LIST OF AUTHORITIES

1. *Oil and Gas Conservation Act,* R.S.A. 2000, c. O-6, section 94.
2. *Energy Resources Conservation Act,* R.S.A. 2000, c. E-10, section 16.
3. Macaulay & Sprague, *Hearings Before Administrative Tribunals,* 2nd ed. (Toronto, Carswell, 2002), page 17-2.7.
4. Sara Blake, *Administrative Law in Canada,* 4th ed., (Markham: LexisNexis Canada Inc., 2006), pages 29, 30, 41, 23 and 96.
5. *Quebec (Sa Majeste du Chef) v. Ontario (Securities Commission),* [1992] O.J. No. 2232, 10 O.R. (3d) 577 at 592 (C.A.), leave to appeal to S.C.C. refused [1992] S.C.C.A. No. 580.
6. Williams and Meyers, *Oil and Gas Law,* Release 40, December 2005, Pub. 820, paragraph 203.1, pages 33-35.
7. Tom F. Mayson, *the Use of Extrinsic Evidence In The Interpretation of written Agreements in Alberta*, Alberta Law Review Vol. 42. No. 2 (October 2004), page 499, at 503.
8. *Canadian National Railway v. Volker Stevin Contracting Ltd.* (1991), 1 Alta. L.R. (3d) 167 at 170 (Alta. C.A.).
9. EUB Decision 2002-037, *ATCO Gas Pipelines Ltd. Disposition of Calgary Stores Block and Distribution of Net Proceeds, Part 2* (March 21, 2002), pages 3-5.
10. David J. Mullan, *Administrative Law,* (Toronto: Irwin Law, 2000), pages 115 and 280.
11. *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, 226 D.L.R. (4th) 193, pages 253-255.

REPRODUCED ELSEWHERE

1. Transcript From Review and Variance Proceedings - Review Applications by EnCana Corporation and Luscar Ltd. Re: Devon Canada Corporation, Fairborne Energy Ltd. and Bearspaw Petroleum (January 31, 2006), page 46, lines 3-13.

2. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 54 Alta. L.R. (4th) 1 at 28, paragraph 51 (SCC).

3. *Anderson v. Amoco Canada Oil and Gas,* (Fruman J) 63 Alta L.R. (3rd) 1 (Alta. Q.B.); 214 D.L.R. (4th) 272 (Alta. C.A.); 241 D.L.R. (4th) 193 (SCC).

4. *Little v. Western Transfer and Storage Limited and Edmonton Collieries Limited,* [1922] 3 W.W.R. 356 (Alta. S.C.A.D.).

5. *Amoco Prod. Co. v. Southern Ute Tribe,* 144 L. Ed 2d 22 (US Supreme Court).

6. *Continental Resources of Illinois Inc. v. Illinois Methane LLC,* 87 N.E. 2d 897 (Ill. App. 5 Dist. 2006).

7. *Borys v. Canadian Pacific Railway,* [1953] A.C. 217 (P.C.).

8. *Alberta Energy Co. v. Goodwell Petroleum Ltd.* (2003), 339 A.R. 201 (Alta. C.A.).

TAB 1

Province of Alberta

OIL AND GAS CONSERVATION ACT

Revised Statutes of Alberta 2000
Chapter O-6

Current as of May 24, 2006

Office Consolidation

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that the amendments have been embodied for convenience of reference only, and that the original Acts should be consulted for all purposes of interpreting and applying the law.

Amendments not in Force

This consolidation incorporates only those amendments in force on the consolidation date shown on the cover. It does not include the following amendments:

RSA 2000 c24 (Supp) s2 amends s78, s3 amends s84, s4 amends ss84.1 to 84.9.

Regulations

The following is a list of the regulations made under the *Oil and Gas Conservation Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Oil and Gas Conservation Act		
(The following list does not include certain special or particular orders made under the Oil and Gas Conservation Act which are exempted from filing under Regulations Act: see AR 288/99.)		
Oil and Gas Conservation	151/71	*241/71, 69/72, 140/72, 233/72, 93/73, 103/73, 51/74, 71/74, 80/74, 144/74, 264/74, 341/74, 41/75, 2/76, 179/76, 202/76, 15/77, 104/77, 250/77, 178/78, 295/78, 428/78, 469/78, 229/79, 326/79, 2/80, 79/80, 51/81, 205/81, 89/82, 206/82, 267/82, 286/82, 337/82,*

		433/82, 460/82, 221/83, 336/83, 364/83, 399/83, 416/83, 15/84, 112/84, 264/84, 189/85, 265/85, 27/86, 234/86, 302/86, 283/87, 350/87, 485/87, 70/88, 188/88, 217/88, 360/88, 70/89, 153/89, 19/90, 146/90, 169/90, 321/90, 40/91, 79/91, 267/91, 374/91, 199/92, 332/92, 371/92, 9/93, 168/93, 186/93, 225/93, 226/93, 117/94, 237/94, 156/95, 105/96, 144/96, 222/97 10/98, 11/98, 12/98, 13/98, 14/98, 25/98, 67/98, 78/98, 128/98, 143/98, 179/98, 224/98, 229/98, 47/99, 131/99, 151/99, 82/2000, 99/2000, 102/2001, 182/2001, 206/2001, 36/2002, 83/2002, 136/2002, 194/2002, 226/2002, 32/2003, 190/2003, 215/2003, 222/2003, 256/2003, 390/2003, 119/2004, 202/2004, 17/2005, 122/2005, 184/2005, 185/2005, 189/2005, 40/2006, 142/2006, 153/2006
Orphan Fund Delegated Administration	45/2001	*238/2001, 251/2001, 67/2006*
Section 43 Exemption	220/74	*248/74, 240/75, 314/76, 367/90, 279/91, 251/2001*

Jurisdiction of Board

94 Except where otherwise provided, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act.

RSA 1980 cO-5 s86

TAB 2

Province of Alberta

ENERGY RESOURCES CONSERVATION ACT

Revised Statutes of Alberta 2000
Chapter E-10

Effective January 1, 2002

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Powers of Board

16 The Board, in the performance of the duties and functions imposed on it by this Act and by any other Act, may do all things that are necessary for or incidental to the performance of any of those duties or functions.

RSA 1980 cE-11 s15

TAB 3

BORDEN LADNER GERVAIS
CALGARY

HEARINGS

BEFORE

ADMINISTRATIVE TRIBUNALS

SECOND EDITION

by
ROBERT W. MACAULAY, Q.C.
and
JAMES L.H. SPRAGUE, B.A., LL.B.

CARSWELL
A THOMSON COMPANY

Rules of evidence are geared to establishing sound factual underpinnings which do not create greater social harm in establishing those underpinnings than the social good those factual underpinnings are capable of producing.

17.1(d) What are the Underlying Concerns of the Rules of Evidence?

Underlying the rules of evidence are three basic purposes. And these should also be the heart of an agency's evidentiary concerns. The rules of evidence exist to:

i. establish a sound factual basis for decisions;
ii. ensure a proper balance between the harm in accepting evidence and the value in doing so; and
iii. maintain a fair and effective process.

I suggest that these concerns should also serve as an agency's guide. Whenever there is no statutory restriction on the admission of evidence and the agency is called upon to decide whether something should or should not be admitted in the proceeding before it, it should ask itself the following questions:

1. Is this evidence capable, if believed, of creating a factual basis for the decision in question, and if so, how far can it logically be taken to do so?
2. If it is capable of supporting the necessary factual base, is there some other reason why it should it be rejected? Will its receipt lead to some greater social harm than the good likely to be accomplished by accepting it?
3. Assuming that the evidence meets the first two concerns, is there anything about the way the evidence is coming which threatens the fairness or the smooth operation of your hearing? And if so, is this threat of sufficient importance, in light of your mandate, to warrant its exclusion?

It is my contention that agencies should not focus their energies on the technical rules of evidence but instead focus on the three concerns noted above. As stated by the Ontario Divisional Court in *Fetherston v. College of Veterinarians (Ont.)*[8.1] it is not the technical recitation of the rules which makes or unmakes a decision. It is what was actually done and why:

> The question . . . is not whether the lay tribunal recited legal principles in the same way as a court or a tribunal of lawyers. The question is whether the decision of the tribunal, in light of the evidence and the reasons taken together, discloses reviewable error.

Therefore, let us now consider the operation of the three concerns noted above.

8.1 (1999), 117 O.A.C. 334 (Div. Ct.).

TAB 4

ADMINISTRATIVE LAW IN CANADA

FOURTH EDITION

Sara Blake

LexisNexis®
Butterworths

May one tribunal intervene in proceedings before another tribunal? If the intervening tribunal has express or implied statutory authority to intervene in the proceedings of another tribunal, it may do so. The latter tribunal may permit such intervention, in accordance with the criteria applied to private intervenors.[158] A city wishing to intervene in proceedings before a tribunal should pass a resolution authorizing the intervention and should ensure that its governing statute grants authority to pass such a resolution.[159]

Questions of standing should be decided at the outset prior to the commencement of the hearing on the merits.[160] A hearing cannot proceed fairly while a person's right to participate remains uncertain. Persons requesting to participate in a proceeding should describe their interest and state the purpose of their intervention to the tribunal with sufficient particularity so as to enable other parties to make representations, and to enable the tribunal to decide whether to grant status and to define the scope of participation. They may be expected to prove their interest with evidence.[161] One cannot expect to be granted status on a vague request to intervene and on an assurance that one's position will be fully disclosed at the hearing.[162]

2.11 NOTICE

1. Purpose

Except in cases involving emergency, advance notice that a decision may be made must be given to all parties who may be affected by a decision. Failure to give notice will likely be fatal to any decision. The purpose of notice is to alert persons whose interests may be affected by the decision so that they may take steps to protect those interests.[163] It serves the function of informing affected persons, as well as the decision maker, of the matters in issue and the proposed action to be taken.[164] Fairness requires that the hearing and decision be restricted to the matters set out in

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[158] *Newfoundland Telephone Co. v. TAS Communications Systems Ltd.*, [1987] S.C.J. No. 79, 45 D.L.R. (4th) 570.

[159] *Rowand v. Edmonton (City)*, [1983] A.J. No. 843, 48 A.R. 271 (C.A.).

[160] *Court v. Alberta (Environmental Appeal Board)*, [2003] A.J. No. 662, 333 A.R. 308 (Q.B.).

[161] *Court v. Alberta*, *ibid.*

[162] *Allied Auto Parts Ltd. v. Canada (Transport Commission)* (1982), 142 D.L.R. (3d) 392 (F.C.A.).

[163] *Sinkovich v. Strathroy (Town) Commissioners of Police*, [1988] O.J. No. 1212, 65 O.R. (2d) 292 (Div. Ct.), leave to appeal to C.A. refused (1988), 33 Admin. L.R. xliv (C.A.); *Collins v. Ontario (Pension Commission)*, [1986] O.J. No. 769, 56 O.R. (2d) 274 (Div. Ct.).

[164] *Kenney v. College of Physicians & Surgeons*, [1991] N.B.J. No. 915, 85 D.L.R. (4th) 637 (C.A.).

the notice.[165] If other matters are to be considered, the notice should be amended and an adjournment may be required.

It may not be sufficient to invite persons for informal discussions about their affairs without advising them that the result of these discussions may be a decision adverse to their interests.[166] A tribunal should not assume, simply because it has been having discussions with a party about a matter, that the party knows a decision will be made.[167] It should still tell the party that it intends to make a decision determining the matter. However, if the explicit purpose of the discussions was to provide an opportunity to have input into the decision, a decision may be made without further notice.[168] It may not be sufficient to summon a person to a meeting without informing them of the purpose of the meeting.[169] A subpoena requiring a person to attend a proceeding as a witness is not notice that a decision affecting that person's interests may be made.[170]

Notice given to a community of a pending decision that may affect property rights must describe the geographical area to be affected so that property owners may ascertain whether their property is within it.[171]

A notice of an oral hearing must state the time and place so that recipients may attend if they wish. Parties must also be notified of any change in the time or place for the hearing.[172]

The Alberta *APA* requires that all parties be given "adequate" notice.[173] The Ontario *SPPA* and Québec *AJA* require that the parties to any proceeding be given "reasonable notice".[174] What is "adequate" or "reasonable" depends

165 *Entrop v. Imperial Oil Ltd.*, [2000] O.J. No. 2689, 189 D.L.R. (4th) 14 (C.A.).

166 *Baiton Enterprises Ltd. v. Saskatchewan (Liquor Licensing Commission)*, [1984] S.J. No. 871, [1985] 1 W.W.R. 186 (Q.B.); *Weston v. Chiropody (Podiatry) Review Committee* (1980), 112 D.L.R. (3d) 343 (Ont. C.A.); *Wagner v. College of Physicians & Surgeons*, [1984] S.J. No. 391, 33 Sask. R. 127 (Q.B.).

167 *Homex Realty & Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011, 116 D.L.R. (3d) 1 at 12, 26.

168 *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] B.C.J. No. 1880, 178 D.L.R. (4th) 666 at 698-700 (C.A.).

169 *Murphy v. Newhook*, [1984] N.J. No. 152, 50 Nfld. & P.E.I.R. 307 (S.C.T.D.).

170 *Elson v. St. John's (City) Residential Tenancies Board*, [1980] N.J. No. 87, 33 Nfld. & P.E.I.R. 373 at 380 (Dist. Ct.); *Honkoop v. Summerside Raceway Presiding Judge*, [1984] P.E.I.J. No. 50, 50 Nfld. & P.E.I.R. 181 at 184 (S.C.).

171 *Central Ontario Coalition Concerning Hydro Transmission Systems v. Ontario Hydro* (1984), 46 O.R. (2d) 715 (Div. Ct.); *Ontario (Joint Board under the Consolidated Hearings Act) v. Ontario Hydro* (1985), 51 O.R. (2d) 82 (C.A.); *Basic Management Ltd. v. Saskatoon (City)*, [1983] S.J. No. 196, 25 Sask. R. 255 (Q.B.).

172 *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] S.C.J. No. 54, [1987] 2 S.C.R. 219; *De Wolfe v. Canada (Correctional Service)*, [2003] F.C.J. No. 1475, 8 Admin. L.R. (4th) 136.

173 *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, s. 3.

174 Ontario *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 6(1); Québec *Administrative Justice Act*, R.S.Q. c. J-3, s. 129.

hearing can be cured by full disclosure of the evidence to be filed at the hearing.[252] The tribunal is not restricted to considering only the facts alleged in the notice of hearing, but should make its decision in light of all of the facts adduced at the hearing. The notice is merely an outline of the alleged facts.[253]

The tribunal should advise the party of the types of disciplinary orders being contemplated and give an opportunity to make representations as to the appropriate order and extenuating circumstances.[254] In contrast, there may be no duty to forewarn an applicant for a licence of the conditions that may be attached to the licence if granted.[255]

The highest level of disclosure requires that a party be informed of any information that is relevant and prejudicial to the party's interests.[256] Any information that might work to the prejudice of a party should be disclosed. Actual prejudice need not be established. If there is a reasonable likelihood of prejudice, the information must be disclosed.[257] While failure to disclose prejudicial information may be fatal to a decision,[258] failure to disclose non-prejudicial information may not.[259] In some cases, exculpatory information should also be disclosed.[260]

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252 *S. (A.B.) v. Manitoba (Director of Child & Family Services)*, [1995] M.J. No. 52, 122 D.L.R. (4th) 693 (C.A.).

253 *Québec (Sa Majesté du Chef) v. Ontario (Securities Commission)*, [1992] O.J. No. 2232, 10 O.R. (3d) 577 at 592 (C.A.), leave to appeal to S.C.C. refused [1992] S.C.C.A. No. 580.

254 *Cymbalisty v. Chiropractors' Assn.*, [1985] S.J. No. 222, 39 Sask. R. 103 at 107 (Q.B.).

255 *CTV Television Network Ltd. v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1982] 1 S.C.R. 530, 134 D.L.R. (3d) 193 at 205.

256 *Downing v. Graydon* (1978), 92 D.L.R. (3d) 355 at 370, 374 (Ont. C.A.); *United Assn. of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 488 v. Alberta (Industrial Relations Board)*, [1976] A.J. No. 355, 69 D.L.R. (3d) 74 at 89 (C.A.).

257 *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 at 1116.

258 In *Kane v. University of British Columbia*, *ibid.*, the fact that the non-disclosure gave rise to a reasonable likelihood of prejudice proved fatal to the decision. However, the Alberta Court of Appeal has said that the party must satisfy a reviewing court that it could have answered or blunted prejudicial statements for the court to set aside the tribunal's decision for non-disclosure: *United Assn. of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 488 v. Alberta (Industrial Relations Board)*, *supra*, note 256 at 90-93.

259 *Cardinal Insurance Co. (Re)*, [1982] F.C.J. No. 516, 44 N.R. 428 at 445-46 (C.A.), leave to appeal to S.C.C. refused (1982), 45 N.R. 534*n* (S.C.C.); *Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc.*, [1991] F.C.J. No. 502, 81 D.L.R. (4th) 376 (C.A.).

260 *Mason v. British Columbia (Securities Commission)*, [2003] B.C.J. No. 1438, 184 B.C.A.C. 111; *Stevens v. Canada (Restrictive Trade Practices Commission)* (1979), 98 D.L.R. (3d) 662 at 664 (F.C.T.D.).

5. The Procedure Chosen by the Tribunal

Tribunals are given latitude in setting their own procedure.[124] The courts are careful not to place decision makers in a procedural strait-jacket.[125] As long as the procedure adopted by a tribunal treats those who come before it fairly, no court will intervene.[126]

Tribunals that process a high volume of cases may have screening procedures and production targets. Efficient processing, by itself, is not procedurally unfair. There is a public interest in containing administrative costs and in expeditious decision making.[127] A tribunal may deal with many similar cases by first adjudicating a "test case" and then applying in subsequent cases the same analytical approach and findings of general facts, subject to a right of the parties in the subsequent cases to dispute the analysis and findings and provided that the analysis and findings are not binding on a panel assigned to hear subsequent cases.[128]

2.6 WERE PROCEDURAL DEFICIENCIES REMEDIED LATER IN THE PROCEEDING?

To determine whether fair procedure has been followed, one must examine the entire proceeding. Although procedural irregularities at one stage may appear to have prejudiced a party's rights, they may diminish in significance if the party has been accorded a full and fair hearing at a later stage in the proceeding. A tribunal may cure its procedural defaults. In the end, the party may be seen not to have suffered any prejudice.

In considering whether a procedural defect has been cured, a number of factors should be considered: the nature of the dispute before the tribunal, the nature and gravity of the procedural defect, the likelihood that the prejudicial effect of that failure may permeate any re-hearing, review or appeal process, the procedural nature of the review, re-hearing or appeal and the significance of the decision to the aggrieved party.[129]

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124 *Baker v. Canada (Minister of Citizenship & Immigration)*, *supra*, note 93 at 213.

125 *Downing v. Graydon* (1978), 92 D.L.R. (3d) 355 at 373 (Ont. C.A.).

126 *Prassad v. Canada (Minister of Employment & Immigration)*, [1989] S.C.J. No. 25, 57 D.L.R. (4th) 663 at 679-80.

127 *Khan v. Canada (Minister of Citizenship & Immigration)*, [2001] F.C.J. No. 1699, 208 D.L.R. (4th) 265 at 274-75 (C.A.); *Irripugge v. Canada (Minister of Citizenship & Immigration)*, [2000] F.C.J. No. 29, 182 F.T.R. 47 (T.D.).

128 *Geza v. Canada (Minister of Citizenship & Immigration)*, [2004] F.C.J. No. 1401, 244 D.L.R. (4th) 218.

129 *International Union of Operating Engineers, Local 882 v. Burnaby Hospital Society*, [1997] B.C.J. No. 2775, 6 Admin. L.R. (3d) 191 (C.A.).

to achieve a purpose not contemplated by the Act.[4] This use is labelled as an "improper purpose".

Discretionary decisions should be based primarily upon a weighing of factors pertinent to the policy and objects of the statute.[5] "A public authority in the exercise of its statutory powers may not act on extraneous, irrelevant and collateral considerations."[6] Nor may the public authority ignore relevant considerations. It should consider all factors relevant to the proper fulfillment of its statutory decision-making duties.[7]

Some tribunals have power to make an order where it is the tribunal's opinion that to do so would be in "the public interest". This is not an unfettered power. The decision must be based on facts proven in evidence and must serve the purposes of the statute granting the power.[8]

Some statutes grant broad authority to manage all aspects of a particular field of activity, conferring the widest possible authority to manoeuvre. Only actions that are clearly beyond the broad purposes of the statute may be questioned.[9]

2. Bad Faith

All decision makers are expected to act in good faith. Powers must not be abused and should not be exercised arbitrarily or dishonestly. The leading case on abuse of power is *Roncarelli v. Duplessis*.[10] In that case, a restaurant owner's liquor licence was revoked because he had posted bail for many Jehovah's Witnesses who were being prosecuted under municipal by-laws for distributing their publications without a peddlar's licence. These reasons

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4 *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)*, *supra*, note 1; *Fisheries Assn. of Newfoundland and Labrador Ltd. v. Newfoundland (Minister of Fisheries, Food & Agriculture)*, [1996] N.J. No. 286, 142 D.L.R. (4th) 732 (C.A.).

5 *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140.

6 *Bareham v. London (Board of Education)* (1984), 46 O.R. (2d) 705 at 713 (C.A.).

7 *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, 226 D.L.R. (4th) 193 at 253-55; *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, *supra*, note 2 at 332.

8 *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] S.C.J. No. 38, 199 D.L.R. (4th) 577; *Lindsay v. Manitoba (Motor Transport Board)*, [1989] M.J. No. 432, 62 D.L.R. (4th) 615 at 628 (C.A.), leave to appeal to S.C.C. refused (1990), 39 Admin. L.R. xxxviii (S.C.C.); *Vallières v. Courtiers J.D. & Associés Ltée*, [1998] A.Q. no 3072, 9 Admin. L.R. (3d) 26.

9 *Carpenter Fishing Corp. v. Canada*, [1997] F.C.J. No. 1811, 155 D.L.R. (4th) 572 (C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 349; *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] F.C.J. No. 1, [1994] 2 F.C. 247 (C.A.), leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 99.

10 *Supra*, note 5.

TAB 5

Sa Majesté du Chef du Québec v. Ontario Securities Commission, Committee for the Equal Treatment of Asbestos Minority Shareholders and Société Nationale de l'Amiante

[Indexed as: Québec (Sa Majesté du Chef) v. Ontario Securities Commission]

Court of Appeal for Ontario, Lacourcière, Krever and McKinlay JJ.A.
October 26, 1992

Constitutional law — Validity of legislation — Securities legislation — Extra-territoriality — Ontario Securities Commission to hold hearing about share purchase transaction by which Quebec Government implemented its public policy over asbestos industry in Quebec — Principles of territorial limit on province's legislative authority not violated.

Crown — Immunity — Statute — Securities Act — Ontario Securities Commission to hold hearing about share purchase transaction by which Quebec Government implemented its public policy over asbestos industry in Quebec — Crown not bound by necessary implication — Crown bound by benefit/burden exception to Crown immunity.

Securities legislation — Take-over bid — Follow-up offer provisions — Ontario Securities Commission to hold hearing about share purchase transaction by which Quebec government implemented its public policy over asbestos industry in Quebec — Securities Act, R.S.O. 1980, c. 466, ss. 34, 71, 72, 88(1)(k), 91(1), 92, 122(1).

Statutes — Crown — Interpretation — Crown immunity — Ontario Securities Commission to hold hearing about share purchase transaction by which Quebec Government implemented its public policy over asbestos industry in Quebec — Crown not bound by necessary implication — Crown bound by benefit/burden exception to Crown immunity — Interpretation Act, R.S.O. 1980, c. 219, s. 11.

In August 1988, the Ontario Securities Commission (OSC) decided that it had jurisdiction to adjudicate about a transaction by which the Quebec Government had implemented its public policy over the asbestos industry in Quebec. On a combined appeal and judicial review application, the Divisional Court upheld the OSC's decision. The Quebec Government appealed.

By its August 1988 decision, the OSC had decided it could review the transaction by which Société Nationale de l'Amiante (SNA), a Quebec Crown corporation, had purchased from General Dynamics Corporation in two stages, the first stage in 1981 and the second in 1986, the shares of its subsidiary, General Dynamics (Canada) Ltd., which subsidiary owned a control block of 54.64% of the shares of Asbestos Corporation Ltd. (ACL), a public company whose shares were traded on the Montreal and Toronto stock exchanges. In the transaction, SNA had paid the equivalent of $80 per ACL share, whose average trade price was $5.55 in December 1986. OSC staff asserted that SNA should offer to purchase the 500,000 ACL shares held by minority shareholders residing in Ontario and elsewhere. The issues for the OSC, which were set out in a notice of hearing dated April 13, 1988, were: whether SNA had failed to comply with the follow-up offer provisions of s. 91(1) of the *Securities Act*; whether the OSC ought to apply under s. 122(1) of the Act to the court for an order that SNA comply with the follow-up offer provisions;

and, whether the OSC ought to order that the exemptions in ss. 34, 71, 72 and 92 of the Act not apply to SNA nor to the Quebec Government.

On its appeal, the Quebec Government challenged the OSC's jurisdiction over the transaction because: (1) the application of Ontario law would be unconstitutional on grounds of extra-territoriality; (2) as a matter of construction, the *Securities Act* did not apply; and (3) the Quebec Government had Crown immunity.

Held, the appeal should be dismissed with costs.

The principle of provincial extra-territorial incompetence that would strike down provincial legislation is limited to situations where the pith and substance of the challenged legislation is in relation to extra-provincial rights; where the pith and substance of the legislation is within the province's competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Here, the legislation was within provincial competence as concerning property and civil rights in the province, and it was not a colourable attempt to conceal an unconstitutional objective. Even applying the appellant's untested thesis that the issue of extra-territorial jurisdiction should be resolved using criteria that fairly and reasonably would compare the connection of the provinces to the parties and the subject matter in issue and would consider the needs of a federated system to advance interprovincial harmony, this thesis did not justify ruling the Ontario law unconstitutional. It could hardly be considered fair and reasonable to suggest that only Ontario residents are subject to Ontario regulatory rules when operating in Ontario capital markets. There was no way that the courts could assist in advancing interprovincial harmony in a situation such as this, since there was no objective way of choosing which provincial government's interest was more compelling.

Churchill Falls (Labrador) Corp. v. Newfoundland (A.G.), [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1, 47 Nfld. & P.E.I.R. 125, 139 A.P.R. 125, 53 N.R. 268, *sub nom. Re Upper Churchill Water Rights Reversion Act, 1980*, **apld**

The appellant advanced two arguments based on the construction of the *Securities Act*; both arguments failed. The premises of the first argument were that the facts did not constitute a "take-over bid" as defined by s. 88(1)(*k*) of the Act and a take-over bid was a pre-condition to the follow-up offer provisions of the Act. However, the OSC was the appropriate forum initially to interpret the Act, and it was premature to interpret the application of the Act without a full hearing of the facts. The premises of the second argument were that s. 124 of the Act, which permits the withdrawal of exemptions in the public interest, required the conduct justifying the withdrawal to have a sufficient Ontario connection. But the public interest referred to in s. 124 should be interpreted as being not only the interest of residents of Ontario, but the interests of all those, including other governments, making use of Ontario capital markets.

The argument based on Crown immunity failed. Although in 1982, there was no express provision in the *Securities Act* binding the Crown and s. 11 of the *Interpretation Act* provides that no Act affects the Crown unless expressly stated, there is the necessary implication exception that legislation will bind the Crown by necessary implication and the benefit/burden exception based on the idea that if the Crown takes the benefit of a statute it must assume the attendant burden. Here, there was not a case for the necessary implication exception but the benefit/burden exception applied.

Sparling v. Caisse du dépôt & placement du Québec, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63, 41 B.L.R. 1, 20 Q.A.C. 174, 89 N.R. 120, *sub nom. Sparling v. Québec*, **apld**

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Other cases referred to

Caisse de dépôt & placement du Québec v. Ontario (Securities Commission) (1983), 42 O.R. (2d) 561, 149 D.L.R. (3d) 456, 23 B.L.R. 92 (Div. Ct.); *Interprovincial Co-operatives Ltd. v. R.*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321, [1975] 5 W.W.R. 382, 4 N.R. 321; *R. v. Royal Bank of Canada*, [1913] A.C. 283, 9 D.L.R. 337, 3 W.W.R. 994 (P.C.)

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Statutes referred to

Constitution Act, 1867, s. 92

Interpretation Act, R.S.O. 1980, c. 219, s. 11 (now R.S.O. 1990, c. I.11)

Securities Act, R.S.O. 1980, c. 466, ss. 34 [am. 1987, c. 7, s. 5], 71 [am. 1986, c. 64, s. 63; 1987, c. 7, s. 6], 72, Part XIX (ss. 88-100 [re-enacted 1987, c. 7, s. 8]), ss. 88(1)(*k*), 91(1), 92, 122(1), 124(1), 125 (now R.S.O. 1990, c. S.5, ss. 35, 72, 73, Part XX (ss. 89-105), 126(1), 128(1), 129)

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Authorities referred to

Castel, J.-G., *Canadian Conflict of Laws* (Toronto: Butterworths & Co. (Canada) Ltd., 1975), p. 200

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Reese, "Limitations on the Extraterritorial Application of Law" (1978), 4 *Dalhousie L.J.* 589

Swan, J., "The Canadian Constitution, Federalism and The Conflict of Laws" (1985), 63 *Can. Bar Rev.* 271

APPEAL from an order of the Divisional Court dismissing an appeal and a judicial review application about the jurisdiction of the Ontario Securities Commission.

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Sheila R. Block and *James C. Tory*, for Sa Majesté du Chef du Québec, applicant/appellant.

D.J.M. Brown, Q.C., for Société Nationale de l'Amiante, respondent.

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W. Ian Binnie, Q.C., and *Sheena MacAskill*, for Ontario Securities Commission, respondent.

B.H. Bresner, for Committee for the Equal Treatment of Asbestos Minority Shareholders, respondent.

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The judgment of the court was delivered by

MCKINLAY J.A.:—This is an appeal by Sa Majesté du Chef du Québec (the "Quebec Government") from the order of the Divisional Court made on January 8, 1991 dismissing an appeal and a concurrent application for judicial review by the Quebec Government of a decision of the Ontario Securities Commission (the "OSC") dated August 15, 1988. In that decision, the OSC held that it had jurisdiction to adjudicate on the matters raised in the notice of hearing dated April 13, 1988. The notice concerned

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transactions by which the Quebec Government implemented its public policy for the Quebec asbestos industry and for economic development in Quebec's asbestos-producing regions. a

FACTS

The background facts and the notice of hearing are set out in the reasons of the majority of the OSC, and are quoted below:

> In the mid-1970s more than one-fourth of the world's production of asbestos, a non-metallic mineral with many industrial applications, was mined in Canada and over four-fifths of Canada's production came from Quebec; however, almost all of Quebec's production was shipped out of that province for processing elsewhere. Determined to expand Quebec's manufacturing sectors and in furtherance of that industrial development strategy to patriate a larger share of the processing of asbestos fibre mined in Quebec, in 1977 the provincial government announced its intention to acquire control of Asbestos Corporation Limited ("ACL"). In that year ACL, with production of 288,500 short tons, was the second-largest producer both in Canada and in Quebec and the only Quebec producer not integrated with a parent company's manufacturing operations. In 1978 Société Nationale de l'Amiante ("SNA") was established as a Crown corporation and in June of 1979 SNA acquired authority to expropriate the assets of ACL. In September of that year SNA offered General Dynamics Corporation ("GD") $42 per share for the control block of stock in ACL and undertook, if successful, to make the same offer to the public shareholders. The offer was rejected. In November of 1981, after protracted negotiations (assisted, perhaps, by its powers of expropriation), SNA purchased a controlling interest in the GD subsidiary that in turn held the ACL control block. In December of 1986, upon GD's exercise of a put option granted to it under the 1981 agreement, SNA bought the rest of the GD subsidiary. No offer has been made to the ACL public shareholders.
>
> ACL was and is a public company whose shares are traded on the Toronto and Montreal stock exchanges. Commission staff say that in all of the circumstances of the case, the ACL public shareholders are entitled to an offer for their shares at a price equivalent to that paid by SNA in the 1986 transaction. That price was the equivalent of $80 per ACL share. The average trading price of ACL shares was $5.55 in the month of December, 1986 and $10.02 in the month of May, 1988. Staff are supported by the Committee for the Equal Treatment of Asbestos Minority Shareholders (the "Shareholders' Committee"), an association representing some scores of ACL minority shareholders resident in Ontario and elsewhere holding in the aggregate approximately 500,000 shares of ACL.

The issues before the OSC are set out in the notice of hearing as reproduced below:

> 1. Whether it appears to the Commission that (SNA) has failed to comply with subsection 91(1) of the *Securities Act* as such subsection read prior to the June 30, 1987 (hereinafter referred to as the "Follow-up Offer Provision");
>
> 2. Whether the Commission should apply under subsection 122(1) of the Act to a judge of the High Court for an order,

a. directing SNA and/or Sa Majesté du Chef du Québec (the "Province of Quebec") to comply with the Follow-up Offer Provision; and

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b. directing the directors and senior officers of SNA to cause SNA to comply with the Follow-up Offer Provision; and

3. Whether it is in the public interest for the Commission to order under subsection 124(1) of the Act, subject to such terms and conditions as it may impose, that any or all of the exemptions contained in sections 34, 71, 72 and 92 of the Act and in the regulations to the Act do not apply to SNA and/or the Province of Quebec and all agents or servants thereof;

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By reason of the following allegations:

1. (ACL) is a reporting issuer within the meaning of the Act and is incorporated under the laws of Canada. Its common shares are listed and posted for trading on the Toronto and Montreal stock exchanges. As at December 31, 1986, there were 2,837,002 common shares of ACL outstanding.

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2. On October 22, 1977, the Province of Quebec announced its intention to take control of ACL as a first step toward establishing provincial control of the Quebec asbestos industry. In furtherance of this objective, the province enacted *An Act Respecting the Société Nationale de l'Amiante*, S.Q. 1978, c. 42 which incorporated SNA as a Crown corporation.

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3. In September, 1979, after lengthy negotiations to acquire the control block of the shares of ACL, the Quebec Minister of Finance indicated that an offer had been made by SNA to purchase the 1,555,010 common shares of ACL (representing 54.64% of ACL's issued common shares) held by General Dynamics (Canada) Limited ("GD Canada"). The offer, made by the Province of Quebec by letter to (GD) of St. Louis, Missouri, U.S.A. was for $42.00 per share of ACL for an aggregate of $65,310,420, and included a promise to pay the minority shareholders of ACL the same price per share as was proposed to be paid to GD. At the time of such offer, GD Canada was a corporation incorporated under the Canada Business Corporations Act, S.C. 1974-75, c. 33, as amended (the "CBCA"), having its registered office in Ontario. GD held all of the 100,000 outstanding common shares of GD Canada. GD Canada's sole assets were its 1,555,010 common shares of ACL and approximately $16,000,000 in cash and short-term investments.

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4. The offer was rejected by GD. Subsequently, the Province of Quebec moved to expropriate the Canadian assets of ACL (Bill 121, Quebec Official Gazette, Part II, August 27, 1979, Vol. 2, No. 24, p. 5127). After challenge by ACL in the courts, the Province of Quebec's right to expropriate such assets was upheld by the Quebec Court of Appeal (*Société Asbestos Ltée c. Société Nationale de l'Amiante*, [1980] C.S. 331; aff'd [1981] C.A. 43). In a letter dated February 27, 1981 from the President of ACL to the shareholders, it was stated that "ACL will continue to take appropriate action to defend all of its shareholders".

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5. Notwithstanding that its power to expropriate had been confirmed, on November 9, 1981, the Province of Quebec announced that it would not be proceeding by expropriation but had reached agreement with GD to acquire, initially, voting control of GD Canada (and through it, voting control of ACL), through a complex transaction. The transaction included provision for the Province of Quebec to ultimately acquire all

equity interests of GD in ACL. Three days later, the Province of Quebec announced that it would not make a similar offer to minority shareholders of ACL at that time and that it was up to GD Canada (now controlled by the Province of Quebec) to evaluate over the years the advantage of eventually increasing its share in ACL. At this time, the price of ACL's shares on The Toronto Stock Exchange (the "TSE") was approximately $37.00 per share.

6. The transaction carried out by the Province of Quebec was structured so that SNA would acquire control of ACL through the acquisition of the new class of voting shares of GD Canada rather than through the direct acquisition of existing shares of GD Canada or of shares of ACL. SNA acquired 21,124 newly created treasury Class "A" common shares of GD Canada, which changed its name to Mines SNA Inc. ("Mines SNA"). This new class of shares was entitled to 5 votes per share in Mines SNA.

7. As a result, for a subscription price of approximately $17,300,000, SNA acquired Class A shares representing after issue approximately 51% of the voting rights but only 17.5% of the equity of Mines SNA. The sole assets of Mines SNA were its control position of ACL, the $17,300,000 of new capital provided by SNA and the approximately $16,000,000 in cash and short-term investments which it had previously held. GD continued to own the 100,000 common shares of Mines SNA, which now give GD only 49% of the voting rights but 82.5% of the equity of Mines SNA.

8. In November, 1981, the Quebec Minister of Finance stated that the minority shareholders of ACL might eventually get an offer from the Province of Quebec. No immediate offer was proposed since the Province of Quebec had not actually acquired any ACL shares at the time. If SNA later forced out GD, obviously the Quebec Government should then "do something with the minority shareholders".

9. On February 12, 1982, the Province of Quebec and SNA signed a formal agreement (the "Agreement") with GD providing for the right of GD to put, between February 12, 1984 and February 11, 1987, and the right of SNA to call, between November 12, 1986, and February 11, 1987, the remaining 100,000 common shares of Mines SNA held by GD, at prices which approximated $42.00 per share of the control block in ACL plus interest from November 12, 1982, compounded at 16% if the put were to be exercised or 17% if the call were to be exercised. The purchase price was to be paid in five year promissory notes of SNA bearing interest at market rates and unconditionally guaranteed by the Province of Quebec. Should neither the put nor the call be exercised, a right of first refusal, each to the other, would continue so long as Mines SNA shares were held. The price of ACL shares on the TSE immediately prior to the signing of the Agreement was approximately $16.00 per share.

10. In March, 1982, the registered office of Mines SNA was moved from Ontario to Quebec.

11. Throughout the intervening period between the date on which the Agreement was signed and the date of the exercise of the put option by GD, various forms of requests were made to SNA and the Province of Quebec for equal treatment for all shareholders of ACL.

12. In the first 5 years under SNA control, over $75 million of working capital of ACL was expended in keeping production workers employed longer in the face of deteriorating asbestos markets than was the case for the rest of the Canadian asbestos industry. Under the price formula in the Agreement, GD was shielded from this working capital drain, whereas the minority shareholders of ACL were not.

13. In November, 1986, a Quebec shareholder of ACL, Mr. Bertrand Fradet, sought leave from the Quebec Superior Court to commence a class action under the CBCA alleging oppression of certain minority shareholders of ACL.

14. After learning of the proposed class action, GD exercised its put option by notice given November 25, 1986. The transaction was completed on December 9, 1986 for an announced aggregate cost to the Province of Quebec for approximately $170 million. SNA thus acquired the remaining shares of Mines SNA and 100% beneficial ownership of the control block of ACL for a net effective price of approximately $80 per share of the ACL control block.

15. On December 3, 1986, the last day on which trades occurred on the TSE prior to completion of the transaction, the common shares of ACL traded at $5 7/8 per share.

16. The deadline for the follow-up offer required by the Follow-up Offer Provision expired June 8, 1987. Prior to the deadline, formal request was made to SNA for it to comply with the Follow-up Offer Provision.

17. The exercise of the put right by GD is for purposes of the Follow-up Offer Provision deemed under subsection 91(2) of the Act (as such subsection read prior to June 30, 1987) to constitute a take-over bid for the securities of ACL held by Mines SNA effected without compliance with section 89 (as such section read prior to June 30, 1987) in reliance on the exemption in clause 8[8](2)(c) (as such clause read prior to June 30, 1987) at a consideration per security equal to the value per security of ACL received directly or indirectly by GD as a consequence of the series of transactions initiated by GD.

18. In any event, the exercise of the put right by GD constituted an offer to purchase indirectly the shares of ACL held by Mines SNA within the meaning of the definition of a "take-over bid" (as such definition read prior to June 30, 1987) which offer to purchase was exempt under clause 88(2)(c) of the Act.

19. There is a published market in the shares of ACL and the value of the consideration paid by SNA for the shares of ACL held by Mines SNA exceeds the "market price" of such shares (as such definition read prior to June 30, 1987) at the date of the exercise of the put.

20. Accordingly, SNA was obliged to make a follow-up offer for all the outstanding shares of ACL at $80.00 per share by June 8, 1987.

21. No such follow-up offer has been made.

22. In any event, based upon the foregoing allegations, it is in the public interest that the Commission remove from SNA and/or the Province of Quebec and all agents and servants thereof, the exemptions contained in sections 34, 71, 72 and 92 of the Act and in the regulations of the Act because:

i. SNA and the Province of Quebec have acquired control of ACL at a substantial premium to the market price of the shares of ACL and such premium has not been shared with or made available to the public shareholders of ACL; a

ii. the public shareholders of ACL have been led to believe that a follow-up offer would be made for the shares of ACL, or that the public shareholders of ACL would be otherwise compensated, by various public statements made by officials of the Province of Quebec and by SNA and such shareholders have relied, to their detriment, on such statements; b

iii. the actions of SNA and the Province of Quebec described in this Notice and their continuing failure to make a follow-up offer to, or to otherwise compensate, the public shareholders of ACL is grossly abusive of shareholders' rights and undermines the integrity of the capital markets of Ontario.

23. Such further and other allegations as Counsel may advise and the Commission permit. c

No finding of fact was made by the Commission, and no facts were admitted by the appellant. However, for the purposes of this appeal only, the appellant admits the allegations in the notice of hearing. d

The sole issue before the Divisional Court and before this court is the jurisdiction of the OSC over the Quebec Government in relation to the matters raised in the notice of hearing. The appellant argues that the OSC is without jurisdiction in this case for the following three reasons: e

(1) the application of Ontario law to the transaction in question is unconstitutional by reason of extra-territoriality;

(2) it is beyond the jurisdiction of the OSC, on the true construction of the *Securities Act*, R.S.O. 1980, c. 466 (as amended to June 30, 1987) (the "Act"), to seek to regulate the actions of the Quebec Government in relation to the transaction in issue; and f

(3) the Quebec Government has Crown immunity from the Act in relation to the transaction.

Counsel for SNA argues that the OSC lacks jurisdiction for the additional reason that: g

(4) its temporal jurisdiction is limited by virtue of s. 125(2) of the Act.

(1) *Is the application of Ontario law to the transaction in question unconstitutional by reason of extra-territoriality?* h

What is in issue in this case is the application within Ontario of legislative sanctions against the appellant as a result of trans-

actions entered into by the appellant which allegedly had a damaging effect on the interests of shareholders resident in Ontario. a Most of the cases cited to us by the appellant involve the *vires* of particular provincial legislation, not the application of valid provincial legislation to a specific fact situation. The question of the validity of legislation passed by a province clearly raises constitutional questions as to the appropriate exercise of the province's legislative power pursuant to s. 92 of the *Constitution Act, 1867*. b The question of jurisdiction of tribunals in one province to resolve disputes involving transactions which could have a substantial connection with another province raises very different considerations. But the appellant argues not that the OSC is without jurisdiction because the legislation under which it would act is c beyond the legislative competence of the province of Ontario, but rather, that the application of the Act to the facts of this case would have an extra-territorial effect which should not be tolerated in a federal state.

The issues before us must be considered in the light of the relief d requested by the appellant, and also in the light of the proposed actions of the OSC as stated in the notice of hearing. The appellant asks, first, that we quash the decision of the OSC accepting jurisdiction over the Quebec Government "in relation to the matters raised in the Notice of Hearing dated April 13, 1988"; second, e it requests an order prohibiting the OSC from taking any further proceedings against the Quebec Government "in relation to the matters in issue"; and third, it requests a declaration that the OSC has no jurisdiction "in relation to the matters in issue." I assume that the "matters raised in the Notice of Hearing" and the "matters in issue" are the same, namely, the suggested rem- f edies set out in paras. 2 and 3 of the notice of hearing. Paragraph 2 proposes an application by the OSC to a judge for an order pursuant to s. 122(1) of the Act, requiring compliance with the follow-up offer provisions of the Act. Paragraph 3 proposes the withdrawal by the OSC of statutory exemptions provided to the g Quebec Government under ss. 34, 71, 72 and 92 of the Act, pursuant to s. 124(1) of the Act.

With respect to an application to the court for a compliance order pursuant to s. 122(1), I agree with the view of Chairman Beck, in his dissent, that it would be incumbent upon the OSC to h make a finding that there was a take-over bid within the terms of the Act before it would be appropriate for it to make an application to a judge for a compliance order. However, such a finding is one that the OSC is eminently suited to make, given the experience and expertise of its members. I see no constitutional issue

involved in the OSC considering whether or not the facts of a given case warrant such an application. An application does not involve the possibility of the OSC making an order against the Quebec Government. Such an order, if made, would be made by the court. Whether or not the court would have jurisdiction to issue a compliance order in this case is another matter, and is not before us on this appeal.

With respect to the question of withdrawal by the OSC of statutory exemptions granted to the Quebec Government under the Act, such an action by the OSC would raise squarely the constitutional issues argued by the appellant. That question does not, however, concern the *vires* of the Act, but rather its application to a particular series of acts, some of which occurred within and some outside Ontario. As background, the appellant cited two decisions — one in which the Judicial Committee of the Privy Council in *R. v. Royal Bank of Canada*, [1913] A.C. 283, 9 D.L.R. 337, and the other in which the Supreme Court of Canada in *Interprovincial Co-operatives Ltd. v. R.*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 — recognized the principle of provincial extra-territorial incompetence. In the *Royal Bank* case, the Privy Council held invalid legislation passed by the Province of Alberta which would have had the effect of depriving holders of bonds in the Alberta Railway Company of their claims against funds held in a Montreal branch of the Royal Bank of Canada. The right of the bondholders to enforce their claims against those funds was a civil right existing and enforceable outside the province of Alberta, and legislation in derogation of that right was held to be outside the legislative competence of the Alberta legislature. In the *Interprovincial Co-operatives* case, Ritchie J., speaking for the majority of the Supreme Court of Canada, held that legislation passed by the Province of Manitoba could not have the extra-territorial effect of rendering unlawful in Manitoba, and subject to liability in damages, the act of discharging mercury into water-courses draining from other provinces into the Province of Manitoba. The drainage was both lawful and permitted by provincial licence in the Provinces of Ontario and Saskatchewan. Both of these cases involved legislation passed by one province purporting to affect rights or actions of individuals in another province. The legislation in each was held to be invalid as encroaching on the exclusive right of each province to legislate with respect to property and civil rights within its own borders.

The instant case involves clearly valid provincial legislation which, by its terms, may affect parties outside of Ontario. The appellant in its factum recognizes that valid laws of one province,

drafted in general terms, may have tolerable extra-provincial effects "provided that the pith and substance of the legislation in question is in relation to matters which fall within provincial subject-matter jurisdiction, and the extra-provincial effects are necessarily incidental to that proper legislative purpose". It acknowledges *Churchill Falls (Labrador) Corp. v. Newfoundland (A.G.)*, [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1, as authority. At p. 332 S.C.R., p. 30 D.L.R., McIntyre J., speaking for the court, limits the application of *R. v. Royal Bank of Canada, supra*, to situations where the pith and substance of the legislation in question is in relation to extra-provincial rights. His Lordship then goes on to state:

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*. A colourable attempt to preserve the appearance of constitutionality in order to conceal an unconstitutional objective will not save the legislation . . .

There can be no doubt that the pith and substance of the legislation involved in this case concerns property and civil rights in the Province of Ontario. Although it may have incidental or consequential effects on extra-provincial rights, the legislation is clearly not a "colourable attempt . . . to conceal an unconstitutional objective". The legislative objective is to regulate the operation of the capital markets in Ontario for the protection of all who use them.

The appellant says that to apply Ontario law to the transaction in question would involve the imposition on Quebec by Ontario of costs exceeding $100,000,000 to the benefit of the Ontario residents and to the detriment of Quebec's public interest — notwithstanding what the appellant argues is Quebec's more significant relationship to the facts. This, it argues, would be unreasonable, unfair and unconstitutional.

The principles advanced by counsel for the appellant are not ones which have been accepted by courts in this country, but are ones which have been gleaned primarily from learned treatises. They are articulated by counsel as follows:

(a) The province with the most significant connection with the transaction and the parties should have jurisdiction;

(b) Less compelling governmental interests of one province should be sacrificed to more compelling governmental interests of another province;

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(c) The exercise of jurisdiction must be fair and reasonable; and

(d) The exercise of jurisdiction must be consistent with the needs of a federated system, resulting in interprovincial harmony.

Although other sources were cited, the primary sources of the appellant's thesis were J.-G. Castel, *Canadian Conflict of Laws* (1975); Reese, "Limitations on the Extraterritorial Application of Law" (1978), 4 *Dalhousie L.J.* 589; and J. Swan, "The Canadian Constitution, Federalism and The Conflict of Laws" (1985), 63 *Can. Bar Rev.* 271.

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It is difficult to extract short passages which digest the import of these treatises for the purpose of this appeal. However, the following, though not directly on point, are of some assistance:

> In a federal state, like Canada, in order to attain the common good, the courts should recognise and accommodate the differing rules of law of the several provinces. There ought to be a reasonable basis for accepting or rejecting the application of the rules of law of a sister province. Courts must show respect for the interests of sister provinces along with the policies they represent, even if they are difficult to identify or accept. Such respect is a major element in the concept of federalism. Of course this may never occur if the forum court selects its own law every time it has a legitimate governmental interest in applying it. No forum province should be allowed always to effectuate its own policies by applying its own laws to *all* the cases that arise out of interprovincial transactions or events. In a federal system competing provincial interests in conflict of laws cases must be evaluated in the light of the national objective of interprovincial harmony. The courts have the duty to accommodate possible conflicting provincial interests. Furthermore, the ultimate choice of the applicable rule of law should promote justice in the particular case before the court.
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> To conclude, in our federation, the provinces must exercise restraint in asserting their individual policies and rules of law and show willingness to accept the policies and rules of law of sister provinces.

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Castel, *Canadian Conflict of Laws* (1975), at p. 200. (Emphasis in original.)

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> It has been the thesis of this paper that two basic principles should be considered in determining the propriety of an extraterritorial application of law. These are that such application should be essentially fair to the parties and also consistent with the needs of the interstate, or international, systems. These principles in turn are vague and leave much room for interpretation. Nevertheless, they provide the essential bases for further developments in this important field.

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Reese, "Limitations on the Extraterritorial Application of Law" (1978), 4 *Dalhousie L.J.* 589 at p. 608.

> The danger in the acceptance of the traditional approach to both jurisdiction and enforcement is that it makes it likely that every possible mistake will be made. Jurisdiction is taken when it should not be, if we were to consider carefully the issue of fairness to the defendant. In any case the unfairness is not excused by the need to consider the fairness to the plaintiff. While many assertions of jurisdiction do not lead to enforcement, other cases in which jurisdiction is taken may force the defendant to submit when its property is threatened by a default judgment with resultant extra-provincial enforcement. . . . Conversely, enforcement is denied in a large class of cases where concern for fairness to the plaintiff would support it and where there may be no necessary unfairness to the defendant.
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> Once we see the relation between jurisdiction and enforcement as merely aspects of the same problem, as in the American approach, many if not all of these mistakes can be avoided. The arguments in favour of the restrictive common law rules regarding the enforcement of foreign judgments are convincingly refuted if those judgments that come for enforcement have only been given after the rendering court has taken jurisdiction when, to put it broadly, the defendant cannot claim to be unfairly surprised by the assertion of jurisdiction against it.

Swan, "The Canadian Constitution, Federalism and The Conflict of Laws" (1985), 63 *Can. Bar Rev.* 271 at pp. 288-89.

Principle (a) above imports a jurisdictional component into the traditional choice of law rule governing contracts — that the law of the place having the closest and most real connection with the transaction should be applied. But there is no choice of law issue here: only the law of Ontario is involved, and no competing Quebec law was proven or argued before the OSC or before this court. If Ontario tribunals are without jurisdiction in this case because the transactions involved are more closely connected to the Province of Quebec, then in all cases where Ontario wishes to regulate the operation of its capital markets, it must first determine whether the transaction or series of transactions involved are more closely connected to Ontario or to some other province or country. If this is so, individuals and corporations need only structure their transactions in such a way that the test of "closest connection" is met, and then, regardless of whether the transactions involved are detrimental to persons resident in Ontario or are contrary to the trading policies established by the Government of Ontario, they can be carried out with impunity.

On the totality of the facts conceded for the purpose of this appeal, I am not prepared to hold that those facts have a more significant connection to the Province of Quebec than to the Province of Ontario. However, even were I prepared to so hold, I do not consider that the jurisdiction of the OSC is ousted by that consideration alone. To hold otherwise would be to severely limit

the ability of the Province of Ontario to regulate the operation of capital markets within its borders.

Principles (b), (c) and (d) overlap, and will be examined together. The appellant argues that, when considering the constitutionality of the application of valid legislation to multi-jurisdictional fact situations, courts should examine carefully the relationship of the legislating province to the parties and facts involved. When competing provincial interests are involved, it argues, each province will likely consider that the best solution is to regulate the situation in such a way as to sacrifice the interests situate in the other province. Thus the courts, in the interest of maintaining interprovincial harmony, should evaluate the competing claims of the provinces to ensure that more compelling governmental interests are not sacrificed to lesser interests. No judicial authority is cited for this proposition, and counsel for the appellant acknowledges that none exists. In the absence of such authority, counsel invites this court to consider the appropriateness, in this case, of applying such a principle.

As stated above, the simple legislative objective involved in this appeal is regulation of the operation of capital markets in Ontario for the protection *of all who use them*. This includes the protection of persons and corporations dealing in Ontario markets whether or not they are resident in Ontario. Thus, the Province of Quebec, when using Ontario markets, is afforded the same protection as all other users. The success of such an objective is vital to the health and growth of commerce in Ontario.

The objective of the Province of Quebec in carrying out the transactions involved was announced in 1977 by the Quebec Government. Its intent was to create an asbestos manufacturing industry in Quebec to complement the asbestos mining industry, thereby creating substantial new employment in regions of Quebec where the rate of unemployment exceeded 20%.

There can be no doubt that both objectives represent "compelling governmental interests". The question posed by the appellant's argument is, "Which is the more compelling?" For Quebec to comply with the provisions of the Ontario Act, the cost to it, we are told, would be approximately $100,000,000. But that $100,000,000 is saved at the expense of persons who have invested in shares trading on Ontario markets, trusting that all who use those markets will trade in accordance with the rules. I see no way the courts can assist in advancing interprovincial harmony in a situation such as this, since there is no objective way of choosing which governmental interest is more compelling. However, I see no reason why residents of one province should

suffer financial loss for the purpose of benefiting another province in advancing its legitimate interests.

a The appellants argue a second dimension to the extra-territorial application issue, and that is, quoting from its factum: "The courts in any civilized federation, in deciding what law applies to multi-jurisdictional situations, must protect parties against arbitrary and unreasonable assertions of jurisdiction by a province b that violate the reasonable expectations of affected parties with respect to the applicable law." I do not intend to discuss the more sophisticated aspects of this argument, since I am satisfied that there is a simple and inevitable response to it. Quebec would have reasonable expectations that any other province, when entering Quebec's capital markets, would abide by Quebec's regulatory c laws. When Quebec enters the capital markets of other provinces, the converse should be true.

The remedies contemplated by the notice of hearing should also be kept in mind. If the OSC were to apply to the court to request a compliance order, the extra-territorial application of Ontario d law would be obvious, and its enforcement subject to scrutiny in such an event. However, in the event the OSC were to withdraw from the Quebec Government the statutory exemptions it enjoys under the Act, any extra-territorial application of Ontario law would be minimal, and would arise only because an out-of-prov- e ince user of the Ontario markets wished to avail itself of Ontario market opportunities. It can hardly be considered fair and reasonable to suggest that only Ontario residents are subject to Ontario regulatory rules when operating in Ontario capital markets. The fact that the offending party is the government of another province should not change the perception of fairness and f reasonableness.

I see no reason, on the basis of the law as it exists, or on the basis of the untested principles put forward by the appellant, why the application of Ontario law to the facts of this case should be held unconstitutional by reason of extra-territoriality.

g (2) *Is it beyond the jurisdiction of the OSC, on the true construction of the Securities Act, to seek to regulate the actions of the Quebec Government in relation to the transaction in issue?*

h The appellant takes the position that when statutes drafted in general terms could have an extra-territorial effect, they should be strictly construed so as to limit that effect. In promoting that view, the appellant argues first, that the take-over provisions on which the OSC relies have no application to the facts of this case;

and second, it argues that s. 124 of the Act, the section which permits the withdrawal of statutory exemptions when such action is in the public interest, is subject to an implicit pre-condition that the conduct relied upon by the OSC as the basis for the exercise of its discretion must have a sufficient Ontario connection.

In his dissenting reasons OSC Chairman Beck stated his view that the basis of either of the remedies proposed in the notice of hearing would, of necessity, have to be failure of the Quebec Government, through its agent SNA, to comply with the follow-up offer provisions of s. 91(1) of the Act. For s. 91(1) to apply, argues the appellant, there must be a take-over bid in the terms defined by s. 88(1)(*k*) of the Act, the relevant portion of which reads:

> (*k*) "take-over bid" means,
>
> (i) an offer made to security holders, the last address of any of whom as shown on the books of the offeree company or other issuer is in Ontario, to purchase directly or indirectly voting securities of the company or other issuer,

There are obvious ambiguities in that definition, and also problems in applying the definition to the facts of this case — particularly with respect to the words "to purchase directly or indirectly". The OSC is the appropriate initial forum in which issues involving interpretation of the Act should be addressed. As stated by the majority of the OSC in their reasons at pp. 19-20:

> It is arguable that the 1981 transaction which took the form of a subscription and purchase by SNA of the newly created treasury shares of GD Canada was in substance (in the language of former clause 88(1)(k)) an indirect offer to purchase GD Canada's shares of ACL and that (in the language of former subsection 91(2)) the 1986 purchase of further GD Canada shares was a deemed take-over bid with ACL as its true target.

That is a decision which should be made in light of all of the facts which may be adduced at a hearing before the OSC. In addressing the issues before it, the OSC is not limited to the facts alleged in the notice of hearing. The notice contains merely an outline of the material facts on which the OSC staff relies. It is appropriate, therefore, that a determination as to whether or not there was, in this case, a take-over bid within the meaning of the Act should await a full hearing of the relevant evidence.

In any event, given the very general words of s. 124(1), it is arguable that a finding by the OSC that a take-over bid has been made need not necessarily precede the withdrawal by the OSC of statutory exemptions enjoyed by the Government of Quebec.

I have difficulty understanding the argument of the appellant that s. 124(1) must be interpreted as being subject to an implicit precondition that the conduct relied upon by the OSC as the basis

for the exercise of its discretion must have a "sufficient Ontario connection". The Ontario connection required by the section is "the public interest". I construe "the public interest" in that provision as being not only the interest of residents of Ontario, but the interest of all persons making use of Ontario capital markets. The discretion being contemplated by the OSC is a discretion to withdraw special privileges given, in this case, to the government of another province. I see nothing in the Act, nor do I see any constitutional or policy reason why any limited interpretation should be placed on the clear wording of the section.

(3) *Does the Quebec Government have Crown immunity from the application of the Securities Act in relation to the transaction?*

The acknowledged facts of this case are reproduced at the beginning of these reasons. The agreement entered into on February 12, 1982 by the Quebec Government and SNA, for the acquisition from GD of the 100,000 common shares of Mines SNA still held by GD at that time, was the culminating agreement in the Quebec Government's negotiations to gain a majority equity position in ACL. It had gained voting control in the fall of 1981. In February of 1982 there was no provision in the *Securities Act* stating that it applied to the Crown in the right of any province.

Section 11 of the *Interpretation Act*, R.S.O. 1980, c. 219, reads:

> 11. No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

Counsel for the appellant argues that because in 1982 there was no express provision in the *Securities Act* binding the Crown, the Quebec Government and its agents cannot be made subject to any regulatory restrictions provided for in the Act. Counsel for the OSC, on the other hand, takes the position that by exploiting the benefits of the Ontario capital markets, the appellant accepted the restrictions on its activities contained in Part XIX of the Act governing take-over bids.

The appellant relies on the decision of the Divisional Court in *Caisse de dépôt & placement du Québec v. Ontario (Securities Commission)* (1983), 42 O.R. (2d) 561, 149 D.L.R. (3d) 456, a case based on similar facts to the one before us, in which it was argued that, despite the above-quoted section of the *Interpretation Act*, the Crown was bound by the provisions of the *Securities Act* by necessary implication, because otherwise the intent of the Act would be wholly frustrated. At p. 565 O.R., p. 459 D.L.R., Reid J., speaking for the court, stated:

> In my opinion, it is by no means apparent on the face of the statute that the exemption of the Crown would amount to the total frustration of the

statute, and thus raise the implication that the Crown agreed from the outset to be bound.

Counsel for the OSC, however, takes the position that that appeal was wrongly decided by the Divisional Court, since it failed to address the separate and broader exception to Crown immunity — namely, the benefit/burden exception. That exception was applied by the Supreme Court of Canada in another case with facts similar to the one before us — *Sparling v. Caisse de dépôt & placement du Québec*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63. The distinction between the necessary implication exception applied by the Divisional court in its 1983 decision, and the benefit/burden exception applied by the Supreme Court of Canada in the *Sparling* decision is elaborated upon in the reasons of La Forest J., speaking for the court, at pp. 1023-24 S.C.R., pp. 68-69 D.L.R.:

> There is no need to consider the necessary implication exception, because the two exceptions are quite distinct. The necessary implication exception has been interpreted in various ways over the years, but it essentially arises as an adjunct to the necessity for express words binding the Crown; the Crown may be bound in the absence of express words where some absurdity would result if the Crown were held to be immune. This has sometimes been narrowed to a requirement that the "beneficent purpose [of the statute] . . . be wholly frustrated unless the Crown were bound" (see *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58 (P.C.), at p. 63).
>
> The benefit/burden exception is quite different. Professor Hogg in his book, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (1971), summarizes the doctrine as follows (at p. 183):
>
> > The restrictions [on a statutory right] are regarded as restrictions on the right itself, and if the Crown could disregard them it would receive a larger right than the statute actually conferred. In other words *all* of the statutory provisions affecting a right to which the Crown claims title are interpreted as if they were advantageous to the Crown . . . [T]here is no room for the rule requiring express words or necessary implication.
>
> C.H.H. McNairn in *Governmental and Intergovernmental Immunity in Australia and Canada* (1977), at p. 10 states:
>
> > By taking advantage of legislation the crown will be treated as having assumed the attendant burdens, though the legislation has not been made to bind the crown expressly or by necessary implication. The force of the rule of immunity is avoided by the particular conduct of the crown and the integrity of the relevant statutory provisions, beneficial and prejudicial.

It is my view that the decision in the *Sparling* case clearly applies to the acknowledged facts of this case, and that the Quebec Government itself, and its agent SNA, are subject to the provisions of the Act with respect to those facts.

(4) *Is the temporal jurisdiction of the OSC limited in this case by virtue of s. 125(2) of the Act?*

a

Counsel for SNA took the position that proceedings before the OSC were not commenced within the time limit established under s. 125(2) of the Act, which reads:

> 125(2) No proceedings under this Act shall be commenced before the Commission more than two years after the facts upon which the proceedings are based first came to the knowledge of the Commission.

b

There is no issue that the OSC was aware, more than two years before the proceeding before it was commenced, of two facts which SNA argues are the only relevant ones: first, the purchase by SNA in 1981 of a controlling interest in GD Canada, which transaction the OSC says had as its "true target" a controlling interest in ACL; and second, the 1982 agreement between the Province of Quebec and SNA on the one hand and GD on the other, providing for a call by SNA or a put by GD of the remaining shares of Mines SNA held by GD. SNA says that the rights of all parties were encompassed in those transactions, and that any proceeding before the OSC should have been commenced no later than two years from the date the latter transaction came to its knowledge — as required by s. 125(2) of the Act. It further says that at the time of the exercise of the put by GD on November 25, 1986, nothing was done in Ontario that would invoke the jurisdiction of the OSC, since the registered office of Mines SNA had been moved from Ontario to Quebec in 1982, and the put was exercised by GD from its head office in St. Louis, Missouri on SNA in Quebec. It argues that the court cannot divorce the temporal from the territorial jurisdiction of the OSC.

c

d

e

f

As I stated earlier in these reasons, I am of the view that territorial jurisdiction of the OSC under s. 124 does not depend solely upon the province or country in which relevant transactions may have taken place, but rather upon whether or not persons availing themselves of the benefits of trading in the Ontario capital markets act in a manner consistent with the provisions of the Act. Consequently, I do not think it necessary to consider territorial jurisdiction in connection with temporal jurisdiction limited under s. 125(2).

g

In this case, although the agreement entered into on February 12, 1982 crystallized the rights of the parties, it was not until the date of an exercise of either the put or the call, or February 11, 1987 (the date on which the right to either put or call terminated), at the earliest, that the OSC would have known whether the Quebec Government intended to make an offer to all shareholders of

h

ACL. On the facts acknowledged by the appellant, I see no room for the operation of s. 125(2). However, new facts could be adduced before the OSC in an attempt to persuade it to the contrary. a

DISPOSITION

I would dismiss the appeal with costs payable by the appellant to the OSC and to the minority shareholders, represented by the Committee for the Equal Treatment of Asbestos Minority Shareholders. b

Appeal dismissed.

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c

Regina v. Durham

Regina v. Stratigeas

[Indexed as: R. v. Durham; R. v. Stratigeas]

Court of Appeal for Ontario, Brooke, Arbour and Doherty JJ.A. d
September 22, 1992

Charter of Rights and Freedoms — Fundamental justice — Section 86(2) of Criminal Code creating offence of careless use or storage of firearms — Offence being regulatory offence rather than true crime — Stigma attached to conviction not great — Mens rea requirement of s. 86(2) not violating s. 7 of Charter — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C-46, s. 86(2). e

In two separate cases, the trial judges ordered the stay of a charge of careless storage or careless use of a firearm contrary to s. 86(2) of the *Criminal Code* on the basis that that subsection violated s. 7 of the *Canadian Charter of Rights and Freedoms*. It was held that s. 86(2) imposed criminal liability on the basis of a civil standard of negligence, that the minimum degree of fault associated with civil negligence was not sufficient to attract liability for a true crime where foreseeability of consequences forms an essential element of the offence, and that foreseeability of consequences formed an essential element of the offence in s. 86(2). It was further held that no person should be stigmatized to the extent that they would be if convicted under s. 86(2) on the basis of a minimum fault amounting to no more than civil negligence. The Crown appealed. f g

Held, the appeal should be allowed.

None of the modes of commission of the offence in s. 86(2) requires proof of any consequence. In any event, the presence of a consequence in the definition of the crime is not determinative of the fault analysis for the purpose of s. 7 of the *Charter*. h

If the decision of the Supreme Court of Canada in *R. v. Nova Scotia Pharmaceutical Society* means that proof of conduct amounting to civil negligence is sufficient to meet the constitutional requirement of fault for all criminal offences, save murder, attempted murder, and the like, s. 86(2) is constitutionally unimpeacha-

TAB 6

THIS BOOKLET CONTAINS THE
FILING INSTRUCTIONS AND PUBLICATION UPDATE

Route to: ☐ ______ ☐ ______ ☐ ______ ☐ ______
☐ ______ ☐ ______ ☐ ______ ☐ ______

Williams & Meyers, Oil and Gas Law

Publication 820 Release 40 December 2005

HIGHLIGHTS

2005 Annual Revision

- Updates to Volumes 1–6 with the newest developments in oil and gas law.

Revision to Manual of Oil and Gas Terms (Volume 8)

- Supplies the latest construction of existing terms and defines many new terms.

Release 40 brings you the 2005 revision of ***Williams & Meyers, Oil and Gas Law***, prepared by *Patrick H. Martin*, Campanile Professor of Mineral Law, Paul M. Hebert Law Center, Louisiana State University, and *Bruce M. Kramer*, Maddox Professor of Law, Texas Tech University School of Law. Along with incorporating recent statutory, regulatory, and judicial developments into Volumes 1 through 6, Professors Martin and Kramer have updated the ***Manual of Oil and Gas Terms*** in Volume 8.

Revisions to Volumes 1–6. Among the many issues covered in these volumes are the following:

Implied right to reasonable use of the surface. When use of the surface is overreached and becomes injurious to a lessor's agricultural pursuits, courts have displayed a willingness to step in and impose liability despite the lack of any express provision. *See Norton Farms, Inc. v. Anadarko Petroleum Corp.* (Kan. Ct. App.), discussed in Ch. 2, § 218.8.

Obligation to restore condition of premises. The discussion of this topic in § 218.12 has been completely revised and updated to incorporate the latest developments, including recent case law in Louisiana involving highly contentious issues of express and implied obligations to restore the surface. *See Terrebonne Parish School Board v. Castex Energy, Inc.* (La.), *Corbello v. Iowa Production* (La.), and *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.* (La. Ct. App.).

§ 203.1 Nonownership theory

Partly as a result of the view that oil and gas in the ground was migratory or fugitive, the so-called nonownership theory was adopted in some states. In essence, under this theory no person owns oil and gas until it is produced and any person may "capture" the oil and gas if able to do so. Of course one may not go upon the land of another to effect the capture, so it is necessary to have such an interest in the land upon which a well is drilled for the purpose of capturing the fugative minerals as will authorize the drilling of the well.

In adjudicating legal controversies in states adopting this theory, the courts applied by analogy the law of wild animals[1] in some cases and the law of underground water in others. Thus under the wild animal analogy, the oil and gas belonged to the person who "captured" it, but the state, as in the case of wild animals, had the power to prohibit or regulate the capture.[2] Under the underground water analogy, a landowner was permitted to take oil and gas from his land even though the result was to drain his neighbor's land, since such right was given a landowner in the case of underground water.[3]

It is not clear in all states what theory is adhered to by the courts. In the following states there is some evidence of the adoption of the nonownership theory, although in some instances the evidence is relatively slight.

[Alabama]

Certain language in Sun Oil Co. v. Oswell, 258 Ala. 326, 62 So. 2d 783, 2 *O.&G.R.* 145 (1953), suggested adherence to the nonownership theory. The court declared that the oil and gas lease in question "does not grant the ownership of the oil and other minerals, but grants and leases to Sun the land described for the purpose of investigating, exploring, prospecting, drilling, mining for and producing oil and other minerals."

In Moorer v. Bethlehem Baptist Church, 272 Ala. 259, 130 So. 2d 367, 16 *O.&G.R.* 491 (1961), the court appeared to open up the question of the nature of the landowner's interest in oil and gas and to leave the question unresolved.

NCNB Texas Nat'l Bank, N.A. v. West, 631 So. 2d 212, 223, 127 *O.&G.R.* 209 (Ala. 1993), declares that "Alabama determines ownership of oil and gas under the nonownership theory, which recognizes the migratory nature of oil and gas and requires actual possession to establish ownership."

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§ 203.1

[1] Westmoreland & Cambria Natural Gas Co. v. DeWitt, 130 Pa. 235, 18 Atl. 724 (1889), is the case most frequently cited for the fugacious nature of oil and gas and a supposed analogy with the law concerning wild animals. Pennsylvania, despite the language of this early case, has adopted the ownership in place theory. *See* § 203.3, *infra.*

[2] *See* Townsend v. State, 147 Ind. 624, 47 N.E. 19 (1897).

[3] Action v. Blundell, 12 M.&W. 324, 152 Eng. Rep. 1223 (Ex. 1843).

For a discussion of the analogies made between oil and gas and other substances, see Colby, "The Law of Oil and Gas," 31 *Cal. L. Rev.* 357 (1943).

NCNB is critically examined in Misha Ylette Mullins, *Alabama Oil and Gas Law: Ownership or Nonownership after NCNB*?, 48 Ala. L. Rev. 1065 (1997) (contending that the nonownership statement in *NCNB* was "unfounded dictum").

[California]

The ownership in place theory was expressly rejected in Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935), the court declaring that the landowner has the "exclusive right on his premises to drill for oil and gas, and to retain as his property all substance brought to the surface on his land." Colby, "The Law of Oil and Gas," 31 *Cal. L. Rev.* 357 at 386 (1943), analyzes the California cases and concludes that for many years ownership in place appears to have been the accepted doctrine in California but this view has been abandoned for the nonownership theory.

The Supreme Court of California adhered to the nonownership theory in Gerhard v. Stephens, 68 Cal. 2d 864 at 878, 69 Cal. Rptr. 612 at 624, 442 P.2d 692 at 704. 31 *O.&G.R.* 28 at 35 (1968), citing this **Treatise**, and in Atlantic Oil Co. v. County of Los Angeles, 69 Cal. 2d 585, 72 Cal. Rptr. 886, 446 P.2d 1006, 31 *O.&G.R.* 440 (1968).

[Illinois]

In Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 131 N.E. 645, 16 A.L.R. 507 (1921), the court observed:

> "Oil and gas in the earth cannot be the subject of an ownership distinct from the soil. They belong to the owner of the soil only so long as they remain under the land, and his grant of them to another is a grant only of such oil and gas as the grantee may find, and no title to its vests into the grantee until it is actually found."

(Text continued on page 35)

In Trigger v. Carter Oil Co., 372 Ill. 182, 23 N.E.2d 55 (1939), the court said:

> "It is the settled law in this State that oil and gas in place are minerals and by reason of their fugacious qualities they are incapable of an ownership distinct from the soil. They belong to the owner of the land only so long as they remain under the land, and if the owner makes a grant of them to another, it is a grant only of the oil and gas that the grantee may take from the land. No title to it vests in the grantee until it is actually removed from the land."

Similarly in Miller v. Ridgley, 2 Ill. 2d 223, 117 N.E.2d 759, 3 *O.&G.R.* 1004 (1954), the court declared that "Oil and gas in the earth cannot be subject to an ownership distinct from the soil so long as they remain in the earth."

See Burnside, "Nature of Interest Created by Oil Leases in Illinois," 24 *Wash. U. L. Q.* 91 (1938). The writer discusses some of the inconsistent language found in some Illinois cases and concludes that Illinois adopts the nonownership theory and that the interest of a lessee is an incorporeal interest, the owner not being entitled to possessory actions.

[Indiana]

The nonownership theory was clearly stated in State v. Ohio Oil Co., 150 Ind. 21, 49 N.E. 809 (1898), *supra* § 203, note 4. A later opinion, Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. App. 461, 57 N.E. 912 (1900), appears to enunciate what is described as the qualified ownership theory. However, as we fail to discern any significant differences between the two theories, this does not appear to have any practical importance.

[Kentucky]

The view of the courts in Kentucky concerning the nature of the landowner's interest in oil and gas is somewhat confused. Hammonds v. Central Kentucky Natural Gas Co., 255 Ky. 685, 75 So. 2d 204 (1934), indicated that "*the owner of land under which oil and gas lie is the absolute owner of them in place* . . . and . . . he may create by grant or reservation *a separate corporeal estate in oil and gas.*" The court then proceeded to declare that "oil and gas are not the property of any one until reduced to actual possession by extraction. . . . *This theory of ownership or, perhaps more accurately speaking, lack of ownership is practically universally recognized.*" (Emphasis supplied.)

TAB 7

Alberta Law Review

Volume 42, No. 2 (October 2004)

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of discretion or fairness.[13] The courts take the view that contractual provisions, which may seem to be unfair, may have been the product of hard bargaining between the parties and therefore deserve to be enforced in accordance with their terms.[14] The result is that, when the words of the contract are clear, they will normally be given effect. As was stated by the Supreme Court of Canada: "Certainly where the parties have capacity in law to enter into the contract, where the terms of the contract are clear and unambiguous, where there is valid consideration passing between the parties, and where there is no evidence of oppression or operative misrepresentation, the law recognizes no principle which fails to enforce the validity of such a contract."[15]

III. BASIC RULES OF CONTRACTUAL INTERPRETATION

A. INTERPRETATION IS A QUESTION OF LAW

The interpretation of a written agreement drafted in ordinary English is a question of law. Accordingly, the interpretation of such an agreement is not a fit subject to introduce evidence and the court will normally not accept evidence, expert or otherwise, to aid in that process.[16] The court is charged with reviewing the agreement and applying the rules of interpretation to determine its legal effect. Therefore the evidence of English professors or other such experts is considered to be of no assistance to the court.[17]

Consistent with this position is the well-established rule that direct evidence of a contracting party's intention is inadmissible,[18] since the meaning that a party subjectively intended to convey is irrelevant to the legal meaning of the words used.[19]

---

13 *Manufacturers Life Insurance v. Toronto-Dominion Bank* (1988), 92 A.R. 92 at 95 (C.A.), followed by Master Funduk in *Wye Gardens Inc. v. Edmonton Equipment Sales Ltd.* (1991), 85 Alta. L.R. (2d) 104 at 111 (M.C.) [*Wye Gardens*]; *Steeplejack Services (Canada) Ltd. v. Access Scaffold & Ladder* (1989), 98 A.R. 311 at 314 (M.C.) [*Steeplejack*].

14 *Hunter Engineering v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 488, Wilson J.

15 *Ronald Elwyn Lister Ltd. v. Dunlop Canada*, [1982] 1 S.C.R. 726 at 745, see also *MLH&A v. Shepp* (1997), 201 A.R. 112 at 118 (Q.B.), Clarke J.; to the same effect is *Brewery, Beverage and Soft Drink Workers Local 250 v. Labatt's Alberta Brewery* (1996), 38 Alta. L.R. (3d) 308 at 316 (C.A.).

16 *Morguard Trust v. Royal Bank* (1989), 70 Alta. L.R. (2d) 242 at 244 (C.A.) [*Morguard Trust*]; followed in the decisions of Master Funduk in *Imperial Oil Limited v. Whissell Enterpirses Ltd.* (1985), 62 A.R. 321 at 325 (M.C.) [*Whissell*]; *Nelson (Trustee of) v. Nelson* (1989), 75 C.B.R. (N.S.) 47 at 50 (Alta. Reg); and *Alberta (Treasury Branches) v. Bate* (1996), 180 A.R. 161 at 165 (M.C.) [*Bate*]; see also *Tokarek v. Davison* (1991), 85 Alta. L.R. (2d) 300 at 304 (M.C.); *852819 Alberta Ltd. v. Louie's Submarine*, [2000] A.J. No. 1493 at para. 31 (Q.B.) (QL) [*Louie's Submarine*]; *Re Bohnet (Bankruptcy)* (2002), 310 A.R. 53 at 58 (M.C.), cases in which Master Funduk, cites J.E. Côté, *An Introduction to the Law of Contract* (Edmonton: Juriliber, 1974) at 147-48 to the same effect. For the purposes of review by the Court of Appeal the interpretation of a contract is a question of law: *Alberta v. Western Irrigation District* (2002), 312 A.R. 358 at 362 (C.A.) [*Western Irrigation*].

17 *Canadian National Railway v. Volker Stevin Contracting Ltd.* (1991), 1 Alta. L.R. (3d) 167 at 170 (C.A.) [*Volker*]; *United Canso Oil & Gas Ltd. v. Washoe Northern Inc.* (1990), 78 Alta. L.R. (2d) 79 at 87-88 (Q.B.), Hutchinson J. [*United Canso*]; see also *Avco Delta Corp. Canada Ltd. v. MacKay*, [1977] 5 W.W.R. 4 at 8 (Alta. S.C. (A.D.)) [*Avco*].

18 *Turbo Resources*, *supra* note 4 at 30.

19 *Anderson and Anderson v. Chaba and Chaba*, [1978] 1 W.W.R. 631 at 637 (Alta. S.C. (A.D.)) [*Chaba*]; *Marthaller v. Lansdowne Equity Venture* (1997), 200 A.R. 226 at 230 (C.A.) and Master Funduk's decisions in *Bate*, *supra* note 16 at 165; *Capital Underwriters Corp. v. Kruger* (1996), 194 A.R. 63 at 74 (M.C.) [*Underwriters*]; *Louie's Submarine*, *supra* note 16 at para. 30.

TAB 8

[Indexed as: **Canadian National Railway Co. v. Volker Stevin Contracting Ltd.**]

CANADIAN NATIONAL RAILWAY COMPANY v. VOLKER STEVIN CONTRACTING LTD. and CANADIAN INDEMNITY COMPANY; TED SIMON, STEVENSON WILLS MATTHEWS, BENJAMIN VAUGHN YALLOP and WILLIAM E. JUBIEN (Third Parties)

Court of Appeal
Harradence, Stratton and Côté JJ.A.

Heard – November 12, 1991.
Judgment – November 25, 1991.

Evidence (civil) – Opinion evidence – Expert witnesses – General – Scientific and engineering witnesses testifying at trial on interpretation of construction contract – Contract containing little jargon or technical language – Interpretation of contract being matter of law rather than subject for evidence – Scientist or engineer improperly testifying on meaning of ordinary English.

Contracts – Interpretation – General – Construction contract requiring contractor to install new culvert by tunnelling through embankment – Contract leaving aspects of construction method to determination of contractor but requiring contractor to maintain structural integrity of soil – Contract putting risk of unforeseen conditions at site on contractor and precluding reliance on information supplied by railway – Railway failing to pass along report on unstable soil conditions at site – Attempt at conventional tunnelling unsuccessful due to unstable soil conditions – Railway terminating contract and retaining another construction company – Tunnel successfully completed using chemical grouting to maintain soil stability – Railway unsuccessfully suing to recover additional cost of that method – Trial judge allowing counterclaim by contractor for damages for breach of contract – In case of doubt, court adopting sensible interpretation advancing objects of contract – Contract not requiring use of conventional tunnelling methods – Use of chemical grouting not violating covenant to maintain structural integrity of soil – Failure to pass on site report not actionable under contract – Appeal allowed.

The plaintiff railway decided to have a new culvert installed by tunnelling through an embankment of fill beneath a trestle. The tenders specified tunnelling without interrupting rail service, with other aspects of the construction method left to the contractor. The contract documents said that the contractor had to make its own assessment of conditions and not rely on the plaintiff's information, and that the contractor was to bear all risk from unforeseen site conditions. The documents also said the contractor was to maintain the structural integrity of the soil.

The defendant obtained the contract, and subcontracted the tunnelling. When the subcontractor's method failed, the defendant terminated the subcontract and the plaintiff terminated the main contract. The plaintiff then hired another contractor, which did the job by a different method, chemical grouting, at a cost higher than the original contracted amount. The plaintiff sued for the difference, and the defendant counterclaimed for breach of contract.

At trial, some of the scientific and engineering witnesses gave opinions on the nature and types of construction contracts, and on how to interpret certain clauses in the contract.

The trial judge dismissed the claim and awarded the defendant damages under the counterclaim on the grounds that the contract called for "conventional" tunnelling methods and forbade a change in the character of the soil, and that "conventional" tunnelling methods would not work, so the tunnel ultimately built was not that originally contracted for. The plaintiff appealed.

Held – Appeal allowed.

It is for the court to interpret a contract, which is a legal matter. It is not a subject for evidence. The contract here contained very little jargon or technical matters, and a scientist or engineer should not have testified about the meaning of ordinary English.

The contract did not call for conventional tunnelling methods; the tunnelling methods were to be proposed by the builder. Moreover, the contract encouraged the use of chemical grouting or similar methods. If there is any doubt in construing a contract, one should prefer the interpretation that makes sense and advances the objects of the contract.

Maintaining the structural integrity of the soil meant its shape and maybe its cohesion, not its chemical or geological nature. No one would want to preserve the nature of unstable soil. Neither does the word "maintain" mean to avoid all change.

Ordinary law restricts the conditions under which one may imply a term in a contract, and forbids implying a term contrary to express terms. It is doubtful that a construction contract implies a warranty by the owner that the work can be carried out or the work achieved. Here, the contract expressly excluded implying any obligation on the plaintiff's part not expressly imposed by the contract. The law of torts should not impose between contracting parties a duty opposite to that imposed by their contract. As the contract said the defendant was to inspect and bear all risk, the plaintiff's failure to pass along a site report regarding the unstable soils problem was not actionable. Moreover, the report did not contain any unusual knowledge that was crying out to be revealed.

Cases considered

Catre Industries Ltd. v. Alberta (1989), 36 C.L.R. 169, 63 D.L.R. (4th) 74, 99 A.R. 321 (C.A.) [leave to appeal to S.C.C. refused (1990), 105 A.R. 254, 108 N.R. 170] – referred to.

Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd., [1991] 4 W.W.R. 251, 53 B.C.L.R. (2d) 180, 44 C.L.R. 88, 7 C.C.L.T. (2d) 177, 1 B.L.R. (2d) 188 (C.A.) – considered.

Gorgichuk Estate v. American Home Assurance Co. (1985), 5 C.P.C. (2d) 166, 14 C.C.L.I. 32, [1985] I.L.R. 1-1984, varied on other grounds [1988] I.L.R. 1-2283, 30 C.C.L.I. 51, 27 O.A.C. 157 (C.A.) – referred to.

Green Elm Holdings v. J.H. Hogg & Associates Ltd. (1983), 31 Alta. L.R. (2d) 88, 7 C.L.R. 159 (C.A.) – distinguished.

Moncton (City) v. Aprile Contracting Ltd. (1980), 29 N.B.R. (2d) 631, 66 A.P.R. 631 (C.A.) – referred to.

R. v. Walter Cabott Construction Ltd. (1975), 44 D.L.R. (3d) 82, varied (1975), 69 D.L.R. (3d) 542, (sub nom. *Walter Cabott Construction Ltd. v. Canada*) 12 N.R. 285 (Fed. C.A.) – considered.

Temar Construction Ltd. v. West Hill Redevelopment Co. (1986), 21 C.L.R. 156 (Ont. H.C.) – referred to.

Warden Construction Co. v. Grimsby (Town) (1983), 2 C.L.R. 69 at 93 (Ont. C.A.) – distinguished.

APPEAL from judgment of Matheson J., (1990), 42 C.L.R. 150, 111 A.R. 116, dismissing action and allowing counterclaim.

C.P. Clarke, Q.C., and *G.A. Harding*, for appellant.
M.J. Bondar, for respondents.

(Doc. Edmonton Appeal 9103-0076-AC)

November 25, 1991. Written memorandum of judgment.

1 Per curiam:– One C.N. rail line links part of the Northwest Territories to the rest of Canada. At one point just inside Alberta, the rail line originally crossed a small valley on a timber trestle. Then later the C.N. put large metal culverts near the bottom, and dumped fill, mostly sand, on top. They covered the old trestle, so that the rail line now runs on an artificial embankment, mostly of sand. After some years the culverts became squashed so they would not carry sufficient water, threatening a washout. They were big enough that a person could walk inside and observe their deformation and consequent closure. The C.N. decided to have one culvert rebuilt, and the other one abandoned and replaced by a new culvert nearby. The C.N. bought and supplied the disassembled pieces of metal culvert. The C.N. called for tenders and specified that the new culvert had to be installed by tunnelling through the embankment without interruption of rail service above, and had to be completed by the end of winter. The C.N. expressly left other aspects of method of construction to the contractor [appeal from (1990), 42 C.L.R. 150, 111 A.R. 116].

2 Neither the C.N. nor Volker Stevin had any tunnelling experience. But a tunnelling company which could not secure a bond big enough for this job persuaded Volker Stevin to bid on this job and to subcontract all the tunnelling out to the tunnelling company. Volker Stevin did bid and got the job, and signed the contract with the C.N. The tunnelling company elected to use the shield method of tunnelling, but that did not work, and very little was done to build the new culvert. Volker Stevin terminated the subcontract, and the C.N. terminated the main contract. C.N. hired a different tunnelling company, Janod, which later successfully completed the job. It used chemical grouting to firm up the soil, and poling plates instead of portions of a shield. Volker Stevin's expert testified, and the trial judgment seems to find, that that was an excellent solution to the problem. The new job cost more that the old contract amount, so the C.N. sued Volker Stevin, which defended and counterclaimed, and third partied some C.N. officials.

3 The trial judgment dismissed C.N.'s suit, awarded Volker Stevin damages under its counterclaim, and dismissed Volker Stevin's third party claim. C.N. was ordered to pay costs of Volker Stevin and the third parties. C.N. appeals.

4 The reasons for judgment of the trial court are lengthy, but these appear to be their essential steps in reasoning:

(a) the contract called for "conventional" tunnelling methods, and forbade a change in the character of the soil;

(b) the contract excluded the possibility of problems in the embankment, other than the old wooden trestle, and said that the soil's structural integrity was basically adequate;

(c) "conventional" tunnelling methods would not work, because they would allow too much deflection, and chemical grouting was not a "conventional" tunnelling method, so the tunnel ultimately built was not that originally contracted for;

(d) the law excuses a builder under the present circumstances as the work called for by the contract is impossible or very difficult, or would not last long.

5 It is curious that some of the scientific and engineering witnesses gave opinions on the nature and types of construction contracts, and on how to interpret certain clauses in this contract. The trial judgment quotes some of that evidence, and seems to rely upon it. But these are legal matters which must be submitted to the court as argument. It is not a subject for evidence, or weighing of the qualifications of the person who submits it. The contract here contains very little jargon or technical matters, and is composed almost entirely of ordinary English. It is for the court itself to interpret that; even a professor of English should not testify on that point: *Gorgichuk Estate v. American Home Assurance Co.* (1985), 5 C.P.C. (2d) 166, 14 C.C.L.I. 32, [1985] I.L.R. 1-1984 (at pp. 7619, 7620), varied on other grounds [1988] I.L.R. 1-2283, 30 C.C.L.I. 51, 27 O.A.C. 157 (C.A.). Therefore, still less can a scientist or engineer testify about the meaning of ordinary English.

6 We have considerable doubts whether proposition (d) above, or any part of it, is correct in law. But our views respecting steps (a) to (c), set out below, make that academic. No more need be said about (d).

7 We attach as an appendix [post, p. 177] a number of the most

relevant portions of the building contract between C.N. and Volker Stevin. It appears to us impossible to say that the contract called for "conventional" tunnelling methods, and forbade chemical grouting. The contract says many times that tunnelling methods are to be proposed by the builder: see supplementary general conditions 1.14(d), 1.26, 2.9(b); general conditions 3, 19, 44; instructions to bidders, paras. 8 and 9. Indeed Volker Stevin first told C.N. that it would investigate soil conditions further with a pilot hole and then tunnel using either the advancing shield method, or chemical freezing. (Its officer testified at trial that the word "chemical" was an error, but the author of that letter did not testify.) Later Volker Stevin elected the shield method. Besides the need to install the metal lining provided by the C.N., we see no restriction in the contract on method of tunnelling. No one showed us any evidence that Volker Stevin in fact interpreted the contract as calling for "conventional" tunnelling methods. No one from the tunnelling subcontractor testified. Therefore, even if *Warden Construction Co. v. Grimsby (Town)* (1983), 2 C.L.R. 69 at 93 (Ont. C.A.), is correctly decided, it is irrelevant.

8 What is more, we read supplementary general condition 2.9(k) as encouraging the use of chemical grouting or other similar methods, whether or not they may be considered "conventional." It says to combat any unstable soil, the contractor is to "employ sheathing; timbering; shoring, poling plates, spiling, grouting or other means necessary to maintain the structural integrity of the soil." It is common ground that the whole problem here was "unstable soil conditions." The second contractor, Janod, later successfully used poling plates and chemical grouting. It is suggested that "grouting" in para. (k) just means filling in the gap around the metal liner, and does not mean the extensive chemical process ultimately used by Janod. As paras. (m) and (n) unconditionally call for grouting, irrespective of the presence of unstable soil, we doubt that interpretation. But in any event, cl. (k) specifically calls for "other means necessary," so plainly the items enumerated in (k) are but examples, and the opposite of exclusive.

9 During the appeal, Volker Stevin suggested that para. (k) was confined to temporary methods during construction. We see nothing there to limit it that way. Some of the examples given sound neither temporary nor readily removable. Nor is there any need to remove them. Nor does the contract guarantee that the metal liner alone will support unstable soil.

10 It is suggested that when Janod injected large quantities of chemicals into the soil to harden it around the tunnel, they destroyed the soil's

character, so that it became a kind of concrete, and so was no longer soil. And in turn it is suggested that that contradicted the original contract, and so both showed that the original contract was impossible, and that what C.N. now sues for is a different job entirely. We disagree. Paragraph (k) does not speak of preserving the soil, still less preserving its chemical or geological nature. Why one would want to preserve the nature of unstable soil we cannot fathom. If there is any doubt in construing a contract, one should prefer the interpretation which makes sense and advances the objects of the contract. What para. (k) expressly says to "maintain" is the "structural integrity of the soil." The "structural integrity" means its shape and maybe its cohesion. Patently that is what timbering would preserve. And obviously slumping or flow or fall of unstable soil is the evil a tunneller must guard against.

11 Nor does the word "maintain" mean to avoid all change. The new *Oxford English Dictionary* includes among the definitions of "maintain" these:

> 4. a. To keep up, preserve, cause to continue in being (a state of things, a condition or activity, etc.); to keep vigorous, effective, or unimpaired; to guard from loss or derogation . . .
>
> 5. a. To cause to continue in a specified state, relation, or position . . .
>
> 11. To back up, stand, give one's support to, defend, uphold (a cause, something established, one's side or interest, etc. . . .)
>
> 13. To hold, keep, defend (a place, position, possession) against hostility or attack, actual or threatened . . . 1660 F. Brooke tr. *LeBlanc's Trav.* 15 There are four avenues cut through the Mountain, easie to be maintained.

It is also relevant to note one of its definitions of "maintenance":

> 3. The action of keeping in effective condition, in working order, in repair, etc.; the keeping up of (a building, light, institution, body of troops, etc.) by the supply of funds or needful provision; the state or fact of being so kept up; means or provision for keeping up.

12 Instructions to "maintain the structural integrity" of a fire department or police force would not forbid replacement of any officers. On the contrary, the instructions plainly imply that any officers killed or disabled or retired are to be replaced at once. Instructions to maintain the structural integrity of a bridge plainly imply that corroded or cracked beams are to be replaced at once with new strong ones, not kept in place until the bridge falls down. That is so even if a number of the beams are already corroded or cracked at the time that the instruction is given.

13 The reasons for judgment say (with apparent approval) that one of the expert witnesses referred to supplementary general condition 2.9(c) and "was of the view that the absence of clear indications of problems related to any other aspects of tunnelling or methods excludes the possibility of other problems." That flies in the face of the clear words of para. (k), just discussed at length. What is more, everyone knew that the embankment was artificial, and had been built by piling sand and other fill over the old culverts and old trestle. And everyone knew that the new construction was to repair one old culvert and totally replace the other, because they had deformed and become squashed shut.

14 The contract documents repeatedly call on the builder to attend at the scene and thoroughly acquaint itself with subsurface and other conditions: see supplementary general condition 1.13, general condition 44, form of tender, and annex B to tender. Volker Stevin argued that their inspection was for site access and cost assessment, not for problem diagnosis, but we can read no such limitations into those clauses: see especially supplementary general condition 2.9(d). The tender certifies that Volker Stevin had inspected, and its counsel told us that its tunnelling subcontractor had also inspected conditions onsite before Volker Stevin bid. Volker Stevin's senior vice-president testified that Volker Stevin left it to its proposed tunnelling subcontractor to study the plans and specifications with care. What is more, the old culverts were taller than a person, and one could enter them and view their deformation, cracking, and squashed ends. Volker Stevin argued that their assumption of risk in general condition 44 arose only if they did not inspect. But in fact it arose if they did not inspect everything: the clause is clear.

15 In oral argument before us, counsel for Volker Stevin repeatedly abandoned any claim for misrepresentation by C.N. (as distinguished from non-disclosure). Given supplementary general condition 1.13 and general condition 44, that abandonment is not surprising.

16 The reasons for judgment point out that supplementary general condition para. 2.9(k) begins "If areas of unstable soil conditions are encountered . . ." The reasons say that "that would infer that the structural integrity of the soil was basically adequate," and that only some areas might not be. For the reasons just given, we reject that suggestion. Nor does it flow in English grammar or logic.

17 It will be seen that the reasons for judgment imply a number of terms which are nowhere in the express words of the contract documents, and indeed contradict the express words in varying degrees. This con-

tract expressly excludes implying any obligation on C.N.'s part which is not expressly imposed by the contract: general condition 4. Even if the contract did not say that, the ordinary law restricts when one may imply a term in a contract, and forbids implying a term contrary to express terms: *Catre Industries Ltd. v. Alberta* (1989), 36 C.L.R. 169, 63 D.L.R. (4th) 74, 99 A.R. 321 (C.A.), especially at pp. 84-86, 88 [D.L.R.]. It is doubtful that a construction contract implies a warranty by the owner that the work can be carried out or the result achieved: see *Temar Construction Ltd. v. West Hill Redevelopment Co.* (1986), 21 C.L.R. 156 (Ont. H.C.), at pp. 168-69, and cases cited, and *Moncton (City) v. Aprile Contracting Ltd.* (1980), 29 N.B.R. (2d) 631, 66 A.P.R. 631 (C.A.), at p. 667.

18 Volker Stevin puts a great deal of emphasis upon supposed design defects here. But if there is no implied warranty by the owner that the design will work, then the significance of such defects either disappears or reverses itself. And when the contract leaves construction method up to the builder, then he in effect becomes one of the designers.

19 In our view, the contract was clear, and put on Volker Stevin the problem of how to bore and maintain a tunnel, and all risk that that might prove expensive or difficult. Volker Stevin and its tunnelling subcontractor inspected the scene at C.N.'s express demand, and C.N. were not tunnelling experts, so we cannot even see any unfairness, were that relevant. Volker Stevin did not have to bid. If they did bid, they could choose any price which they wanted, and allow in it for any contingencies which they wished. They chose to gamble that they could put in the low bid and still make money, and they lost: see the *Catre* case, at p. 91, and cases there cited.

20 During the second day of the appeal, Volker Stevin raised another argument. They suggested that C.N. was wrong not to pass on to prospective bidders a site report which C.N had obtained about the problem from the manufacturer of the metal tunnel lining. They framed that claim in tort, not contract. We see a number of obstacles to that claim:

(a) It is not pleaded in the statement of defence, or counterclaim, or particulars; the only thing at all close is a brief plea of misrepresentation, abandoned before us.

(b) It seems contrary to common sense that the law of torts should impose between contracting parties (or their employees) a duty the very opposite of that which they have imposed between themselves by their contract. The contract here says ad nauseam that the builder must make

his own assessment of conditions, not rely on C.N.'s information, and must bear all risk of difficulties or cost overruns from unforeseen conditions on the site: see supplementary general conditions 1.10, 1.13.

(c) The authority cited to us is a lone sentence in *R. v. Walter Cabott Construction Ltd.* (1975), 44 D.L.R. (3d) 82 at 98 (Fed. T.D.). The facts there were rather unusual. Mahoney J. cited no authority for that legal proposition. As the law already has categories of contracts where disclosure is and is not required between parties negotiating a contract, the best which can be said of the sentence relied on is that it is far too broad. The Federal Court of Appeal reversed that part of the decision of Mahoney J. Without setting out a general rule, Pratte J. held that there was no duty in tort there beyond the duties in contract, and the rest of the court concurred on that point: (1975), 69 D.L.R. (3d) 542, (sub nom. *Walter Cabott Construction Ltd. v. Canada*) 12 N.R. 285, at pp. 545-46, 549 [D.L.R.].

(d) Volker Stevin relies upon *Green Elm Holdings v. J.H. Hogg & Associates Ltd.* (1983), 31 Alta. L.R. (2d) 88, 7 C.L.R. 159 (C.A.). That was a suit by an *owner* against the subdesigner to whom the designer hired by the plaintiff owner had delegated part of the design. The design could be built and was built, but did not suffice for the plaintiff owner's purposes. That case has nothing to do with the present situation, and no general statements of law are found there. There is apparently no authority at the appellate level in the Commonwealth making an owner's designers liable in tort to the *builder*, and in one case the British Columbia Court of Appeal would not find such a duty of care: *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1991] 4 W.W.R. 251, 53 B.C.L.R. (2d) 180, 44 C.L.R. 88, 7 C.C.L.T. (2d) 177, 1 B.L.R. (2d) 188.

(e) The manufacturer's report not given to Volker Stevin was not a scientific analysis of geological or subsoil conditions. It did not analyze instability of the soil itself. (That was in other material which C.N. did give Volker Stevin.) Instead portions of the manufacturer's report on which Volker Stevin relied on appeal covered three things:

(i) a description of what was evident to the naked eye of anyone who entered the two old culverts;

(ii) a discussion in common-sense terms (with no evidence of advanced technical knowledge) of what could and could not have caused the culvert's obvious deformation;

(iii) an educated guess that compacting or backfilling during the original entombment of the old trestle played a role in the deformation.

21 We cannot see that C.N. had any unusual or peculiar knowledge which cried out to be revealed, especially to Volker Stevin, who knew the basic facts anyway, or to its tunnelling subcontractor which had more tunnelling knowledge than did C.N.

22 Therefore, we need not consider whether C.N.'s employees could take advantage of an exculpatory clause in C.N.'s contract had they themselves been guilty of misrepresentation or actionable non-disclosure.

23 There was a great deal of evidence on a number of points which appear to us irrelevant, and we will not recite that evidence.

24 We heard no dispute about the amounts involved in the suit. When counsel for the plaintiff C.N. was leading Mr. Yallop's evidence at trial on amount, counsel for the defendant Volker Stevin said that quantum was not in issue, and C.N.'s counsel dropped that line of evidence. On appeal Volker Stevin's counsel raised the question of quantum, but desisted when reminded of this. He conceded that C.N.'s computations are right. Nor did we hear any suggestions that the defendant bonding company was in any different legal position than the defendant Volker Stevin. They appear here, and appeared at trial, by the same counsel. At the end of oral argument we announced that the appeal would be allowed. We promised reasons to follow, which are found above. We allow the main suit for the amounts suggested by C.N. at trial, and dismiss the counterclaim. The third party notice becomes academic.

25 After we announced that the appeal was allowed, we heard argument on costs. Counsel for Volker Stevin said that when he had won at trial, he had got costs on double col. 6 up to the date of the losing party's offer of settlement, and at four times col. 6 thereafter. He suggested that turnabout would be fair play, and counsel for C.N. did not object. Nor did C.N. object to his reminder that Volker Stevin was to get costs in any event of an earlier procedural appeal, to be set off against the main costs. We adopt that suggestion for costs in Queen's Bench and on appeal. C.N. should recover costs of second counsel, and no limiting rule should apply. If any more details need to be worked out, or directions are useful, any member of the panel may give them before or after entry of formal judgment.

APPENDIX

SUPPLEMENTARY GENERAL CONDITIONS #1

1.4 WORK INCLUDED

The work included in the contract consists of furnishing all equipment, tools, and labour necessary for sorting, loading, hauling and installation of tunnel liner and multiplate culverts, disposal of excavated material, channel relocation, backfill of existing culvert, supply and install shoring as required, end treatment hold down devices, and any and all work ordered by the Engineer necessary to complete this work as shown on the drawings and specified herein.

1.7 PROCEDURE OF CONSTRUCTION

The Contractor shall study all drawings, so as to become familiar with the conditions under which the Contract will have to be carried out.

The Contractor shall carry out all work in such a way and sequence that all work covered under the Contract shall be completed by the completion date specified. The site shall be left in a neat and tidy condition.

1.8 BASIS OF TENDERING (Cont'd.)

Unless otherwise stated in this specification, the unit prices above referred to shall include all labour, scaffolding, tools, implements, machinery, service and materials constructed in place and shall include all overhead, profit and supervision and the entire cost of all permits, certificates, Sales Tax, Provincial Sales Tax, Provincial Labour Taxes, Workers' Compensation, Public Liability and Property Damage, Surety Bond, Royalties, and any and all other costs of a like nature to which the work is liable.

1.10 ALLOWANCE FOR WORKING CONDITIONS

The Contractor shall take into consideration all of the precautions, conditions and limitations of every kind which may affect the work or his operations, and he must allow for same in the various Unit Prices or lump sums submitted.

1.12 CONTRACTOR TO SHOW ABILITY TO DO WORK

Before the award of the contract, any tenderer may be required to show to the satisfaction of the Engineer that he has, or can obtain, the necessary and proper equipment, tools, facilities and means, and that he has the experience, ability and financial resources to perform the work within the time specified and in a satisfactory or workmanlike manner.

1.13 VISITING THE SITE

The Contractor shall visit the site before submitting his tender in order to thoroughly acquaint himself with all local conditions under which he will be called upon to carry out the work coming under his contract.

The Contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, particularly those bearing upon transportation, disposal, handling and storage of materials, availability of labour, water, electric power, roads and uncertainties of weather, or similar physical conditions at the site, the conformation and con-

ditions of the ground, the character of equipment and facilities needed preliminary to and during the prosecution of the work or the cost thereof under this Contract.

The Contractor further acknowledges that he has satisfied himself as to the character, quality and quantity of any and all surface and subsurface materials, including streams and ground water, to be encountered. The Contractor has considered all exploratory work done by or for the Railway, as well as information presented by the Drawings and Specifications made a part of this Contract. Any failure of the Contractor, to acquaint himself with all the available information will not relieve him from responsibility for performing the work. Representations made but not so expressly stated and for which liability is not expressly assumed by the Railway in the Contract and for information on or opinions concerning soils and subsurface conditions or other matters furnished by or for the Railway or for any understanding, opinions, or representations made or so expressed by any of its officers or agents during or prior to the execution of this Contract, shall be deemed only for the information of the Contractor and the Contractor shall have no claim against the Railway resulting from such information.

1.14 WORK SCHEDULE

The Contractor shall submit, with his tender documents, a schedule or diagram showing the dates on which all activities will be commenced and finished and to which the Contractor is prepared to work and stand by bearing in mind that the completion date must not be altered. The Contractor shall indicate, in his schedule, his expected progress in increments of not more than one week.

Within 14 days after the award of the contract, the contractor shall submit to the Engineer for approval a detailed work schedule in increments of not more than one week.

The detailed work schedule shall:

(d) Clearly indicate the construction periods and sequences of operations of each item of work in sufficient detail so the Engineer can determine the feasibility of the program.

Approval by the Engineer of the Contractor's detailed construction program shall in no way be construed to relieve the Contractor of any of his duties or responsibilities under this contract.

1.24 INTENT OF PLANS AND SPECIFICATIONS (Cont'd.)

If the Contractor, in the course of the work, finds any discrepancy between the specifications, the plans and the physical conditions of the locality, or any errors or omissions in the plans, it shall be his duty to immediately inform the Engineer in writing, and the Engineer shall promptly verify the same. Any work done after such discovery, until authorized, will be done at the Contractor's risk.

Specifications shall take precedence over the drawings. Figures on the drawings shall take precedence over scaled measurements; details shall take precedence over drawings made to a smaller scale.

1.26 CONSTRUCTION METHODS AND PROSECUTION OF WORK

As far as it is consistent with the nature of the work and the results to be attained, the order and methods of prosecuting the work will be left to the discretion of the Contractor, with whom the responsibility for such order and methods shall rest; provided, however, that the Engineer shall have the right at all times to prescribe and control such order and methods with a view to the safety and to the rapid and economical construction of the work.

If the Contractor fails, in the opinion of the Engineer, to carry on the work with sufficient diligence and skill, or his delegated representative having jurisdiction fails to co-operate with all trades and the Engineer, as aforementioned to ensure completion in accordance with the Contract, the Engineer may take whatever steps he considers necessary under Clauses 22 and Page A5, of Annex "A", General Conditions attached.

1.27 MAINTENANCE AND GUARANTEE

The Contractor will be held absolutely responsible for the care of the work and whatever appertains thereto from commencement of same to its final completion and acceptance.

All work performed under this contract, unless otherwise specified, shall be guaranteed by the Contractor for a period of one year from the date of final acceptance of work by the Railway, during which period of one year the Contractor shall, immediately on receipt of notice in writing from the Railway, and at his own expense, make good all defects of whatever nature which may develop during that period.

In the event of the Contractor refusing or neglecting to do so, the Railway may employ some other person or persons to make good any such defects, loss or damage, and the expense of employing such person or persons to make good any such defects, loss, or damage, shall be charged to and paid by the Contractor.

1.62 ADDENDA TO SPECIFICATION

Should any bidder find discrepancies in or omissions from the contract drawings or specifications, or be in doubt as to their meaning, he shall notify the Engineer who will forthwith interpret the true intent and if necessary issue addenda to specifications stating the true intent and purpose of the contract drawings or specifications relative thereto. Upon award of contract, said addenda shall become an integral part of the contract.

SUPPLEMENTARY GENERAL CONDITIONS – #2

2.2 WORK INCLUDED

The work consists of furnishing all plant, labour and equipment to install structural plate corrugated steel pipe, tunnel liner plate, anchoring and stiffening systems, excavation and disposal, backfill existing culvert and install end treatment.

All work shall be carried out by personnel skilled in this type of installation.

2.3 SCOPE OF THE WORK

The scope of the works is as follows:

(b) Under the closure of the railway traffic for a continuous period of ten days excavate for, install and backfill grade for the 2450 mm. Structural plate corrugated steel pipe including the installation of the adapter to provide connection to the proposed 2400 mm tunnel liner plate installation; and the removal of the existing damaged culvert section now in place.

(c) With the rail traffic in continuous service install 2400 mm tunnel liner plate through an existing structural plate corrugated steel pipe to connect onto the installation described in paragraph (b).

(d) Install a new tunnel liner plate installation of 4200 mm diameter.

2.4 MATERIAL (Cont'd.)

(c) All other materials including anchors, grout, sand bags and miscellaneous iron will be supplied by the contractor.

2.9 INSTALLATION OF 4200 MM TUNNEL LINER PLATE

(a) A new 4200 mm diameter tunnel liner plate is required to be installed through the railway grade as shown on the drawings.

(b) The Contractor shall submit with his form of tender the construction method and procedures he intends to use to accomplish this installation.

(c) The Contractor is to be aware of the existence of an old timber trestle within the limits of his installation. Piling and timber will be encountered during the tunnelling operation.

(d) The soil information contained on the contract drawing was obtained by the railway in June of 1985. It is the responsibility of the contractor in using this information to ensure that it is suitable for their purposes and to supplement it as they consider necessary.

(e) The Contractor is to pay particular attention to the fact that his tunnelling operation will be carried out during the operation of the railway. The Contractor is to ensure that his operations do not jeopardize the structural integrity of the railway grade and track.

(f) The tunnel liner plate culvert shall be assembled and installed according to the ring makeup drawing and manufacturers recommendations.

(g) Tunnel liner plates are to be installed in such a manner as to have the grout holes located every third ring at the two, four, six, eight, and ten o'clock positions.

(i) Installation shall begin at the outlet end of the structure and shall proceed continuous to the inlet end.

(j) Excavation shall be kept to a minimum. It shall be advanced ahead of the tunnel liner installation in relationship to the structural makeup of the soil encountered and at no time shall it exceed 600 mm.

(k) If areas of unstable soil conditions are encountered the contractor shall employ sheathing; timbering; shoring, poling plates, spiling, grouting or other means necessary to maintain the structural integrity of the soil.

(l) Excavation material gained by the tunnelling operation may be disposed of on railway property at a site approved by the Engineer.

(m) Grouting shall be carried out via each grout hole provided and shall be carried out immediately after each ring sectionals installed not exceeding 4 hours after installation or as directed by the Engineer.

(n) Grouting shall be done to ensure that all voids are filled taking care that no shifting or deformation occurs to the liner during this operation due to excessive pressure.

2.10 BASIS OF PAYMENT (4200 mm Tunnel Liner Plate)

The Unit Prices shall also include the cost of all pumping, bailing, shoring, etc. and the furnishing of all necessary pumps, tools and equipment required to keep the work area dry.

CN CONTRACT

Work to be done.

III. The Contractor shall forthwith commence the work provided for by the said Contract, shall diligently execute the respective portions thereof according to the Contract and on or before the following dates, namely:

February 23, 1986

Time for completion.

shall deliver the same to the Railway completed in every particular to the satisfaction of the Engineer.

Payments.

IV. (1) The Railway covenants with the Contractor, that the Contractor having in all respects complied with the provisions of the Contract, will be paid for and in respect of the work the price or the various prices set out in the schedule of prices embodied in the said accepted tender, (Annex "B"), and any other sums of money properly payable under the terms of the Contract.

Interpretation of the Contract.

VII. (a) If there is any discrepancy or conflict between the provisions of this Agreement and the General Conditions (Annex "A"), this Agreement shall govern.

(b) If there is any discrepancy or conflict between the General Conditions (Annex "A") and Annexes "B" and "C", the provisions of the General Conditions (Annex "A") shall govern.

GENERAL CONDITIONS

Interpretation.

1. In the Contract:

(a) "work" or "works" shall, unless the context otherwise requires, mean the whole of the work and materials, matters and things required to be done furnished and performed by the Contractor in or under this Contract;

Included and incidental works

3. The price or each respective price and amount of money stipulated in the schedule of prices embodied in the accepted tender (Annex "B") and in any Engineer's certificate issued pursuant to Clause 13 or 14 of these General Conditions includes and determines the full compensation to the Contractor for not only the particular description of work and materials mentioned therein but also all and every kind of planning, labour, supervision, materials, machinery, plant, equipment, civil and other works and things of whatsoever nature required for the full execution, completion and delivery, in accordance with the Contract, of the work. All of such incidental facilities and services shall be provided by the Contractor without further expense to the Railway. In case of any dispute as to what work, materials and/or incidental facilities or services are included in the work contracted for, or in the said schedule and certificates, or any item thereof, the decision of the Engineer shall be final and conclusive.

Implied contracts negatived.

4. No implied obligation of any kind whatsoever, by or on behalf of the Railway shall arise or be implied from anything in the Contract contained, nor from any position or situation of the parties at any time, it being clearly understood that the express covenants and agreements herein contained made by the Railway, shall be the only covenants and agreements upon which any rights against the Railway may be founded.

Quality.

8. The works shall be constructed of the best materials of their several kinds, and carried on and completed in the best and most workmanlike manner, and in the manner required by, and in strict conformity with, the Contract, as defined in Article II of the Agreement, all to the complete satisfaction of the Engineer.

Extra work.

14. (1) The Engineer may from time to time, before the final acceptance of the works, order in writing extra work to be done. The price for such work shall be determined by the Engineer who may either fix a unit price or a lump sum price, or may, if he so elects, provide that the price shall be determined by the actual cost, which will include additional costs for Surety Bond, Public Liability and Property Damage Insurance, Workmen's Compensation Insurance, Provincial Labour Tax, Provincial Sales Tax, and other costs of a like nature that may be imposed upon the Contractor by Federal or Provincial laws, to which shall be added ten per cent to cover general expense and superintendence, profits, contingencies, use of tools (other than Contractor's

plant), Contractor's risk and liability. If the Contractor shall perform any work or furnish any material which is not provided for in the Contract, or which was not authorized in writing by the Engineer, the Contractor shall receive no compensation for such work or material so furnished, and does hereby release and discharge the Railway from any liability therefor.

Covenants herein apply to Extra Work.

16. All alterations, changes or extra work so ordered, shall, except as otherwise expressly provided, fall within and be governed by the terms and conditions of this Contract, in like manner and to the same extent as the works originally contracted for.

Delays.

19. The Contractor shall not be entitled to make any claim or demand, nor bring any action or suit against the Railway for any damage which he may sustain by reason of any delay in the progress of the work.

Defective work or material.

May require removal or re-execution.

Non-compliance by Contractor.

20. Should the Contractor use or employ, or intend to use or employ, in or about the works, any tools, plant, materials, equipment, or things which, in the opinion of the Engineer, are not in accordance with the provisions of the Contract or are for any reason unsuitable for the works, or should the Engineer consider that any work is for any reason improperly, defectively, or insufficiently executed or performed, the Engineer may order the Contractor to remove the same and to use and employ proper tools, plant, materials, equipment, or things, or to properly re-execute and perform such work, as the case may be; should the Contractor not commence within twenty-four hours to carry out and comply with the said order or orders with all due diligence, the Engineer may at any time thereafter execute, or cause to be executed, the orders so given by him, and the Contractor shall, on demand, pay to the Railway all costs, damages, and expenses incurred by the Engineer in respect thereof, or occasioned to the Railway by reason of non-compliance by the Contractor with any such orders, or the Railway may retain and deduct the amount of such costs, damages and expenses from any amounts then or thereafter payable to the Contractor.

Insufficient workmen, plant, etc.
Work not proceeding with due diligence.

22. If the Engineer shall at any time consider the number of workmen, quantity of machinery, tools, plant, equipment, or of proper materials or things, respectively employed or provided by the Contractor on or for the said works, to be insufficient for the advancement of such works, or any part thereof, toward the completion within the time limited in

Engineer may provide additional at Contractor's expense.

Repayment by Contractor.

respect thereof, or that the works are, or some part thereof is, not being carried on with due diligence, the Engineer may, in writing, order the Contractor to employ or provide such additional workmen, machinery, tools, plant, equipment, materials or things as he may think necessary, and in case the Contractor shall not, within three days, or such other longer period as may be fixed by any such order, in all respects comply therewith, the Engineer may provide and employ such additional workmen, machinery, tools, plant, equipment, material and things respectively or employ a sub-contractor, or sub-contractors as he may think proper, and may pay in respect of such additional workmen such wages, Workmen's Compensation assessments, fringe benefits and all other things and benefits of a similar nature, as may be applicable, and for such additional machinery, tools, plant, equipment, materials and things respectively and to such sub-contractor or sub-contractors such prices as he may think proper, and all such amounts so paid shall be repaid on demand by the Contractor, or the same may be retained and deducted out of any sum that may then or thereafter be due from the Railway to the Contractor. The Contractor shall employ the additional sub-contractor, or sub-contractors, workmen, machinery, tools, plant, equipment, materials and things so provided and employed by the Engineer, in the diligent advancement of the works; the workmen so provided being thereafter exempt from discharge or removal by the Contractor without the consent and approval of the Engineer. In the event that the Engineer provides and employs additional workmen or employs a sub-contractor or sub-contractors, such shall thereupon be deemed to be the workmen of the Contractor or sub-contractors of the Contractor for the purposes of this Contract.

Default or delay by Contractor.

May take work out of the Contractor's hands.

Materials, etc. subject to lien.

Power of sale.

Set off against damages.

23. In case the Contractor makes default in the prompt commencement or in the diligent prosecution of any of the works or parts or portions thereof to be performed or that may be ordered, under the Contract, to the satisfaction of the Engineer, the Engineer may give a general notice in writing to the Contractor that he, the Contractor, has made such default. Should the Contractor during six (6) days (excluding Sundays) from the giving of such notice fail to remedy such default or delay to the satisfaction of the Engineer, or should the Contractor make default in completion of the works, or any portion thereof, within the time limited with respect thereto, in or under the Contract, or should the Contractor become insolvent or bankrupt, or aban-

don the work or any part thereof, or otherwise should he fail to observe and perform any of the provisions of this Contract then, and in any of such cases, the Engineer may forthwith within such further time as he deems reasonable and without prior notice or other proceedings whatsoever take all the work, or any portion or portions thereof, out of the Contractor's hands, and may employ such means as he may see fit to complete the works, or any such portion or portions thereof so taken over, or to partly complete or advance the same, and in such case the Contractor shall be chargeable with, and remain liable for, all loss and damages which may be suffered by the Railway by reason of such default, or the non-completion by the Contractor of the works, and shall also be liable to the Railway for the cost of doing any such work over and above the contract price therefor, and no objection or claim shall be made by the Contractor on account of the ultimate cost of the work so taken for any reason proving greater than, in the opinion of the Contractor, it should have been. All or any part of such loss and damages may be chargeable by the Railway against and may be deducted from any monies accruing or owing to the Contractor from time to time and any remainder thereof shall be recoverable from the Contractor. All materials and things whatsoever, and all machinery, tools, plant and equipment and all licenses, powers and privileges, acquired, possessed or provided by the Contractor for the purposes of the works, or by the Engineer under the provisions of the Contract, shall be subject to a lien or pledge in favor of the Railway for all purposes incidental to the completion of the works; and the Railway may use, exercise and employ the same in such completion, and may sell, or otherwise dispose of, the whole or any portion of such materials and things, machinery, tools, plant and equipment at forced sale prices, and may retain the proceeds of such sale or disposition and all other amounts then or thereafter payable by the Railway to the Contractor under the Contract, on account of or in part satisfaction of any loss or damage which it may sustain or may have sustained by reason aforesaid.

Waiver negatived.

43. No condoning, excusing, or overlooking by the Railway, or by any person acting on its behalf, on previous occasions, of breaches or defaults similar to that for which any action is taken, or power exercised, or forfeiture is claimed or enforced against the Contractor, shall be taken to operate as a waiver of any provisions of the Contract, nor to

defeat, affect or prejudice in any particular the rights of the Railway hereunder.

Contractor's information.

Contractor's investigation of every condition of work before execution of Contract.

44. The Contractor declares that in tendering for the works and in entering into the Contract he has either investigated for himself the character of the work and all local conditions that might affect his tender or his acceptance of the work, or that not having so investigated, he is willing to assume and does hereby assume all risk of conditions arising or developing in the course of the work which might or could make the work, or any items thereof, more expensive in character, or more onerous to fulfil, than was contemplated or known when the tender was made or the Contract signed. The Contractor also declares that he did not and does not rely upon information furnished by any method, whatsoever, by the Railway or its officers or employees, being aware that any information from such sources was and is approximate and speculative only, and was not in any manner warranted or guaranteed by the Railway.

INSTRUCTIONS TO BIDDERS – PARAS. 8 and 9

The tenderer shall submit with his tender a construction schedule and method of operation to install the 2450 mm structural plate corrugated steel pipe and a construction method and procedure to install the 4200 mm tunnel liner plate as called for in the specifications.

This document must not be detached from the "Form of Tender" as it constitutes a part of the contract.

FORM OF TENDER – PARAS. 1 and 2

ANNEX "B"

FT3425-256.8-1.2

CANADIAN NATIONAL RAILWAY COMPANY

FORM OF TENDER
FOR THE INSTALLATION OF TUNNEL LINER PLATE
CULVERTS AT LUTOSE CREEK – KM 413.36
(MILE 256.85) MEANDER RIVER SUBDIVISION
NEAR STEEN RIVER, ALBERTA

VOLKER STEVIN CONTRACTING LTD., the undersigned, hereby offer and agree to furnish all and every kind of labour, scaffolding, tools, implements, machinery, plant, services and materials that may be required to execute and complete, in a satisfactory and workmanlike manner, all the work required to complete the above project in accordance with Plans and Specifications attached hereto and exhibited, and such further details as may be furnished from time to time during progress of the work.

VOLKER STEVIN CONTRACTING LTD., have examined the Plans, Specifications, Instructions to Bidders, the Site and Existing Conditions, and have ascertained all necessary particulars with regard to the work and upon

acceptance of this tender ____________________ prepared to enter into a contract in the form exhibited with the said Specifications, for the performance of the work for the Unit Prices given below:

SITE VISIT

THE SITE WAS VISITED AND INSPECTED

ON THE 9 DAY OF SEPT 1985

BY Bruno Taurell

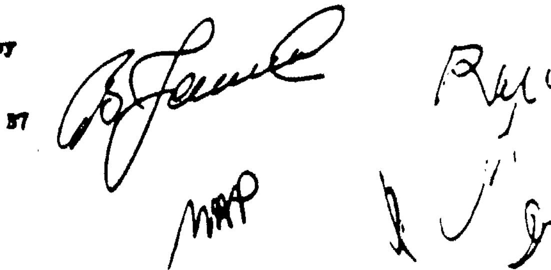
BEING THE AUTHORIZED REPRESENTATIVE OF

THE TENDERER AND HOLDING THE TITLE OF

OR POSITION OF ESTIMATOR

Note: This sheet shall be initialled by all parties signing Sheet B9

B7



Appeal allowed.

[Indexed as: **Alberta (Director of Maintenance & Recovery) v. P. (T.)**]

HERMAN ARNOLD WALDE v. T.P.

Court of Appeal
Lieberman and Foisy JJ.A., Power J. (ad hoc)

Judgment – November 26, 1991.

Costs – Parties entitled to or liable for costs – General – Court awarding costs against Director of Maintenance and Recovery only in special or unusual circumstances.

TAB 9

ALBERTA ENERGY AND UTILITIES BOARD

Calgary, Alberta

ATCO GAS AND PIPELINES LTD. **DISPOSITION OF CALGARY STORES BLOCK** **AND DISTRIBUTION OF NET PROCEEDS – PART 2**	**Decision 2002-037** **Application No. 1247130** **File No. 6405-17-2**

1 BACKGROUND

1.1 The Application

By letter dated August 28, 2001, ATCO Gas – South (AGS or the Company), a division of ATCO Gas and Pipelines Ltd., filed an application (the Application) with the Alberta Energy and Utilities Board (the Board) for approval of the sale of the AGS properties located in the City of Calgary, known as the Calgary Stores Block (the Stores Block) and further described as:

North Parcels: Plan A1, Block 63, Lots 1-20

South Parcels: Plan A1, Block 63, Lots 21-40, and the buildings located thereon.

The Company submitted that the assets comprising the Stores Block were no longer used and useful in the provision of utility service and requested the Board's approval of the following:

1. The sale transaction (the Sale) to Calgary Co-Operative Association Limited (Co-Op), summarized on Attachment 1 to the Application, pursuant to section 25.1 (now section 26) of the *Gas Utilities Act* (GU Act), and
2. Disposition of the proceeds of sale as outlined in Attachment 1 to the Application. The Company submitted that the land proceeds net of the remaining net book value of the assets sold and disposition costs should be recognized as 'Profit from Sale of Plant' by AGS, and accrue to the benefit of shareholders.

Further, the Company requested the Board's approval of the Sale prior to October 31, 2001 so that parties to the Land Sale Agreement between the Company and Co-Op dated August 13, 2001 could waive or satisfy certain conditions precedent by that date.

1.2 The Withdrawn Application

The Application was substantially similar to AGS's earlier application #2000366 that was withdrawn (the Withdrawn Application). The Board noted from the record of the proceeding from the Withdrawn Application, that parties did not generally object to the proposed sale of the Stores Block, but did object to the allocation of the proceeds from the disposition.

The Withdrawn Application was filed with the Board by letter dated December 21, 2000. A written proceeding was conducted that consisted of an interrogatory process, followed by argument and reply. The Board received reply submissions on or around March 13, 2001. By

proximity to a high-density residential community, retail commercial developments, and the downtown core.

Alternatives to address those issues were identified and reviewed. The Company considered renovations to the existing buildings, as well as relocation to a leased facility. The Company decided to relocate to new facilities, and advised that it had entered into a lease arrangement for the relocation of the stores function. That decision was expected to lower costs to customers by at least $625,000 over a ten-year period on a net present value basis, when compared to the alternative of remaining at the current site and renovating existing facilities. The Company submitted that the decision to relocate would best meet the needs of both customers and the Company.

The Company also submitted that the decision to relocate to the new leased facility resulted in assets included in rate base that would no longer be required for the provision of utility service. Therefore, the Company had executed a conditional purchase and sale agreement with Co-Op. AGS suggested that the Stores Block would provide no on-going benefit or service to customers, and that the Sale would result in no harm to customers. Rather, the Company submitted that the Sale mitigated any stranded cost issues.

AGS requested that the Sale be approved and that the treatment of the proceeds of sale be consistent with the removal of an asset from the provision of regulatory service. AGS submitted that the proceeds of sale should first be used to retire the remaining net book value of the assets and to cover the costs of disposition, with the balance to accrue to shareholders as a gain on sale.

3 REGULATORY POLICY AND GENERAL PRINCIPLES

The Board considers it would be helpful to set out a description of certain policy and general principles that impact the Application.

3.1 Regulatory Policy

Pursuant to section 25.1 of the GU Act, the Board's approval is required for the sale of property by a designated utility that is considered to be outside the ordinary course of business. The utility is expected to seek Board approval of an actual sale transaction, be it conditional or final. The Board's responsibility under section 25.1 (and similarly under section 91.1 (now section 101) of the *Public Utilities Act* (PUB Act)) does not generally apply to proposed or potential transactions, which are typically dealt with in the context of a GRA. The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding. On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed.

The Board employs a "no-harm" test when evaluating applications to dispose of rate base assets pursuant to section 25.1 of the GU Act. The Board's no-harm test addresses the potential impact on both rates and the level of service to customers. The Board also assesses the prudence of the sale transaction, taking into account the purchaser (for example, any relationship to the vendor), and the tender or sale process followed. As well, the Board considers whether the availability of future regulatory processes might be able to address any potential adverse impacts that could arise from a transaction.[1]

In conjunction with the no-harm test, the Board also addresses the treatment of gains or losses on the disposition of utility assets. The Board acknowledges that the treatment employed is not formulaic or mechanical. In previous decisions[2] referred to by the Board in Decision E86073 "the Board pointed out that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. In each of those decisions the Board went on to state, "The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case."[3]

The Board also stated in Decision E86073 that a reading of the Alberta Court of Appeal in *TransAlta Utilities Corporation v. Alberta (Public Utilities Board)*, (1986) 68 A.R. 171 (TransAlta Appeal) "would tend to support the view that the treatment of the proceeds of the disposition of utility assets is a question to be resolved having regard to the circumstances peculiar to each given case that comes before the Board for decision."[4]

However, notwithstanding the Board's consideration of the circumstances peculiar to each case, the Board also recognized in Decision E86073 that "certain statements made during the course of the decision in the TransAlta Appeal are matters of general application and are relevant to the matter before the Board."[5] In other words, the Board will endeavor to be consistent in its general approach to determining what is fair and reasonable.

3.2 The No-Harm Test

The Application before the Board was made by AGS pursuant to section 25.1 of the GU Act. As previously noted, this section requires a designated owner of a gas utility to obtain Board approval before disposing of its property outside the ordinary course of its business.

While the section does not detail the matters to be considered by the Board in determining whether to approve a disposition of property, the Board has in various cases developed a no-harm test to review the impact of the disposition on customers.

[1] The Board summarized the general principles of the "no-harm" test in Decision 2000-41, *TransAlta Utilities Corporation, Sale of Distribution Business* (July 5, 2000), and more recently in Decision 2001-65, *ATCO Gas – North (A Division of ATCO Gas and Pipelines Ltd.), Sale of Certain Petroleum and Natural Gas Rights, Production and Gathering Assets, Storage Assets and Inventory: Reasons for Decision 2001-46* (July 31, 2001).

[2] Decision E84116 at page 13 and Decision E84081 at page 12.

[3] Decision E86073, page 10

[4] Decision E86073, page 11

[5] Decision E86073, page 11

The rationale for and description of the no-harm test that follows was summarized by the Board in Decision 2001-65 wherein the Board stated:

> *The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest. This mandate has been recognized by the Alberta Court of Appeal*[6] *and the Supreme Court of Canada.*[7] *It has also been referred to recently on a number of occasions by the Board.*[8] *In keeping with this broad mandate, section 10(3)(d) of the Alberta Energy and Utilities Board Act*[9] *authorizes the Board to attach conditions to any order that the Board considers to be in the public interest. In the Board's view, conditions allocating sale proceeds to customers in order to mitigate harm caused by proposed asset dispositions are fully within its jurisdiction as characterized by the courts and reflected in the Board's governing legislation.*[10]

In describing the no harm test in Decision 2000-41 the Board stated, "...the Board is of the view that, subject to those issues which can be dealt with in future regulatory proceedings..., it must consider whether the disposition will adversely impact the rates customers would otherwise pay and whether it would disrupt safe and reliable service to customers."[11]

The Board also stated in Decision 2001-65 that:

> *In Decision 2000-41, the Board held that it must be satisfied that the proposed transaction will either not harm customers or, on balance, leave them at least no worse off than before the transaction in terms of financial impact and reliability of service.*
>
> *The Board distilled this principle from several decisions made by it pursuant to section 25.1 of the GU Act.*[12] *In those decisions, the Board developed what has come to be known as the no-harm test, but in Decision 2000-41 the Board recognized that it should conduct a balancing of both the potential positive and negative impacts of the transaction to determine whether it is in the overall public interest. Specifically, the Board held:*
>
> > *As a result, rather than simply asking whether customers will be adversely impacted by some aspect of the transactions, the Board concludes that it should weigh the potential positive and negative impacts of the transactions to*

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[6] *Dome Petroleum Ltd. v. Alberta (Public Utilities Board)* (1976) 2 A.R. 453, *affd.* [1977] 2 S.C.R. 822.
[7] *ATCO Ltd. v. Calgary Power Ltd.* [1982] 2 S.C.R. 557, at 576 (per Estey J.).
[8] For example, Decision 2000-41, page 7; and Decision 2000-46, *ESBI Alberta Ltd., 2001General Tariff Application, Phase I & II, Part A: System Support Services – Thermal Power Purchase Arrangements (Appendix E)* (July 11, 2000), page 9.
[9] S.A. 1994, c. A-19.5, as amended
[10] Decision 2001-65, page 16
[11] Decision 2000-41, *TransAlta Utilities Corporation, Sale of Distribution Business* (July 5, 2000), in which the Board approved the sale by TransAlta Utilities Corp. (TransAlta) of its electric distribution business to UtiliCorp Networks Canada (Alberta) Ltd. (UtiliCorp). Page 8
[12] Decision 2000-41, page 8

TAB 10

ESSENTIALS OF
CANADIAN LAW

ADMINISTRATIVE LAW

DAVID J. MULLAN

IRWIN LAW
A Quicklaw Company

C. SPECIFIC GROUNDS

The cases discussed to this point have exemplified a number of the important grounds of review for abuse of discretion: acting under dictation, failing to take account of relevant factors, taking account of irrelevant factors, and acting for improper purposes or motives. These last two are the most common bases for review in this domain.

1) Failing to Take Account of Relevant Factors

Baker notwithstanding, failing to take account of relevant considerations or factors is not a common ground of judicial review. However, *Dalton v. Criminal Injuries Compensation Board* provided an example.[36] It involved the Ontario Criminal Injuries Compensation legislation amended in the wake of *Sheehan*, which directed the Board to "have regard to all relevant circumstances." In quashing the Board's decision to deny the compensation, the Court held that the Board had failed to take into account the severity of the injuries the claimant had suffered. A man with whom she had been drinking had pushed her from a van after when she rebuffed his sexual advances. The Board also failed to consider the possibility that the claim should have been reduced rather than denied outright because of what it believed to be the claimant's contributory conduct. In some senses, of course, this was a review of the tribunal's assessment and weighing of the evidence and also its reasoning processes. However, when the legislative direction to take account of all relevant factors is worded in objective, not subjective, language (as previously), the case for this form of intervention is that much stronger.

2) Fettering of Discretion

More common, particularly in recent years, have been cases where the allegation is that the decision maker failed to genuinely exercise its discretionary powers in an individual case; but rather made its decision on the basis of a pre-existing policy. In general, the courts have had no problem with agencies and tribunals adopting policies by which their work will be guided. From time to time, the courts have even suggested that this activity is a good practice even where not specifically sanctioned by legislation.[37] Nonetheless, this tolerance does not permit an

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36 (1982), 36 O.R. (3d) 394 (Ont. Div. Ct.)

37 See, for example, the judgment of Laskin C.J. in *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1978] 2 S.C.R. 141.

or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not."

These various provisions do not however alter the common law rather, they reflect the common law position: in general, the normal rules of evidence do not apply to administrative tribunals and agencies. Thus, in a variety of contexts,[118] Canadian courts have cited with approval the classic statement of Lord Loreburn L.C. in *Board of Education* v. *Rice*: "They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."[119] Obviously, the opening clause of this sentence concedes considerable discretion to the decision-maker in determining how information will be obtained. On the other hand, such a discretion, whether existing at common law or by reason of specific statutory provision, does not provide an excuse for compromising the general principles of procedural fairness.

A good illustration is provided by the 1955 judgment of the Supreme Court of Canada in *Mehr* v. *Law Society of Upper Canada*.[120] At issue there was the solicitation and use by the Society's Discipline Committee of a joint declaration made by persons outside Canada who were not available for cross-examination. This declaration contradicted sworn oral testimony that had been given by the lawyer who was the subject of the disciplinary proceedings and ultimately disbarred. In the circumstances, the Court held that the "reception of such evidence was . . . wrongful and fatal to the validity of the proceedings."[121] Indeed, the Court went on to express reservations as to the position adopted in the Court of Appeal that the committee was not obliged to adhere to court rules of evidence. This suggests that, where a professional career is at stake, the common law might well require adherence to or at least close approximation to the ordinary rules of evidence.

However, since then, the ordinary rules of evidence have become that much more relaxed with respect to the use of hearsay in general, including statements made outside the course of the hearing by persons not only disabled from testifying directly or unwilling to do so. As a consequence, it now seems highly unlikely that, even in professional disciplinary proceedings, the courts would refuse to countenance the

118 See, example, *British Columbia (Labour Relations Board)* v. *Traders Services Ltd.*, [1958] S.C.R. 672.

119 [1911] A.C. 179 (H.L. Eng.) at 182.

120 [1955] S.C.R. 344 [*Mehr*].

121 *Ibid.* at 349.

TAB 11

Minister of Labour for Ontario v. Canadian Union of Public Employees et al.; Canadian Bar Association et al., Interveners

[Indexed as: C.U.P.E. v. Ontario (Minister of Labour)]

Court File No. 28396

Supreme Court of Canada
McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: October 8, 2002
Judgment rendered: May 16, 2003

Administrative law — Natural justice — Legitimate expectations — Minister of Labour having long-standing practice of appointing chairs of interest arbitration boards from list of experienced arbitrators acceptable to management and labour — Minister appointing retired judges as chairs — Minister's discretionary power had to be exercised in accordance with purpose of statute — Reviewable on standard of patent unreasonableness — Assuming duty of consultation with unions, Minister complied with duty — Unions had no legitimate expectation that Minister would continue to make appointments from list — However, Minister's decision to limit appointments to retired judges patently unreasonable — Minister required to consider labour relations expertise and broad acceptability in making appointments — Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14, ss. 6(5), 7.

Employment — Labour relations — Interest arbitration — Minister of Labour having long-standing practice of appointing chairs of interest arbitration boards from list of experienced arbitrators acceptable to management and labour — Minister appointing retired judges as chairs — Minister's discretionary power had to be exercised in accordance with purpose of statute — Reviewable on standard of patent unreasonableness — Assuming duty of consultation with unions, Minister complied with duty — Unions had no legitimate expectation that Minister would continue to make appointments from list — However, Minister's decision to limit appointments to retired judges patently unreasonable — Minister required to consider labour relations expertise and broad acceptability in making appointments — Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14, ss. 6(5), 7.

Collective bargaining in Ontario hospitals is governed by the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 ("the Act"). Most hospital revenue comes from the government. Hospitals and hospital employees are denied the right to lock out or to strike and are required to submit disputes concerning the negotiation of collective agreements to interest arbitration boards. Each party appoints one member to the board. If the parties' appointees cannot agree on a third person to chair the board, s. 6(5) of the Act states that "the Minister [of Labour] shall appoint

as a third member a person who is, in the opinion of the Minister, qualified to act." Section 7 protects the Minister's decision with a privative clause. Between 1979 and 1997, the Minister appointed the vast majority of chairs from a list of experienced arbitrators acceptable to both management and labour, established for the purpose of grievance arbitration under s. 49(10) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, and its predecessors. In 1997, the Government of Ontario proposed to eliminate the existing system of interest arbitration and replace it with a permanent dispute resolution commission. The hospital employees' unions strongly objected to this proposal, and the then Minister and her staff had several meetings and discussions with union officials about it. The government later withdrew the proposal, and the Minister announced that the government intended to return to the status quo. In January, 1998, a union representing hospital employees wrote to the Minister seeking assurances that she would only select chairs from the list and would consult with it before placing other names on the list. The Minister did not reply to that letter, but in a letter dated February 2nd to the president of an arbitrator's association, the new Minister stated that "existing systems for appointment of arbitrators" would continue. In February, 1998, the Minister appointed four retired judges to chair interest arbitration boards. Two unions applied for judicial review of the Minister's action. The Divisional Court dismissed the application on the ground that in the absence of a claim under the *Canadian Charter of Rights and Freedoms*, the actions of the Minister, being based on a power granted by statute, could not be attacked as a denial of natural justice or as lacking independence or impartiality. The unions' appeal to the Court of Appeal was allowed. The court held that the Minister's exercise of the discretionary power conferred by s. 6(5) of the Act was reviewable by the court and had to be in accordance with the rules of natural justice. The Minister's action gave rise to a reasonable apprehension of bias and an appearance of interference with the institutional independence and impartiality of the boards of arbitration. The court also held that the Minister had failed to meet the legitimate expectations of the unions, contrary to the principles of fairness and natural justice, and that the unions were entitled to notice of the Minister's intention, an opportunity to consider their position, and possibly an opportunity to discuss the situation. The court declared that that the Minister created a reasonable apprehension of bias because the Minister had a significant and direct interest in the outcome of the arbitral awards, that the Minister interfered with the independence and impartiality of boards of arbitration, and that the Minister interfered with the unions' legitimate expectations. The court prohibited the Minister from appointing chairs unless they were made from the established list of experienced labour relations arbitrators.

On appeal by the Minister, **held**, McLachlin C.J.C., Major and Bastarache JJ. dissenting, the Court of Appeal's order should be varied, and the appeal should otherwise be dismissed.

Per Binnie J., Gonthier, Iacobucci, Arbour, LeBel, and Deschamps JJ. concurring:

1. *Interpretation of s. 6(5)* — Although the Minister's power under s. 6(5) of the Act was expressed in broad terms, his decision was constrained by the scheme and object of the Act as a whole, which the legislature intended to serve as a neutral and

credible substitute for the right to strike and to lock out. The legislature intended the Minister, in making his selection, to have regard to relevant labour relations expertise as well as independence, impartiality, and general acceptability within the labour relations community. "General acceptability" meant that the candidate had a track record in labour relations and was generally seen in the labour relations community as widely acceptable to both labour and management by reason of his or her independence, neutrality, and proven expertise.

2. *Procedural fairness* — Although there was an appearance that the Minister had a significant interest in outcomes as well as process, the legislature specifically conferred the power of appointment on the Minister. Absent a constitutional challenge, a statutory regime expressed in clear and unequivocal language prevailed over common law principles of natural justice. The Minister's perceived interest in the outcome of the arbitrations therefore did not bar him from exercising the statutory power of appointment conferred on him by s. 6(5).

Assuming that the Minister had a duty to consult with the unions, that duty was satisfied by the meetings and the intense and strident discussions concerning the government's proposed changes to the Act. The evidence of a commitment by the Minister to return to the status quo was equivocal, and the evidence did not establish a firm practice in the past of appointing arbitrators from a fixed list or from the s. 49(10) list or by way of mutual agreement. To bind the exercise of the Minister's discretion, the evidence of the promise or undertaking by the Minister must generally be such as, in a private law context, would be sufficiently certain and precise as to give rise to a claim for breach of contract or estoppel by representation. The general promise to continue the existing system where the reference to the system was itself ambiguous and where the system was to be subject to reform could not bind the Minster's exercise of his or her discretion under the doctrine of legitimate expectations.

3. *Standard of Review* — The precise wording of the power of appointment "of a person who is, in the opinion of the Minister, qualified to act", coupled with the privative clause in s. 7, was a strong legislative signal that the Minister was to be afforded a broad latitude in making his selection. The Minister, with the assistance of his officials, knew more about labour relations and its practitioners than the courts did. The question before him was one of selection amongst candidates he regarded as qualified. All of these factors suggested that the legislature intended the Minister's appointments under s. 6(5) to prevail unless his selection was shown to be patently unreasonable.

4. *Meaning of "Patently Unreasonable"* — Patent unreasonableness identified the point where no amount of curial deference could justify letting the decision stand. A patently unreasonable approach meant that there could have been many appropriate answers, but not the one reached by the decision maker. A patently unreasonable appointment was one whose defect was immediate and obvious, and so flawed in terms of implementing the legislative intent that no amount of curial deference could properly justify allowing it to stand.

5. *Review of the Minister's Appointments in this Case* — A statutory decision maker was required to take into consideration relevant criteria and to exclude from

consideration irrelevant criteria. The Minister did not err by not restricting himself to the list of arbitrators established under s. 49(10) of the *Labour Relations Act, 1995*. It was not at all unreasonable for the Minister to adopt the view, expressed by the unions, that any individual who had broad experience as an interest arbitrator and who enjoyed wide acceptability in the labour relations community could be appointed under s. 6(5). However, in limiting his appointments to retired judges, the Minister excluded key criteria (labour relations expertise and broad acceptability) and substituted another criterion (judicial experience) that was not sufficient to comply with his legislative mandate. The appointment of an inexpert and inexperienced chair who was not seen as broadly acceptable in the labour relations community was a defect in approach that was both immediate and obvious. Having regard the legislative intent manifested in the Act, the Minister's approach to the s. 6(5) appointments was patently unreasonable.

6. *Institutional Independence and Impartiality* — The Act required the use of *ad hoc* arbitration boards. Despite the lack of security of tenure, financial security, and administrative independence, professional labour arbitrators functioned successfully because of their training, experience, and mutual acceptability. The proper exercise of the appointment power under s. 6(5) would therefore lead to a tribunal which, in the context of labour relations, satisfied concerns about institutional independence. There were no substantial grounds to think that retired judges would, as a class, suffer from an anti-labour bias. The problem with some retired judges was not partiality but expense. The Court of Appeal's holding that the arbitration boards lacked institutional independence and impartiality could therefore not be sustained. However, a challenge to the appointment of a particular retired judge to a particular *ad hoc* tribunal could be questioned on a case-by-case basis on grounds of lack of independence or partiality.

7. *Remedy* — The order of the Court of Appeal should be varied to declare that the Minster was required, in the exercise of his power of appointment under s. 6(5), to be satisfied that prospective chairs were not only independent and impartial but possessed appropriate labour relations expertise and were recognized in the labour relations community as generally acceptable to both labour and management. The order did not invalidate completed arbitration awards. Any challenges to continuing arbitrations were subject to judicial review on a case-by-case basis.

Per Bastarache J., McLachlin C.J.C. and Major J. concurring, dissenting: For the reasons given by Binnie J., the Minister satisfied his duty of procedural fairness, and concerns about institutional independence and impartiality did not render the Minister's exercise of his appointment power patently unreasonable. These unsuccessful challenges did not foreclose the possibility of a successful challenge to a particular board on the basis of particular facts.

The presence of a privative clause, the expertise of the Minister and his officials, and the fact-based and contextual nature of the decision all supported the conclusion that the Minister's appointments were reviewable only on the most deferential standard, that of patent unreasonableness. The Minister developed an opinion as to who was qualified to act. He valued professional experience as an impartial decision maker and he recognized that judges were typically generalists who quickly

learned the necessary substance within the context of each case. The Act called for the Minister to reach his own opinion, not to consider a specific determining factor. His appointments were not patently unreasonable because it took some significant searching or testing to find the defect, if there was one.

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By Binnie J.

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APPEAL from a judgment of the Ontario Court of Appeal, 194 D.L.R. (4th) 265, 26 Admin. L.R. (3d) 55, 5 C.C.E.L. (3d) 8, 2003 C.L.L.C. ¶220-039, 51 O.R. (3d) 417, 138 O.A.C. 256, 101 A.C.W.S. (3d) 3, [2000] O.J. No. 4361 (QL), allowing an appeal from a judgment of the Ontario Divisional Court, 117 O.A.C. 340, 86 A.C.W.S. (3d) 5, [1999] O.J. No. 358 (QL), dismissing an application by two unions for judicial review of the Minister of Labour's appointment of chairs of interest arbitration boards under s. 6(5) of the *Hospital Labour Disputes Arbitration Act* (Ont.).

Leslie McIntosh, for appellant.
Howard Goldblatt, *Steven Barrett* and *Vanessa Payne*, for respondents.
J. Gregory Richards, *Jeff G. Cowan* and *Susan Philpott*, for intervener, Canadian Bar Association.
Michel G. Picher and *Barbara McIsaac*, for intervener, National Academy of Arbitrators (Canadian Region).

[1] BASTARACHE J. (MCLACHLIN C.J.C. and MAJOR J. concurring, dissenting):—I adopt Binnie J.'s recital of the facts and judicial history. In my view, however, the Minister of Labour ("Minister") did not make appointments that were patently unreasonable. In reaching

limit his appointments to the s. 49(10) list, but the question at this later stage is whether it was patently unreasonable of him, as a matter of law, not to do so.

[169] The principal C.U.P.E. witness, Julie Davis, in cross-examination, conceded that some of the arbitrators who are in fact on the s. 49(10) list were unacceptable to her union. The witness for the appellant Service Employees International Union, Marcelle Goldenberg, went even further in her affidavit:

> It is my understanding that a significant number of all arbitrators on the [s. 49(10)] roster (including both those who were required to complete the Arbitrator Development Program and those who were placed directly on the roster) fail to meet the criteria of acceptability at their first review [4 years after appointment] and are purged from the list.

Just as being on the s. 49(10) list is no guarantee of acceptability, so the unions' acceptance of non-s. 49(10) candidates, including Professor Weiler and Ray Illing, confirm the reasonableness of the Minister's view that candidates can qualify for s. 6(5) appointments without being on the s. 49(10) list.

[170] The unions, speaking through the OFL, said that they would be satisfied with any individual "who had broad experience as an interest arbitrator and enjoyed wide acceptability in the labour relations community" (see para. 142 above). It would not be at all unreasonable for the Minister to adopt the same position. The Minister, accordingly, cannot be faulted for refusing to limit his selection to the s. 49(10) roster.

(b) Rejecting the Criteria of "Labour Relations Expertise and Broad Acceptability Within the Labour Relations Community"

[171] Earlier in these reasons, I referred to Justice Rand's *dictum* in *Roncarelli* that the exercise of a discretion "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration" (p. 140). I propose briefly to supplement that *dictum* by reference to our more recent case law, then consider it in relation to the test for "patent unreasonableness" on the facts of this case.

(i) Exclusion from Consideration of Relevant Criteria

[172] The principle that a statutory decision maker is required to take into consideration relevant criteria, as well as to exclude from consideration irrelevant criteria, has been reaffirmed on numerous

occasions. In *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164, 20 D.L.R. (4th) 641, the issue was whether a municipal Council erred in refusing to consider an application for the subdivision of some land prone to flooding. Although the Council had considered that fact, it failed to consider the severity of those floods and excluded consideration of any possible solutions to the problem. Wilson J. stated, at pp. 174-75:

> More specifically, was [the Council] entitled to consider the potential flooding problem and make it the ground of its decision to refuse approval of the subdivision? As Rand J. said in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, any discretionary administrative decision must "be based upon a weighing of considerations pertinent to the object of the administration". For the reasons already given I am of the view that the Council was entitled to take the flooding problem into consideration. The issue does not, however, end there. As Lord Denning pointed out in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, at p. 693, the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration.
>
> . . . . .
>
> The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.

[173] Again, in *Reference re Bill 30, an Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1191, 40 D.L.R. (4th) 18, Wilson J. noted:

> It is, however, well established today that a statutory power to make regulations is not unfettered. It is constrained by the policies and objectives inherent in the enabling statute. A power to regulate is not a power to prohibit. It cannot be used to frustrate the very legislative scheme under which the power is conferred.

[174] In my view, as will be seen, the appointment of retired judges as a class to chair *HLDAA* arbitration boards had the effect of frustrating "the very legislative scheme under which the power is conferred". See also *Baker*, *supra*, at para. 73.

[175] More recently, in *Suresh*, at paras. 37-38, the Court restated this basic principle of administrative law:

> Baker does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors . . .
>
> . . . . .

> The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. *It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion.* [Emphasis added.]

[176] In applying the patent unreasonableness test, we are not to reweigh the factors. But we are entitled to have regard to the importance of the factors that have been excluded altogether from consideration. Not every relevant factor excluded by the Minister from his consideration will be fatal under the patent unreasonableness standard. The problem here, as stated, is that the Minister expressly excluded factors that were not only relevant but went straight to the heart of the *HLDAA* legislative scheme.

(ii) Application of These Principles to the Facts of This Case

[177] The task before the arbitration boards was not to apply existing collective agreements to a fact situation (as in a grievance arbitration) but to write the essential and most controversial terms of the collective agreement itself. The need for labour relations expertise, independence and impartiality, reflected in broad acceptability, has been a constant refrain of successive Ministers of Labour to the Ontario legislature since *HLDAA* was introduced in 1965, and its various amendments thereafter.

[178] I do not impute to the Minister a knowledge of *HLDAA*'s legislative history. He himself aptly summarized the legislative intent when he wrote on February 2, 1998 that "the parties *must* perceive the [*HLDAA*] system as neutral *and credible*" (emphasis added).

[179] His reading of the legislative intent is reinforced by the evidence of practice and experience in the labour relations field. I accept, as did the Court of Appeal, the testimony in this respect of Professor Joseph Weiler, whose affidavit was filed on behalf of the unions (at para. 36):

> The *independence and impartiality of arbitrators* is guaranteed not by their remoteness, security of tenure, financial security or administrative security, *but by training, experience and mutual acceptability*. [Emphasis added.]

[180] I agree too with the observation of the Ontario Court of Appeal in this case that the matters before a *HLDAA* "interest" arbitration were "not essentially legal but practical and require the