owing by him to the Crown for overpayment of allowance; and that prior to receiving social allowance he received municipal assistance, which by The Municipal Act of Manitoba is made a debt owing by the respondent to the municipality. The respondent contends that the continued payments by Canada to Manitoba of contributions under the Plan are illegal, as being contrary to the statutory authority conferred by s. 7(1) of the Plan, because they contribute to the cost of a provincial system of assistance to persons in need which is in breach, in several respects, of the conditions and undertakings [page608] to which such payments are made subject by s. 7(1). He contends that s. 20(3) of The Social Allowances Act, which authorizes the deduction from a social allowance payment of an amount to repay an overpayment of allowance, is contrary to the provincial undertaking to provide assistance to any person in need in an amount or manner that takes into account his basic requirements because such deduction has the effect of reducing the amount of a social allowance payment below the cost of basic requirements; that s. 444 of The Municipal Act, which makes the cost of any municipal assistance to a person in need a debt owing to the municipality, is in breach of the provincial undertaking to provide assistance to a person in need; and that the authority conferred on municipalities by s. 11(5)(b) of The Social Allowances Act to fix the amount of assistance required to meet the cost of basic

requirements is contrary to the indication in the Plan that such authority shall be exercised by the provincial authority designated in the agreement made pursuant to the Plan.

The respondent sues for a declaration that the federal cost-sharing payments are illegal and an injunction to stop them as long as the provincial system of assistance to persons in need fails to comply with the conditions and undertakings imposed by the Plan. On a motion to strike by the appellants under Federal Court Rule 419(1) the respondent's statement of claim was struck out in the Trial Division of the Federal Court on the grounds that the respondent lacked the requisite standing to bring his action and the statement of claim did not disclose a reasonable cause of action. A majority of the Federal Court of Appeal allowed an appeal from this order and restored the respondent's statement of claim. The appellants appeal from that judgment, and the issues in the appeal are whether the respondent should be recognized as having standing to bring his action, and if he has the requisite standing, whether the statement of claim discloses a reasonable cause of action.

Held: The appeal should be dismissed.

The respondent does not have a sufficiently direct, personal interest in the legality of the federal cost-sharing payments, as distinct from provincial compliance with the conditions and undertakings imposed by the Plan, to bring him within the general requirement for standing to sue, without the consent of the Attorney General, for a declaration or an injunction to challenge an exercise of statutory authority. He should, however, be recognized, as a matter of judicial discretion, as having public interest standing to bring his action. The approach to public interest standing reflected in the judgments of this Court in Thorson, McNeil and [page609] Borowski, in which there was a challenge to the constitutionality or operative effect of legislation, should be extended to a non-constitutional challenge by an action for a declaration to the statutory authority for public expenditure or other administrative action. The respondent meets the criteria laid down for the discretionary recognition of public interest standing in Thorson, McNeil and Borowski. His action raises justiciable issues. The issues are serious ones, and the respondent has a genuine interest in them. If the respondent were denied standing there would be no other way in which the issues could be brought before a court. The respondent should be recognized as having standing to sue for the injunctive, as well as the declaratory, relief prayed for in his statement of claim. The alternative contention that the statement of claim does not disclose a reasonable cause of action should be rejected. It is not plain and obvious that the respondent cannot succeed with his contentions.

Cases Cited

Applied: Thorson v. Attorney General of Canada, *[1975] 1 S.C.R. 138*; Nova Scotia Board of Censors v. McNeil, *[1976] 2 S.C.R. 265*; Minister of Justice of Canada v. Borowski, *[1981] 2 S.C.R. 575*; referred to: MacIlreith v. Hart *(1908), 39 S.C.R. 657*; Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd., [1982] A.C. 617; Australian Conservation Foundation Inc. v. Commonwealth of Australia (1980), 28 A.L.R. 257; London County Council v. Attorney-General, [1902] A.C. 165; Carota v. Jamieson, *[1977] 1 F.C. 19*; Gouriet v. Union of Post Office Workers, [1978] A.C. 435; Boyce v. Paddington Borough Council, [1903] 1 Ch. 109; London Passenger Transport Board v. Moscrop, [1942] A.C. 332; Cowan v. Canadian Broadcasting Corp., *[1966] 2 O.R. 309*; Rosenberg v. Grand River Conservation Authority *(1976), 69 D.L.R. (3d) 384*; Smith v. Attorney General of Ontario,

[1924] S.C.R. 331; Flast v. Cohen, 392 U.S. 83 (1968); Linda R.S. v. Richard D., 410 U.S. 614 (1973); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); Re Lofstrom and Murphy *(1971), 22 D.L.R. (3d) 120*; LeBlanc v. City of Transcona, *[1974] S.C.R. 1261*; Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Operation Dismantle Inc. v. The Queen, *[1985] 1 S.C.R. 441*.

Statutes and Regulations Cited

Canada Assistance Plan, R.S.C. 1970, c. C-1, ss. 2 "person in need","provincial authority", 4, 6(2)(a), 7(1), 9(1)(g). Federal Court Rules, C.R.C. 1978, c. 663, R. 419(1). Municipal Act, S.M. 1970, c. 100, s. 444. [page610] Social Allowances Act, R.S.M. 1970, c. S160, ss. 11(5)(b), 20(3) [en. 1980, c. 37, s. 10].

Authors Cited

Cromwell, Thomas A. Locus Standi: A Commentary on the Law of Standing in Canada. Toronto: Carswells, 1986. Thio, S.M. Locus Standi and Judicial Review. Singapore: Singapore University Press, 1971. Zamir, Itzhac. The Declaratory Judgment. London: Stevens & Sons Ltd., 1962.

APPEAL from a judgment of the Federal Court of Appeal, *[1984] 1 F.C. 516*, *146 D.L.R. (3d) 704*, *48 N.R. 126*, allowing respondent's appeal from a judgment of Nitikman D.J. of the Trial Division striking out respondent's statement of claim. Appeal dismissed.

T.B. Smith, Q.C., Harry Glinter and Susan D. Clark, for the appellants. G. Patrick S. Riley and A.J. Roman for the respondent.

Solicitor for the appellants: R. Tassé, Ottawa. Solicitor for the respondent: G. Patrick S. Riley, Winnipeg.

[Quicklaw note: An errata was published at [1986] 2 S.C.R., page iv. The change indicated therein has been made to this document and the text of the errata as published in S.C.R. is appended to the judgment.]

The judgment of the Court was delivered by

LE DAIN J.

1 This appeal raises the question whether a private individual has standing to sue for a declaration that certain payments out of the Consolidated Revenue Fund of Canada are illegal on the ground that they are not made in accordance with the applicable statutory authority. More specifically, the question is whether a recipient of provincial assistance to persons in need, who claims to be prejudiced by certain provisions of the provincial legislation respecting such assistance, should be recognized as having standing to seek a declaration that payments by the federal government to the provincial government of contributions to the cost of such assistance, pursuant to the Canada Assistance Plan, R.S.C. 1970, c. C-1 (hereinafter referred to as "the Plan"), are illegal, as being contrary to the authority conferred by the Plan, because the provincial legislative provisions complained of do not comply with the conditions and undertakings to

which the federal cost-sharing payments are made subject by the Plan. There is also the issue, raised alternatively, whether, if [page611] there is the requisite standing to sue, the statement of claim discloses a reasonable cause of action.

2 The appeal is by leave of this Court from the judgment of the Federal Court of Appeal (Thurlow C. J. and Lalande D.J.; Heald J. dissenting), on April 25, 1983, *[1984] 1 F.C. 516*, allowing an appeal from the order on November 17, 1982 of Nitikman D.J. in the Trial Division, who, on a motion to strike under Federal Court Rule 419 (1), struck out the respondent's statement of claim on the grounds that the respondent lacked standing and the statement of claim did not disclose a reasonable cause of action.

I

3 The respondent's statement of claim contains the following allegations of fact. The respondent is a resident of Manitoba who by reason of illness and disability is unable to provide adequately for himself and is therefore a person in need within the meaning of the Plan. His sole source of support is the social allowance he receives under The Social Allowances Act, R.S.M. 1970, c. S160, of Manitoba. For a period of forty-six months an amount equal to 5 per cent of the respondent's social allowance was deducted from his monthly allowance in payment of a debt owing by him to the Crown for overpayment of allowance. Prior to receiving social allowance the respondent received municipal assistance, which, by s. 444 of The Municipal Act, S.M. 1970, c. 100, of Manitoba, is made a debt owing by the respondent to the municipality.

4 The respondent contends that the continued payments by Canada to Manitoba of contributions under the Plan are illegal, as being contrary to the statutory authority conferred by s. 7(1) of the Plan, because they contribute to the cost of a provincial system of assistance to persons in need which is in breach, in several respects, of the conditions and undertakings to which such payments are made subject by s. 7 (1). Section 7 (1) reads as follows:

[page612]

> 7. (1) Contributions or advances on account thereof shall be paid, upon the certificate of the Minister, out of the Consolidated Revenue Fund at such times and in such manner as may be prescribed, but all such payments are subject to the conditions specified in this Part and in the regulations and to the observance of the agreements and undertakings contained in an agreement.

5 The respondent contends that s. 20(3) of The Social Allowances Act, which authorizes the deduction from a social allowance payment of an amount to repay an overpayment of allowance, is contrary to the provincial undertaking to provide assistance to any person in need in an amount or manner that takes into account his basic requirements because such deduction has the effect of reducing the amount of a social allowance payment below the cost of basic requirements. The provincial undertaking is required as a condition of contributions under the Plan by s. 6 (2)(a) thereof and is contained in clause 2 of the agreement of March 20, 1967 (hereinafter referred to as "the Agreement") entered into by the Government of Canada and the Government of Manitoba pursuant to s. 4 of the Plan.

6 The respondent further contends that s. 444 of The Municipal Act, which makes the cost of any municipal assistance to a person in need a debt owing to the municipality, is in breach of the provincial

of the proceedings at which the issue of standing is best considered had earlier been the subject of comment by this Court in McNeil, supra, where, the question of standing to bring an action for a declaration of legislative invalidity having been raised and determined in the courts below as a preliminary matter, Laskin C.J. said at p. 267: "In granting leave, this Court indicated that where, as here, there is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or to the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing." A similar view was expressed by the House of Lords in Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd., [1982] A.C. 617. There the question arose in the context of an application for judicial review under R.S.C. Ord. 53, r. 3 (5), which required that an applicant have "a sufficient interest in the matter to which the application relates." The members of the House of Lords were of the view that it was necessary to consider the merits of the application in order to determine the matter to which the application related. This question was also considered by the High Court of Australia in Australian Conservation Foundation Inc. v. Commonwealth of Australia (1980), 28 A.L.R. 257, where the opinion was expressed that it is a matter of judicial discretion, having regard to the particular circumstances of a case, whether to determine the question of standing with final effect as a preliminary matter or to reserve it for consideration on the merits. The Court held that for reasons of cost and convenience the judge had properly exercised that discretion in dealing with the question of standing as a preliminary matter and striking out the statement of claim. Assuming that the question whether an issue of standing to sue [page617] may be properly determined as a preliminary matter in a particular case is one which a court should consider, whether or not it has been raised by the parties, I agree with the view expressed in the Australian Conservation Foundation case. It depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted. In my opinion the present case is one in which the question of standing can be properly determined on a motion to strike. The nature of the respondent's interest in the substantive issues raised by his action is sufficiently clearly established by the allegations and contentions in the statement of claim and the statutory and contractual provisions relied on without the need of evidence or full argument on the merits.

III

17 I turn to the question whether the respondent has a sufficient personal interest in the legality of the federal cost-sharing payments to bring him within the general requirement for standing to challenge an exercise of statutory authority by an action for a declaration or an injunction. The nature of the interest required by a private individual for standing to sue for declaratory or injunctive relief where, as in the present case, a question of public right or interest is raised, has been defined with reference to the role of the Attorney General as the guardian of public rights. Only the Attorney General has traditionally been regarded as having standing to assert a purely public right or interest by the institution of proceedings for declaratory or injunctive relief of his [page618] own motion or on the relation of another person. His exercise of discretion as to whether or not to give his consent to relator proceedings is not reviewable by the courts. See London County Council v. Attorney-General, [1902] A.C. 165, and Gouriet v. Union of Post Office Workers, [1978] A.C. 435. In such a case a private individual may not sue for declaratory or injunctive relief without the consent of the Attorney General unless he can show what amounts to a sufficient private or personal interest in the subject matter of the proceedings. It is in this sense that I have referred to the discretionary control of the Attorney General over public interest standing. Thorson,

McNeil and Borowski represent a departure from or exception to that general rule, but before considering their application in the present case it is necessary to consider whether the respondent has a sufficient interest in the legality of the federal cost-sharing payments to bring him within the general rule.

18 The general rule was laid down in cases involving the private action for public nuisance but it has been applied in a variety of public law contexts where an issue of public right or interest has been raised. The statement of the rule that has been most often cited is that of Buckley J. in Boyce v. Paddington Borough Council, [1903] 1 Ch. 109, in which the issue was whether the plaintiff, a private individual, could bring an action, without the consent of the Attorney General, for an injunction to restrain a public authority from erecting an obstruction in an open space that interfered with the access of light to the windows of the plaintiff's property. The case involved the public right to the open space and the private right to access of light to private property. It was held that the plaintiff could sue without joining the Attorney General because, although the right to the open space was a public right, the plaintiff sought to restrain an interference with his private right to access of light to his property, and he also suffered special damage peculiar to himself from the interference with the public right. Buckley J. stated the rule as follows at p. 114:

[page619]

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of the premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from end to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

19 That statement has been treated as an authoritative expression of the rule and applied on several occasions to actions for a declaration as well as actions for an injunction, most notably by the House of Lords in London Passenger Transport Board v. Moscrop, [1942] A.C. 332, and Gouriet, supra. Examples of its application in Canada to cases involving issues of statutory authority are the judgments of the Ontario Court of Appeal in Cowan v. Canadian Broadcasting Corp., *[1986] 2 O.R. 309*, and Rosenberg v. Grand River Conservation Authority *(1976), 69 D.L.R. (3d) 384*. While the authority of the rule is well established the precise nature of the two exceptions stated by Buckley J. -- interference with a private right and special damage peculiar to oneself -- has been the subject of a variety of commentary and expression. The "private right" referred to by Buckley J. has been said to be "a right the invasion of which gives rise to an actionable wrong within the categories of private law, for example, a breach of contract or trust or the commission of a tort": S.M. Thio, Locus Standi and Judicial Review (1971), p. 161. It has also been observed that the exception for private rights applies not only to common law rights but to a right created by statute for the benefit of a plaintiff: I. Zamir, The Declaratory Judgment (1962), p. 269. The nature of the interest reflected by the words "special damage peculiar to himself" in the second exception in Boyce has been variously characterized in the cases. For a convenient reference to the conflicting meanings given to these words in the private action for public nuisance see T.A. Cromwell, Locus Standi: A Commentary on the Law of Standing in Canada (1986), pp. 24-27. In Smith v. Attorney General of Ontario, *[1924] S.C.R. 331*, [page620] which was considered by this Court in Thorson, Duff J. referred to the general rule as follows at p. 337: "An individual, for example, has no status to maintain an action

restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act." In Cowan, supra, in which the standing requirement laid down in Boyce was applied by the Ontario Court of Appeal to an action for declaratory and injunctive relief alleging that the Canadian Broadcasting Corporation had exceeded its statutory authority by operating a French language broadcasting station, Schroeder J.A. said at p. 311:

> A plaintiff, in attempting to restrain, control or confine within proper limits, the act of a public or quasi-public body which affects the public generally, is an outsider unless he has sustained special damage or can show that he has some "special interest, private interest, or sufficient interest". These are terms which are found in the law of nuisance but they have been introduced into cases which also involve an alleged lack of authority. Therefore, in an action where it is alleged that a public or quasi-public body has exceeded or abused its authority in such a manner as to affect the public, whether a nuisance be involved or not, the right of the individual to bring the action will accrue as it accrues in cases of nuisance on proof that he is more particularly affected than other people.

In Australian Conservation Foundation, supra, in which the High Court of Australia applied the rule in Boyce to deny public interest standing to challenge the validity of administrative procedures respecting a requirement for an environmental impact statement, Gibbs J., at p. 268, made the following observations concerning the meaning to be given to the words "special damage peculiar to himself" in Boyce:

> Although the general rule is clear, the formulation of the exceptions to it which Buckley J. made in Boyce v Paddington Borough Council is not altogether satisfactory. Indeed the words which he used are apt to be misleading. His reference to "special damage" cannot be limited to actual pecuniary loss, and the words "peculiar to himself" do not mean that the plaintiff, and no one else, must have suffered damage. However, the expression [page621] "special damage peculiar to himself", in my opinion should be regarded as equivalent in meaning to "have a special interest in the subject matter of the action".

In Borowski, supra, Laskin C.J., dissenting, referred to the general rule as follows at p. 578: "Unless the legislation itself provides for a challenge to its meaning or application or validity by any citizen or taxpayer, the prevailing policy is that a challenger must show some special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society."

20 The precise nature of the respondent's interest in the legality of the federal cost-sharing payments is not easy to characterize in terms of the general rule. The respondent sues as a person in need within the meaning of the Plan who claims to have been prejudiced by the alleged provincial non-compliance with the conditions and undertakings to which the federal cost-sharing payments are made subject by the Plan. He alleges the prejudice caused by the deduction from his monthly social allowance payment of an amount to repay an overpayment of allowance, which he contends was caused by administrative error. Counsel for the appellants conceded that the deduction reduced the amount of the respondent's monthly social allowance payment below that required to meet the cost of basic requirements or necessities. The respondent alleges the further prejudice arising from the fact that he remains indebted for the municipal assistance which he received prior to qualifying for social allowance. Although the Plan was enacted for the benefit of persons in need it does not confer any rights on such persons; their entitlement to assistance arises under the provincial legislation. Nor can the federal cost-sharing payments be said to affect such

entitlement directly. The respondent contends, however, that the continued payment of the federal contributions, despite the alleged provincial non-compliance with the conditions [page622] and undertakings imposed by the Plan, is in effect a cause of such non-compliance and the resulting prejudice to the respondent. He argues that it is the federal failure to insist on provincial compliance with the conditions and undertakings imposed by the Plan that permits or encourages such continued non-compliance by the province. What the respondent seeks by a declaration that the federal payments are illegal and an injunction to stop them is to compel the province to comply with the conditions and undertakings imposed by the Plan.

21 Counsel for the appellants contended that there was an insufficient "nexus" between the alleged provincial non-compliance with the conditions and undertakings imposed by the Plan and the alleged illegality of the federal payments to satisfy the general requirement for standing to bring an action for a declaration. The term "nexus" was apparently borrowed from American cases on standing to which we were referred in the course of argument. As formulated in Flast v. Cohen, 392 U.S. 83 (1968), a case of taxpayer's standing to challenge the constitutionality of federal public expenditure, the nexus requirement has a two-fold aspect of a special nature based on particular features of the American Constitution. The term "nexus" is used in a more general sense in other cases, such as Linda R.S. v. Richard D., 410 U.S. 614 (1973), to refer to the causative relationship that must exist between the injury or prejudice complained of and the action attacked. The action attacked must have been a cause of the injury or prejudice complained of, and the plaintiff must have a personal stake in the outcome of the litigation -- that is, stand to benefit in his personal interests from the relief sought. It is in this general sense that I understood counsel for the appellants to use the word "nexus". The American requirement of "nexus" or "directness", as it is sometimes referred to (cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), per Frankfurter J. at pp. 152-53), stems from the special constitutional requirement of case or controversy for federal jurisdiction under Article III of the Constitution, and for this reason the American cases on standing must be treated with some caution. I am of the opinion, however, that a similar requirement of directness or causal relationship between the alleged prejudice or grievance and the challenged action is implicit in the notions of interference with private right and special damage. I note that Thio, op. cit., pp. 5-6, refers to [page623] the general requirement for standing in administrative law as being that of a "direct, personal interest". In Australian Conservation Foundation, supra, Gibbs J., referring to the general rule, stated the requirement of a personal stake in the outcome of the litigation as follows at p. 270:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

22 There is no doubt that the respondent has a direct, personal interest in the alleged provincial non-compliance with the conditions and undertakings imposed by the Plan. A declaration that the federal cost-sharing payments are illegal would necessarily involve a finding that the province had failed to comply with the conditions and undertakings imposed by the Plan, but this would not affect the validity of the provincial legislative provisions about which complaint is made. Cf. Re Lofstrom and Murphy *(1971), 22 D.L.R. (3d) 120* (Sask. C.A.) See also LeBlanc v. City of Transcona, *[1974] S.C.R. 1261*, per Spence J. at p. 1268. It cannot be asserted for a certainty that the province would feel compelled by such a finding to change the offending legislative provisions. The effect on provincial action of a declaration that the

federal payments are illegal and even an injunction to stop them is also necessarily a matter of speculation. For a somewhat analogous relationship between the prejudice suffered and the action attacked that was held to be too speculative for standing see Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). Although I have experienced some difficulty on this question, I am on balance of the view that the relationship between the prejudice allegedly caused to the respondent by the provincial non-compliance with the conditions and undertakings imposed by the Plan and the alleged illegality of the federal payments [page624] is too indirect, remote or speculative to be a sufficient causative relationship for standing under the general rule. The respondent must therefore in my opinion rely for standing on what is essentially a public interest in the legality of the federal cost-sharing payments, albeit that of a particular class of the public defined by the Plan as persons in need. It is accordingly necessary to consider whether the respondent should be recognized as having standing, as a matter of judicial discretion, by application of the principle or approach reflected in the decisions of this Court in Thorson, McNeil and Borowski.

IV

23 Opinion has differed as to the scope and implications of what was held by this Court in Thorson, McNeil and Borowski. The two questions that are particularly relevant to the issue of standing in this appeal may be summarized as follows: (a) Does the approach to public interest standing in those cases apply to a non-constitutional challenge to the statutory authority for administrative action; and (b) As a result of what was said in those cases about MacIlreith v. Hart *(1908), 39 S.C.R. 657*, in which this Court affirmed the standing of a municipal ratepayer to challenge the legality of municipal expenditure, does the principle of that case apply by analogy to a challenge to the legality of federal public expenditure?

24 In the Federal Court of Appeal, Thurlow C.J. appears to have relied particularly on MacIlreith v. Hart and generally on the approach reflected in Thorson, McNeil and Borowski for his conclusion that the respondent should be recognized as having standing, as a matter of judicial discretion. In one passage of his reasons, which I quote below, there is possibly a suggestion that he may have considered the respondent to have a sufficient personal interest in the legality of the federal payments for standing, but I read his reasons as a whole as basing standing in this case on what is essentially a public interest. In his analysis of the issue of reasonable cause of action, which he undertook [page625] first and which perhaps unavoidably overlapped with his discussion of standing, he referred to the present case as one falling directly within the class of MacIlreith v. Hart. He was referring there to the distinction noted by Laskin C.J. in his dissenting judgment in Borowski, which I also quote below, between an issue of the legality of federal or provincial public expenditure arising incidentally to an issue of the constitutionality of legislation and such an issue arising "per se". After saying at p. 525 that MacIlreith v. Hart varied from the present case "only in that it is a federal expenditure which is alleged to be illegal and in that the appellant does not assert standing as a taxpayer", Thurlow C.J. made the following statements at p. 526, which although made with reference to the issue of reasonable cause of action, suggest, I think, the nature of the interest which he considered sufficient for standing in this case: "Once it is accepted for the purposes of this appeal that the allegations of the statement of claim are true, and it is not inconceivable that they may be true, one may at once wonder how the citizenry can put a stop to such illegal action otherwise than by the declaration of a court of competent jurisdiction"; and "What is at stake is the right of the citizens of Canada to have the Consolidated Revenue Fund of Canada applied in accordance with the law." Referring explicitly to the issue of standing in the light of the judgments of this Court in Thorson, McNeil and Borowski, Thurlow C.J. expressed his conclusion in the following passages of his reasons for judgment at

TAB 89

Alberta Land Stewardship Amendment Act, 2011, SA 2011, c 9

ALBERTA LAND STEWARDSHIP AMENDMENT ACT, 2011

Chapter 9

(Assented to May 13, 2011)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Amends SA 2009 cA-26.8

…

5 Section 5 is repealed and the following is substituted:

Consultation required

5 Before a regional plan is made or amended, the Stewardship Minister must

(a) ensure that appropriate public consultation with respect to the proposed regional plan or amendment has been carried out, and present a report of the findings of such consultation to the Executive Council, and

(b) lay before the Legislative Assembly the proposed regional plan or amendment.

10 Section 13 is amended by adding the following after subsection (2):

(2.1) Notwithstanding subsection (2), a regional plan may provide rules of application and interpretation, including specifying which parts of the regional plan are enforceable as law and which parts of the regional plan are statements of public policy or a direction of the Government that is not intended to have binding legal effect.

TAB 90

Alberta Land Stewardship Act, SA 2009, c A-26.8

ALBERTA LAND STEWARDSHIP ACT

Chapter A-26.8

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Purposes of Act

1 The purposes of this Act are

(a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;

(b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;

(c) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.

Part 1
Regional Plans

Division 1
Making, Amending and Reviewing Regional Plans

How regional plans are made and amended

4(1) The Lieutenant Governor in Council may make or amend regional plans for planning regions.

(2) The Lieutenant Governor in Council may make regulations

(a) classifying amendments to regional plans;

(b) prescribing the process, procedure or criteria, if any, for all or any class of amendments to regional plans;

(c) respecting the notice or consultation, or both, required for amendments to regional plans or for a class of amendment;

(d) respecting the conditions or criteria to be met in applying for an amendment to a regional plan, who may apply for an amendment to a regional plan and to whom the application must be made, and the procedure for verifying that any conditions or criteria have been met;

(e) respecting the role and function of the secretariat, government departments and other persons in reviewing, preparing or developing amendments to regional plans for consideration by the Lieutenant Governor in Council;

(f) appointing or designating a person or entity to perform any function with respect to a proposed amendment to a regional plan and, if required, appointing a person as a commissioner under the *Public Inquiries Act* for the purposes described in the regulation.

(3) A regulation under subsection (2) may be made with respect to all or one or more regional plans.

(4) If a regulation is made under subsection (2) about how a regional plan is to be amended, an amendment to the regional plan may be made by the Lieutenant Governor in Council only in accordance with the regulation.

Lieutenant Governor in Council not constrained

5(1) A regional plan may be made or amended whether or not

(a) a regional advisory council has been appointed for a planning region to which a regional plan or an amendment to a regional plan applies;

(b) a regional advisory council or other person has provided advice about a proposed regional plan or an amendment to a regional plan and irrespective of the advice given and irrespective of whether or not the advice was considered or followed;

(c) the secretariat has provided advice with respect to a regional plan or an amendment to a regional plan and irrespective of the advice given and irrespective of whether or not the advice was considered or followed.

(2) The Lieutenant Governor in Council may repeal a regional plan.

Part 2
Nature and Effect of Regional Plans and Compliance Declarations

Division 1
Nature and Effect of Regional Plans

Legal nature of regional plans

13(1) A regional plan is an expression of the public policy of the Government and therefore the Lieutenant Governor in Council has exclusive and final jurisdiction over its contents.

(2) Regional plans are legislative instruments and, for the purposes of any other enactment, are considered to be regulations.

(3) The meaning of a regional plan is to be ascertained from its text, in light of the objectives of the regional plan, and in the context in which the provision to be interpreted or applied appears.

(4) A regional plan and every amendment to a regional plan must

(a) be published in Part I of The Alberta Gazette, and

(b) be made publicly available by the secretariat in accordance with section 59(c).

(5) A regional plan and every amendment to a regional plan comes into effect when it is published in Part I of The Alberta Gazette or on any later date specified in the regional plan or amendment.