COURT FILE NUMBER	1703-12327	Clerk's Stamp JUDICIAL CENTRE OF EDMONTON FILED AUG 16 2019 Clerk of the Court of Queen's Bench
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS LTD.	
DOCUMENT	**REPLY BRIEF OF THE TOWN OF BONNYVILLE, ATHABASCA COUNTY AND MUNICIPAL DISTRICT OF OPPORTUNITY NO. 17**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BROWNLEE LLP** 700, 396 – 11th Avenue SW Calgary, AB T2R 0C5 **Attention: Gregory G. Plester** **Solicitors for the Town Of Bonnyville, Athabasca County and Municipal District of Opportunity No. 17** Telephone: (403) 232-8300 Fax: (403) 232-8408 E-mail: gplester@brownleelaw.com File No.: 71063-0083 & 71008-0092 & 71796-0415/GGP	

Table of Contents

I. INTRODUCTION

1. This Reply Brief is provided in response to the written briefs filed on August 9, 2019 by: the Monitor, Ernst & Young Inc. (the "**Monitor**"); Jeff and Jackie Hadfield (the "**Hadfields**"); Canadian Western Bank ("**CWB**"); and 726 Remote Accommodations Ltd., 726 Modular Finance Ltd. and Reliant Asset Management, LLC ("**726**"). Defined terms used in this Reply Brief are the same as those in the Brief of Bonnyville, Athabasca and Opportunity (collectively, the "**Municipalities**"), filed on August 2, 2019.

A. Modern Approach to Statutory Interpretation

2. The Monitor and 726 rely on various decisions, including *Lloyds Bank*, *Sparrow Electric* and *Virginia Hills* (currently the subject of an application for leave to appeal to the Supreme Court of Canada), in support of the position that "plain and unambiguous" language must be utilized in section 348 in order to claim a special lien over the Structures subject to a lease with a third party.

Lloyds Bank v International Warranty Company Limited, [1990] 60 DLR (4th) 272 [***Lloyds Bank***] **[726's Authorities, Tab 3]**

Royal Bank of Canada v Sparrow Electric Corp, [1997] 1 SCR 41 [***Sparrow Electric***] **[Monitor's Authorities, Tab 10]**

Northern Sunrise County v Virginia Hills Oil Corp, 2019 ABCA 61 [***Virginia Hills***] **[Monitor's Authorities, Tab 6]**

3. However, this requirement for "plain and unambiguous" language finds support in case law that predates the decision of the Supreme Court of Canada in *Rizzo*, which provides the foundation for the modern approach to statutory interpretation. The search for "plain and unambiguous" language is not in line with the requirements of the modern approach that must be followed today.

Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27 [***Rizzo***] **[Tab 2]**

4. The modern approach emphasizes a complex and holistic approach to statutory interpretation that requires courts to apply a textual, contextual and purposive approach to statutory interpretation. Importantly, this approach mandates that courts

always consider legislative intent as part of the interpretive process and a court "...must do so regardless of whether the legislation is considered ambiguous". [*emphasis added*]

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 8 [**Tab 3**]

5. The approach utilized in *Lloyds* and *Sparrow Electric*, as well as the decisions that follow, applies a strict approach in that it only allows for a provision to be given an interpretation that is without ambiguity – it requires the court to reject any possible interpretation that would result in any degree of ambiguity.

6. The reversion to the historical restrictive approach advocated for by the Monitor and 726 is contrary to modern jurisprudence that requires the modern principle to be applied to all legislation. As explained by Pierre-André Côté in his text:

> In *Leiriao v. Val Belair (City)* the majority of the Supreme Court preferred to give "full meaning" to a provision concerning the powers of a municipality to establish land reserves by expropriation, rather than to interpret it restrictively, as was proposed in dissent.
>
> This evolution reflects major changes in values. It is taking place unevenly, from province to province and from court to court, but, despite some wavering, a definite trend has been established, as it reflects a more general recognition of the relative nature of property law, particularly when property rights are set against collective interests.

Pierre-André Coté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 514 [*The Interpretation of Legislation in Canada*] [**Tab 4**]

7. Under the modern principle, the historical interpretive preference in favour of private property rights is no longer justified. Under the modern approach to interpretation, legislation is now appropriately understood as an attempt to balance competing concerns.

8. The modern approach to interpretation requires this Court to examine all of the contextual factors, as more fully outlined in the Brief of Bonnyville, Athabasca and Opportunity, filed August 2, 2019. Application of the modern approach supports a

finding that the special lien applies to all of the land and improvements that were subject to assessment by a municipality. It bears repeating that:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament [emphasis added].

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 8 [**Tab 3**]

B. Structures were Assessed by the Municipality and Remain on the Lands

9. The submissions of 726 raise a number of hypothetical scenarios that are not before the Court for consideration in this application. Athabasca and Opportunity are asking this Court to consider whether the special lien created pursuant to section 348 applies to the Structures. These Structures:

   a. have been historically assessed by Athabasca and Opportunity and form part of the assessed value that was used to calculate the tax levy payable by the Canada North Parties;

   b. continue to be assessed by Athabasca and Opportunity, in accordance with the requirements of the *MGA*; and

   c. remain on the same lands that are at issue in these proceedings, which also continue to be assessed by Athabasca and Opportunity.

10. Whether the special lien applies in these circumstances is not determinative of whether the special lien would apply where similar structures have been removed from assessed lands or sold to a third party, as hypothesized by 726. The application of the special lien in those circumstances would necessarily require consideration of such issues as whether the structures have been moved outside of the municipality; whether such structures are still considered improvements to land; and whether there is a *bona fide* purchaser for value.

11. Ultimately, these issues are not raised in the facts before the Court, and the Court is not being asked to make a determination on those issues. Rather, the scope of this

application is limited to the Structures, which again, remain on assessed lands within Athabasca and Opportunity, and have not been sold to any third party purchasers.

C. Collateral Attacks on Assessments Not Permitted

12. The Hadfields and CWB have each attempted to collaterally attack the assessments prepared with respect to the land and improvements at issue. In particular:

    i. The Hadfields dispute the identity of the assessed person with respect to improvements on the Athabasca Lands;

    ii. CWB disputes the use of the income approach for purposes of assessing land and improvements at the Wabasca Camp; and

Brief of Jeff and Jackie Hadfield at para 5.

Brief of Canada Western Bank at para. 12

13. The assessments are not at issue in this application and the Respondents are prohibited from attempting to collaterally attack those assessments at this time and in this forum. These attempts to challenge the assessments issued by Athabasca and Opportunity are an impermissible attempt to circumvent the assessment complaint process established by Part 11 of the *MGA* and to avoid the applicable limitations set by legislation.

14. A collateral attack is a challenge "...made in proceedings other than those whose specific object is the reversal, variation or nullification of the order or judgment."

Wilson v. The Queen, [1983] 2 SCR 594 **[Tab 5].**

15. The doctrine of collateral attack applies to prevent a party from challenging the validity of an order by any means other than the review process that has been established by statute. The Supreme Court of Canada has said: "The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice."

R. v. Consolidated Maybrun Mines Ltd., [1998] 1 SCR 706 ["***Consolidated Maybrun***"] **[Tab 6].**

16. The application of the doctrine of collateral attack is dictated by the intentions of the legislature and whether the legislature intended that another board or body other than the current forum should determine the matter in dispute. It is irrelevant whether the issue raised is lack of jurisdiction *ab initio* or loss of jurisdiction.

R. v. Al Klippert Ltd., [1998] SCR 737 at para 13 ["***Klippert***"] **[Tab 7].**

Consolidated Maybrun, *supra* at para 62 **[Tab 6].**

17. The determination of whether the legislature intended for an administrative tribunal to have exclusive authority to determine an issue will depend on several factors, including:

a. The wording of the applicable statute;

b. The purpose of the legislation;

c. Whether the legislation provides a review process or appeal mechanism;

d. The kind of collateral attack and whether the issue falls within the purpose of the administrative tribunal; and

e. The consequence to the party.

Klippert, *supra* **[Tab 7].**

18. In *Consolidated Maybrun Mines*, the Supreme Court of Canada considered whether the legislature intended for the Environmental Appeal Board to have exclusive jurisdiction to determine the validity of an environmental protection order. There, the applicable legislation also established a fulsome, *de novo* and adversarial review process. Following its analysis of the review process established by the applicable legislation, the Court determined that the legislature *had* intended to give exclusive jurisdiction to the administrative tribunal. The Court noted that:

> In establishing this process, the legislature clearly intended to set up a complete procedure, independent of any right to apply to a superior court for review, in order to ensure that there would be a rapid and effective means to resolve any disputes that might arise between the Director and the persons to whom an order is directed.

Consolidated Maybrun, *supra* at para 57 [**Tab 6**].

19. The Court's comments can equally be applied to the assessment complaint process set out in the *MGA*: The legislature has established a specialized tribunal, a complete hearing process, and a means for obtaining recourse to the courts for the specific purpose of considering issues relating to the assessment of properties, including the very issues regarding the appropriate assessed person and the appropriate assessed value for the subject properties that are raised by the Respondents.

MGA, *supra* Part 11 [**Tab 1**].

20. In *R. v. Klippert*, a case that originated in Alberta, the Supreme Court of Canada considered whether a failure to challenge a Stop Order issued under the *MGA* prevented a party from later collaterally challenging the order. The Court noted that the *MGA* allowed for an appeal of the order to the subdivision and development appeal board, and for an appeal of the board's decision to the Court of Appeal, with leave. In determining that the legislature had intended to give the appeal board exclusive jurisdiction to determine the validity of a stop order issued under the *MGA*, the court noted:

> As can be seen, this is a public, adversarial process affording the person concerned the opportunity to present his or her rights, and ultimately to be informed of the reasons or her point of view and assert his or her rights, and ultimately to be informed of the reasons for the Board's decision. Furthermore, an interested party may, if dissatisfied with the Board's decision, take his or her case to the Court of Appeal on a question of law or of jurisdiction. It should be noted that this is not an appeal as of right, but one requiring leave of a judge of the Court of Appeal. Not only is this a full appeal mechanism, but the procedure for applying to the Court of Appeal for leave shows the protection the legislature intended to afford the Board's decisions and the importance it placed in that body.

Klippert, supra at para 18 [**Tab 7**].

21. Similarly, the importance placed on assessment review boards by the legislature is reflected in the Supreme Court of Canada's determination that decisions of an assessment review board must be reviewed on a deferential standard.

Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47, [2016] 2 SCR 293 at para 34[**Tab 8**].

22. The doctrine of collateral attack has been applied by the Court to prevent a taxpayer from challenging enforcement proceedings undertaken by the Canada Revenue Agency where the tax payer had failed to challenge the underlying assessment to the appropriate forum, the Tax Court. The Supreme Court of British Columbia has said:

> The Court should not allow a plaintiff to disguise their collateral attack by framing their action in tort. The Court should look behind the cause of action pled to determine whether, in pith and substance, the action calls into question the validity of the decision. If it does, it must be struck as an abuse of process.

Leroux v. Canada Revenue Agency, 2010 BCSC 865 at paras 61 and 73 [**Tab 9**].

23. In Alberta, the *MGA* and the *Matters Relating to Assessment Complaints Regulation* establish the only permissible method of challenging assessments. The legislation establishes the requirements for submitting a complaint, disclosure of evidence, conduct of a hearing before an assessment review board, and the process for commencing a judicial review of a resulting decision. The assessment and assessment complaint process established by the *MGA* repeatedly emphasizes the need for an expedited complaints process:

a. An assessment notice <u>must</u> be issued before July 1st of each year;

b. A complaint regarding an assessment <u>must</u> be made within 60 days of the issuance of the assessment notice;

c. An assessment review board <u>must</u> release its decision within 30 days of the end of a hearing and no later than the end of the year;

d. An application for permission to appeal of a board's decision under the previous regime had to be made within 30 days; and

e. An application for judicial review under the current regime <u>must</u> be made within 60 days.

MGA, *supra* Part 11 [**Tab 1**].

24. The *MGA* explicitly bars any complaint that is not commenced before the applicable complaint deadline. The Court has recognized that a tax payer will lose its right to challenge an assessment to the assessment review board if it fails to commence a

complaint in time. The legislature did not intend to bar late assessment complaints while simultaneously allowing for late assessment complaints to proceed in a different forum.

MGA, s. 461(1.1) [**Tab 1**].

Edmonton (City) v. Assessment Review Board of the City of Edmonton, 2012 ABQB 399 [**Tab 10**].

25. There are several reasons why it is particularly important for assessment complaints to be resolved in a timely manner. Most importantly, municipalities rely on property tax revenue to provide essential services within their community. Assessment complaints can create significant budgetary uncertainty for municipalities. As assessments are prepared annually, any errors in an assessment must be resolved before the end of the calendar year or they cannot be incorporated into subsequent assessments. If a tax payer were permitted to simply ignore an assessment and tax notice and then challenge the validity of the tax levy several years later, the ability of municipalities to manage their finances would be significantly impaired. This is particularly true in light of the requirement that municipalities must balance their budget annually.

26. An expedited complaint process also allows municipalities to correct any assessment error, as determined by an assessment review board, at the earliest possible opportunity. Municipalities are only permitted to correct an error in the assessment roll for the current year. If a municipality has issued an assessment to the wrong tax payer, the municipality can only correct the issue and send an amended assessment notice to the correct tax payer if the issue is resolved within a single tax year.

27. The intention to ensure that certainty regarding municipal tax revenues is established in a timely manner is also reflected in the fact that the *MGA* bars any claim by a tax payer for the repayment of any payment made to a municipality beyond six months after the payment was made.

MGA, s. 352 [**Tab 1**].

28. Also, municipalities are required to pay annual education requisitions to the Province. These requisitions are set as a mil rate and are calculated based on the total assessed property within a municipality. These requisitions must be paid to the Province regardless of whether the municipality is able to recover the requisition from the tax payer. So, if a tax payer is permitted to overturn an assessment several years after it was issued, a municipality will be unable to recover the requisition it had already paid to the Province and will be forced to bear the financial burden of the requisition as a result of the late complaint.

29. Another major concern with the possibility of allowing the Respondents to circumvent the complaint process is the obvious evidentiary issues. In respect to CWB's attempt to challenge the assessed value of the Wabasca Camp, resolving a dispute about the proper valuation of that property should properly involve the disclosure of competing appraisal evidence. Not only has CWB not provided any evidence in support of its position that the property was over-assessed (it does not actually provide any evidence of what CWB suggests the proper assessed value should have been), this process has not afforded the municipality's assessor the opportunity to respond and defend the assessment.

30. Similarly, there are significant evidentiary concerns arising from the assessment issue raised by the Hadfields. The evidence relied on by the Hadfields in support of their position is mainly hearsay and was submitted late. The municipality has not had an opportunity to provide evidence in response to the Hadfield's evidence and even if it had, doing so would require the municipality to obtain particulars regarding the day-to-day operation of the now-insolvent business that was operated on the subject lands dating back to 2014 (which was the year the assessment was prepared for the 2015 tax levy). There is no possibility of a procedurally fair adjudication of this issue at this time, through this process and in this forum.

31. Allowing a challenge to the assessments well beyond the applicable complaint deadlines would seriously undermine the assessment regime crafted by the Legislature that is intended to ensure that assessment issues are resolved rapidly. Here, it would certainly compromise the repute of the administration of justice if

competing creditors were allowed to challenge assessments outside the established forum and well beyond (in some cases, years beyond) the applicable statutory deadline.

D. Identity of Assessed Person Properly Determined

32. Even if the Hadfields were not barred from raising a collateral attack against the assessments (as outlined above), there is no evidence to support a finding that the assessed person for the improvements in Athabasca is properly determined under section 304(1)(f) of the *MGA*.

33. Section 304(1)(f) provides that the assessed person is the holder of the subject lease, licence or permit where the assessed property is:

> 304(1)(f) a parcel of land, or a part of a parcel of land, and the improvements to it held under a lease, licence or permit from the owner of the land where the land and the improvements are used for
>
> (i) drilling, treating, separating, refining or processing of natural gas, oil, coal, salt, brine or any combination, product or by-product of any of them,
>
> (ii) pipeline pumping or compressing, or
>
> (iii) working, excavating, transporting or storing any minerals in or under the land referred to in the lease, licence or permit or under land in the vicinity of that land. [*emphasis added*]

MGA, s 304(1)(f) **[Tab 1]**.

34. The Athabasca Lands are owned by 137 and Wandering River. No lease, license or permit from 137 or Wandering River respecting the parcel of land, or a part of a parcel of land, and the improvements to it has been submitted into evidence to support the Hadfield's reliance on section 304(1)(f). On this basis alone, the submissions of the Hadfields must be rejected.

Supplemental Affidavit of Brian Pysyk sworn July 24, 2019 at para 7 and Exhibit "F"

MGA, s 304(1)(f) **[Tab 1]**.

35. Further, the Hadfields have assumed that the land and improvements were used for "drilling, treating, separating, refining or processing of natural gas, oil, coal, salt, brine

or any combination, product or by-product of any of them". However, there is simply no evidence on the record that would substantiate this claim.

36. Therefore, even if this Court could consider a change in "assessed person" on the assessments previously issued, the Hadfields have failed to provide sufficient evidence to support a finding that section 304(1)(f) even applies. The available evidence shows that the relevant portions of the subject lands were used for the purposes of operating a lodging business. There is no evidence that any "drilling, treating, separating, refining or processing of natural gas, oil, coal, salt, brine" ever took place on the lands. The link between the lands and the pipeline construction relied on by the Hadfields is remote at best.

37. Athabasca and Opportunity maintain that the assessed person has been properly identified in accordance with section 304(1)(b) of the *MGA*, as the owner of the parcel of land.

MGA, s 304(1)(b) [**Tab 1**].

E. Special Lien for Pre-Insolvency Taxes Owing Applies to Land and Any Improvements

38. The special lien over the sale proceeds from the Structures is not limited to the amount of taxes payable on each individual Structure, as suggested by 726 and CWB. Section 348 does not limit the special lien in this manner.

39. Section 348 creates a special lien for property taxes owing to a municipality. There is no division in section 348 between taxes levied on the basis of assessments prepared for land or assessments prepared for improvements. Rather, the special lien applies to land and any improvements to the lands, for the full amount of property taxes payable, on a joint and several basis. That is, the full amount of property taxes owing to Athabasca and Opportunity by the Canada North Parties can be recovered from any land and Structures within Athabasca and Opportunity, respectively.

40. Section 348 again provides, in relevant part:

> Taxes due to a municipality
>
> ...
>
> (d) are a special lien
>
> (i) on land and any improvements to the land, if the tax is a property tax…

MGA, s 348(d)(i) [**Tab 1**].

41. While an assessment notice may identify specific assessment values for each improvement, ultimately, it is the total assessed value of land and improvements that is used to determine the taxpayer's tax liability – that is the taxes due to a municipality. Property taxes are not levied specifically with respect to each improvement, separate from the land. Where calculated, the individual assessment values attributed to each improvement are simply a means to determining the total assessment value that is ultimately used to determine tax liability.

See, for example, Affidavit of Brian Pysyk, sworn July 24, 2019, Exhibit "G"

See, for example, Affidavit of William Kostiw, sworn July 24, 2019, Exhibit "F"

42. In some circumstances, there is no division between assessments for land and improvements even for the purposes of assessment. For example, in the case of Opportunity, where assessments were prepared using the income approach, there is no division in the assessment notice between assessments for land and improvements – there is one global assessment prepared by Opportunity for the Wabasca Camp. As such, it is impossible to even attempt to allocate an estimated amount of taxes payable with respect to each Structure.

Affidavit of William Kostiw, sworn July 24, 2019, Exhibit "H"

43. The special lien extends to land and any improvements to the land, to the full extent of the property taxes owing to the municipality. That is, the amount of the special lien in favor of the municipality over a specific improvement is not limited by the assessed value of that improvement (if such an assessed value can even be determined) times

the tax rate for the applicable tax year. Rather, the broad special lien allows the municipality to recover the total amount of property taxes owing by the assessed person to the municipality against any single parcel of land or improvement, or as many parcels of land and improvements necessary to satisfy the taxes owing. Any inequity can then be addressed by application of marshalling, as previously outlined by the Municipalities.

F. Post-Insolvency Taxes and Penalties

44. These parties concede that it may be appropriate to wait to distribute amounts owing to Athabasca and Opportunity for pre-insolvency taxes levied until the underlying assets which gave rise to the taxes are sold by the Monitor. Athabasca and Opportunity's special lien extends to these assets, and it may be in the best interests of the insolvency proceedings to pay out these claims once the assets (or at least a sufficient portion of them) have been sold by the Monitor.

45. However, the claims for post-insolvency taxes are not subject to the same considerations. Athabasca and Opportunity are entitled to payment for post-insolvency taxes, in accordance with the Initial Order in these proceedings, as a necessary cost of the restructuring process. Payment of post-insolvency taxes, including any penalties included as a part of those taxes, should not be dependent on the sale of assessed assets.

46. CWB has referred to several cases where the Court has agreed that taxes that have accrued post-insolvency need not necessarily be paid during the insolvency proceedings, for example, in order to maintain liquidity within the estate. Even if payment of the post-insolvency taxes is not required immediately, the post-insolvency taxes should not be treated as equivalent to claims that exist prior to the insolvency, including pre-insolvency taxes.

47. While pre-insolvency taxes are subject to an ordering of priorities and a possible compromise pursuant to the *CCAA* process, post-insolvency taxes are explicitly recognized in the Initial Order in these proceedings (which reflects the template initial order used in Alberta) as amounts to be paid as part of the costs of preserving the

estate throughout the *CCAA* process. The Initial Order contemplates that post-insolvency taxes, along with all other post-insolvency costs, are not subject to the same possibility of compromise as pre-insolvency creditors. Essentially, post-insolvency taxes, even where payment is deferred by Court Order (which has not occurred here) are not subject to ranking along with other claims – they are a cost to be incurred by the estate and borne by the body of creditors as a whole as a necessary cost of preserving the estate. The "priority" afforded to post-insolvency taxes is not derived by the special lien established by section 348 of the *MGA*; it arises as a result of the fact that post-insolvency taxes constitute a cost of preserving the estate in the same manner as costs incurred in relation to insurance or maintenance costs.

48. Here, the post-insolvency taxes should be paid in full before any distribution is made to any creditor and the ultimate liability for the post-insolvency taxes should be dealt with through the anticipated cost-allocation application to be brought by the Monitor.

49. In the case of Athabasca, the 2017, 2018 and 2019 tax levies all became due after the Initial Order was granted and are therefore post-insolvency taxes. In the case of Opportunity, all of the outstanding taxes are post-insolvency taxes.

50. While CWB suggests that the municipalities should not be entitled to claim penalties for the period since the September 6, 2018 procedural order, the purported inequity complained of by CWB does not apply equally to all of the Respondents. While, admittedly, the issue of whether the various improvements that were subject to assessment and taxation by the municipalities were subject to a special lien was adjourned by agreement, there was never (at least until the Hadfields filed their brief on August 9, 2019) any dispute that the property taxes levied by the municipalities was, at minimum, recoverable as against the lands themselves. Therefore, to the extent that this Court determines that there was an inequity due to the accrual of penalties after September 6, 2018, that should be reflected in the attribution of liability for the taxes.

51. There was never an issue with respect to the special lien over lands – the only real issue before the Court that was adjourned pending the decision in *Northern Sunrise County* was with respect to the Structures.

G. Allocation of Costs

52. CWB takes the position that the municipalities should be subject to an allocation of the costs of the Monitor. These municipalities submit that there are insufficient facts presently available to make any determination regarding the allocation of the Monitor's costs. It would be premature at this juncture for this Court to make a determination regarding allocation of costs and any such decision should be postponed until a future application, presumably to be brought by the Monitor.

53. While it might be appropriate to address the issue of cost allocation if there were an application for a distribution before the Court, this is not such an application. These municipalities acknowledge and submit that no distribution to a pre-insolvency creditor should proceed without consideration to the issue of allocation of the Monitor's costs. However, here, the municipalities merely seek an order regarding the *allocation* of liability for the respective tax debts. While the municipalities refer to and rely on section 7 of the Initial Order as authority for the payment of the post-insolvency taxes by the Monitor, that payment would not constitute a distribution *per se*. No court order is required to allow the Monitor to proceed with paying post-insolvency taxes, in fact, it is already *required* by the Initial Order. A payment by the Monitor of post-insolvency taxes would not be subject to an allocation of the Monitor's costs – such a payment would become <u>part of</u> the costs of the Monitor to be allocated as between the remaining proceeds in the estate.

54. Regarding the process for allocating the Monitors costs, when that process does eventually proceed, the proper procedure should be to establish an allocation of the costs as between pools of proceeds realized from specific assets and then to distribute the resulting net proceeds (after subtracting the allocated costs) from each pool of proceeds to those secured creditors with claims against those assets in order of priority. Obviously, this process will be enormously complex in this instance, and

without considerable assistance from the Monitor it will not be possible to reach any reasonable conclusion regarding which creditors should bear the Monitor's costs.

55. While CWB is correct that none of the municipalities have sought leave to lift the stay of proceedings in this matter, the same can equally be said of CWB. If CWB was concerned about the risk of escalating costs in these proceedings then it could also have sought leave to lift the stay of proceedings. Or, if there were concerns that the costs of preserving particular assets within these *CCAA* proceedings would exceed realizable proceeds, the proper course would have been to have disclaimed the assets.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of August, 2019.

BROWNLEE LLP
PER:

FOR:

GREGORY G. PLESTER,
Counsel for the Town of Bonnyville, Athabasca County, and M.D. of Opportunity No. 17

LIST OF AUTHORITIES

TAB

1. *Municipal Government Act*
2. *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27
3. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed
4. Pierre-André Coté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011)
5. *Wilson v. The Queen*, [1983] 2 SCR 594
6. *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 SCR 706
7. *R. v. Al Klippert Ltd.*, [1998] SCR 737
8. *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.,* 2016 SCC 47, [2016] 2 SCR 293
9. *Leroux v. Canada Revenue Agency*, 2010 BCSC 865
10. *Edmonton (City) v. Assessment Review Board of the City of Edmonton*, 2012 ABQB 399

TAB 1

Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of June 28, 2019

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Recording assessed persons

304(1) The name of the person described in column 2 must be recorded on the assessment roll as the assessed person in respect of the assessed property described in column 1.

	Column 1 Assessed property		Column 2 Assessed person
(a)	a parcel of land, unless otherwise dealt with in this subsection;	(a)	the owner of the parcel of land;
(b)	a parcel of land and the improvements to it, unless otherwise dealt with in this subsection;	(b)	the owner of the parcel of land;
(c)	a parcel of land, an improvement or a parcel of land and the improvements to it held under a lease, licence or permit from the Crown in right of Alberta or Canada or a municipality;	(c)	the holder of the lease, licence or permit or, in the case of a parcel of land or a parcel of land and the improvements to it, the person who occupies the land with the consent of that holder or, if the land that was the subject of a lease, licence or permit has been sold under an agreement for sale, the purchaser under that agreement;

	Column 1 Assessed property		Column 2 Assessed person
(d)	a parcel of land forming part of the station grounds of, or of a right of way for, a railway other than railway property, or a right of way for, irrigation works as defined in the *Irrigation Districts Act* or drainage works as defined in the *Drainage Districts Act*, that is held under a lease, licence or permit from the person who operates the railway, or from the irrigation district or the board of trustees of the drainage district;	(d)	the holder of the lease, licence or permit or the person who occupies the land with the consent of that holder;
(d.1)	railway property;	(d.1)	the owner of the railway property;
(e)	a parcel of land and the improvements to it held under a lease, licence or permit from a regional airports authority, where the land and improvements are used in connection with the operation of an airport;	(e)	the holder of the lease, licence or permit or the person who occupies the land with the consent of that holder;
(f)	a parcel of land, or a part of a parcel of land, and the improvements to it held under a lease, licence or permit from the owner of the land where the land and the improvements are used for	(f)	the holder of the lease, licence or permit;

	Column 1 Assessed property		Column 2 Assessed person
	(i) drilling, treating, separating, refining or processing of natural gas, oil, coal, salt, brine or any combination, product or by-product of any of them,		
	(ii) pipeline pumping or compressing, or		
	(iii) working, excavating, transporting or storing any minerals in or under the land referred to in the lease, licence or permit or under land in the vicinity of that land.		
(g)	machinery and equipment used in the excavation or transportation of coal or oil sands as defined in the *Oil Sands Conservation Act*;	(g)	the owner of the machinery and equipment;
(h)	improvements to a parcel of land listed in section 298 for which no assessment is to be prepared;	(h)	the person who owns or has exclusive use of the improvements;
(i)	linear property;	(i)	the operator of the linear property;

(3) The penalty must not be imposed sooner than 30 days after the tax notice is sent out.

1994 cM-26.1 s344

Penalty for non-payment in other years

345(1) A council may by bylaw impose penalties in any year following the year in which a tax is imposed if the tax remains unpaid after December 31 of the year in which it is imposed.

(2) A penalty under this section is imposed at the rate set out in the bylaw.

(3) The penalty must not be imposed sooner than January 1 of the year following the year in which the tax was imposed or any later date specified in the bylaw.

1994 cM-26.1 s345

Penalties

346 A penalty imposed under section 344 or 345 is part of the tax in respect of which it is imposed.

1994 cM-26.1 s346

Cancellation, reduction, refund or deferral of taxes

347(1) If a council considers it equitable to do so, it may, generally or with respect to a particular taxable property or business or a class of taxable property or business, do one or more of the following, with or without conditions:

(a) cancel or reduce tax arrears;

(b) cancel or refund all or part of a tax;

(c) defer the collection of a tax.

(2) A council may phase in a tax increase or decrease resulting from the preparation of any new assessment.

1994 cM-26.1 s347

Tax becomes debt to municipality

348 Taxes due to a municipality

(a) are an amount owing to the municipality,

(b) are recoverable as a debt due to the municipality,

(c) take priority over the claims of every person except the Crown, and

(d) are a special lien

(i) on land and any improvements to the land, if the tax is a property tax, a community revitalization levy, a special tax, a clean energy improvement tax, a local improvement tax or a community aggregate payment levy, or

(ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community.

RSA 2000 cM-26 s348;2005 c14 s12;2018 c6 s5

Fire insurance proceeds

349(1) Taxes that have been imposed in respect of improvements are a first charge on any money payable under a fire insurance policy for loss or damage to those improvements.

(2) Taxes that have been imposed in respect of a business are a first charge on any money payable under a fire insurance policy for loss or damage to any personal property

(a) that is located on the premises occupied for the purposes of the business, and

(b) that is used in connection with the business and belongs to the taxpayer.

1994 cM-26.1 s349

Tax certificates

350 On request, a designated officer must issue a tax certificate showing

(a) the amount of taxes imposed in the year in respect of the property or business specified on the certificate and the amount of taxes owing,

(b) the total amount of tax arrears, if any, and

(c) the total amount of tax, if any, in respect of which collection is deferred under this Part.

RSA 2000 cM-26 s350;2016 c24 s51

Non-taxable property

351(1) The following are exempt from taxation under this Part:

(a) property listed in section 298;

(b) any property or business in respect of which an exemption from assessment or taxation, or both, was granted before January 1, 1995

(i) by a private Act, or

(ii) by an order of the Lieutenant Governor in Council based on an order of the Local Authorities Board.

(2) A council may by bylaw cancel an exemption referred to in subsection (1)(b), with respect to any property or business.

(3) A council proposing to pass a bylaw under subsection (2) must notify the person or group that will be affected of the proposed bylaw.

(4) A bylaw under subsection (2) has no effect until the expiration of one year after it is passed.

(5) A copy of a bylaw under subsection (2) must be sent to the Minister and if the bylaw amends a private Act the Minister must send a copy to the clerk of the Legislative Assembly.

1994 cM-26.1 s351

Limitation on time for starting proceedings

352(1) An action, suit or other proceedings for the return by a municipality of any money paid to the municipality, whether under protest or otherwise, as a result of a claim by the municipality, whether valid or invalid, for payment of taxes or tax arrears must be started within 6 months after the payment of the money to the municipality.

(2) If no action, suit or other proceeding is started within the period referred to in subsection (1), the payment made to the municipality is deemed to have been a voluntary payment.

1994 cM-26.1 s352

Division 2
Property Tax

Property tax bylaw

353(1) Each council must pass a property tax bylaw annually.

(2) The property tax bylaw authorizes the council to impose a tax in respect of property in the municipality to raise revenue to be used toward the payment of

(a) the expenditures and transfers set out in the budget of the municipality, and

(b) the requisitions.

(3) The tax must not be imposed in respect of property

(a) that is exempt under section 351, 361 or 362, or

(2) An application under this section may be made within 5 years after the date of the public auction.

(3) The Court must decide if notice must be given to any person other than the applicant and in that event the hearing must be adjourned to allow notice to be given.

RSA 2000 cM-26 s450;2009 c53 s119

Seizure of designated manufactured home

451 Part 10 of the *Civil Enforcement Act* does not apply to a designated manufactured home in a manufactured home community that has been seized under a distress warrant.

1994 cM-26.1 s451;1994 cC-10.5 s146;1998 c24 s41

Regulations

452 The Minister may make regulations respecting any other matter related to the recovery of taxes under this Division that is considered necessary to carry out the intent of this Division.

1994 cM-26.1 s452

Part 11
Assessment Review Boards

Division 1
Establishment and Function of Assessment Review Boards

Interpretation

453(1) In this Part,

(a) "assessment notice" includes an amended assessment notice and a supplementary assessment notice;

(b) "assessment roll" includes a supplementary assessment roll;

(c) "chair" means the member of an assessment review board designated as chair under section 454.1(2), 454.2(2) or 455(2);

(d) "clerk", in respect of a local assessment review board or composite assessment review board having jurisdiction in one or more municipalities, means the designated officer appointed as clerk under section 456;

(e) "composite assessment review board" means a composite assessment review board established by a council under section 454(b) or jointly established by 2 or more councils under section 455;

(f) "local assessment review board" means a local assessment review board established by a council under section 454(a) or jointly established by 2 or more councils under section 455;

(g) "provincial member" means a person appointed by the Minister under section 454.21(2);

(h) "tax notice" includes a supplementary tax notice;

(i) "tax roll" includes a supplementary tax roll.

(2) In this Part, a reference to an assessment review board

(a) means a local assessment review board or a composite assessment review board, as the case requires, and

(b) includes a panel of the board convened under section 454.11 or 454.21.

2016 c24 s62

Assessment review boards to be established

454 A council must by bylaw establish

(a) a local assessment review board to hear complaints referred to in section 460.1(1), and

(b) a composite assessment review board to hear complaints referred to in section 460.1(2).

2016 c24 s62

Appointment of members to local assessment review board

454.1(1) A council must

(a) appoint at least 3 persons as members of the local assessment review board,

(b) prescribe the term of office of each member appointed under clause (a), and

(c) prescribe the remuneration and expenses, if any, payable to each member appointed under clause (a).

(2) The council must designate one of the members appointed under subsection (1) as the chair of the local assessment review board and must prescribe the chair's term of office and the remuneration and expenses, if any, payable to the chair.

(3) The chair may delegate to any other member appointed under subsection (1) any of the powers, duties or functions of the chair.

2016 c24 s62

Panels of local assessment review board

454.11(1) Where a hearing is to be held in respect of a complaint referred to in section 460.1(1), the chair of the local assessment review board must convene a panel of 3 of its members to hear the complaint.

(2) Despite subsection (1) but subject to subsection (3)(b) and any conditions prescribed by the regulations under section 484.1(c), a panel of a local assessment review board may consist of only one member appointed by the chair.

(3) Unless an order of the Minister authorizes otherwise, the chair must not appoint

(a) more than one councillor to a 3-member panel, or

(b) a councillor as the only member of a one-member panel.

(4) Where a panel consists of 3 members, the panel members must choose a presiding officer from among themselves.

(5) Where a panel has only one member, that member is the presiding officer.

2016 c24 s62;2018 c11 s13

Appointment of members to composite assessment review board

454.2(1) A council must

(a) appoint at least 2 persons as members of the composite assessment review board,

(b) prescribe the term of office of each member appointed under clause (a), and

(c) prescribe the remuneration and expenses, if any, payable to each member appointed under clause (a).

(2) The council must designate one of the members appointed under subsection (1) as the chair of the composite assessment review board and must prescribe the chair's term of office and the remuneration and expenses, if any, payable to the chair.

(3) The chair may delegate to another member appointed under subsection (1) any of the powers, duties or functions of the chair.

2016 c24 s62

Panels of composite assessment review board

454.21(1) Where a hearing is to be held in respect of a complaint referred to in section 460.1(2), the chair of the composite assessment review board must convene a panel to hear the complaint.

(2) The panel must consist of 2 members of the composite assessment review board appointed by the chair and one provincial member appointed by the Minister in accordance with the regulations.

(3) Unless an order of the Minister authorizes otherwise, the chair must not appoint more than one councillor to a panel.

(4) Despite subsection (2) but subject to any conditions prescribed by the regulations under section 484.1(d), a panel of a composite assessment review board may consist of only the provincial member.

(5) The provincial member is the presiding officer of every panel of a composite assessment review board.

2016 c24 s62

Qualifications of members

454.3 A member of an assessment review board may not participate in a hearing of the board unless the member is qualified as provided for in the regulations.

2016 c24 s62

Joint establishment of assessment review boards

455(1) Two or more councils may agree to jointly establish the local assessment review board or the composite assessment review board, or both, to have jurisdiction in their municipalities.

(2) Where an assessment review board is jointly established,

(a) the councils must jointly designate one of the board members as chair and must jointly prescribe the chair's term of office and the remuneration and expenses, if any, payable to the chair, and

(b) the chair may delegate any of the powers, duties or functions of the chair to another board member but not to the provincial member of a panel of the board.

2016 c24 s62

Clerk

456(1) The council of a municipality must appoint a designated officer to act as the clerk of the assessment review boards having jurisdiction in the municipality.

(2) Where an assessment review board is jointly established, the councils must jointly appoint the clerk.

(3) The clerk must not be an assessor or a designated officer having authority to grant or cancel tax exemptions or deferrals under section 364.1.

(4) The council or councils appointing the clerk must prescribe the clerk's remuneration and duties.

2016 c24 s62

Replacement of panel members

457 In circumstances provided for by the regulations, the chair of an assessment review board may replace a member of a panel.

2016 c24 s62

Quorum

458(1) Where a panel of a local assessment review board consists of 3 members, a quorum is 2 members.

(2) Where a panel of a composite assessment review board consists of 3 members, a quorum is 2 members, one of whom must be the provincial member.

2016 c24 s62

Decision

459 A decision of a panel of an assessment review board is the decision of the assessment review board.

2016 c24 s62

Complaints

460(1) A person wishing to make a complaint about any assessment or tax must do so in accordance with this section.

(2) A complaint must be in the form prescribed in the regulations and must be accompanied with the fee set by the council under section 481(1), if any.

(3) A complaint may be made only by an assessed person or a taxpayer.

(4) A complaint may relate to any assessed property or business.

(5) A complaint may be about any of the following matters, as shown on an assessment or tax notice:

(a) the description of a property or business;

(b) the name and mailing address of an assessed person or taxpayer;

(c) an assessment;

(d) an assessment class;

(e) an assessment sub-class;

(f) the type of property;

(g) the type of improvement;

(h) school support;

(i) whether the property is assessable;

(j) whether the property or business is exempt from taxation under Part 10;

(k) any extent to which the property is exempt from taxation under a bylaw under section 364.1;

(l) whether the collection of tax on the property is deferred under a bylaw under section 364.1.

(6) A complaint may be made about a designated officer's refusal to grant an exemption or deferral under a bylaw under section 364.1.

(7) Despite subsection (5)(j),

(a) there is no right to make a complaint about an exemption or deferral given by agreement under section 364.1(11) unless the agreement expressly provides for that right, and

(b) there is no right to make a complaint about a decision made under a bylaw under section 364.2 in respect of an exemption or deferral.

(8) There is no right to make a complaint about any tax rate.

(9) A complaint under subsection (5) must

(a) indicate what information shown on an assessment notice or tax notice is incorrect,

(b) explain in what respect that information is incorrect,

(c) indicate what the correct information is, and

(d) identify the requested assessed value, if the complaint relates to an assessment.

(10) A complaint about a local improvement tax must be made within one year after it is first imposed.

(11) Despite subsection (10), where a local improvement tax rate has been revised under section 403(3), a complaint may be made about the revised local improvement tax whether or not a complaint was made about the tax within the year after it was first imposed.

(12) A complaint under subsection (11) must be made within one year after the local improvement tax rate is revised.

(13) A complaint must include the mailing address of the complainant except where, in the case of a complaint under subsection (5), the correct mailing address of the complainant is shown on the assessment notice or tax notice.

(14) An assessment review board has no jurisdiction to deal with a complaint about designated industrial property or an amount prepared by the Minister under Part 9 as the equalized assessment for a municipality.

(15) An assessment review board has no jurisdiction to deal with a complaint about any matter relating to an exemption or deferral under section 364.2, including a refusal to grant an exemption or deferral or a cancellation of an exemption or deferral under that section.

2016 c24 s62;2019 c6 s8

Jurisdiction of assessment review boards

460.1(1) A local assessment review board has jurisdiction to hear complaints about any matter referred to in section 460(5) that is shown on

(a) an assessment notice for

(i) residential property with 3 or fewer dwelling units, or

(ii) farm land,

or

(b) a tax notice other than a property tax notice, business tax notice or improvement tax notice.

(2) Subject to section 460(14) and (15), a composite assessment review board has jurisdiction to hear complaints about

(a) any matter referred to in section 460(5) that is shown on

(i) an assessment notice for property other than property described in subsection (1)(a), or

(ii) a business tax notice or an improvement tax notice,

or

(b) a designated officer's decision to refuse to grant an exemption or deferral under section 364.1.

(3) In this section, a reference to "improvement tax" includes a business improvement area tax in Part 10, Division 4 and a local improvement tax in Part 10, Division 7.

2016 c24 s62;2017 c22 s37;2019 c6 s9

Address to which a complaint is sent

461(1) A complaint must be filed with the assessment review board at the address shown on the assessment or tax notice for the property

(a) in the case of a complaint about a designated officer's decision to refuse to grant an exemption or deferral under section 364.1, not later than the date stated on the written notice of refusal under section 364.1(9), or

(b) in any other case, not later than the complaint deadline.

(1.1) A complaint filed after the complaint deadline is invalid.

(2) The applicable filing fee must be paid when a complaint is filed.

(3) On receiving a complaint, the clerk must set a date, time and location for a hearing before an assessment review board in accordance with the regulations.

2016 c24 s62;2017 c13 s2(13)

Notice of assessment review board hearing

462(1) If a complaint is to be heard by a local assessment review board, the clerk must

(a) within 30 days after receiving the complaint, provide the municipality with a copy of the complaint, and

(b) within the time prescribed by the regulations, notify the municipality, the complainant and any assessed person other than the complainant who is directly affected by the complaint of the date, time and location of the hearing.

(2) If a complaint is to be heard by a composite assessment review board, the clerk must

(a) within 30 days after receiving the complaint, provide the municipality with a copy of the complaint, and

(b) within the time prescribed by the regulations, notify the Minister, the municipality, the complainant and any assessed person other than the complainant who is directly affected by the complaint of the date, time and location of the hearing.

2016 c24 s62

Absence from hearing

463 If any person who is given notice of the hearing does not attend, the assessment review board must proceed to deal with the complaint if

(a) all persons required to be notified were given notice of the hearing, and

(b) no request for a postponement or an adjournment was received by the board or, if a request was received, no postponement or adjournment was granted by the board.

2016 c24 s62

Proceedings before assessment review board

464(1) Assessment review boards are not bound by the rules of evidence or any other law applicable to court proceedings and have power to determine the admissibility, relevance and weight of any evidence.

(2) Assessment review boards may require any person giving evidence before them to do so under oath.

(3) Members of assessment review boards, including provincial members of panels of composite assessment review boards, are commissioners for oaths while acting in their official capacities.

2016 c24 s62

Hearings open to public

464.1(1) Subject to subsections (2) and (3), all hearings by an assessment review board are open to the public.

(2) If an assessment review board considers it necessary to prevent the disclosure of intimate personal, financial or commercial matters or other matters because, in the circumstances, the need to protect the confidentiality of those matters outweighs the desirability of an open hearing, the assessment review board may conduct all or part of the hearing in private.

(3) If all or any part of a hearing is to be held in private, no party may attend the hearing unless the party files an undertaking stating that the party will hold in confidence any evidence heard in private.

(4) Subject to subsection (5), all documents filed in respect of a matter before an assessment review board must be placed on the public record.

(5) An assessment review board may exclude a document from the public record

(a) if the assessment review board is of the opinion that disclosure of the document could reasonably be expected to disclose intimate personal, financial or commercial matters or other matters, and

(b) the assessment review board considers that a person's interest in confidentiality outweighs the public interest in the disclosure of the document.

(6) Nothing in this section limits the operation of any statutory provision that protects the confidentiality of information or documents.

2016 c24 s62

Notice to attend or produce

465(1) If, in the opinion of an assessment review board hearing a complaint,

(a) the attendance of a person, or

(b) the production of a document or thing,

is required for the purpose of the hearing, the board may, on application, cause a notice to be served on a person requiring a person to attend or to attend and produce the document or thing.

(2) An application under subsection (1) must be made in accordance with the regulations made under section 484.1(n.1).

(3) If a person fails or refuses to comply with a notice served under subsection (1), the assessment review board may apply to the Court of Queen's Bench and the Court may issue a warrant requiring the attendance of the person or the attendance of the person to produce a document or thing.

2016 c24 s62

Protection of witnesses

466 A witness may be examined under oath on anything relevant to a matter that is before an assessment review board and is not excused from answering any question on the ground that the answer might tend to

(a) incriminate the witness,

(b) subject the witness to punishment under this or any other Act, or

(c) establish liability of the witness

(i) to a civil proceeding at the instance of the Crown or of any other person, or

(ii) to prosecution under any Act,

but if the answer so given tends to incriminate the witness, subject the witness to punishment or establish liability of the witness, it must not be used or received against the witness in any civil proceedings or in any other proceedings under this or any other Act, except in a prosecution for or proceedings in respect of perjury or the giving of contradictory evidence.

2016 c24 s62

Division 2
Decisions of Assessment Review Boards

Decisions of assessment review board

467(1) An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.

(2) An assessment review board must dismiss a complaint that was not made within the proper time or that does not comply with section 460(9).

(3) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration

(a) the valuation and other standards set out in the regulations,

(b) the procedures set out in the regulations, and

(c) the assessments of similar property or businesses in the same municipality.

(4) An assessment review board must not alter any assessment of farm land, machinery and equipment or railway property that has been prepared correctly in accordance with the regulations.

RSA 2000 cM-26 s467;2009 c29 s24;2018 c11 s13

Appeal to composite assessment review board

467.1 A complaint about a designated officer's decision to refuse to grant an exemption or deferral under section 364.1 is an appeal of the decision and a composite assessment review board may, after hearing the complaint, confirm the designated officer's decision or replace it with the board's decision.

2016 c24 s63

Assessment review board decisions

468(1) Subject to the regulations, an assessment review board must, in writing, render a decision and provide reasons, including any dissenting reasons,

(a) within 30 days from the last day of the hearing, or

(b) before the end of the taxation year to which the complaint that is the subject of the hearing applies,

whichever is earlier.

(2) Despite subsection (1), in the case of a complaint about a supplementary assessment notice, an amended assessment notice or any tax notice other than a property tax notice, an assessment review board must render its decision in writing in accordance with the regulations.

RSA 2000 cM-26 s468;2009 c29 s25

Costs of proceedings

468.1 A composite assessment review board may, or in the circumstances set out in the regulations must, order that costs of and incidental to any hearing before it be paid by one or more of the parties in the amount specified in the regulations.

2009 c29 s26

Effect of order relating to costs

468.2 An order of the composite assessment review board under section 468.1 may be registered in the Personal Property Registry and at any land titles office and, on registration, has the same effect as if it were a registered writ of enforcement issued after judgment has been entered in an action by the Court of Queen's Bench.

2009 c29 s26

Notice of decision

469 The clerk must, within 7 days after an assessment review board renders a decision, send the board's written decision and reasons, including any dissenting reasons, to the persons notified of the hearing under section 462(1)(b) or (2)(b), as the case may be.

RSA 2000 cM-26 s469;2009 c29 s27;2016 c24 s64

Judicial review

470(1) Where a decision of an assessment review board is the subject of an application for judicial review, the application must be filed with the Court of Queen's Bench and served not more than 60 days after the date of the decision.

(2) Notice of an application for judicial review must be given to

(a) the assessment review board that made the decision,

(b) the complainant, other than an applicant for the judicial review,

(c) an assessed person who is directly affected by the decision, other than the complainant,

(d) a municipality, if the decision that is the subject of the judicial review relates to property that is within the boundaries of that municipality, and

(e) the Minister.

(3) If an applicant for judicial review of an assessment review board decision makes a written request for materials to the assessment review board for the purposes of the application, the assessment review board must provide the materials requested within 14 days from the date on which the written request is served.

(4) An assessment review board whose decision is the subject of an application for judicial review must, within 30 days from the date on which the board is served with the application, forward to the clerk of the Court of Queen's Bench the certified record of proceedings prepared under Part 3 of the Alberta Rules of Court.

(5) Documents excluded from the public record of a hearing by an assessment review board remain excluded from the public record on judicial review unless otherwise ordered by the Court of Queen's Bench.

(6) No member of an assessment review board, including a provincial member appointed to a panel of a composite assessment review board, is liable for costs by reason of or in respect of a judicial review under this Act.

RSA 2000 cM-26 s470;2009 c29 s28; 2014 c13 s35;2016 c24 s65

470.1 Repealed 2016 c24 s65.

Technical irregularities

471(1) If there has been substantial compliance with this Part, the decision of an assessment review board is not invalid because of a defect in form, a technical irregularity or informality.

(2) An assessment review board may correct any error or omission in its decision.

1994 cM-26.1 s471;1996 c30 s44

472 to **476** Repealed 1995 c24 s73.

TAB 2

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N° du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

TAB 3

SULLIVAN
ON THE
CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

LexisNexis®

CHAPTER 2

Driedger's Modern Principle

ANALYSIS OF THE MODERN PRINCIPLE

§2.1 ***Introduction.*** In the first edition of the *Construction of Statutes*, published in 1974, Elmer Driedger described an approach to statutory interpretation which he called the modern principle:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[1]

In the years following that first edition, the modern principle was frequently cited and relied on, and in 1998, in *Re Rizzo & Rizzo Shoes Ltd.*, it was declared to be the preferred approach of the Supreme Court of Canada. Speaking for the Court, Iacobucci J. wrote:

> Although much has been written about the interpretation of legislation ... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone.[2]

Since the Rizzo case, Driedger's modern principle has been the starting point for statutory interpretation in innumerable decisions by Canadian courts. It has even been applied to interpretation of Quebec's Civil Code.[3]

§2.2 The chief virtue of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. In interpreting a legislative provision, a court must form an impression of the meaning of its text. But to infer what rule the legislature intended to enact, it must also take into account

1 Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67. This principle was reproduced in the second edition, published in 1983, without modification at p. 87.

2 [1998] S.C.J. No. 2, at para. 21, [1998] 1 S.C.R. 27, at 41 (S.C.C.). For a comprehensive and critical analysis of Driedger's modern principle, see Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimation" (2006), 40 Thémis 131-72.

3 See *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] S.C.J. No. 55, [2004] 3 S.C.R. 257, at para. 20*ff.* (S.C.C.).

TAB 4

Pierre-André Côté
in collaboration with Stéphane Beaulac and Mathieu Devinat

The Interpretation of Legislation in Canada

Fourth Edition

CARSWELL®

Application of the principle of strict construction of penal statutes depends on the judge's appreciation of the enactment's clarity. Not surprisingly, what is obscure to some is clear to others; and although invoked by one judge the principle may be ignored by another under identical circumstances.[219]

SUBSECTION 3

STATUTES WHICH ENCROACH UPON ENJOYMENT OF PROPERTY

"Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law".[220] To this right corresponds a principle of interpretation: encroachments on the enjoyment of property should be interpreted rigorously and restrictively.

Rigorous interpretation: conditions imposed by statute that limit the enjoyment of property must be followed strictly.[221] Restrictive interpretation: if a genuine problem in interpreting statute that limits the enjoyment of property arises, the judge is justified in choosing the construction that limits the effect of the law and favours the enjoyment of property.[222]

The principle is particularly relevant to expropriation legislation. The courts require that the legislature express themselves extremely clearly where there is an intention to expropriate or confis-

219. Compare, for example, the majority and minority opinions in *Bélanger* v. *The Queen*, [1970] S.C.R. 567, or *Anderson* v. *R.*, [1970] S.C.R. 843.
220. *Harrison* v. *Carswell*, [1976] 2 S.C.R. 200, 219 (Dickson J.).
221. *Costello* v. *City of Calgary*, [1983] 1 S.C.R. 14; *St. Peters Evangelical Lutheran Church* v. *Ottawa*, [1982] 2 S.C.R. 616; *Riopelle* v. *City of Montreal* (1911), 44 S.C.R. 579; *Ville de Boucherville* v. *Jaybalt Corp.*, [1966] Que. S.C. 611.
222. See however *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, par. 84 (Binnie J.), regarding a detention remedy, in which the Supreme Court considered the principle of strict interpretation to be a subsidiary principle, applicable when a provision is ambiguous: "The applicable principle is not 'strict construction' but s. 12 of the Interpretation Act, which provides that every enactment 'is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects'".

cate without compensation.[223] The words of Lord Atherson, in *Attorney-General* v. *De Keyser's Royal Hotel*, are often quoted:

> The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.[224]

In *Colonial Sugar Refining Co.* v. *Melbourne Harbour Trust Commissioners*, Lord Warrington wrote:

> ... a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.[225]

The principle is also set out in article 952 of the *Civil Code of Quebec*:

> No owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in consideration of a just and prior indemnity.

In practice, the presumption that the legislature intended deprivation of property to be compensated can lead a court to one of two conclusions: either the statute does not dispossess the owner of

223. The principle was enunciated by Bastarache J. thus: "It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the legislation" (*ATCO Gas & Pipelines Ltd.* v. *Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, par. 79). See also *Pacific National Investments Ltd.* v. *Victoria (City)*, [2000] 2 S.C.R. 919, par. 26 (LeBel J.).

224. *Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508, 542. This passage has been quoted frequently, *e.g. Manitoba Fisheries Ltd.* v. *The Queen*, [1979] 1 S.C.R. 101. See also: *Toronto Area Transit Operating Authority* v. *Dell Holdings Ltd.*, [1997] 1 S.C.R. 32. At pages 44 and 45, Cory J. emphasizes that while these provisions which authorise expropriation must be interpreted restrictively, given that they are a serious limit to one's rights, the provisions which outline the payment of an indemnity are to be given a large and liberal interpretation, since they are remedial. See also *Rock Resources Inc.* v. *British Columbia* (2003), 229 D.L.R. (4th) 115, [2003] 8 W.W.R. 680, par. 132 ff. (Finch J.) (B.C.C.A.).

225. *Colonial Sugar Refining Co.* v. *Melbourne Harbour Trust Commissioners*, [1920] A.C. 342, 359. In *Husky Oil Operations Ltd.* v. *Minister of National Revenue*, [1995] 3 S.C.R. 453, Justice Iacobucci (dissenting) outlined the following principle at page 553: "In cases of ambiguity, courts are to rely on the principle of statutory interpretation according to which statutes purporting to pay the debts of one person out of the property of another are to be given a restrictive interpretation."

the property,[226] or the dispossessed owner has the right to compensation.[227]

The presumption in favour of compensation also applies to statutes conferring administrative powers: these should not be interpreted as authorizing expropriation without compensation unless there is a clear provision to that effect in the enabling act.[228]

Planning bylaws have frequently been construed restrictively in the light of the principle of free enjoyment of property. In *City of Montreal* v. *Morgan*, Justice Anglin asserted that ". . . by-laws in restraint of rights of property as well as penal by-laws should be strictly construed".[229] Similarly, Rivard J. in *Cité de Sherbrooke* v. *King Street Shopping Centre Ltd.* wrote:

> A zoning bylaw always encroaches on the free exercise of property rights. The municipalities that possess such power are obliged to exercise it in clear and precise terms which must be construed strictly. When the public interest and the common good require the municipality to interfere with the exercise of private rights, these are exceptional measures which must be applied in the exact terms provided for by the statute.[230]

However, this traditional approach to urban planning bylaws, a natural outgrowth of the laissez-faire philosophy which prevailed in the nineteenth century, is now challenged by public policy concerns related to a more rational organization of urban life. Thus, there is a clear trend toward a less strict interpretation of urban planning legislation. This trend, manifested principally in decisions of the

---

226. For example, *Blackwoods Ltd. and the Manitoba Brewing and Malting Co.* v. *Canadian Northern Railway Co.* (1910), 44 S.C.R. 92; *Abell* v. *County of York* (1921), 61 S.C.R. 345; *A.G. for British Columbia et al.* v. *Parklane Private Hospital Ltd.*, [1975] 2 S.C.R. 47; *Re Estabrooks Pontiac Buick Ltd.* (1983), 44 N.B.R. (2d) 201 (N.B.C.A.).

227. For example, *Imperial Oil Ltd.* v. *R.*, [1974] S.C.R. 623; *Manitoba Fisheries Ltd.* v. *The Queen*, [1979] 1 S.C.R. 101; *Casimiro Resource Corp.* v. *British Columbia (Attorney General)* (1991), 80 D.L.R. (4th) 1 (B.C.C.A.). The context may justify no compensation being paid: *Bertram S. Miller Ltd.* v. *The Queen*, [1986] 3 F.C. 291 (C.A.).

228. *Leahy* v. *Town of North Sydney* (1906), 37 S.C.R. 464; *B.C. Electric Railway Co.* v. *Public Utilities Commission of B.C.*, [1960] S.C.R. 837; *Imperial Oil Ltd.* v. *R.*, [1974] S.C.R. 623.

229. *City of Montreal* v. *Morgan*, (1920), 60 S.C.R. 393, 404.

230. *Cité de Sherbrooke* v. *King Street Shopping Centre Ltd.*, [1963] Que. Q.B. 340, 343 [*translation*].

Ontario courts,[231] has influenced the Supreme Court. Justice Spence, in *Bayshore Shopping Centre Ltd.* v. *Township of Nepean*,[232] summarized the two conflicting philosophies regarding urban planning regulation: a restrictive attitude, because such bylaws limit free enjoyment of property (the traditional approach), and a more liberal attitude, aimed at protecting society and promoting the public interest (the innovative approach). Taking note of this contradiction, he approached "the interpretation and application of the by-law without acknowledging any compulsion to consider its provision either strictly or liberally".

If, in the *Bayshore* case, a restrictive interpretation was overruled by a neutral one, the Court went a step further in *Soo Mill & Lumber Co.* v. *City of Sault Ste-Marie*,[233] by liberally interpreting the Ontario *Planning Act* and the regulations of application authorized by it.[234]

In *Leiriao* v. *Val-Bélair (City)* the majority of the Supreme Court preferred to give "full meaning" to a provision concerning the powers of a municipality to establish land reserves by expropriation, rather than to interpret it restrictively, as was proposed in dissent.[235]

This evolution reflects major changes in values. It is taking place unevenly, from province to province and from court to court,[236] but, despite some wavering, a definite trend has been established, as it reflects a more general recognition of the relative nature of property law, particularly when property rights are set against collective interests.[237]

231. *For example, Re Bruce and City of Toronto*, [1971] 3 O.R. 62 (C.A.); *Galway & Cavendish (United Townships)* v. *Windover* (1996), 130 D.L.R. (4th) 710 (Ont. Div. Ct.).
232. *Bayshore Shopping Centre Ltd.* v. *Township of Nepean*, [1972] S.C.R. 755, 764.
233. *Soo Mill & Lumber Co.* v. *City of Sault Ste-Marie*, [1975] 2 S.C.R. 78.
234. *Ibid.*, p. 83.
235. *Leiriao* v. *Val-Bélair (City)*, [1991] 3 S.C.R. 349. For interpretative principles applicable to statutes conferring municipal powers, see *Pacific National Investments Ltd.* v. *Victoria (City)*, [2000] 2 S.C.R. 919, par. 35-36 (LeBel J.); *Nanaimo (City)* v. *Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, par. 18 (Major J.).
236. For example, *Village of Renforth* v. *Bowes* (1975), 10 N.B.R. (2d) 191 (Q.B.), 197 (Stevenson J.). See also *Re Rockcliffe Park Realty Ltd.* (1976), 62 D.L.R. (3d) 17 (Ont. C.A.); *R.* v. *Bennett* (1994), 126 N.S.R. (2d) 350 (N.S.S.C.).
237. In Quebec law, ownership is defined as the right to use, enjoy and dispose of property fully and freely (*Civil Code of Quebec*, article 947). However, the exercise of this right is subject to article 7 ("No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith."), which, as noted by Justices Lebel and

The reasons of Forget J., of the Quebec Court of Appeal, in *Ville de Mascouche* v. *Thiffault*, clearly illustrate the evolution that is taking place:

> I start this analysis by the last proposition of the trial judge with respect to the restrictive interpretation of a zoning by-law. This opinion is rather well established; however, with the greatest respect, I have great difficulty conceiving its basis.
>
> During the period of economic liberalism in the 19th Century, property rights were deemed absolute. Things have evolved since; the notion of common interest, of harmonious development, of quality of life and the environment – once inconceivable – are now at the centre of preoccupation of citizens and are the object of many statutes and public regulations. . ..
>
> Advocates of restrictive interpretation seem to juxtapose individual property rights with those of a distant disembodied community, whereas zoning by-laws are enacted for the benefit of one and all for a given zoning district and the illegal use of one owner is generally detrimental to another.
>
> By analogy, one can highlight that in tax matters it has always been repeated that statutes and regulations are to be restrictively interpreted. The Supreme Court [in *Québec (Communauté urbaine)* v. *Notre-Dame de Bon-Secours*[238]] has brought this position to an end. It ruled that in this area, as in all others, one must seek the intention of the legislature. I really do not see why we should not follow the same path with respect to municipal zoning by-laws.[239]

Where the protection of historic buildings is concerned, the Supreme Court has adopted an interpretive philosophy which seeks to strike a fair balance between the collective interest in the preservation of architectural heritage and the individual interest in the free enjoyment of property.[240] The protection of the environment is an

---

Deschamps in *St. Lawrence Cement Inc.* v. *Barrette*, [2008] 3 S.C.R. 392, par. 24, recognizes that "one person's right necessarily limits that of another person, and to uphold all such rights concurrently will reduce the absoluteness of each". See also articles 976 ff. of the Civil Code of Quebec, applicable to immovables.

238. *Québec (Communauté urbaine)* v. *Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3.

239. *Ville de Mascouche* v. *Thiffault*, J.E. 96-1097, p. 5-6 (C.A.) [*translation*]. See also *Bois-des-Filion (Ville)* v. *Guay* (2004), CanLII 46880, par. 39 (Lemelin J.) (C.A.Q.).

240. *St. Peters Evangelical Lutheran Church* v. *Ottawa*, [1982] 2 S.C.R. 616, commented on by E. Tucker, "The Gospel of Statutory Rules of Interpretation

increasingly prevalent preoccupation of the public, and may justify restrictions on property rights which will be viewed as perfectly legitimate.[241]

In conclusion, it should not be forgotten that the principle of strict interpretation of enactments encroaching on the free enjoyment of property does not relieve the courts of their duty to examine the particular text in order to determine its meaning and scope. Only when there is serious doubt about the legislature's intention does the principle come into play. In *Wilson* v. *Jones*,[242] a zoning bylaw case, Spence J. emphasized the need to study the enactment in its entirety before invoking the principle of restrictive interpretation:

> . . . a by-law restricting the use of land must be strictly construed and that any doubt as to the application of the by-law to prevent the erection of a specific building should be resolved in favour of such proposed use. No authority need be cited for each of these propositions. These principles, however, need only be applied when upon the reading of the whole by-law there is an ambiguity or difficulty of construction.[243]

In the words of Lord Radcliffe, in *A.G. for Canada v. Hallet & Carey Ltd.*, ". . . where the import of some enactment is inconclusive or ambiguous, the Court may properly lean in favour of an interpretation that leaves private rights undisturbed".[244]

SUBSECTION 4

TAXATION STATUTES

Historically, the courts have given a strict and literal interpretation to taxation statutes. Today, however, they are interpreted in the same manner as other legislation; however, in cases of reasonable doubt, the enactment is applied "in the favour of the subject".

Requiring Liberal Interpretation According to St-Peters", (1985) 35 *U. of T.L.J.* 113.

241. *Municipalité régionale du Comté d'Abitibi* v. *Ibitiba Ltée*, [1993] R.J.Q. 1061 (C.A.). In municipal law, see *114957 Canada Ltée (Spraytech, Société d'arrosage)* v. *Hudson (Town)*, [2001] 2 S.C.R. 241, par. 27 ff. (L'Heureux-Dubé J.).
242. *Wilson* v. *Jones*, [1968] S.C.R. 554, 559.
243. Along the same lines: *Village de Beaulieu* v. *Brique Citadelle Ltée*, [1971] Que. S.C. 181, 186 (Côté J.). Also: *Association des propriétaires des Jardins Taché Inc.* v. *Entreprises Dasken Inc.*, [1974] S.C.R. 2, 13 (Pigeon J.).
244. *A.G. for Canada* v. *Hallet & Carey Ltd.*, [1952] A.C. 427, 450.

TAB 5

James Stephen Wilson *Appellant*;

and

Her Majesty The Queen *Respondent.*

File No.: 16931.

1983: March 14; 1983: December 15.

Present: Laskin C.J. and Dickson, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Courts — Collateral proceedings — Superior court wiretap authorizations — Evidence obtained pursuant to authorizations found inadmissible by inferior court — Whether or not superior court can be collaterally attacked in any court and in particular by an inferior court — Criminal Code, R.S.C. 1970, c. C-34, ss. 178.12(1)(b),(g), 178.13(1)(b), 178.14, 178.16(1)(a), 178.16 (3)(b).

Appellant was acquitted in provincial court on the collapse of the Crown's case following the judge's ruling that the Crown's wiretap evidence was inadmissible as illegally obtained. The ruling was based on the information obtained from the cross-examination of the deponent of the affidavits that were made in support of the applications for authorization to wiretap in the Court of Queen's Bench. The authorizations were valid on their face and the trial judge did not open the sealed packets. The Manitoba Court of Appeal allowed an appeal from the acquittals and ordered a new trial. At issue here is whether or not a judge of an inferior court can look behind the apparently valid order of a superior court and rule the evidence obtained under that order inadmissible.

Held: The appeal should be dismissed.

Per Laskin C.J. and Estey and McIntyre JJ.: A court order that has not been varied or set aside on appeal cannot be collaterally attacked and must receive full effect according to its terms. This rule has not been altered with respect to wiretap authorizations by Part IV.1 of the *Code* except to the extent that a trial judge must consider the admissibility of wiretap evidence, but without going beyond the face of the authorization. In the absence of the right of appeal from an authorization, and given the inapplicability of *certiorari*, any application for review of an authorization must be made to the court that made it. As it is not always practical or

James Stephen Wilson *Appelant*;

et

Sa Majesté La Reine *Intimée.*

N° du greffe: 16931.

1983: 14 mars; 1983: 15 décembre.

Présents: Le juge en chef Laskin et les juges Dickson, Estey, McIntyre et Chouinard.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Tribunaux — Procédures indirectes — Autorisations d'écoute électronique accordées par une cour supérieure — Une cour inférieure juge irrecevable la preuve obtenue en vertu de ces autorisations — L'ordonnance d'une cour supérieure peut-elle être attaquée indirectement devant une cour quelconque et, en particulier, devant une cour inférieure? — Code criminel, S.R.C. 1970, chap. C-34, art. 178.12(1)b),g), 178.13(1)b), 178.14, 178.16(1)a), 178.16(3)b).

Un juge de la Cour provinciale ayant déclaré irrecevables pour cause d'illégalité des preuves obtenues par écoute électronique, le ministère public n'avait plus aucune preuve à l'appui des accusations et l'appelant a été acquitté. La décision a été fondée sur les renseignements recueillis au cours du contre-interrogatoire de l'auteur des affidavits appuyant les demandes d'autorisation d'écoute électronique présentées devant la Cour du Banc de la Reine. Les autorisations sont valides en apparence et le juge du procès n'a pas ouvert les paquets scellés. La Cour d'appel du Manitoba a accueilli un appel contre les acquittements et a ordonné la tenue d'un nouveau procès. La question litigieuse en l'espèce est de savoir si un juge d'une cour inférieure peut vérifier une ordonnance apparemment valide d'une cour supérieure et conclure à l'irrecevabilité de la preuve obtenue en vertu de cette ordonnance.

Arrêt: Le pourvoi est rejeté.

Le juge en chef Laskin et les juges Estey et McIntyre: Une ordonnance d'une cour qui n'a été ni modifiée ni infirmée en appel ne peut faire l'objet d'une attaque indirecte, mais doit recevoir son plein effet. En ce qui concerne les autorisations d'écoute électronique, la partie IV.1 du *Code* n'apporte aucune modification à cette règle, sauf dans la mesure où un juge du procès doit déterminer la recevabilité de preuves obtenues par écoute électronique. Toutefois, il est obligé à cette fin de s'en tenir à ce que dit l'autorisation. En l'absence d'un droit d'appel contre une autorisation et vu l'inapplicabilité du *certiorari*, toute demande de révision d'une autopossible to apply for review to the same judge who made the order, another judge of the same court can review an *ex parte* order if: 1) he has the power to discharge the order, 2) he acts with the consent of, or in the event of the unavailability of, the judge who made the order, and 3) he hears the motion *de facto* as to both the facts and the law involved. A judge reviewing a wiretap authorization must, in addition, not substitute his discretion for that of the authorizing judge.

Per Dickson and Chouinard JJ.: Subsections 178.16(1) and 176.16(3) in combination require a trial judge to go behind an apparently valid authorisation to consider its validity and therefore have modified the rule that a court order not be impeached except by appeal, by action to set aside or by prerogative writ. These subsections make no distinction between information on the face of the record and information *dehors* the record, and to restrict a trial judge to considering only the former as a matter of statutory interpretation would unnecessarily fetter his ability to determine admissibility. Section 178.16, too, makes no suggestion as to review of an authorization by anyone but the trial judge and s. 178.14 contemplates that the packet be opened by any judge of a superior court of criminal jurisdiction or by a judge as defined by s. 482. The common law doctrine that the authorization could only be reviewed by the Court making it, and preferrably by the actual judge, was therefore overridden. Further, it was implicit in the language of ss. 176.16(1) and (3)(*b*) that an inferior court judge could attack a superior court's authorization.

Prima facie evidence of fraud, non-disclosure or misleading disclosure are valid reasons for opening the sealed packet. Once a foundation for opening the packet is established, a trial judge within the contemplation of s. 178.14 can open the packet and make a full review for compliance with Part IV.1. Section 178.16(3)(*b*) grants a discretion to cure non-substantive defects, but substantive defects in the application render the evidence inadmissible. The trial judge cannot decide that he would have exercised his discretion differently from the authorizing judge.

risation doit être adressée à la cour qui l'a accordée. Comme il n'est pas toujours pratique ni possible d'adresser une demande de révision au juge qui a rendu l'ordonnance, un autre juge de la même cour peut réviser une ordonnance rendue *ex parte*: (1) s'il a le pouvoir d'annuler l'ordonnance, (2) s'il agit avec le consentement du juge qui a rendu l'ordonnance ou si ce dernier ne peut siéger, et (3) s'il reprend au complet l'audition de la demande, à la fois sur le plan du droit et celui des faits en cause. De plus, le juge qui procède à la révision d'une autorisation d'écoute électronique ne doit pas substituer son appréciation à celle du juge qui a accordé l'autorisation.

Les juges Dickson et Chouinard: Les paragraphes 178.16(1) et 178.16(3) ont pour effet cumulatif d'exiger du juge du procès qu'il vérifie une autorisation apparemment valide afin de déterminer si elle l'est en réalité. Cela constitue donc une modification de la règle selon laquelle une ordonnance d'une cour ne peut être attaquée si ce n'est par voie d'appel, d'action en annulation ou de bref de prérogative. Ces paragraphes ne font pas de distinction entre ce qui est manifeste à la lecture du dossier et ce qui est en dehors du dossier et si, par voie d'interprétation législative, le juge du procès était limité à l'examen des seuls cas qui relèvent de la première catégorie, cela aurait pour effet d'entraver inutilement sa capacité de décider de la recevabilité. Suivant l'art. 178.16, seul le juge du procès peut entreprendre la révision d'une autorisation et, aux termes de l'art. 178.14, le paquet peut être ouvert par tout juge d'une cour supérieure de juridiction criminelle ou par un juge défini à l'art. 482. Ne s'applique donc pas la doctrine de *common law* suivant laquelle l'autorisation ne peut être révisée que par la cour qui l'a accordée et, de préférence, par le même juge. De plus, il se dégage implicitement du texte du par. 176.16(1) et de l'al. 176.16(3)*b*) qu'un juge d'une cour inférieure peut attaquer une autorisation émanant d'une cour supérieure.

Une preuve *prima facie* de fraude, de non-divulgation ou de déclaration trompeuse justifie l'ouverture du paquet scellé. Du moment qu'il y a un motif de le faire, un juge du procès visé à l'art. 178.14 peut ouvrir le paquet et procéder à un examen complet afin de déterminer si les exigences de la partie IV.1 ont été respectées. L'alinéa 178.16(3)*b*) confère un pouvoir discrétionnaire de réparer les vices de forme ou de procédure, mais, si la demande est entachée d'un vice de fond, cela entraîne l'irrecevabilité de la preuve. Le juge du procès ne peut conclure que, dans l'exercice de son pouvoir discrétionnaire, il n'aurait pas agi de la même façon que le juge qui a accordé l'autorisation.

The deponent of an affidavit supporting an authorization request can be cross-examined to determine if the pre-conditions of s. 178.13(*b*) have been met. The questions can be put so as not to disclose information considered confidential by the judge and yet uncover any basis on which to argue invalidity.

The trial judge here was not authorized to order the opening of the sealed packet. The trial should have been adjourned to allow an application under s. 178.14 for an order to open the packet and the judge acting under that section would determine if the packet should be opened. The trial judge, however, would examine the packet's contents and decide if the authorization was valid. The ruling by the trial judge that admitting evidence obtained from unlawful wiretaps would bring the administration of justice into disrepute was irrelevant here. Section 178.16(2) does not deal with primary evidence of this kind but rather with derivative evidence.

Poje v. Attorney General for British Columbia, [1953] 1 S.C.R. 516, affirming *sub nom. Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 D.L.R. 385; *Royal Trust Co. v. Jones*, [1962] S.C.R. 132; *Re Donnelly and Acheson and The Queen* (1976), 29 C.C.C. (2d) 58, considered; *Pashko v. Canadian Acceptance Corp. Ltd.* (1957), 12 D.L.R. (2d) 380; *Gibson v. Le Temps Publishing Co.* (1903), 6 O.L.R. 690; *Clark v. Phinney* (1896), 25 S.C.R. 633; *Maynard v. Maynard*, [1951] S.C.R. 346; *Badar Bee v. Habib Merican Noordin*, [1909] A.C. 615; *R. v. Welsh and Iannuzzi (No. 6)* (1977), 32 C.C.C. (2d) 363; *R. v. Wong (No. 1)* (1976), 33 C.C.C. (2d) 506; *Charette v. The Queen*, [1980] 1 S.C.R. 785, affirming *R. v. Parsons* (1977), 37 C.C.C. (2d) 497; *Dickie v. Woodworth* (1883), 8 S.C.R. 192; *Stewart v. Braun*, [1924] 3 D.L.R. 941; *Re Stewart and The Queen* (1976), 30 C.C.C. (2d) 391, affirming (1975), 23 C.C.C. (2d) 306; *Re Turangan and Chui and The Queen* (1976), 32 C.C.C. (2d) 254, affirming (1976), 32 C.C.C. (2d) 249; *Bidder v. Bridges* (1884), 26 Ch. D. 1; *Boyle v. Sacker* (1888), 39 Ch. D. 249; *Gulf Islands Navigation Ltd. v. Seafarers' International Union* (1959), 18 D.L.R. (2d) 625; *R. v. Dass* (1979), 47 C.C.C. (2d) 194; *R. v. Gill* (1980), 56 C.C.C. (2d) 169; *R. v. Ho* (1976), 32 C.C.C. (2d) 339; *Re Miller and Thomas and The Queen* (1976), 23 C.C.C. (2d) 257; *Goldman v. The Queen*, [1980] 1 S.C.R. 976; *R. v. Miller and Thomas (No. 4)* (1975), 28 C.C.C. (2d) 128; *R. v. Newall (No.1)* (1982), 67 C.C.C. (2d) 431; *R. v.*

L'auteur d'un affidavit produit à l'appui d'une demande d'autorisation peut être contre-interrogé afin de déterminer si l'on a satisfait aux conditions préalables que pose l'al. 178.13(1)*b*). Il est possible de formuler des questions qui éviteront la divulgation de renseignements que le juge estime confidentiels et qui permettront en même temps de découvrir un fondement pour un argument d'invalidité.

En l'espèce, le juge du procès n'était pas autorisé à ordonner l'ouverture du paquet scellé. Il lui aurait fallu ajourner le procès afin de permettre que soit présentée une demande fondée sur l'art. 178.14 visant à obtenir une ordonnance qui aurait autorisé l'ouverture du paquet et c'est le juge saisi de cette demande qui aurait statué sur l'opportunité d'ouvrir le paquet. Le juge du procès doit toutefois examiner le contenu du paquet et décider de la validité de l'autorisation. La conclusion du juge du procès que l'admission de la preuve obtenue illégalement par écoute électronique aurait pour effet de ternir l'image de la justice n'est pas pertinente en l'espèce. Le paragraphe 178.16(2) ne porte pas sur une preuve principale de ce genre, mais plutôt sur la preuve dérivée.

Jurisprudence: arrêts examinés: *Poje v. Attorney General for British Columbia*, [1953] 1 R.C.S. 516, confirmant *sub nom. Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 D.L.R. 385; *Royal Trust Co. v. Jones*, [1962] R.C.S. 132; *Re Donnelly and Acheson and The Queen* (1976), 29 C.C.C. (2d) 58; arrêts mentionnés: *Pashko v. Canadian Acceptance Corp. Ltd.* (1957), 12 D.L.R. (2d) 380; *Gibson v. Le Temps Publishing Co.* (1903), 6 O.L.R. 690; *Clark v. Phinney* (1896), 25 R.C.S. 633; *Maynard v. Maynard*, [1951] R.C.S. 346; *Badar Bee v. Habib Merican Noordin*, [1909] A.C. 615; *R. v. Welsh and Iannuzzi (No. 6)* (1977), 32 C.C.C. (2d) 363; *R. v. Wong (No. 1)* (1976), 33 C.C.C. (2d) 506; *Charette c. La Reine*, [1980] 1 R.C.S. 785, confirmant *R. v. Parsons* (1977), 37 C.C.C. (2d) 497; *Dickie v. Woodworth* (1883), 8 R.C.S. 192; *Stewart v. Braun*, [1924] 3 D.L.R. 941; *Re Stewart and The Queen* (1976), 30 C.C.C. (2d) 391, confirmant (1975), 23 C.C.C. (2d) 306; *Re Turangan and Chui and The Queen* (1976), 32 C.C.C. (2d) 254, confirmant (1976), 32 C.C.C. (2d) 249; *Bidder v. Bridges* (1884), 26 Ch. D. 1; *Boyle v. Sacker* (1888), 39 Ch. D. 249; *Gulf Islands Navigation Ltd. v. Seafarers' International Union* (1959), 18 D.L.R. (2d) 625; *R. v. Dass* (1979), 47 C.C.C. (2d) 194; *R. v. Gill* (1980), 56 C.C.C. (2d) 169; *R. v. Ho* (1976), 32 C.C.C. (2d) 339; *Re Miller and Thomas and The Queen* (1976), 23 C.C.C. (2d) 257; *Goldman c. La Reine*, [1980] 1 R.C.S. 976; *R. v. Miller and Thomas (No. 4)* (1975), 28 C.C.C. (2d) 128;

Johnny and Billy (1981), 62 C.C.C. (2d) 33; *R. v. Bradley* (1980), 19 C.R. (3d) 336; *Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No.3)* (1978), 40 C.C.C. (2d) 212; *Re Zaduk and The Queen* (1977), 37 C.C.C. (2d) 1; *R. v. Haslam* (1977), 36 C.C.C. (2d) 250; *Re Regina and Kozak* (1976), 32 C.C.C. (2d) 235; *R. v. Kalo, Kalo and Vonschober* (1975), 28 C.C.C. (2d) 1; *R. v. Blacquiere* (1980), 57 C.C.C. (2d) 330; *Re Regina and Collos* (1977), 37 C.C.C. (2d) 405, reversing on other grounds (1977), 34 C.C.C. (2d) 313; *R. v. Robinson* (1977), 39 C.R.N.S. 158; *R. v. Hollyoake* (1975), 27 C.C.C. (2d) 63; *R. v. Crease (No. 2)* (1980), 53 C.C.C. (2d) 378; *R. v. Cardoza* (1981), 61 C.C.C. (2d) 412; *R. v. Gabourie* (1976), 31 C.C.C. (2d) 471; *R. v. Hancock and Proulx* (1976), 30 C.C.C. (2d) 544, referred to.

APPEAL from a judgment of the Manitoba Court of Appeal, [1982] 2 W.W.R. 91, 13 Man. R. (2d) 155, 65 C.C.C. (2d) 507, allowing an appeal from appellant's acquittals by Dubienski Prov. Ct. J. Appeal dismissed.

Robert L. Pollack, for the appellant.

John D. Montgomery, Q.C., for the respondent.

The judgment of Laskin C.J. and Estey and McIntyre JJ. was delivered by

McINTYRE J.—The appellant was charged with nine counts relating to betting. He was tried before Dubienski, Provincial Court Judge in the Manitoba Provincial Court. The Crown's case depended on evidence obtained by wiretap for which it had procured four authorizations under the provision of Part IV.1 of the *Criminal Code* from judges of the Court of Queen's Bench of Manitoba. Each authorization contained the following words:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Cherniak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

R. v. Newall (No. 1) (1982), 67 C.C.C. (2d) 431; *R. v. Johnny and Billy* (1981), 62 C.C.C. (2d) 33; *R. v. Bradley* (1980), 19 C.R. (3d) 336; *Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No. 3)* (1978), 40 C.C.C. (2d) 212; *Re Zaduk and The Queen* (1977), 37 C.C.C. (2d) 1; *R. v. Haslam* (1977), 36 C.C.C. (2d) 250; *Re Regina and Kozak* (1976), 32 C.C.C. (2d) 235; *R. v. Kalo, Kalo and Vonschober* (1975), 28 C.C.C. (2d) 1; *R. v. Blacquiere* (1980), 57 C.C.C. (2d) 330; *Re Regina and Collos* (1977), 37 C.C.C. (2d) 405, infirmant pour d'autres motifs (1977), 34 C.C.C. (2d) 313; *R. v. Robinson* (1977), 39 C.R.N.S. 158; *R. v. Hollyoake* (1975), 27 C.C.C. (2d) 63; *R. v. Crease (No. 2)* (1980), 53 C.C.C. (2d) 378; *R. v. Cardoza* (1981), 61 C.C.C. (2d) 412; *R. v. Gabourie* (1976), 31 C.C.C. (2d) 471; *R. v. Hancock and Proulx* (1976), 30 C.C.C. (2d) 544.

POURVOI contre un arrêt de la Cour d'appel du Manitoba, [1982] 2 W.W.R. 91, 13 Man. R. (2d) 155, 65 C.C.C. (2d) 507, qui a accueilli un appel de l'acquittement de l'appelant par le juge Dubienski de la Cour provinciale. Pourvoi rejeté.

Robert L. Pollack, pour l'appelant.

John D. Montgomery, c.r., pour l'intimée.

Version française du jugement du juge en chef Laskin et des juges Estey et McIntyre rendu par

LE JUGE McINTYRE—L'appelant a subi son procès devant le juge Dubienski de la Cour provinciale du Manitoba relativement à neuf chefs d'accusation en matière de paris. Les accusations étaient fondées sur des preuves obtenues par écoute électronique en vertu de quatre autorisations accordées par des juges de la Cour du Banc de la Reine du Manitoba, conformément à la partie IV.1 du *Code criminel*. Chacune de ces autorisations contient les mots suivants:

> [TRADUCTION] LECTURE FAITE de l'affidavit du sergent-détective Anton Cherniak;
>
> ÉTANT CONVAINCU que l'octroi de cette autorisation sert au mieux l'administration de la justice, que d'autres méthodes d'enquête ont été essayées et ont échoué, ou ont peu de chance de succès, et que l'urgence de l'affaire est telle qu'il ne serait pas pratique de mener l'enquête relative aux infractions mentionnées ci-après en n'utilisant que les autres méthodes d'enquête;

At trial, on cross-examination of the police officer Cherniak who is referred to in the authorizations, evidence was given that Cherniak had had the sole direction of the investigation and that he had made the applications for the authorizations. He said that the interceptions were made under the authorizations, that they were the sole investigations made and that no other investigation was done or ordered by him after the first authorization. He was unaware of any other investigating steps. It is evident that counsel for the appellant by this line of cross-examination was attempting to ascertain whether or not the above-quoted words from the authorization were true and whether the prescriptions of s. 178.13(1)(*b*) of the *Code* had been satisfied. That section reads:

> **178.13** (1) An authorization may be given if the judge to whom the application is made is satisfied.
>
> . . .
>
> (*b*) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

No objection was taken by the Crown to this line of examination.

On the basis of the cross-examination of the police officer, the trial judge made the following finding:

> "No other investigative procedures had been tried and failed, that there was no evidence that investigative procedures were likely to succeed, nor that there was any urgency."

As a result, the trial judge held that the interceptions of the private communications of the appellant had not been lawfully made as required by s. 178.16 of the *Criminal Code* and he ruled the evidence obtained by the wiretaps inadmissible. The case for the Crown collapsed and the appellant was acquitted on all counts.

On appeal to the Manitoba Court of Appeal, the Crown argued that the provincial court judge was without jurisdiction to go behind the authorizations and thereby make a collateral attack upon the order of a superior court. The appeal was

Lors de son contre-interrogatoire au cours du procès, le policier Cherniak, dont il est question dans les autorisations, a témoigné qu'il était seul responsable de l'enquête et que c'est lui qui avait demandé les autorisations. Il a déclaré que les interceptions ont été faites en vertu des autorisations, qu'il s'agissait là des seules enquêtes effectuées et qu'aucune autre enquête n'a été effectuée ou ordonnée par lui après la première autorisation. Il n'était au fait d'aucune autre méthode d'enquête. Il est évident que par ce contre-interrogatoire, l'avocat de l'appelant tentait de déterminer la véracité de l'extrait précité de l'autorisation et si on avait rempli les conditions prescrites par l'al. 178.13(1)*b*) du *Code*, dont voici le texte:

> **178.13** (1) Une autorisation peut être donnée si le juge auquel la demande est présentée est convaincu
>
> . . .
>
> *b*) que d'autres méthodes d'enquête ont été essayées et ont échoué, ou ont peu de chance de succès, ou que l'urgence de l'affaire est telle qu'il ne serait pas pratique de mener l'enquête relative à l'infraction en n'utilisant que les autres méthodes d'enquête.

Le ministère public ne s'est pas objecté à ce genre de contre-interrogatoire.

Se fondant sur le témoignage rendu par le policier au cours de son contre-interrogatoire, le juge du procès a conclu ce qui suit:

> [TRADUCTION] «Aucune autre méthode d'enquête n'avait été essayée ni n'avait échoué, rien n'indiquait que d'autres méthodes d'enquête avaient peu de chance de succès ni qu'il s'agissait d'un cas urgent.»

En définitive, le juge du procès a estimé que les interceptions des communications privées de l'appelant n'avaient pas été faites légalement comme l'exige l'art. 178.16 du *Code criminel* et il a conclu à l'irrecevabilité de la preuve obtenue par écoute électronique. Le ministère public n'ayant plus aucune preuve à l'appui des accusations, l'appelant a été acquitté relativement à chacun des chefs.

En appel devant la Cour d'appel du Manitoba, le ministère public a fait valoir que le juge de la Cour provinciale n'avait pas compétence pour vérifier les autorisations et ainsi attaquer indirectement l'ordonnance d'une cour supérieure. L'appel allowed and a new trial was ordered. Monnin J.A. (as he then was), with whom Matas J.A. concurred, held that an authorization granted by a superior court judge could not be collaterally attacked in a provincial court. O'Sullivan J.A., concurring in the result, went further and said that: "In my opinion, where there is an authorization granted by a superior court of record, it cannot be collaterally attacked in any court and it cannot be attacked at all in an inferior court." A further argument was advanced by the appellant Wilson that there was no evidence of proper notice of intention to adduce wiretap evidence as required under s. 178.16(4) of the *Code*. This argument was rejected in the Court of Appeal and, on an acknowledgment that there was some five months' notice given, it was rejected in this Court as well. The only remaining issue then is whether or not the trial judge erred in law in refusing to admit the wiretap evidence.

In the Manitoba Court of Appeal, Monnin J.A. said:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such

a été accueilli et un nouveau procès ordonné. Le juge Monnin (c'était alors son titre), aux motifs duquel a souscrit le juge Matas, a conclu qu'une autorisation accordée par un juge d'une cour supérieure ne peut être attaquée indirectement devant une cour provinciale. Le juge O'Sullivan, qui a souscrit quant à l'issue, est allé encore plus loin, affirmant: [TRADUCTION] «Selon moi, une autorisation accordée par une cour d'archives supérieure ne peut être attaquée indirectement devant une cour et ne peut absolument pas être attaquée devant une cour inférieure.» L'appelant Wilson a soumis un autre argument selon lequel rien n'indiquait qu'on avait, conformément au par. 178.16(4) du *Code*, donné un préavis en bonne et due forme de l'intention de produire des éléments de preuve obtenus par écoute électronique. La Cour d'appel a rejeté cet argument et, comme on a reconnu qu'il y a eu un préavis d'environ cinq mois, cette Cour l'a rejeté également. La seule question qui reste donc à trancher est celle de savoir si le juge du procès a commis une erreur de droit en refusant d'admettre la preuve obtenue par écoute électronique.

En Cour d'appel du Manitoba, le juge Monnin a affirmé:

> [TRADUCTION] Le dossier d'une cour supérieure doit être considéré comme la vérité absolue tant qu'il n'a pas été infirmé.

Je suis d'accord avec cette affirmation. Selon un principe fondamental établi depuis longtemps, une ordonnance rendue par une cour compétente est valide, concluante et a force exécutoire, à moins d'être infirmée en appel ou légalement annulée. De plus, la jurisprudence établit très clairement qu'une telle ordonnance ne peut faire l'objet d'une attaque indirecte; l'attaque indirecte peut être décrite comme une attaque dans le cadre de procédures autres que celles visant précisément à obtenir l'infirmation, la modification ou l'annulation de l'ordonnance ou du jugement. Lorsqu'on a épuisé toutes les possibilités d'appel et que les autres moyens d'attaquer directement un jugement ou une ordonnance, comme par exemple les procédures par brefs de prérogative ou celles visant un contrôle judiciaire, se sont révélés inefficaces, le seul recours qui s'offre à une personne qui veut

TAB 6

Consolidated Maybrun Mines Limited and J. Patrick Sheridan *Appellants*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Consolidated Maybrun Mines Ltd.

File No.: 25326.

1998: January 29; 1998: April 30.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Bastarache JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Validity of order — Collateral attack on administrative order in penal proceedings — Circumstances in which person charged with failing to comply with administrative order can collaterally attack validity of order — Applicable principles.

Environmental law — Offences — Defences — Validity of administrative order — Order made under provincial environmental protection statute to prevent risk of contamination — Persons to whom order directed not availing themselves of right to appeal under statute and ignoring order — Persons charged with failing to comply with order — Whether these persons can raise validity of order by way of defence — Environmental Protection Act, R.S.O. 1980, c. 141, ss. 17, 146(1a).

The appellant company owns a gold and copper mine and the appellant P.S. is the guiding mind of the company. After inspecting the mine, employees of the Ontario Ministry of the Environment concluded that it was abandoned and that transformers containing PCBs presented a risk of environmental contamination. Despite numerous efforts to have the company take corrective action, the condition of the site did not change. In 1987, the Ministry's Regional Director issued an order, under s. 17 of the *Environmental Protection Act*, and required the appellants, *inter alia*, to construct a storage area for the transformers, to clean the concrete stained by spillage of contaminated oil, and to drum the contaminated material. The appellants did not appeal to

Consolidated Maybrun Mines Limited et J. Patrick Sheridan *Appelants*

c.

Sa Majesté la Reine *Intimée*

Répertorié: R. *c.* Consolidated Maybrun Mines Ltd.

Nº du greffe: 25326.

1998: 29 janvier; 1998: 30 avril.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci et Bastarache.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Validité d'une ordonnance — Contestation incidente d'une ordonnance administrative dans le cadre d'une procédure pénale — Dans quelles circonstances une personne accusée de ne pas s'être conformée à une ordonnance administrative peut-elle en soulever la validité de façon incidente? — Principes applicables.

Droit de l'environnement — Infraction — Moyen de défense — Validité d'une ordonnance administrative — Arrêté pris en vertu d'une loi provinciale sur la protection de l'environnement pour prévenir un risque de contamination — Personnes visées par l'arrêté ne se prévalant pas des mécanismes d'appel prévus à la loi et ignorant l'arrêté — Personnes accusées de ne pas s'être conformées à l'arrêté — Ces personnes peuvent-elles soulever comme moyen de défense la validité de l'arrêté? — Loi sur la protection de l'environnement, L.R.O. 1980, ch. 141, art. 17, 146(1a).

La compagnie appelante est propriétaire d'une mine d'or et de cuivre et l'appelant P.S. est la tête dirigeante de cette compagnie. Après avoir visité la mine, les employés du ministère de l'Environnement de l'Ontario ont conclu qu'elle était abandonnée et que des transformateurs contenant des BPC présentaient un risque de contamination pour l'environnement. Malgré de multiples démarches pour que la compagnie remédie à la situation, l'état des lieux est demeuré inchangé. En 1987, un directeur régional du ministère a pris un arrêté, en vertu de l'art. 17 de la *Loi sur la protection de l'environnement*, et ordonné notamment aux appelants de construire un abri pour entreposer les transformateurs, de nettoyer le solage de béton souillé par des écoulethe Environmental Appeal Board and basically elected to disregard the order. When charged by the Ministry with failing to comply with the order, the appellants submitted by way of defence that the order was invalid. They argued that there were no reasonable and probable grounds, as required by s. 17(2) of the Act, to believe that the situation at the mine constituted an environmental risk. After examining the evidence, the trial judge concluded that only the order to drum and store the contaminated material was valid and ordered the appellants to pay a fine. The Ontario Court (General Division) allowed the respondent's appeal with respect to the counts relating to the failure to construct a storage area and to clean, and dismissed the appellants' appeal of the conviction. The court held that by reviewing the validity of the order, the trial judge had exceeded his jurisdiction under the *Environmental Protection Act* and encroached on the Environmental Appeal Board's functions. The Court of Appeal affirmed that judgment.

Held: The appeal should be dismissed.

The question of whether a penal court may determine the validity of an administrative order on a collateral basis depends on the statute under which the order was made. The best way to decide this question, taking both the integrity of the administrative process and the interests of litigants into account, is to focus the analysis on the legislature's intention as to the appropriate forum. In doing this, it must be presumed that the legislature did not intend to deprive a person to whom an order is directed of an opportunity to assert his or her rights. The wording of the statute from which the power to issue the order derives, the purpose of the legislation, the availability of an appeal, the nature of the collateral attack taking into account the appeal tribunal's expertise and *raison d'être*, and the penalty on a conviction for failing to comply with the order are all important, but not exhaustive, factors for determining the legislature's intention. In this case, a review of the *Environmental Protection Act* leads to the conclusion that the trial judge lacked jurisdiction to rule on the validity of the order. Persons charged with failing to comply with an order made under this legislation may not collaterally attack the validity of the order after failing to avail themselves of the appeal mechanisms provided by the Act.

ments d'huile contaminée, et de mettre dans des barils les matériaux contaminés. Les appelants n'ont pas interjeté appel devant la Commission d'appel de l'environnement et ont choisi, pour l'essentiel, d'ignorer l'arrêté. Accusés par le ministère de ne pas s'être conformés à cet arrêté, les appelants ont soulevé son invalidité comme moyen de défense. Ils ont soutenu qu'il n'existait pas de motifs raisonnables et probables, tel que requis par le par. 17(2) de la Loi, de croire que la situation à la mine présentait un risque pour l'environnement. Après examen de la preuve, le juge du procès a conclu que seule l'ordonnance relative à la mise en barils et au remisage des matériaux contaminés était valide et il a condamné les appelants à une amende. La Cour de l'Ontario (Division générale) a accueilli l'appel de l'intimée concernant les chefs d'accusation relatifs au défaut de construire un abri et de nettoyer, et a rejeté l'appel des appelants relatif à leur déclaration de culpabilité. La cour a statué que le juge du procès avait, en examinant la validité de l'arrêté, excédé la compétence que lui confère la *Loi sur la protection de l'environnement* et usurpé les fonctions confiées à la Commission d'appel de l'environnement. La Cour d'appel a confirmé ce jugement.

Arrêt: Le pourvoi est rejeté.

La question de savoir si un tribunal pénal peut, de façon incidente, se prononcer sur la validité d'une ordonnance administrative dépend de la loi dont découle l'ordonnance. La façon appropriée de trancher cette question, compte tenu à la fois de l'intégrité du processus administratif et des intérêts des justiciables, est de placer au centre de l'analyse la recherche de l'intention législative quant au forum approprié. Ce faisant, il faut présumer que le législateur n'a pas voulu priver une personne visée par une ordonnance de l'occasion de faire valoir ses droits. Les termes de la loi dont découle le pouvoir de rendre une ordonnance, l'objectif de la loi, l'existence d'un droit d'appel, la nature de la contestation eu égard à l'expertise de l'instance d'appel et à sa raison d'être, et la sanction imposable pour le non-respect de l'ordonnance, sont des facteurs importants, mais non exhaustifs, qui permettent de cerner l'intention législative. En l'espèce, l'examen de la *Loi sur la protection de l'environnement* amène à conclure que le juge du procès n'avait pas compétence pour se prononcer sur la validité de l'arrêté. La personne accusée de ne pas s'être conformée à un arrêté pris en vertu de cette loi ne peut, en défense, chercher à attaquer de façon incidente la validité de l'ordonnance alors qu'elle ne s'est pas prévalue des mécanismes d'appel prévus par la Loi.

The purpose of the Act is primarily to prevent contamination of the province's environment. This purpose is reflected both in the scope of the powers conferred on the Director and in the establishment of an appeal board designed to counterbalance those powers by affording affected individuals an opportunity to present their points of view and to assert their rights as quickly as possible. Permitting a person to whom an order is directed to collaterally attack the order at the stage of penal proceedings would encourage conduct contrary to the Act's objectives and would tend to undermine its effectiveness. In this connection, the appellants cannot raise their right to make full answer and defence since there is no indication that the Act's appeal process is inadequate or that the Board was powerless to remedy the deficiency that they raise against the order.

L'objectif premier de la Loi est de prévenir la contamination de l'environnement dans la province. Cet objectif se reflète à la fois dans l'étendue des pouvoirs conférés au directeur et dans la création d'une instance d'appel qui vise à contrebalancer ces pouvoirs en accordant aux personnes touchées l'occasion de faire connaître leur point de vue et de faire valoir leurs droits dans les plus brefs délais. Le fait d'autoriser une personne visée par un arrêté à attaquer l'ordonnance de façon incidente au stade du processus pénal encouragerait un comportement contraire aux objectifs de la Loi et tendrait à miner son efficacité. À cet égard, les appelants ne peuvent opposer leur droit à une défense pleine et entière puisque rien n'indique que le processus d'appel établi par la Loi est inadéquat ou que la Commission n'est pas habilitée à remédier au défaut que les appelants invoquent à l'encontre de l'arrêté.

With respect to the factor regarding the nature of collateral attack, whether the issue is lack of jurisdiction *ab initio* or loss of jurisdiction is irrelevant. What is important is on whom the legislature intended to confer jurisdiction to hear and determine the question raised. Since in this case the legislature set up a specialized tribunal to hear questions relating to the environment and to take the appropriate action necessary to prevent it from being contaminated, permitting a penal court to answer such questions in lieu of the Environmental Appeal Board, which was established precisely for this purpose, would undermine the scheme set up by the Act. Lastly, the penal consequences provided by the Act — fines — do not justify a conclusion that the legislature's intention was to authorize collateral attacks to the detriment of the Act's objectives and the Board's jurisdiction.

Quant au facteur relatif à la nature de la contestation, il importe peu que soit invoquée l'absence de compétence *ab initio* ou la perte de compétence. Ce qui importe c'est de savoir qui le législateur a voulu habiliter à entendre et à trancher la question soulevée. Puisqu'en l'espèce le législateur a mis sur pied une instance spécialisée pour entendre les questions relatives à l'environnement et adopter les mesures appropriées pour prévenir sa contamination, permettre que ces questions soient tranchées par un tribunal pénal plutôt que par la Commission d'appel de l'environnement, créée à cette fin, porterait atteinte au régime mis en place par la Loi. Enfin, les conséquences pénales prévues par la Loi — des amendes — ne permettent pas de conclure que l'intention du législateur était d'autoriser des contestations incidentes, au détriment des objectifs poursuivis par la Loi et de la compétence de la Commission.

Cases Cited

Distinguished: *Re Mac's Convenience Stores Inc. and Minister of the Environment for Ontario* (1984), 48 O.R. (2d) 9; **referred to:** *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. Domm* (1996), 31 O.R. (3d) 540, leave to appeal refused, [1997] 2 S.C.R. viii; *Everywoman's Health Centre Society (1988) v. Bridges* (1990), 54 B.C.L.R. (2d) 273; *McGee v. United States*, 402 U.S. 479 (1971); *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Commission des accidents du travail du Québec v. Valade*, [1982] 1 S.C.R. 1103; *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Khanna*

Jurisprudence

Distinction d'avec l'arrêt: *Re Mac's Convenience Stores Inc. and Minister of the Environment for Ontario* (1984), 48 O.R. (2d) 9; **arrêts mentionnés:** *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223; *R. c. Domm* (1996), 31 O.R. (3d) 540, autorisation de pourvoi refusée, [1997] 2 R.C.S. viii; *Everywoman's Health Centre Society (1988) c. Bridges* (1990), 54 B.C.L.R. (2d) 273; *McGee c. United States*, 402 U.S. 479 (1971); *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Commission des accidents du travail du Québec c. Valade*, [1982] 1 R.C.S. 1103; *Abel Skiver Farm Corp. c. Ville de Sainte-Foy*, [1983] 1 R.C.S. 403; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3; *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *R. c.*

v. Procureur général du Québec (1984), 10 Admin. L.R. 210; *R. v. Rice*, [1980] C.A. 310; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Campbell Chevrolet Ltd.* (1984), 14 C.E.L.R. 25; *R. v. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237; *R. v. Al Klippert Ltd.* (1996), 43 Alta. L.R. (3d) 225; *Yakus v. United States*, 321 U.S. 414 (1944); *McKart v. United States*, 395 U.S. 185 (1969); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *R. v. Wicks*, [1997] 2 W.L.R. 876; *Director of Public Prosecutions v. Head*, [1959] A.C. 83; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048.

Statutes and Regulations Cited

Environmental Protection Act, R.S.O. 1980, c. 141, ss. 1(1)(c) "contaminant" [am. 1983, c. 52, s. 1(1)], 2, 7, 8, 16, 17 [rep. & sub. *idem*, s. 6], 120 *et seq.*, 122(1), 123 [am. 1981, c. 49, s. 3], 143, 146(1a) [en. 1986, c. 68, s. 14], (3) [*idem*], (4) [*idem*].
Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 17, 186(2).

Authors Cited

Mullan, David J. *Administrative Law*, 3rd ed. Scarborough, Ont.: Carswell, 1996.

APPEAL from a judgment of the Ontario Court of Appeal (1996), 28 O.R. (3d) 161, 89 O.A.C. 199, 133 D.L.R. (4th) 513, 105 C.C.C. (3d) 388, 19 C.E.L.R. (N.S.) 75, [1996] O.J. No. 881 (QL), affirming a judgment of the Ontario Court (General Division) (1993), 86 C.C.C. (3d) 317, 12 C.E.L.R. (N.S.) 171, [1993] O.J. No. 2935 (QL), which had allowed the respondent's appeal and dismissed the appellants' appeal from a judgment of the Ontario Court (Provincial Division) (1992), 73 C.C.C. (3d) 268 and 76 C.C.C. (3d) 94. Appeal dismissed.

Edward L. Greenspan, Q.C., and *Marie Henein*, for the appellants.

Lori Sterling and *Jerry Herlihy*, for the respondent.

English version of the judgment of the Court delivered by

Sharma, [1993] 1 R.C.S. 650; *Khanna c. Procureur général du Québec* (1984), 10 Admin. L.R. 210; *R. c. Rice*, [1980] C.A. 310; *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154; *R. c. Campbell Chevrolet Ltd.* (1984), 14 C.E.L.R. 25; *R. c. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237; *R. c. Al Klippert Ltd.* (1996), 43 Alta. L.R. (3d) 225; *Yakus c. United States*, 321 U.S. 414 (1944); *McKart c. United States*, 395 U.S. 185 (1969); *United States c. Mendoza-Lopez*, 481 U.S. 828 (1987); *R. c. Wicks*, [1997] 2 W.L.R. 876; *Director of Public Prosecutions c. Head*, [1959] A.C. 83; *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048.

Lois et règlements cités

Loi sur la protection de l'environnement, L.R.O. 1980, ch. 141, art. 1(1) «contaminant» [mod. 1983, ch. 52, art. 1(1)], 2, 7, 8, 16, 17 [abr. & rempl. *idem*, art. 6], 120 et suiv., 122(1), 123 [mod. 1981, ch. 49, art. 3], 143, 146(1a) [aj. 1986, ch. 68, art. 14], (3) [*idem*], (4) [*idem*].
Loi sur la protection de l'environnement, L.R.O. 1990, ch. E.19, art. 17, 186(2).

Doctrine citée

Mullan, David J. *Administrative Law*, 3rd ed. Scarborough, Ont.: Carswell, 1996.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1996), 28 O.R. (3d) 161, 89 O.A.C. 199, 133 D.L.R. (4th) 513, 105 C.C.C. (3d) 388, 19 C.E.L.R. (N.S.) 75, [1996] O.J. No. 881 (QL), qui a confirmé un jugement de la Cour de l'Ontario (Division générale) (1993), 86 C.C.C. (3d) 317, 12 C.E.L.R. (N.S.) 171, [1993] O.J. No. 2935 (QL), qui avait accueilli l'appel de l'intimée et rejeté l'appel des appelants contre un jugement de la Cour de l'Ontario (Division provinciale) (1992), 73 C.C.C. (3d) 268 et 76 C.C.C. (3d) 94. Pourvoi rejeté.

Edward L. Greenspan, c.r., et *Marie Henein*, pour les appelants.

Lori Sterling et *Jerry Herlihy*, pour l'intimée.

Le jugement de la Cour a été rendu par

tory, provided, however, that it reflects a general approach aimed at determining the legislature's intention as to the appropriate forum. From this perspective, the factors set out above are not independent and absolute criteria, but important clues, among others, for determining the legislature's intention. In doing this, it must, *inter alia*, be presumed that the legislature did not intend to deprive citizens affected by government actions of an adequate opportunity to raise the validity of the order. The interpretation process must, therefore, determine not whether a person can challenge the validity of an order that affects his or her rights, but whether the law prescribes a specific forum for doing so.

The basis for my reservation concerning the fourth factor is that the Court of Appeal, in answering the question as to the nature of the collateral attack, suggests that a distinction be drawn between invalidity for lack of jurisdiction *ab initio* and invalidity resulting from loss of jurisdiction, which is not open to a collateral attack. However, it is not clear that this distinction can always be drawn in practice, nor is it clear how it really makes it possible to determine the legislature's intention as to the appropriate forum.

As regards the problems raised by the dichotomy between lack of jurisdiction and loss of jurisdiction, it must be recognized that the distinction between an order in respect of which an agent of the state lacks jurisdiction from the outset and an order that is so unreasonable as to result in a loss of jurisdiction, is not the easiest one to draw. Since *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, the judgments of this Court have shown the clearest possible determination to avoid the problems connected with this type of distinction.

However, Laskin J.A.'s approach to the nature of the collateral attack has an even more fundamental flaw. The distinction he proposes implies an approach that focuses exclusively on the jurisdiction of the authority that issued the order and disregards any relationship between the kind of collateral attack and the jurisdiction or *raison*

faisante en autant, cependant, qu'elle reflète une démarche générale centrée sur la recherche de l'intention législative quant au forum approprié. Dans cette optique, les facteurs énoncés ci-dessus ne représentent pas des critères autonomes et absolus, mais plutôt des indices importants, parmi d'autres, permettant de cerner l'intention législative. Ce faisant, on doit, notamment, présumer que le législateur n'a pas eu pour intention de priver les citoyens affectés par les actes de l'Administration d'une possibilité adéquate de faire valoir l'invalidité d'une ordonnance. La démarche interprétative doit donc viser à déterminer non pas si une personne peut ou non soulever la validité d'une ordonnance qui affecte ses droits, mais plutôt si la loi prescrit un forum particulier à cette fin.

Ma réserve à l'égard du quatrième facteur tient à ce que la Cour d'appel, en se penchant sur la question de la nature de la contestation, suggère de faire une distinction entre l'invalidité pour absence de juridiction *ab initio* et l'invalidité qui découle de la perte de juridiction et pour laquelle une attaque incidente ne serait pas autorisée. Il n'est pas clair, cependant, que cette distinction soit toujours possible en pratique, ni comment cette distinction permet véritablement de nous informer sur l'intention législative quant au forum approprié. 47

En ce qui concerne les difficultés soulevées par la dichotomie fondée sur l'absence de juridiction et la perte de juridiction, il faut reconnaître que la distinction entre une ordonnance pour laquelle un agent de l'État n'aurait pas juridiction au départ et une ordonnance à ce point déraisonnable qu'elle entraînerait une perte de juridiction n'est pas des plus aisées. Depuis l'arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, la jurisprudence de notre Cour démontre une volonté on ne peut plus claire d'échapper aux difficultés liées à ce type de distinction. 48

Mais l'approche du juge Laskin relativement à la nature de la contestation souffre d'une faille encore plus fondamentale. La distinction qu'il propose implique, en effet, une démarche centrée exclusivement sur la juridiction de l'autorité qui a rendu l'ordonnance, sans égard aux rapports qui peuvent exister entre la nature de la contestation et 49

TAB 7

Her Majesty The Queen *Appellant*

v.

Al Klippert Ltd. *Respondent*

Indexed as: R. *v.* Al Klippert Ltd.

File No.: 25670.

1998: January 29; 1998: April 30.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Bastarache JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Validity of order — Collateral attack on administrative order in penal proceedings — Circumstances in which person charged with failing to comply with administrative order can collaterally attack validity of order — Applicable principles.

Municipal law — Zoning — Non-conforming use — Order made under provincial planning statute enjoining company to stop operating mine on part of its land — Company not availing itself of right to appeal under statute and ignoring order in part — Company charged with failing to comply with order — Whether company can raise validity of order by way of defence — Planning Act, R.S.A. 1980, c. P-9, ss. 81, 154, 155.

In 1964 the respondent company purchased a parcel of land on which it operates a sand and gravel mine. A mine has been in operation on the site since 1959. At that time, the land was situated in a municipal district, which was annexed to the City of Calgary in 1961. In 1991, the respondent dug up a part of the land that had until then gone untouched. Following a citizen's complaint and an investigation by a development officer of the City, the company was served with an order, under s. 81 of the Alberta *Planning Act*, that enjoined it to stop all mining on this part of the land and to restore the site to its original condition. The respondent did not appeal to the Development Appeal Board ("Board") and, although it did stop the operations at issue, it failed to restore the site to its original condition, which would have cost it approximately $45,500. When charged with

Sa Majesté la Reine *Appelante*

c.

Al Klippert Ltd. *Intimée*

Répertorié: R. *c.* Al Klippert Ltd.

No du greffe: 25670.

1998: 29 janvier; 1998: 30 avril.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci et Bastarache.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit administratif — Validité d'une ordonnance — Contestation incidente d'une ordonnance administrative dans le cadre d'une procédure pénale — Dans quelles circonstances une personne accusée de ne pas s'être conformée à une ordonnance administrative peut-elle en soulever la validité de façon incidente? — Principes applicables.

Droit municipal — Zonage — Usage dérogatoire — Ordonnance rendue en vertu d'une loi provinciale sur l'aménagement du territoire enjoignant une compagnie à cesser d'exploiter une carrière sur une partie de son terrain — Compagnie ne se prévalant pas du mécanisme d'appel prévu à la loi et ignorant en partie l'ordonnance — Compagnie accusée de ne pas s'être conformée à l'ordonnance — La compagnie peut-elle soulever comme moyen de défense la validité de l'ordonnance? — Planning Act, R.S.A. 1980, ch. P-9, art. 81, 154, 155.

La compagnie intimée a acheté, en 1964, un terrain sur lequel elle exploite une carrière de sable et de gravier. L'exploitation d'une carrière sur ce site remonte à 1959. À l'époque, le terrain était situé dans un district municipal qui, en 1961, a été fusionné à la ville de Calgary. En 1991, l'intimée a creusé une partie du terrain auparavant inexploité. À la suite d'une plainte d'un citoyen et d'une enquête d'un agent d'aménagement de la ville, la compagnie a fait l'objet d'une ordonnance, fondée sur l'art. 81 de la *Planning Act* de l'Alberta, l'enjoignant de cesser toute excavation sur cette partie du terrain et de remettre les lieux dans leur état antérieur. L'intimée n'a pas interjeté appel devant la commission d'appel en matière d'aménagement («commission») et, bien qu'elle ait cessé l'exploitation litigieuse, elle a négligé de remettre les lieux dans leur état original, ce failing to comply with the order, the respondent submitted by way of defence that the municipal district had granted the former owner an authorization to operate a mine on the land in 1959. After examining the evidence, the trial judge concluded that such an authorization had in all likelihood been in effect and that the mining operations constituted a non-conforming use that could be continued pursuant to s. 74(4) of the *Planning Act*. The respondent was therefore acquitted. On appeal, the Court of Queen's Bench found the respondent guilty. The court held that the trial judge lacked jurisdiction to determine the merits of the order since an appeal lay to the Board. In a majority decision, the Court of Appeal reversed that judgment and restored the respondent's acquittal.

Held: The appeal should be allowed.

The principles applicable to this case were reviewed in *Consolidated Maybrun*. In summary, whether a collateral attack is possible must be determined by reviewing the legislature's intention as to the appropriate forum. For that purpose, it is helpful to consider, in particular, the following factors: the wording of the statute under the authority of which the order was issued; the purpose of the legislation; the existence of a right of appeal; the kind of collateral attack in light of the expertise or *raison d'être* of the administrative appeal tribunal, and the penalty on a conviction for failing to comply with the order. These factors are not exhaustive and constitute indicia that might be of assistance in determining the legislature's intention. Owing to the particular characteristics of a given administrative scheme, it may be that one of these factors will be decisive on its own in one case.

Applying these principles here leads to the conclusion that the trial judge lacked jurisdiction to determine the merits of the order. The *Planning Act* does not authorize a person affected by an order to disregard the appeal procedure before the Board and then to seek to collaterally attack the order by way of defence to a penal charge. The purpose of the Act is to ensure the harmonious use and development of land in the province by taking into account both economic and environmental interests, as well as the rights of affected individuals. To achieve that purpose, the Act provides that an order issued by a development officer may be appealed to the Board and then, with leave, to the Court of Appeal. This is a public, adversarial process affording the person concerned the opportunity to present his or her point of view and assert his or her rights, and to be informed of

qui lui aurait occasionné une dépense d'environ 45 500 $. Accusée de ne pas s'être conformée à l'ordonnance, l'intimée soulève, comme moyen de défense, l'existence d'une autorisation d'exploiter une carrière sur le terrain accordée par le district municipal à l'ancien propriétaire en 1959. Après examen de la preuve, le juge du procès a conclu qu'il existait vraisemblablement une telle autorisation et que l'excavation constituait un usage dérogatoire dont la continuation était permise en vertu du par. 74(4) de la *Planning Act*. L'intimée a donc été acquittée. En appel, la Cour du Banc de la Reine a déclaré l'intimée coupable. La cour a statué que le juge du procès n'avait pas compétence pour se prononcer sur le bien-fondé de l'ordonnance vu l'existence d'un droit d'appel devant la commission. La Cour d'appel, à la majorité, a infirmé ce jugement et rétabli l'acquittement de l'intimée.

Arrêt: Le pourvoi est accueilli.

Les principes applicables à la présente affaire ont été examinés dans l'arrêt *Consolidated Maybrun*. En résumé, la réponse à la question de savoir si la contestation incidente est possible doit reposer sur un examen de l'intention législative quant au forum approprié. À cette fin, il est utile de considérer, en particulier, les facteurs suivants: les termes de la loi dont découle le pouvoir de rendre l'ordonnance; l'objectif de la loi; l'existence d'un droit d'appel; la nature de la contestation, eu égard à l'expertise ou à la raison d'être de l'instance administrative d'appel, et la sanction imposable pour le non-respect de l'ordonnance. Ces facteurs ne sont pas exhaustifs et constituent des indices susceptibles de cerner l'intention législative. Vu les particularités propres à chaque régime administratif, il se peut qu'un seul de ces facteurs s'avère déterminant dans un cas donné.

Une application de ces principes en l'espèce amène à conclure que le juge du procès n'avait pas compétence pour se prononcer sur le bien-fondé de l'ordonnance. La *Planning Act* ne permet pas à une personne visée par une ordonnance d'ignorer la procédure d'appel devant la commission pour ensuite, à titre de moyen de défense contre une accusation pénale, chercher à contester l'ordonnance de façon incidente. L'objectif de cette loi est d'assurer l'usage et le développement harmonieux du territoire de la province en tenant compte à la fois des intérêts économiques et environnementaux, ainsi que des droits des personnes touchées. Pour réaliser cet objectif, la Loi prévoit qu'une ordonnance rendue par un agent d'aménagement peut faire l'objet d'un appel devant la commission puis, sur autorisation, devant la Cour d'appel. Il s'agit d'un processus contradictoire et the reasons for the Board's decision. Aside from an application to a superior court for review, this is the only mechanism available for challenging an order. Here, the Court of Appeal's error lies primarily in focusing on the powers of the development officer rather than on those of the Board. It is clear that the Board had jurisdiction to determine questions relating to the existence of a permit or of a right of use based on a non-conforming use. The penalty on a conviction for failing to comply with the order — a maximum fine of $2,500 — is insufficient to justify disregarding the appeal procedure and allowing collateral attacks.

public offrant à la personne concernée la possibilité d'exposer son point de vue et de faire valoir ses droits, ainsi que d'être informée des motifs qui sous-tendent la décision de la commission. Outre la demande de révision en cour supérieure, c'est le seul mécanisme par lequel une ordonnance peut être contestée. En l'occurrence, l'erreur de la Cour d'appel réside principalement dans l'accent qu'elle a mis sur les pouvoirs de l'agent d'aménagement plutôt que sur ceux de la commission. Il est clair que la commission avait compétence pour trancher les questions relatives à l'existence d'un permis ou d'un droit d'exploitation fondé sur un usage dérogatoire. Quant à la sanction imposable pour le non-respect de l'ordonnance — une amende maximale de 2 500 $ —, elle est insuffisante pour que l'on puisse ignorer la procédure d'appel et permettre les contestations incidentes.

With respect to the power to order, pursuant to the powers conferred by s. 155 of the *Planning Act*, that the order be complied with, although a judge required to exercise that power can, for sentencing purposes only, consider the merits of the order, this is not a wide open door to collateral attacks to the detriment of the appeal procedure established by the Act. In this case, it is not open to us to decide whether the trial judge erred in exercising that power when imposing the sentence after the judgment of the Court of Queen's Bench.

Par ailleurs, en ce qui concerne le pouvoir d'ordonner le respect de l'ordonnance, prévu à l'art. 155 de la *Planning Act*, bien que le juge appelé à l'exercer puisse tenir compte, pour les fins de la sentence uniquement, du bien-fondé de l'ordonnance, cela n'a pas pour effet d'ouvrir la porte aux contestations incidentes au détriment de la procédure d'appel instaurée par la Loi. En l'espèce, il ne nous appartient pas de décider si le juge du procès a erré en exerçant ce pouvoir lors du prononcé de la sentence après le jugement de la Cour du Banc de la Reine.

Cases Cited

Followed: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, aff'g (1996), 28 O.R. (3d) 161; **referred to:** *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Khanna v. Procureur général du Québec* (1984), 10 Admin. L.R. 210; *R. v. Rice*, [1980] C.A. 310.

Jurisprudence

Arrêt suivi: *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, conf. (1996), 28 O.R. (3d) 161; **arrêts mentionnés:** *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *R. c. Sharma*, [1993] 1 R.C.S. 650; *Khanna c. Procureur général du Québec* (1984), 10 Admin. L.R. 210; *R. c. Rice*, [1980] C.A. 310.

Statutes and Regulations Cited

Municipal Government Act, S.A. 1994, c. M-26.1.
Planning Act, R.S.A. 1980, c. P-9, ss. 2, 74(4), 81(1), 83(3), (4), 84, 85(2), (3), 152 [am. 1984, c. 33, s. 8], 154 [am. 1991, c. 28, s. 15], 155 [rep. & sub. *idem*, s. 16].

Lois et règlements cités

Municipal Government Act, S.A. 1994, ch. M-26.1.
Planning Act, R.S.A. 1980, ch. P-9, art. 2, 74(4), 81(1), 83(3), (4), 84, 85(2), (3), 152 [mod. 1984, ch. 33, art. 8], 154 [mod. 1991, ch. 28, art. 15], 155 [abr. & rempl. *idem*, art. 16].

APPEAL from a judgment of the Alberta Court of Appeal (1996), 187 A.R. 241, 127 W.A.C. 241, 43 Alta. L.R. (3d) 225, 35 M.P.L.R. (2d) 192, 141 D.L.R. (4th) 80, 111 C.C.C. (3d) 108, [1996] 10 W.W.R. 755, [1996] A.J. No. 852 (QL), allowing the respondent's appeal from a judgment of the Court of Queen's Bench (1993), 146 A.R. 211,

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1996), 187 A.R. 241, 127 W.A.C. 241, 43 Alta. L.R. (3d) 225, 35 M.P.L.R. (2d) 192, 141 D.L.R. (4th) 80, 111 C.C.C. (3d) 108, [1996] 10 W.W.R. 755, [1996] A.J. No. 852 (QL), qui a accueilli l'appel de l'intimée contre un jugement de la Cour du Banc de la Reine (1993), 146 A.R.

(a) contravenes any provision of this Act or the regulations,

(a.1) contravenes a land use by-law,

(b) contravenes an order under section 81,

. . .

is guilty of an offence and is liable to a fine of not more than $2500.

155 If a person is found guilty of an offence under section 154, the court may, in addition to any other penalty imposed, order the person to comply with

(a) this Act, the regulations or a land use by-law,

(b) an order under section 81, or

(c) a development permit, a subdivision approval or a condition attached to a development permit or subdivision approval.

a) contrevient à une disposition de la présente loi ou des règlements,

a.1) contrevient à un règlement municipal concernant l'usage du territoire,

b) contrevient à une ordonnance fondée sur l'article 81,

. . .

155 Lorsqu'une personne est reconnue coupable d'une infraction définie à l'article 154, la cour peut, en sus de toute autre peine, lui ordonner de se conformer

a) à la présente loi, à la réglementation ou à un règlement municipal concernant l'usage du territoire

b) à une ordonnance fondée sur l'article 81, ou

c) à un permis d'aménagement, à une approbation de lotissement ou encore à une condition de permis d'aménagement ou d'approbation de lotissement.

V. Analysis

1. *Applicable Principles*

13 In *Consolidated Maybrun*, *supra*, this Court reviewed the applicable principles for determining whether a person charged with failing to comply with an administrative order can collaterally attack the order by way of defence. I do not intend here to repeat all the matters discussed in that decision. In summary, whether a collateral attack is possible must be determined by reviewing the legislature's intention as to the appropriate forum. For that purpose, I stated that it might be helpful to consider, in particular, the following factors: (1) the wording of the statute under the authority of which the order was issued; (2) the purpose of the legislation; (3) the existence of a right of appeal; (4) the kind of collateral attack in light of the expertise or *raison d'être* of the administrative appeal tribunal; and (5) the penalty on a conviction for failing to comply with the order.

14 However, I wish to stress once again that these factors are not necessarily exhaustive but rather constitute various indicia which might be of assistance in determining the legislature's intention.

V. Analyse

1. *Les principes applicables*

Dans l'affaire *Consolidated Maybrun*, précitée, notre Cour a examiné les principes applicables pour déterminer si une personne accusée d'avoir violé une ordonnance administrative peut, en défense, contester cette ordonnance de façon incidente. Je n'entends pas reprendre ici l'ensemble des considérations exprimées dans cet arrêt. En résumé, la réponse à la question de savoir si la contestation incidente est possible doit reposer sur un examen de l'intention législative quant au forum approprié. À cette fin, j'ai indiqué qu'il pouvait être utile de considérer, en particulier, les facteurs suivants: (1) les termes de la loi dont découle le pouvoir de rendre l'ordonnance; (2) l'objectif de la loi; (3) l'existence d'un droit d'appel; (4) la nature de la contestation, eu égard à l'expertise ou à la raison d'être de l'instance administrative d'appel; et (5) la sanction imposable pour défaut d'avoir respecté l'ordonnance.

Je tiens à rappeler, cependant, que ces facteurs ne sont pas nécessairement exhaustifs mais constituent plutôt divers indices susceptibles de nous aider à cerner l'intention législative. De même, en

Furthermore, due to the particular characteristics of a given administrative scheme, it may be that one of these factors will be decisive on its own in one case but not in another. The determination of legislative intent is never a mechanical act, and an inflexible formula cannot be applied in carrying it out.

2. *Application of the Principles to the Case at Bar*

Applying the principles from *Consolidated Maybrun*, *supra*, to the case at bar, I conclude that the Court of Appeal erred in permitting the collateral attack on the administrative order.

The purpose of the *Planning Act*, as stated in s. 2 thereof, is to ensure the harmonious use and development of land in the province by taking into account both economic and environmental interests, as well as the rights of affected individuals. The growth of modern societies has shown the serious problems that can result from anarchic development and use of land, in particular those problems concerning public health and the environment. While the public interest in regulating land use is indisputable, such regulation must also take the rights of affected individuals into account. Furthermore, as I stated in *Consolidated Maybrun*, *supra*, at para. 27:

> In order to ensure the integrity of . . . administrative structures, while at the same time seeking to protect the rights of individuals affected by government actions, the legislature is free to set up internal mechanisms and establish appropriate forums to enable such individuals to assert their rights. In considering the requirements resulting from the rule of law and the rights of a person accused of non-compliance with an administrative order, it is important not to isolate the penal proceedings from the whole of the process established by the legislature.

In the present case, the Act establishes a process and a specific forum for achieving the purpose of balancing the public interest against individual rights. In the specific case of an order issued by a

raison des particularités propres à chaque régime administratif, il se peut qu'un seul de ces facteurs s'avère déterminant dans un cas donné mais non dans un autre. La recherche de l'intention législative n'est jamais un acte mécanique et on ne saurait pour y parvenir recourir à quelque formule rigide.

2. *L'application des principes à la présente affaire*

En l'espèce, appliquant les principes dégagés dans l'arrêt *Consolidated Maybrun*, précité, je conclus que la Cour d'appel a erré en permettant la contestation incidente de l'ordonnance administrative. 15

L'objectif de la *Planning Act*, tel qu'il est d'ailleurs énoncé à son art. 2, est d'assurer l'usage et le développement harmonieux du territoire de la province en tenant compte à la fois des intérêts économiques et environnementaux, ainsi que des droits des individus affectés. Le développement des sociétés modernes a montré les difficultés importantes, notamment du point de vue de la santé publique et de l'environnement, pour ne nommer que celles-là, pouvant résulter d'un développement et d'un usage anarchique du territoire. En même temps que l'intérêt public à réglementer l'usage du territoire est incontestable, cette réglementation doit également tenir compte des droits des individus affectés. Par ailleurs, comme je l'affirme dans l'affaire *Consolidated Maybrun*, précitée, au par. 27: 16

> Afin d'assurer l'intégrité [des] structures administratives tout en cherchant à protéger les droits des personnes affectées par les actes de l'Administration, il est loisible au législateur de mettre en place des mécanismes internes et de prévoir des forums appropriés pour permettre à ces personnes de faire valoir leurs droits. En considérant les exigences qui découlent du principe de légalité et les droits d'une personne accusée de ne pas s'être conformée à une ordonnance administrative, il importe de ne pas isoler l'instance pénale de l'ensemble du processus mis en place par le législateur.

En l'espèce, la Loi prévoit un processus et un forum particulier afin que l'objectif d'assurer un équilibre entre l'intérêt public et les droits individuels soit réalisé. Dans le cas particulier d'une 17 development officer, the *Planning Act* provides for a full appeal mechanism. Thus, under ss. 83 and 84, a person affected by an order or denied a permit may, within 14 days, appeal to a development appeal board. The Act then requires the Board to notify the municipal authorities concerned and hold a public hearing within 30 days. It must also keep a record of the hearing and give written reasons within 15 days of the conclusion of the hearing. It may confirm or revoke the order, or issue a new one.

ordonnance rendue par un agent d'aménagement, un mécanisme d'appel complet est prévu à la *Planning Act*. Ainsi, en vertu des art. 83 et 84, une personne qui est visée par une ordonnance ou à qui un permis a été refusé peut, dans les 14 jours, s'adresser à une commission d'appel en matière d'aménagement. Celle-ci doit alors, en vertu de la Loi, aviser les autorités municipales intéressées et tenir des audiences publiques dans les 30 jours. Elle doit, en outre, tenir un registre des audiences et donner des motifs écrits dans les 15 jours de la fin des audiences. Elle peut confirmer ou infirmer l'ordonnance, ou encore en délivrer une nouvelle.

18 I see no inconsistency between full recognition of the rights of affected individuals and the procedure established by the legislature for the Development Appeal Board's proceedings. As can be seen, this is a public, adversarial process affording the person concerned the opportunity to present his or her point of view and assert his or her rights, and ultimately to be informed of the reasons for the Board's decision. Furthermore, an interested party may, if dissatisfied with the Board's decision, take his or her case to the Court of Appeal on a question of law or of jurisdiction. It should be noted that this is not an appeal as of right, but one requiring leave of a judge of the Court of Appeal. Not only is this a full appeal mechanism, but the procedure for applying to the Court of Appeal for leave shows the protection the legislature intended to afford the Board's decisions and the importance it placed in that body.

Je ne vois aucune incompatibilité entre la pleine reconnaissance des droits des individus affectés et la procédure établie par le législateur devant la commission d'appel en matière d'aménagement. Comme on le constate, il s'agit d'un processus contradictoire et public offrant à la personne concernée la possibilité d'exposer son point de vue et de faire valoir ses droits, ainsi que, ultimement, d'être informée des motifs qui sous-tendent la décision de la commission. De plus, la partie intéressée peut, si elle n'est pas satisfaite de la décision de la commission, porter l'affaire devant la Cour d'appel sur une question de droit ou de juridiction. Je souligne qu'il ne s'agit pas d'un appel de plein droit, mais plutôt sur autorisation d'un juge de la Cour d'appel. Non seulement s'agit-il là d'un mécanisme d'appel complet, mais la procédure d'autorisation devant la Cour d'appel montre la protection que le législateur a voulu accorder aux décisions de la commission et l'importance qu'il accorde à cette instance.

19 It is true, as underlined by the Court of Appeal, that where the initial stage of the order is concerned: "There has been no hearing in front of a board with expertise. One person, making an initial judgement, makes a direction without the normal safeguards of ensuring both sides have been heard" (p. 248). However, it is for this very reason that the Act provides for the possibility of appealing to the Board within 14 days. In my view, aside from an application to a superior court for review,

Il est vrai, comme le souligne la Cour d'appel, qu'au stade initial de l'ordonnance: [TRADUCTION] "Aucune audience n'a été tenue devant une commission spécialisée. Une seule personne, en exerçant un jugement initial, donne une directive sans bénéficier de la protection qu'offre normalement le fait de s'assurer que les deux parties ont été entendues" (p. 248). Mais c'est précisément pour ce motif que la Loi prévoit la possibilité d'un appel à la commission dans les 14 jours. À mon avis, outre this is the only mechanism available for challenging an order.

la demande de révision en cour supérieure, c'est là le seul mécanisme par lequel une ordonnance peut être contestée.

Here, the Court of Appeal's error lies primarily in focusing on the powers of the development officer rather than on those of the Development Appeal Board. While the subject of the challenge is the officer's order, the question whether the order can be challenged without appealing to the Board requires that the Board's jurisdiction be considered first. From this perspective, it is not especially helpful to focus, as did the Court of Appeal, on the fact that the Act confers no exclusiveness whatsoever on the development officer's decisions or that an order issued by the officer is not final. The point at issue here is not whether the officer's order may or may not be challenged, but in what forum that challenge must take place and, more specifically, whether the legislature intended that the officer's decision be challenged before the Development Appeal Board rather than in a penal court. The discussion must therefore focus on the Board's jurisdiction.

En l'occurrence, l'erreur de la Cour d'appel réside principalement dans l'accent qu'elle a mis sur les pouvoirs de l'agent d'aménagement plutôt que sur ceux de la commission d'appel en matière d'aménagement. Bien que l'objet de la contestation soit l'ordonnance rendue par l'agent, la question de savoir s'il est possible de contester l'ordonnance sans s'adresser à la commission exige que l'on s'interroge en premier lieu sur la juridiction de la commission. Dans cette optique, il n'est pas particulièrement utile d'insister, comme le fait la Cour d'appel, sur le fait que la Loi ne confère pas un quelconque degré d'exclusivité aux décisions de l'agent d'aménagement ou encore qu'une ordonnance rendue par l'agent n'a pas un caractère final. En effet, la question litigieuse ici n'est pas de savoir si l'ordonnance rendue par l'agent peut ou non être contestée, mais plutôt dans quel forum cette contestation doit avoir lieu et, plus précisément, si la législature a voulu que la décision de l'agent soit contestée devant la commission d'appel en matière d'aménagement plutôt que devant un tribunal pénal. À cette fin, c'est donc sur la juridiction de la commission qu'il faut centrer l'examen. 20

Nor is it helpful, in my view, to consider, as the Court of Appeal did, the fact that Klippert could have been charged with breaching the municipal by-law rather than with failing to comply with the order, and that in such a case it might have raised the existence of a permit. This tells us nothing about the legislature's intention regarding the appropriate way to challenge an order issued pursuant to the Act. Had Klippert simply been charged with breaching the municipal by-law, it can of course be assumed that it would have been able, by way of defence, to raise the existence of a permit or even to challenge the validity of the by-law: *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Khanna v. Procureur général du Québec* (1984), 10 Admin. L.R. 210 (Que. C.A.); *R. v. Rice*, [1980] C.A. 310. In such a case, it would have been inappropriate to

À mon avis, il n'est pas davantage utile, selon moi, de considérer, à l'instar de la Cour d'appel, le fait que Klippert aurait pu être accusée de violation du règlement municipal plutôt que de non-respect de l'ordonnance et que, dans ce cas, elle aurait pu invoquer l'existence d'un permis. Cela ne nous informe en rien de l'intention du législateur quant à la façon appropriée de contester une ordonnance rendue sous l'autorité de la Loi. Si Klippert avait simplement été accusée d'avoir violé le règlement municipal, on peut certes supposer qu'elle aurait été autorisée à se défendre en invoquant l'existence d'un permis ou même en contestant la validité du règlement: *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *R. c. Sharma*, [1993] 1 R.C.S. 650; *Khanna c. Procureur général du Québec* (1984), 10 Admin. L.R. 210 (C.A. Qué.); *R. c. Rice*, [1980] C.A. 310. Dans ce cas, en effet, on serait bien mal 21 criticize Klippert for failing to appeal the matter to the Board, as the Board in the absence of an order would not have had jurisdiction to hear such an appeal. However, the situation before the Court is totally different. An order was issued from which an appeal lay to the Board and then, with leave, to the Court of Appeal. In this context, the existence of a permit or of a right of use based on a non-conforming use are clearly questions over which the Board had jurisdiction. After neither complying with the order nor seeking to challenge it in accordance with the requisite procedure, Klippert cannot reformulate the charge as it pleases in order to defend itself as if only the municipal by-law were at issue. I would add that had the by-law's validity been challenged, the penal court's jurisdiction would not be a problem. However, that is not the case here.

venu de reprocher à Klippert de ne pas avoir porté l'affaire devant la commission puisque celle-ci, en l'absence d'ordonnance, n'aurait pas juridiction. Mais c'est une toute autre situation qui nous concerne ici. Une ordonnance a été délivrée pour laquelle un droit d'appel existe devant la commission puis, sur autorisation, devant la Cour d'appel. Dans ce contexte, l'existence d'un permis ou d'un droit d'exploitation fondé sur un usage dérogatoire sont clairement des questions à l'égard desquelles la commission avait juridiction. N'ayant ni respecté l'ordonnance, ni cherché à la contester suivant la procédure requise, Klippert ne peut reformuler l'accusation à sa guise pour se défendre comme si seul le règlement municipal était en cause. Je note, par ailleurs, que si la validité du règlement était contestée, la juridiction du tribunal pénal ne poserait pas problème. Ce n'est toutefois pas le cas ici.

22 I turn now to the question of sentencing. Section 154 provides for a fine of up to $2,500. In itself, this penalty is insufficient to justify disregarding the appeal procedure and allowing collateral attacks. However, unlike the situation in *Consolidated Maybrun*, *supra*, the *Planning Act* gives the trial judge the power to order, in addition to this penalty, that the accused comply with the development officer's order (s. 155). This power was in fact exercised by Judge Delong in the case at bar, with the result that the three acres at issue may no longer be mined and that the land must be restored to its original condition. It was adduced in evidence that the cost of restoring the land would be approximately $45,500. On the one hand, it cannot be denied that this is an especially serious consequence for the accused. On the other, it was pointed out that s. 155 has the effect of requiring the judge to rule on land-use planning matters, so that the hesitation to allow the trial judge to determine the merits of the order would not be justified. The Court of Appeal accepted this argument.

J'en viens à considérer la peine. L'article 154 prévoit une amende pouvant aller jusqu'à 2 500 $. En elle-même, cette sanction est insuffisante pour justifier que l'on puisse ignorer la procédure d'appel et permettre les contestations incidentes. Toutefois, et contrairement à la situation dans l'affaire *Consolidated Maybrun*, précitée, la *Planning Act* donne au juge du procès le pouvoir d'ordonner, en sus, que l'accusé se soumette à l'ordonnance de l'agent d'aménagement (art. 155). Ce pouvoir a d'ailleurs été exercé en l'espèce par le juge Delong, avec la conséquence que les trois acres en litige ne peuvent désormais être excavés et que le terrain doit être remis en état. À cet égard, il a été mis en preuve que le coût de la remise en état serait aux alentours de 45 500 $. D'une part, on ne peut nier qu'il s'agit là de conséquences particulièrement lourdes pour l'accusée. D'autre part, on nous fait remarquer que l'art. 155 a pour effet d'amener le juge à se prononcer sur des questions de planification foncière, de sorte que les réticences à permettre au juge du procès de se prononcer sur le mérite de l'ordonnance ne seraient pas justifiées. Cet argument a d'ailleurs été retenu en Cour d'appel.

23 Although I sympathize with the respondent on this point, I nevertheless do not believe that the

Bien que je sympathise avec l'intimée sur ce point, je ne crois pas que la solution consiste pour solution is to authorize collateral attacks, thereby permitting to circumvent the appeal procedure established by the Act. The legislature's intention in establishing this procedure was to avoid systematic recourse to the courts, and to allow collateral attacks would run counter to this legitimate purpose.

This does not mean, however, that a judge required to exercise his or her power under s. 155 cannot, for sentencing purposes only, consider an error in the order, *inter alia* as to the existence of a permit. However, this is not equivalent to allowing a collateral attack by way of defence to the charge of failing to comply with an order. In the case at bar, the commission of the charged offence is independent of the merits of the order, which should, where appropriate, be raised before the Development Appeal Board. A person who refuses to comply with an order commits an offence, which can then be punished under s. 154.

As for whether it is appropriate for the judge to further order, pursuant to the additional powers conferred by s. 155, that the order be complied with, this question is a distinct one, which is reflected in the scheme of the Act, which deals separately with the fine and the decision to uphold the order. The fact that the merits of the order can be considered for this specific purpose is not a wide open door to collateral attacks to the detriment of the appeal procedure established by the Act.

This solution has the merit of encouraging affected persons to avail themselves of the prescribed procedure for challenging the order, thereby avoiding systematic recourse to the courts, while at the same time permitting the trial judge, in the event of non-compliance, to impose a sentence that is fair in light of the legal situation of the accused. In my view, this is the only interpretation of the Act that respects at once the integrity of the Act's appeal process, the powers conferred by the Act on the trial judge and the rights of a person affected by an administrative order.

autant à autoriser les contestations incidentes et permettre ainsi que soit contournée la procédure d'appel mise en place par la Loi. Ce faisant, le législateur a voulu éviter le recours systématique aux tribunaux et il serait contraire à cet objectif légitime de permettre les contestations incidentes.

Cela ne signifie pas, par ailleurs, que le juge appelé à exercer le pouvoir conféré par l'art. 155 ne puisse tenir compte, pour les fins de la sentence uniquement, du caractère erroné de l'ordonnance, notamment quant à l'existence d'un permis. Cela n'est toutefois pas l'équivalent de permettre une contestation incidente en défense à l'accusation d'avoir violé une ordonnance. En l'espèce, l'infraction reprochée est indépendante du mérite de l'ordonnance, qui aurait dû, le cas échéant, être soulevé devant la commission d'appel en matière d'aménagement. Une personne qui refuse de se conformer à une ordonnance commet ainsi une infraction, laquelle pourra alors être sanctionnée en vertu de l'art. 154. 24

Quant à savoir s'il est opportun que le juge ordonne, au surplus, et en vertu des pouvoirs additionnels que lui confère l'art. 155, que l'ordonnance soit respectée, il s'agit là d'une question dont le caractère distinct se reflète dans l'économie de la Loi qui traite séparément de l'amende et de l'ordre de respecter l'ordonnance. Qu'il soit permis, à cette fin particulière, de se pencher sur le mérite de l'ordonnance n'a pas pour effet d'ouvrir tout grand la porte aux contestations incidentes au détriment de la procédure d'appel instaurée par la Loi. 25

Cette solution a le mérite d'inciter les personnes affectées à se prévaloir de la procédure prescrite pour contester l'ordonnance, évitant ainsi le recours systématique aux tribunaux, tout en permettant, en cas de défaut, au juge du procès de rendre une sentence qui soit équitable compte tenu de la situation juridique de l'accusé. C'est, à mon avis, la seule interprétation de la Loi qui respecte à la fois l'intégrité du processus d'appel qu'elle instaure, les pouvoirs qu'elle confère au juge du procès et les droits d'une personne visée par une ordonnance administrative. 26

27 In the case before us, however, the respondent did not raise in this Court the question whether Judge Delong had erred in imposing the sentence, and sought no relief in respect thereof. In these circumstances, it is not open to us to decide whether Judge Delong erred in upholding the order when imposing the sentence. That would require us to review the evidence that the trial judge had the benefit of hearing and in respect of which we are in principle neither equipped nor prepared to intervene in the instant case.

En l'espèce, cependant, l'intimée n'a pas soulevé devant nous la question de savoir si le juge Delong avait erré en prononçant la sentence et n'a formulé aucune demande à cet égard dans ses conclusions. Dans ces circonstances, il ne nous appartient pas de décider si le juge a commis une erreur en ordonnant à l'intimée de se conformer à l'ordonnance lors de la sentence. Cela nous forcerait, au demeurant, à examiner une preuve testimoniale qu'il a eu le bénéfice d'entendre et à l'égard de laquelle nous ne sommes, en principe, ni équipés pour intervenir, ni disposés à le faire dans le présent dossier.

VI. Disposition

VI. Dispositif

28 I conclude that the *Planning Act* does not authorize a person affected by an order to disregard the appeal procedure before the Development Appeal Board and then to seek to collaterally attack the order by way of defence to a penal charge. The trial judge accordingly lacked jurisdiction to determine the merits of the order.

Je conclus que la *Planning Act* ne permet pas à une personne visée par une ordonnance d'ignorer la procédure d'appel devant la commission d'appel en matière d'aménagement pour ensuite, en défense à une accusation pénale, chercher à contester l'ordonnance de façon incidente. En conséquence, le juge du procès n'avait pas juridiction pour se prononcer sur le mérite de l'ordonnance.

29 For these reasons, I would allow the appeal, set aside the decision of the Court of Appeal and affirm the conviction entered by Chrumka J. of the Court of Queen's Bench and the sentence imposed by the Provincial Court (Criminal Division), the whole with costs.

Pour ces motifs, j'accueillerais le pourvoi, j'infirmerais la décision de la Cour d'appel et je confirmerais la déclaration de culpabilité prononcée par le juge Chrumka de la Cour du Banc de la Reine de même que la sentence prononcée par la Cour provinciale (Division criminelle), le tout avec dépens.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitor for the appellant: City of Calgary Solicitor's Office, Calgary.

Procureur de l'appelante: Le Bureau du procureur de la ville de Calgary, Calgary.

Solicitors for the respondent: Courtney Sebree, Calgary.

Procureurs de l'intimée: Courtney Sebree, Calgary.

TAB 8

City of Edmonton *Appellant*

v.

Edmonton East (Capilano) Shopping Centres Limited (as represented by AEC International Inc.) *Respondent*

and

Attorney General of British Columbia, Assessment Review Board for the City of Edmonton and British Columbia Assessment Authority *Interveners*

Indexed as: Edmonton (City) *v.* Edmonton East (Capilano) Shopping Centres Ltd.

2016 SCC 47

File No.: 36403.

2016: March 23; 2016: November 4.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Municipal law — Taxation — Property assessments — Assessment Review Board for City of Edmonton — Taxpayer filing complaint disputing municipal property assessment amount — Board increasing property assessment as requested in City's response to complaint — Lower courts agreeing with taxpayer that Board cannot increase property assessment — Whether Board had power to increase assessment — Municipal Government Act, R.S.A. 2000, c. M-26, s. 467.

Administrative law — Appeals — Standard of review — Boards and tribunals — Assessment Review Board for City of Edmonton — Taxpayer filing complaint disputing municipal property assessment amount — Board increasing property assessment as requested in City's response to complaint — Standard of review applicable to Board's decision to increase taxpayer's property assessment —

Ville d'Edmonton *Appelante*

c.

Edmonton East (Capilano) Shopping Centres Limited (représentée par AEC International Inc.) *Intimée*

et

Procureur général de la Colombie-Britannique, Assessment Review Board for the City of Edmonton et British Columbia Assessment Authority *Intervenants*

Répertorié : Edmonton (Ville) *c.* Edmonton East (Capilano) Shopping Centres Ltd.

2016 CSC 47

N° du greffe : 36403.

2016 : 23 mars; 2016 : 4 novembre.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit municipal — Fiscalité — Évaluation foncière — Comité de révision des évaluations de la Ville d'Edmonton — Dépôt par un contribuable d'une plainte visant à contester le montant d'une évaluation foncière municipale — Augmentation de l'évaluation foncière par le Comité conformément à ce qui a été demandé par la Ville dans sa réponse à la plainte — Les cours d'instance inférieure convenant avec le contribuable que le Comité ne peut augmenter l'évaluation foncière — Le Comité avait-il le pouvoir d'augmenter l'évaluation? — Municipal Government Act, R.S.A. 2000, c. M-26, art. 467.

Droit administratif — Appels — Norme de contrôle — Organismes et tribunaux administratifs — Comité de révision des évaluations de la Ville d'Edmonton — Dépôt par un contribuable d'une plainte visant à contester le montant d'une évaluation foncière municipale — Augmentation de l'évaluation foncière par le Comité conformément à ce qui a été demandé par la Ville dans sa

Whether Board's decision reasonable — Municipal Government Act, R.S.A. 2000, c. M-26, s. 470.

The taxpayer Company owns a shopping centre in Edmonton, Alberta. For the 2011 taxation year, the City of Edmonton assessed the value of the mall at approximately $31 million. The Company disputed this assessment by filing a complaint with the Assessment Review Board. The Company's position was that the assessed value exceeded the market value of the mall and was inequitable when compared to the assessed value of other properties. It sought a reduction in the assessed value to approximately $22 million.

When reviewing the Company's submissions and evidence, the City discovered what it determined was an error in its original assessment. The City requested that the Board increase the assessed value of the shopping centre to approximately $45 million. While the Company expressed concern about the City's change in position, it did not dispute the Board's power to increase the assessment in this case. Under s. 467(1) of the *Municipal Government Act*, after hearing a complaint, an assessment review board may "change" the assessment or "decide that no change is required". The Board ultimately increased the assessment to approximately $41 million. A decision of an assessment review board may be appealed to the Court of Queen's Bench, with permission, on a question of law or jurisdiction of sufficient importance to merit an appeal. On appeal to the Alberta Court of Queen's Bench, the chambers judge set aside the Board's decision and remitted the matter to the Board for a hearing *de novo*. This order was affirmed on appeal to the Alberta Court of Appeal. This Court must determine what the appropriate standard of review is for the Board's implicit decision that it could increase the Company's property assessment and determine if the Board's decision withstands scrutiny on that standard.

Held (McLachlin C.J. and Moldaver, Côté and Brown JJ. dissenting): The appeal should be allowed, the decision of the Court of Appeal set aside and the Board's decision reinstated.

Per Abella, Cromwell, Karakatsanis, Wagner and Gascon JJ.: The standard of review in this case is reasonableness. Unless the jurisprudence has already settled the applicable standard of review, the reviewing court should begin by considering whether the issue involves

réponse à la plainte — Norme de contrôle applicable à la décision du Comité d'augmenter l'évaluation foncière du contribuable — La décision du Comité était-elle raisonnable? — Municipal Government Act, R.S.A. 2000, c. M-26, art. 470.

La Société contribuable est propriétaire d'un centre commercial à Edmonton (Alberta). Pour l'exercice 2011, la Ville d'Edmonton a établi la valeur du centre commercial à environ 31 millions de dollars. La Société a contesté cette évaluation en déposant une plainte auprès du Comité de révision des évaluations. Selon la Société, la valeur imposable du centre commercial excédait sa valeur marchande et était inéquitable comparativement à la valeur imposable d'autres propriétés. Elle a demandé que cette valeur soit réduite à environ 22 millions de dollars.

Lorsqu'elle a examiné les observations et la preuve présentées par la Société, la Ville a constaté ce qu'elle a jugé être une erreur dans son évaluation initiale. La Ville a demandé au Comité d'augmenter à environ 45 millions de dollars la valeur imposable du centre commercial. Bien qu'elle ait exprimé certaines réserves quant à ce changement de position, la Société n'a pas contesté le pouvoir du Comité d'augmenter l'évaluation en l'espèce. Suivant le par. 467(1) du *Municipal Government Act*, après avoir entendu la plainte, le comité de révision des évaluations peut « modifier » l'évaluation ou « décider qu'aucun changement n'est requis ». Le Comité a finalement augmenté l'évaluation à environ 41 millions de dollars. La décision du comité de révision des évaluations est susceptible d'appel devant la Cour du Banc de la Reine, sur permission de celle-ci, à l'égard d'une question de droit ou de compétence suffisamment importante pour justifier un appel. Lors de l'appel devant la Cour du Banc de la Reine de l'Alberta, le juge en cabinet a annulé la décision du Comité et lui a renvoyé l'affaire pour nouvelle audition. Cette ordonnance a été confirmée par la Cour d'appel de l'Alberta. La Cour doit déterminer quelle est la norme de contrôle applicable à la décision implicite du Comité selon laquelle il pouvait augmenter l'évaluation foncière de la Société, et si la décision du Comité résiste à une analyse suivant cette norme.

Arrêt (la juge en chef McLachlin et les juges Moldaver, Côté et Brown sont dissidents) : Le pourvoi est accueilli, la décision de la Cour d'appel est annulée et la décision du Comité est rétablie.

Les juges Abella, Cromwell, Karakatsanis, Wagner et Gascon : La norme de contrôle applicable en l'espèce est celle de la décision raisonnable. À moins que la jurisprudence n'établisse déjà la norme de contrôle applicable, la cour de révision doit d'abord se demander si elle est the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness. This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

In this case, the framework from *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, provides a clear answer. The substantive issue here — whether the Board had the power to increase the assessment — turns on the interpretation of s. 467(1) of the Act, the Board's home statute. The issue does not fall within one of the four categories identified in *Dunsmuir* as calling for correctness review. Accordingly, the standard of review is presumed to be reasonableness.

A statutory right of appeal is not a new category of correctness and should not be added to the list of correctness categories enumerated in *Dunsmuir*. Recognizing issues arising on statutory appeals as a new category to which the correctness standard applies would go against strong jurisprudence from this Court.

The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer. Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. However, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution.

en présence d'une question portant sur l'interprétation par un organisme administratif de sa propre loi constitutive ou d'une loi étroitement liée à son mandat. Dans l'affirmative, la norme de contrôle applicable est présumée être celle de la décision raisonnable. La présomption de déférence en cas de contrôle judiciaire respecte le principe de la suprématie législative et la décision de déléguer le pouvoir décisionnel à un tribunal administratif plutôt qu'aux cours de justice. Cette présomption favorise également l'accès à la justice dans la mesure où le choix du législateur de déléguer une question à un tribunal administratif souple et spécialisé assure aux parties un processus décisionnel plus rapide et moins coûteux.

Le cadre établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, fournit une réponse claire en l'espèce. La question de fond que soulève la présente affaire — soit celle de savoir si le Comité avait le pouvoir d'augmenter l'évaluation — concerne l'interprétation du par. 467(1) de la Loi, la loi constitutive du Comité. Elle ne relève pas de l'une des quatre catégories qui, suivant l'arrêt *Dunsmuir*, commandent l'application de la norme de la décision correcte. En conséquence, la norme de contrôle applicable est présumée être celle de la décision raisonnable.

Les questions visées par un droit d'appel prévu par la loi ne constituent pas une nouvelle catégorie de questions à laquelle s'applique la norme de la décision correcte et elles ne devraient pas être ajoutées à la liste des catégories de questions à laquelle s'applique la norme de la décision correcte selon l'arrêt *Dunsmuir*. Il serait contraire à la jurisprudence bien établie de la Cour de considérer que les questions se soulevant dans le cadre d'un appel prévu par la loi forment une nouvelle catégorie de questions à laquelle s'applique la norme de la décision correcte.

La présomption d'application de la norme de la décision raisonnable repose sur le choix du législateur de confier à un tribunal administratif spécialisé la responsabilité d'appliquer les dispositions législatives, ainsi que sur l'expertise de ce tribunal en la matière. L'expertise découle de la spécialisation des fonctions des tribunaux administratifs qui, comme le Comité, appliquent un régime législatif qui leur est familier. L'expertise peut aussi découler du fait que la loi exige que les membres d'un tribunal administratif donné possèdent certaines qualifications. Cependant, l'expertise n'est pas une question touchant aux qualifications ou à l'expérience d'un membre donné d'un tribunal administratif. C'est plutôt quelque chose d'inhérent au tribunal administratif en tant qu'institution.

This Court has often applied a reasonableness standard on a statutory appeal from an administrative tribunal, even when the appeal clause contained a leave requirement and limited appeals to questions of law, or to questions of law or jurisdiction. In light of this strong line of jurisprudence — combined with the absence of unusual statutory language — there was no need for the Court of Appeal to engage in a long and detailed contextual analysis. Inevitably, the result would have been the same. The presumption of reasonableness is not rebutted here.

The contextual approach can generate uncertainty and endless litigation concerning the standard of review. As in British Columbia, legislatures can specify the applicable standard of review; unfortunately explicit legislative guidance is not common.

The Board's decision to increase the Company's property assessment was reasonable. Given that the Company did not dispute the Board's power to increase the assessment in this case, it is not surprising the Board did not explain why it was of the view that it could increase the assessment. Accordingly, the Board's decision should be reviewed in light of the reasons which could be offered in support of it. It was reasonable for the Board to interpret s. 467(1) of the Act to permit it to increase the Company's property assessment at the City's request. While s. 460(3) of the Act provides that only assessed persons and taxpayers may make complaints, the scheme of the Act does not require that municipalities be empowered to file a "complaint" against an assessment. The Act provides other mechanisms by which municipalities can change or seek changes to an assessment. The Board's interpretation of s. 467(1) of the Act is consistent with the ordinary meaning of "change" in s. 467(1) and the overarching policy goal of the Act, to ensure assessments are correct, fair and equitable. The alternative would permit taxpayers to use the complaints process to prevent assessments made in error from being corrected, thereby frustrating the Act's purpose.

Per McLachlin C.J. and Moldaver, Côté and Brown JJ. (dissenting): The appropriate standard of review of the Assessment Review Board's decision is correctness. The legislature of Alberta created a municipal assessment

La Cour a souvent appliqué la norme de la décision raisonnable en cas d'appel formé en vertu de la loi contre la décision d'un tribunal administratif, et ce, même lorsque la disposition établissant le droit d'appel imposait l'obligation d'obtenir une autorisation et limitait les appels aux questions de droit, ou aux questions de droit ou de compétence. À la lumière de ce fort courant jurisprudentiel — conjugué à l'absence de libellé législatif inhabituel — la Cour d'appel n'avait pas besoin de procéder à une analyse contextuelle longue et détaillée. Le résultat aurait inévitablement été le même. La présomption d'application de la norme de la décision raisonnable n'est pas réfutée en l'espèce.

Le recours à une analyse contextuelle peut être source d'incertitude et d'interminables litiges au sujet de la norme de contrôle applicable. Les législateurs peuvent, comme l'a fait celui de la Colombie-Britannique, indiquer la norme de contrôle applicable; malheureusement, il est peu fréquent de trouver des indications explicites dans les lois pertinentes.

La décision du Comité d'augmenter l'évaluation foncière de la Société était raisonnable. Comme la Société n'a pas contesté le pouvoir du Comité d'augmenter l'évaluation en l'espèce, il n'est pas surprenant que celui-ci n'ait pas expliqué pourquoi il était d'avis qu'il pouvait augmenter l'évaluation. En conséquence, la décision du Comité devrait être examinée à la lumière des motifs qui pourraient être donnés à l'appui de celle-ci. Il était raisonnable pour le Comité de considérer que le par. 467(1) de la Loi lui permettait d'augmenter l'évaluation foncière de la Société à la demande de la Ville. Si le par. 460(3) de la Loi précise que seuls les contribuables et les personnes visées peuvent déposer une plainte, l'économie générale de la Loi n'exige pas que les municipalités disposent du pouvoir de déposer une « plainte » contre une évaluation. La Loi prévoit d'autres mécanismes permettant aux municipalités de modifier une évaluation ou de demander des changements à celle-ci. L'interprétation que donne le Comité au par. 467(1) de la Loi s'accorde avec le sens ordinaire du mot « modifier » figurant à cette disposition et l'objectif fondamental de la Loi, c'est-à-dire faire en sorte que les évaluations soient exactes, justes et équitables. Conclure autrement aurait pour effet que les contribuables pourraient se servir du processus de contestation pour empêcher la correction d'évaluations établies erronément, situation qui ferait obstacle à la réalisation de l'objet de la Loi.

La juge en chef McLachlin et les juges Moldaver, Côté et Brown (dissidents) : La norme de contrôle applicable à la décision du Comité de révision des évaluations est celle de la décision correcte. Le législateur albertain complaints regime that allows certain questions squarely within the expertise of an assessment review board to be reviewed on a deferential standard through the ordinary mechanism of judicial review. The legislature, however, also designated certain questions of law and jurisdiction — for which standardized answers are necessary across the province — to be the subject of an appeal to the Court of Queen's Bench. The statutory scheme and the Board's lack of relative expertise in interpreting the law lead to the conclusion that the legislature intended that the Board's decisions on such questions be reviewed on a correctness standard. As a result, even were the Board's interpretation presumptively owed deference on the basis that the Board is interpreting its home statute, this presumption of deference has been rebutted by clear signals of legislative intent. Consistency in the understanding and application of these legal questions is necessary, and only courts can provide such consistency.

The existence of a statutory right of appeal can, in combination with other factors, lead to a conclusion that the proper standard of review is correctness. A statutory right of appeal, like a privative clause, is an important indicator of legislative intent and, depending on its wording, it may be at ease with judicial intervention. But a statutory right of appeal is not a new "category" of correctness review. The ostensibly contextual standard of review analysis should not be confined to deciding whether new categories have been established. An approach to the standard of review analysis that relies exclusively on categories and eschews any role for context risks introducing the vice of formalism into the law of judicial review. In every case, a court must determine what the appropriate standard of review is for this question decided by this decision maker. This is not to say that a full contextual standard of review analysis must be conducted in every single case. Where a standard of review analysis is performed and the proper standard of review is determined for a particular question decided by a particular decision maker, that standard of review should apply in the future to similar questions decided by that decision maker. Disregard for the contextual analysis would represent a significant departure from *Dunsmuir* and from this Court's post-*Dunsmuir* jurisprudence.

The question at issue here is not one which falls within the Board's expertise. An administrative decision maker

a créé un régime de contestation des évaluations municipales qui permet que certaines questions relevant clairement de l'expertise d'un tel comité soient contrôlées selon une norme déférente dans le cadre du processus ordinaire de contrôle judiciaire. Toutefois, le législateur a également prévu que certaines questions de droit et de compétence — auxquelles des réponses uniformes sont nécessaires partout dans la province — doivent faire l'objet d'un appel devant la Cour du Banc de la Reine. Le régime législatif et le manque d'expertise relative du Comité en matière d'interprétation des lois mènent à la conclusion que le législateur entendait que les décisions du Comité à l'égard de telles questions soient contrôlées selon la norme de la décision correcte. Par conséquent, même si l'interprétation du Comité est présumée commander la déférence du fait que celui-ci interprète sa loi constitutive, cette présomption est réfutée par des indications claires de l'intention du législateur. La cohérence dans l'interprétation et l'application de ces questions juridiques est nécessaire, et seules les cours de justice peuvent assurer cette cohérence.

L'existence d'un droit d'appel statutaire peut, combinée à d'autres facteurs, permettre de conclure que la norme de contrôle applicable est celle de la décision correcte. Un droit d'appel statutaire, comme une clause privative, constitue un indice important de l'intention du législateur et, selon son libellé, il peut s'accommoder de l'intervention judiciaire. Cependant, un droit d'appel statutaire ne forme pas une nouvelle « catégorie » à laquelle s'applique la norme de la décision correcte. L'analyse de détermination de la norme de contrôle applicable — analyse manifestement contextuelle — ne devrait pas se limiter à la question de savoir si de nouvelles catégories ont été établies. Le recours à une analyse reposant exclusivement sur des catégories et n'accordant aucun rôle au contexte risque d'introduire un trop grand formalisme dans le droit relatif au contrôle judiciaire. Dans tous les cas, la cour de révision doit déterminer la norme de contrôle applicable à une question donnée tranchée par un décideur donné. Cela ne veut pas dire qu'une analyse contextuelle complète est chaque fois nécessaire. Lorsqu'une analyse de détermination de la norme de contrôle applicable est effectuée et que la norme de contrôle appropriée à l'égard d'une question donnée tranchée par un décideur donné est déterminée, cette norme devrait s'appliquer à l'avenir aux questions semblables tranchées par ce décideur. Faire abstraction de l'analyse contextuelle représenterait une rupture importante avec l'arrêt *Dunsmuir* et la jurisprudence de la Cour depuis cet arrêt.

La question en litige en l'espèce ne relève pas de l'expertise du Comité. Un décideur administratif n'a pas is not entitled to blanket deference in all matters simply because it is an expert in some matters. An administrative decision maker is entitled to deference on the basis of expertise only if the question before it falls within the scope of its expertise, whether specific or institutional. Expertise is a relative concept. It is not absolute. While the Board may have familiarity with the application of the assessment provisions of the Act, the legislature has recognized that the Board's specialized expertise does not necessarily extend to general questions of law and jurisdiction. The Board's decisions may, instead, be appealed on these questions of law and jurisdiction. The legislature created a tribunal with expertise in matters of valuation and assessment. In light of this lack of relative expertise on questions of law and jurisdiction, it cannot be maintained that a presumption applies that the legislature intended that the Board's determinations on questions of law and jurisdiction be owed deference.

Applying the proper standard, the Board erred in increasing the Company's property assessment in this case and the appeal should be dismissed. The Board's decision to increase the assessed value based on the City's submissions must be quashed because the Board considered information that it was statutorily prohibited from considering. Assessment review boards have jurisdiction only to adjudicate the issues that are raised in the assessed person's complaint form. The Board in this case erred by hearing and partially accepting the City's new and revised assessment based on an entirely new classification, one which was not the subject of the Company's complaint. The word "change" in s. 467(1) of the Act should be given its ordinary and grammatical meaning. The Board is not precluded from ever increasing an assessment; however, the Board's decision-making authority in this case was limited to the specific matters that were raised in the Company's complaint. The Board had no authority to inquire into the fairness and equity of the assessment generally and to consider or accept elements of the new assessment proposed by the City in increasing the assessment.

droit à une déférence absolue à l'égard de toute question du simple fait qu'il agit comme expert dans certaines matières. La déférence s'impose à l'égard d'un tel décideur en raison de son expertise uniquement si la question dont il est saisi relève de son champ d'expertise, qu'elle soit spécifique ou institutionnelle. L'expertise constitue un concept relatif, et non absolu. Bien que le Comité puisse être familier avec l'application des dispositions de la Loi en matière d'évaluation, le législateur a reconnu que son expertise spécialisée ne s'étend pas nécessairement aux questions générales de droit et de compétence. Les décisions du Comité peuvent plutôt être portées en appel en ces matières. Le législateur a créé un tribunal doté d'une expertise en matière d'évaluation foncière. Vu ce manque d'expertise relative en ce qui concerne les questions de droit et de compétence, on ne peut soutenir que le législateur est présumé avoir voulu que les décisions du Comité à cet égard commandent la déférence.

Suivant la norme de contrôle appropriée, le Comité a commis une erreur en augmentant l'évaluation foncière de la Société en l'espèce et le pourvoi doit être rejeté. Comme le Comité a considéré des renseignements que la loi lui interdisait d'examiner, sa décision d'augmenter la valeur imposable sur la base des observations de la Ville doit être annulée. Les comités de révision des évaluations n'ont compétence que pour statuer sur les questions soulevées dans le formulaire de plainte de la personne visée. En l'espèce, le Comité a commis une erreur en entendant la plainte et en acceptant partiellement la nouvelle évaluation révisée établie par la Ville sur le fondement d'une classification entièrement nouvelle, laquelle ne faisait pas l'objet de la plainte de la Société. Le mot « modifier » figurant au par. 467(1) de la Loi devrait être interprété suivant son sens ordinaire et grammatical. Rien n'empêche le Comité d'augmenter une évaluation; toutefois, le pouvoir décisionnel du Comité en l'espèce était limité aux questions précises soulevées dans la plainte de la Société. Le Comité n'avait pas compétence pour se pencher sur le caractère juste et équitable de l'évaluation en général, ni pour examiner ou accepter les éléments de la nouvelle évaluation proposée par la Ville en vue de hausser l'évaluation foncière.

Cases Cited

By Karakatsanis J.

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **distinguished:** *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; **approved:** *Edmonton (City) v. Army & Navy Department Stores Ltd.*, [2002] A.M.G.B.O. No. 126

Jurisprudence

Citée par la juge Karakatsanis

Arrêt appliqué : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; **distinction d'avec l'arrêt :** *Tervita Corp. c. Canada (Commissaire de la concurrence)*, 2015 CSC 3, [2015] 1 R.C.S. 161; **arrêt approuvé :** *Edmonton (City) c. Army & Navy Department* the broad policy context within which that agency must work" (*McLean*, at para. 31, quoting *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336, per Wilson J.).

sont souvent appelés à appliquer dans l'exercice de leurs fonctions » (*Dunsmuir*, par. 68). Comme l'a souvent fait remarquer la Cour, une cour de justice « [n'est] peut-être pas aussi bien qualifié[e] qu'un organisme administratif déterminé pour donner à la loi constitutive de cet organisme des interprétations qui ont du sens compte tenu du contexte des politiques générales dans lequel doit fonctionner cet organisme » (*McLean*, par. 31, citant *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324, p. 1336, la juge Wilson).

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

[34] Comme je l'ai déjà expliqué, la Cour a souvent appliqué la norme de la décision raisonnable en cas d'appel formé en vertu de la loi contre la décision d'un tribunal administratif, et ce, même lorsque la disposition établissant le droit d'appel imposait l'obligation d'obtenir une autorisation et limitait les appels aux questions de droit (voir, p. ex., *Sattva*), ou aux questions de droit ou de compétence (voir, p. ex., *McLean*, *Smith* et *Bell Canada*). À la lumière de ce fort courant jurisprudentiel — conjugué à l'absence de libellé législatif inhabituel comme celui qui est en cause dans *Tervita* — la Cour d'appel n'avait pas besoin de procéder à une analyse contextuelle longue et détaillée. Le résultat aurait inévitablement été le même que dans les affaires susmentionnées. La présomption d'application de la norme de la décision raisonnable n'est pas réfutée.

[35] I would add this comment. The contextual approach can generate uncertainty and endless litigation concerning the standard of review. Subject to constitutional constraints, the legislature can specify the applicable standard of review. In British Columbia, for example, the legislature has displaced almost the entire common law on the standard of review (see the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58 and 59). Unfortunately, clear legislative guidance on the standard of review is not common.

[35] J'ajouterais le commentaire suivant. Le recours à une analyse contextuelle peut être source d'incertitude et d'interminables litiges au sujet de la norme de contrôle applicable. Sous réserve des limites d'ordre constitutionnel, le législateur peut indiquer la norme de contrôle qui s'applique. En Colombie-Britannique, par exemple, le législateur a écarté presque toutes les règles de common law relatives à la norme de contrôle (voir la loi intitulée *Administrative Tribunals Act*, S.B.C. 2004, c. 45, art. 58 et 59). Malheureusement, il est peu fréquent de trouver des indications claires à cet égard dans les lois pertinentes.

TAB 9

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leroux v. Canada Revenue Agency,* 2010 BCSC 865

Date: 20100707
Docket: 0628510
Registry: Prince George

Between:

Irvin Leroux and Irvin Leroux carrying on business as Leroux Holdings and also as Irvin's Park & Campground

Plaintiff

And

Canada Revenue Agency

Defendant

Before: The Honourable Mr. Justice Preston

Corrected Judgment: The judgment was corrected at paragraph 76 on July 9, 2010

Reasons for Judgment

Counsel for the Plaintiff:	Paul E. Jaffe
Counsel for the Defendant:	David Jacyk & Elizabeth McDonald
Place and Date of Trial:	Prince George, B.C. March 24-26, 2010
Place and Date of Judgment:	Prince George, B.C. July 07, 2010

The Charter and Bill of Rights pleadings

Collateral Attack

[57] The plaintiff asserts that because he was liable for GST he was not entitled to a statutory stay of collection proceedings under the *ETA* pending a final determination of the validity of his tax reassessment. He asserts that the defendant took collection action against him before the Tax Court determined that the reassessment was invalid and as a result he suffered losses. The plaintiff alleges that the lack of a statutory stay violated his rights under s. 7 and s. 15(1) of the *Charter* and 1(a) of the *Bill of Rights.*

[58] The reasoning in *Roitman* was recently expanded on by the Federal Court of Appeal in *Canada v. Domtar Inc.* 2009 FCA 218. Domtar sought a declaration in the Federal Court that section 18 of the *Softwood Lumber Products Export Charge Act 2006*, S.C. 2006, c. 13*,* was unconstitutional and sought repayment from the Crown of the money it had paid pursuant to that provision. The Federal Court of Appeal concluded that the essential nature of Domtar's claim was for a refund of money paid under a provision of that Act. The fact that the claim was based on a constitutional challenge was found not to affect the jurisdiction of the Tax Court of Canada over the dispute. The Court held that the Tax Court of Canada could determine the lawfulness of an assessment challenged on constitutional grounds, whether those grounds involved the *Charter* or the constitutional division of powers: *Domtar*, paras. 38-39. Accordingly, the Tax Court was found to have exclusive jurisdiction to entertain Domtar's claim.

[59] Section 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, [*TCCA*] sets out the Court's jurisdiction as follows:

> **12.** (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act,*

> *2006* when references or appeals to the Court are provided for in those Acts. [Emphasis added]

[60] Furthermore, the Supreme Court of Canada in *Canada v. Addison & Leyen Ltd.,* 2007 SCC 33 at para. 10-11, although in the context of judicial review, cautioned courts about interfering with the specialized jurisdiction of the Tax Court:

> [10] ... Moreover, in the case at bar, the allegations of fact in the statement of claim do not disclose any reason why it would have been impossible to deal with the tax liability issues relating to either the underlying tax assessment against York or the assessments against the respondents through the regular appeal process.
>
> [11] Reviewing courts should be very cautious in authorizing judicial review in such circumstances. The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

[61] Pursuant to the *TCCA* and the Federal Court of Appeal's decision in *Domtar*, the Tax Court of Canada has jurisdiction over the matters raised by the plaintiff. The plaintiff's *Charter* and *Bill of Rights* claims seek redress for collection actions taken pursuant to an invalid tax assessment, an issue falling within the exclusive jurisdiction of the Tax Court. There is no reason why these claims could not have properly been brought before the Tax Court through the review process provided. For this Court to grant relief on this basis would be to permit a collateral attack on the reassessment decision of the Tax Court.

- *Section 15 (1) of the Charter*

[62] The plaintiff claims that because GST debtors are not entitled to a statutory stay of collection activities, they are treated differently from other debtors, and that this is a violation of s. 15(1) of the *Charter* which requires that

> 15. (1) Every individual is equal before and under the law and has the right to equal benefit of the law without discrimination ... .

[63] Section 15(1) does not apply to all distinctions in legislation. The focus of s. 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping.

[64] In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, the Supreme Court of Canada established a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The first step was considered by the Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, which articulated that concept, at para. 13, as follows:

> [13] What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

[65] It is clear that a distinction between persons who owe GST and persons owing income tax are not grounds analogous to the enumerated ground contemplated in s.15. They are not immutable or constructively immutable nor do they often serve as the basis for stereotypical decision making. It is therefore plain and obvious that the claim under s. 15(1) cannot succeed and should be struck out pursuant to Rule 19(24)(a).

- *Section 7 of the Charter*

[66] The plaintiff asserts that the lack of a stay of collection activities deprived him of his right to security of the person and right to liberty otherwise than in accordance with the principles of fundamental justice. The jurisprudence makes it plain that the plaintiff cannot rely on s. 7 of the *Charter* in these circumstances.

[67] Section 7 does not protect the kind of economic interests or the impacts arising from them that are alleged in the amended statement of claim. In *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, the Supreme Court of Canada described the distinction as follows at para. 45:

> [45] ... The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66:
>
>> ... the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

[68] In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 the Supreme Court concluded at para. 86, that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not engage his rights under s. 7:

> [86 ... The prejudice to the respondent in this case . . . is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.

[69] Furthermore, the right to a stay of collection in these circumstances is not a principle of fundamental justice. In *R. v. Malmo-Levine*, 2003 SCC 74, the Supreme Court of Canada set out the test for principles of fundamental justice, at para. 113:

> [113] In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[70] Finally, even if the right to a stay of collection were a principle of fundamental justice, the plaintiff was not deprived of that right. The plaintiff could have sought a judicial stay of proceedings. In *Canada (Minister of National Revenue) v. Swiftsure Taxi Co. Ltd.*, 2005 FCA 136, the Court concluded that a judicial stay of collection activity was available even where the statutory stay was not.

- *Section 1(a) of the Bill of Rights*

[71] The *Bill of Rights* is a federal statute that renders inoperative federal legislation inconsistent with its protections. It protects rights that existed when the *Bill of Rights* was enacted, in 1960. Section 1(a) contains the right not to be deprived of the enjoyment of property except by due process of law.

[72] As noted above, the plaintiff could have sought a judicial stay of the collection activity and did not. His failure to avail himself of the procedures for due process under the law prevents a conclusion that he was deprived of property other than by due process of law.

Conclusion with respect to the Charter and Bill of Rights

[73] The plaintiff is seeking relief relating to the collection of federal taxes. Matters arising under the *ITA* and *ETA* are within the exclusive jurisdiction of the Tax Court. Unlike negligence claims for damages, the jurisdiction of the Tax Court includes the jurisdiction to hear constitutional challenges. Accordingly, these issues could and should properly have been raised on appeal to the Tax Court. To permit the plaintiff to raise them now would amount to a collateral attack and should be struck out as an abuse of process pursuant to Rule 19(24)(d).

[74] In the alternative, it is plain and obvious on the merits of the claims that neither the *Charter* nor the *Bill of Rights* apply in the circumstances and that those claims cannot succeed. Therefore, these claims should be struck as disclosing no reasonable cause of action pursuant to Rule 19(24)(a).

Result

[75] The defendant's application to strike out the plaintiff's amended statement of claim is dismissed except for the portions of the amended statement of claim relating to alleged breaches of sections 7 and 15 of the *Charter* and s. 1(a) of the *Bill of Rights*. The paragraphs containing the claims that cannot be maintained are paragraph 82(n) and paragraphs 93 – 134 and G to J under the claims.

Costs

[76] The time consumed by argument related to the *Charter* and *Bill of Rights* issues was only a very small part of the overall time taken to deal with the application. The plaintiff was substantially successful and is entitled to his costs. Given the complexity of the matter those costs are to be assessed on at scale C.

"B.M. PRESTON J."

The Honourable Mr. Justice Preston

TAB 10

Court of Queen's Bench of Alberta

Citation: Edmonton (City) v Assessment Review Board of the City of Edmonton, 2012 ABQB 399

Date: 20120615
Docket: 1103 09983
Registry: Edmonton

Between:

The City of Edmonton

Applicant

- and -

The City of Edmonton Assessment Review Board and Stephen Richard Wood

Respondents

Memorandum of Decision of the Honourable Mr. Justice S.D. Hillier

---

1. This application for judicial review focuses on the interpretation and application of statutory time requirements under the *Municipal Government Act*, RSA 2000, c M-26 (MGA). The Applicant City of Edmonton (City) challenges an Order of the Respondent City of Edmonton Assessment Review Board (ARB) which purported to validate the complaint of Stephen Richard Wood (Wood), even though it was received five working days after the prescribed deadline.

2. The City asserts that the ARB erred in law by purporting to direct the complaint to a hearing on the merits in the absence of authority to extend the deadline imposed pursuant to statute. It refers specifically to the mandatory language of ss. 309(1)(c), 461(1) and 467(2) of the MGA.

3. Characterizing the error as jurisdictional or at minimum a matter of general law and statutory interpretation, the City says the standard of review is correctness; however, even if the standard is reasonableness as the ARB asserts, the City urges that the level of deference cannot sustain the decision and that it must be referred back to the ARB with directions.

4. The ARB responds that the decision is justifiable the range of reasonable dispositions in the exercise of its authority and the appeal should be dismissed.

5. From the evidence as I will review shortly, two points deserve immediate notation:

i) it is clear that Mr. Wood objected to his assessment, sought to discuss it, then mailed the complaint before the deadline and was unaware of any specific delay in postal delivery;

ii) on the other hand, the City did all that it was required to do in setting the deadline to include the required sixty days plus the period for deemed mail delivery to property owners as set by the *Interpretation Act*, RSA 2000, c I-8 and giving notice that failure to meet the filing deadline would invalidate a complaint.

6. In various other situations where complaints have been filed late, board decisions in Alberta have concluded that no power exists to extend the prescribed deadline. The ARB here made no reference to any prior cases where a discretion was exercised, much less the criteria being applied contrary to the wording of the legislation.

7. Having considered the full submissions and for reasons that follow, I have decided that the ARB erred in concluding that it had jurisdiction (or in exercising implied discretion) to extend the time for filing in the face of the mandatory language of the MGA. Accordingly the appeal of the City must be allowed.

Background

8. On January 4, 2011, the City mailed the Annual Realty Assessment Notice to property owners, including Wood. Enclosed with the Assessment Notice was a complaint form to be completed by owners who were not satisfied by the market value assessment of their property. The bottom of the complaint form specifically states in bold:

> **Important Notice**: Your completed complaint form and any supporting attachments, the agent authorization form, and the prescribed filing fee of **$50** must be submitted no later than **March 14, 2011** to the following address:
>
> **Assessment Review Board, Main Floor, City Hall Edmonton, AB T5J 2R7**
>
> **New this year: you can file your complaint online. Go to http://arb.edmonton.ca**
>
> **Please be advised that complaints with an incomplete complaint form, complaints submitted after the filing deadline, or complaints without the required filing fee, are invalid. If mailing, please allow sufficient time for delivery on or before the deadline date.**

9. Included with the Assessment Notice was a further document entitled Information about Your Assessment [Record, Tab 6] which sets out suggested steps to follow in questioning an assessment. Step 4 notes: "If you're still not satisfied, you may file a formal complaint with the ARB prior to the deadline date". The document goes on to state the following:

> **How do I make a formal complaint to the Assessment Review Board (ARB)?**
>
> Your completed complaint form, any supporting attachments, and the required fee must be received no later than the deadline date indicated on this assessment notice
>
> ...
>
> **Late formal complaints to the ARB**
>
> The deadline date is indicated on the front of this assessment notice.
>
> Complaints submitted after the deadline are invalid.
>
> If mailing, please allow sufficient time to ensure delivery on or before the deadline date.

10. Mr. Wood asserts that he made multiple phone calls to the City from and after February 14, 2011 to try to discuss his assessment. He says that despite promises, his calls were not returned. In his last call on March 4, 2011 he said he was worried about not receiving any calls back and missing the deadline and "they informed me that I should mail it anyways."

11. For reasons unexplained he mailed the complaint the following week on March 8 and it was post-marked March 9, 2011 which was a Wednesday. City records indicate it was

46. The ARB responds that the Court should recognize that the ARB interpreted its power in the context of a risk of denial of natural justice. Upon a review of the surrounding circumstances, it concluded that the complainant had done all that could be expected to make or file his appeal. Alternatively the ARB urges that the interpretation of the legislation is not clear and the choice made by the ARB was within a range of acceptable outcomes even if the Court may not agree with its interpretation.

Analysis

47. A review on the reasonableness standard is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: ***Dunsmuir*** at para 47.

48. I begin my analysis by noting that the scope and mandate of ARB proceedings at the preliminary stage under review is to determine compliance with a statutory deadline.

49. Although this appeal is framed as a question of statutory interpretation and therefore a question of law, it is necessary to address the factual context in which the interpretation was effected.

50. The ARB purported to address the issue as to whether Wood filed the assessment complaint by the filing deadline of March 14, 2011. It is not disputed that the complaint was postmarked March 9 and the deadline was March 14. The only evidence before the ARB was that the complaint arrived at the ARB on March 21, 2011. I note in this regard that the presumption of regularity provides that official acts are correctly and solemnly done unless the opposite is proven: ***Lethbridge (City) v Daisley***, 2000 ABCA 79, 250 AR 365 at para 23, 250 AR 365, leave denied [2000] SCCA No. 214, 293 AR 189.

51. Section 461(1) of the MGA provides that a complaint must be filed with the designated officer at the address shown on the assessment or tax notice, not later than the date shown on that notice. The ARB recognized that Wood derives no assistance on the facts here from s. 23 of the *Interpretation Act* which presumes service 7 days from the date of mailing within Alberta, given that 7 days after the date of mailing was past the deadline. Therefore, the evidence before the ARB established that the complaint was not received by the deadline.

52. Faced with this situation, the ARB embarked on a consideration of Wood's intentions and fairness of the process.

53. Did the ARB err in concluding that it was not compelled to dismiss this complaint if it found that Wood intended to submit the complaint on time, and took sufficient steps to satisfy the ARB of such intention?

Statutory Provisions

54. Part of discerning the intent of the legislation is to consider the objective or purpose of the sections at issue. In that regard I note:

a) property assessments are an important step in the setting of property taxes in each municipality, and owners are accorded a right to complain annually about the valuation on which the tax rate will be applied;

b) the time limit for complaints was recently extended from 30 to 60 days: s. 309(1)(c);

c) no single method for delivery of complaints is prescribed;

d) only an assessed person or taxpayer may make a complaint: s. 460(3);

e) the prescribed topics of complaint do *not* include the actual tax rate: s. 460(6);

f) the designated officer has specific time limits after receiving the complaint to provide a copy to the municipality: s. 462(1)(a); and

g) a hearing may proceed if a person who has notice does not attend: s. 463.

55. So this is a process that is neither vague nor loose - the objective is to consider prescribed issues only (s. 460(5)), render a timely decision with reasons (s. 468(1)) and send it to notified persons within 7 days of the decision (s. 469). The wording of the time limit must be interpreted in this context.

56. The deadline by which the complaint must be made is set by the municipality. It must be prescribed in the assessment notice as a date 60 days after the deemed receipt of Notice by the owner. There is no dispute that the March 14 deadline meets this requirement derived from s. 309(1); to that extent, I agree with the ARB that not much else turns on the interpretation of that particular section.

57. However, the choice and meanings of the words used in the phrase "the date by which a complaint must be *made*, which date must be 60 days after the assessment notice ... is *sent* to the assessed person" in s. 309(1)(c) are informed by the requirement in s. 461(1) that "a complaint *must be filed with the designated officer at the address shown* on the assessment... notice *not later than* the date shown on that notice" [emphasis added]. The reason for consistency in interpretation is that ss. 309(1)(c) and 461(1) in this context are referring to the same step. Since s. 461(1) describes how the complaint is to be made, the two sections should harmonize to avoid absurd timing conflicts.

58. What neither section in the MGA provides is that the date set out in the assessment notice (here, March 14) is the deadline for mailing only, such that there is no requirement for actual receipt by the ARB. But is that a reasonable alternative interpretation?

59. In looking at this possibility, I note first that the legislature speaks of "filing with the designated officer at the address shown" which focuses on the receiving end of the process. It did not make any reference to mailing or postmarks in this context at all. It could have done so, just as it did in s. 341 of the MGA in deeming the date a tax payment to have been received based on the postmark stamped on the envelope. Similarly, the legislature did not deem receipt by a prescribed number of days after it is sent as it did in s. 337 in deeming receipt after 7 days for a tax notice.

60. From its decision, I am unable to identify where the ARB considered in a transparent and justified interpretation that it possessed the power to deem compliance in these circumstances.

61. I conclude, based on the legislation, that the ARB could not reasonably interpret the deadline in s. 461(1) as referring to the date of mailing. Instead, what the ARB appears to have done is to invoke principles of fairness and natural justice in order to extend the deadline in this particular case.

62. Under AR 310/2009, provision is made for abridgment or expansion of various deadlines. The time limit for filing complaints is not included in any of those provisions (ss. 6, 10, 35, 41).

63. Section 23 of the *Interpretation Act* might provide a viable argument for deeming service 7 days from the date of mailing within Alberta, however as noted above, 7 days after the date of mailing was past the deadline in this case.

64. Section 467(2) provides that the ARB *must* dismiss a complaint that was not made within the proper time.

65. I find that nothing in the legislative regime militates in favour of a discretion on the part of the ARB to grant the extension which it granted in this case.

Case law

66. In the absence of any legislative authority, it is important to consider whether the case law applicable to administrative tribunals may accord some discretion to relieve against this statutory deadline.

67. The Court in ***Calgary (City of) v Municipal Government Board***, 2004 ABQB 85, 353 AR 332 concluded that the term "sent" in the earlier wording of s. 309 to begin the appeal period meant sent and received. In support of that interpretation, the Court relied on the reasoning in ***Switzer's Investments Ltd v Calgary (City)***, [1999] AJ No 1662, citing ***Bowen v Council of City of Edmonton*** (1977), 2 Alta LR (2d) 112, 3 AR 63 (CA) wherein a 30 day limitation period for appeal did not begin to run until the decision in writing was communicated to the affected party. The reasoning that an appeal period cannot properly begin to run until receipt of the decision to be reviewed, or at minimum the 7 days deemed by s. 23 of the *Interpretation Act* is entirely logical.

68. The Court of Appeal in ***Samedan Oil of Canada, Inc v Alberta (Provincial Treasurer)*** (1993), 10 Alta LR (3d) 48, [1993] AJ No 311 upheld a decision in the context of the *Alberta Corporate Tax Act*, RSA 1980, c A-17 that "... a mailed document is not 'filed' until it is received and not at the point of mailing". The Court contrasted the interpretation from federal legislation which expressly stated that: "Anything sent by mail shall be deemed to have been received by the recipient on the day that it was mailed".

69. In addition to court decisions, there are prior decisions of ARBs and MGBs which have held that complaints must be received by the ARB. These cases reject any power to exercise a discretion to extend the statutory time line.

70. The ARB urged the Court to apply a test of "substantial compliance" as applied in ***Edmonton (City) v Edmonton Composite Assessment Review Board***, 2012 ABQB 154, [2012] AJ No 224 [***Colliers***] regarding sufficiency of the contents of complaints.

71. Unlike the circumstances in the line of cases which ***Colliers*** follows, however, in the present case there was only one way to comply with the time requirement for filing - it must have been received for that purpose by the prescribed date.

72. This brings us to the ground relied on by the ARB in the impugned decision: strict application of s. 467(2) would be unfair in this case because the circumstances were beyond Wood's control.

73. Section 467(2) provides that the ARB *must* dismiss a complaint that was not made within the proper time. The consequence is unequivocal but is not "...manifestly absurd, or extremely harsh, unjust or capricious": ***Boardwalk Reit LLP*** at para 78.

74. There was no evidence to suggest that Wood was unable to file the complaint prior to his discussions with the City. In fact, he did so.

75. Furthermore, there is nothing in the evidence upon which the ARB could have reasonably inferred that Wood believed that he only needed to post the complaint before the prescribed deadline. All the notices from the City reinforced the need to allow sufficient time for delivery on or before the deadline date and the consequences of failure. By his own evidence he was told on a Friday (March 4) that "...you might as well mail it off" but he did not do so until the following Tuesday (March 8).

76. The ARB submits that Wood had done all that could be expected to do in order to file his appeal in a timely fashion. If this argument were to be successful, it would potentially apply in all cases where the vagaries of the postal system result in a delay in delivery of complaints. The deadline, of which Wood was given two months notice, was Monday, March 14, 2011. The decision does not reference nor is there any explanation for Wood's choice to wait 4 or 5 weeks before first trying to contact the City. Despite the quickly approaching deadline, Wood mailed the complaint, apparently by regular mail, in circumstances whereby it was postmarked on Wednesday March 9, 2011.

77. The ARB did not expressly consider the fact that Wood, latterly faced with a tight deadline, might have delivered the complaint by way of courier, personal delivery or electronic filing. He also might have mailed it by way of priority post, Xpresspost or registered mail. All of these means of delivery would have provided him with more control by guaranteeing delivery within a certain time and enabling him to obtain delivery confirmation.

78. There was no evidence to the effect that Wood was precluded for any reason from delivering the complaint by one or more of these alternative means so as to ensure compliance with the instructions in the Notice. In the end, he chose a means of delivery which was not only uncertain in terms of timing, but which also left him with no documentation to support his argument that Canada Post could not possibly have taken 12 days to deliver the complaint.

79. I find that the ARB's conclusion was unreasonable. The ARB is required by the MGA to dismiss out of time complaints. The ARB concluded that a denial of natural justice would result from applying the statutory deadline to Wood's complaint. Wood had 69 days within which to file his complaint and chose to use the regular mail system several working days prior to the deadline. Even assuming the ARB might extend a deadline for reasons of natural justice in very exceptional cases, it unreasonably concluded that the circumstances in this case were beyond Wood's control so as to provide the ARB with discretion not to dismiss the complaint.

80. Regrettably, the ARB decision here does not explain how it reached the conclusion that it was empowered to exercise a discretion in these circumstances. The Court is required to supplement the decision in assessing sufficiency of reasons and I recognize the sympathetic concerns which may have led to the ARB's decision. However, I am unable to fashion reasons that can withstand scrutiny so as to place the ARB's interpretation within a range of possible outcomes. There is simply no support in the legislation, case law or facts which would assist or rationalize the conclusion reached by the ARB in conflict with prior decisions on this point.

Summary

81. By any measure, the short reasoning process used by the ARB was not transparent, justifiable or intelligible with respect to the basis for its exercise of discretion. It does not meet the requirements of the MGA for the ARB to purport to extend a mandatory time limit based on a conclusion that the complainant intended to file the complaint by the deadline but that circumstances were "... beyond his control, either with Canada Post or with the ARB..."

82. Equally, I can find no basis to place the decision within a range of possible, acceptable outcomes which are defensible in the face of the facts and law to be applied: ***Dunsmuir*** para 47. The language chosen to invoke this time limit simply cannot support the exercise of an unexpressed discretion having full regard to the purpose of the legislation.

83. Overall, the Decision of the ARB in this matter must be cancelled, to use the words of s. 470.1, and is referred back; however, there is nothing to be "reheard" since the Court's direction is that the ARB lacks authority other than to dismiss the complaint under s. 467(2).

84. If the parties cannot agree, costs may be spoken to within 30 days of the date of this decision.

Heard on the 24th day of May, 2012.
Dated at the City of Edmonton, Alberta this 15th day of June, 2012.

S.D. Hillier
J.C.Q.B.A.