DEVELOPMENT APPEAL BOARD AGENDA

200-D1-H2-23

Tuesday, November 7, 2023 at 7:00 p.m. City Hall, Council Chamber

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Item No.	Page No.	Description
1.		Introduction of the Board.
2.		Opening Remarks from the Chair.
3.		Preliminary Matter: whether the Appellant has standing to appeal.
4.		Presentation from the Appellant.
5.		Presentation from representatives of the City of Yellowknife, regarding the issuance of Development Permit No PL-2022-0151.
6.		Presentation from the Developer.
7.		Presentations from persons referred to in subsection 66(2) of the *Community Planning and Development Act*.
8.		Presentation from any other persons the Boards considers necessary.
9.		Summation and closing remarks from the representative for the Appellants.
10.		Summation and closing remarks from the representatives for the City of Yellowknife.
11.		Summation and closing remarks from the representatives for the Developer.
12.		Summation and closing remarks from any other presenter.
13.		Close of hearing.

Background Documentation

ANNEX A		
14.	3	Letter from Mr. Bryan Manson to the Secretary of the Development Appeal Board serving Notice of Appeal – written submission.
ANNEX B		
15.	17	Written submission from the City of Yellowknife.

ANNEX C

16. 158 Letter from the Secretary of the Development Appeal Board to the Appellant, Mr. Bryan Manson, with respect to the scheduling of a hearing on November 7, 2023.

ANNEX D

17. 168 Letter from the Secretary of the Development Appeal Board to the Developer, Mr. Hazem Kobaissi, with respect to the scheduling of a hearing on November 7, 2023.

Mr. Bryan Manson
Moyle Drive
Yellowknife, NT X1A 0B6

City of Yellowknife
OCT 10 2023
Received

10 October 2023

Development Appeal Board
c/o City Clerk's Office
City of Yellowknife
4807 – 52 Street (City Hall)
P.O. Box 580,
Yellowknife, NT X1A 2N4

HAND DELIVERED

Re: Development Permit PL-2022-0151 (Lot 83, Block 308, Plan# 4204)

I am a concerned citizen of Yellowknife that takes an interest in how the City of Yellowknife applies Zoning Bylaw 5045 (The Bylaw). I believe that the City of Yellowknife (The City) is not applying The Bylaw under the Community Planning and Development Act (The Act) appropriately. I live within 30 m of Lot 83, Block 308, Plan# 4204.

Pursuant to 62(1)(c) of The Act, I wish to file this notice of appeal with the Development Appeal Board, specifically that the development permit relates to a use of land or the building that has been permitted at the discretion of the Development Officer (DO). The specific grounds that I am relying on for my appeal are as follows; own Parcels I am and adversely affected. BKM 10/10/23.

1. The term "rear set-back" is not clearly defined in The Bylaw. By not clearly defining rear set-back, the DO has no guidelines to follow as to measuring the set-back consistently and fairly. Some Canadian jurisdictions define set-back in general as the distance from the nearest element of a structure to the property line. (Ottawa Zoning By-law 2008-250 Part 1-Definitions (Section 54)). The Bylaw uses the edge of the foundation to the property line as the reference distance for the rear set-back distance. The Bylaw does not provide a simple graphic or detailed description of this term. The drawings provided to me shows that the rear of the proposed building has three distinct construction features that protrude past the foundation, towards the rear property line. I submit that the Bylaw's definition of rear set-back does not adequately address this and that the proposed variance. I submit that the actual variance granted

exceeds The Bylaw definition of rear set-back, and that the rear set-back is substantially less than 3.5 m.

2. The Bylaw fails to meet the Act's requirement listed in Section 18, 1(t), "the control of the density of the population in the municipality". The City has recently published documents and Plans stating that they intend to increase the population density in various locations throughout the City but I have been unable to locate any coherent or consistent, clear definition of "density". While Section 18 is discretionary, it is odd that the City followed all of The Acts 21 discretionary headings, except "density". The term is ambiguous and lacks the clarity required for such a document. The Act clearly states that, "the purpose of a zoning bylaw is to regulate and control the use and development of land and buildings…." How can The City regulate or control "density" when it is not defined by any metric? This leaves far too much discretion to the DO.

3. The City proports that a variance granted in 2012(?), when the first Development Permit was issued for this lot under the repealed City of Yellowknife Consolidated Zoning Bylaw# 4044 to construct a Single-Family Dwelling is still valid and that this process is to demonstrate transparency by The City. I disagree and I assert that under The Act this is not the case for the following reasons.

a. I was provided a drawing (A01) that states, "Note: Existing foundation as per previously approved development permit." The City is relying on a variance granted nine years ago, with multiple Discontinuances (The Act, Section 27(2)) under a repealing Zoning Bylaw for a set-back, to move forward under The Bylaw to now construct a new Multi-Unit (four-plex) dwelling. The rules and circumstances for which the original variance was granted have drastically changed over the last nine years.

b. There were multiple gaps in the various Landowners of 7 Findlay Pt. possessing and maintaining a valid Development Permit for the property. I know of gaps in 2014 and 2017; there may be more. Under the Act, Discontinued Use, Section 27(2), the non-conforming use is discontinued after one year. Therefore, the variance granted under Bylaw 4044 should be void and would no longer apply. Additionally, for The City to say that it was granted in the past and grandfathered today is incorrect. The drawings provided clearly states, "existing foundation as per previously approved Development Permit." Grandfathering of any Development Permit is not addressed in the Act nor The Bylaw.

c. The Act states in Section 28 (1)a that a non-conforming building under construction may be completed in accordance with the Development Permit and may be used. However, in Section 28(1)c, the building not yet under construction may be constructed in accordance with the Development Permit subject to the conditions set out in Section 28 (2). The conditions state that the building may not be enlarged, added to, rebuilt or structurally altered. The City needs to decide if the exiting foundation is considered a building to be under construction, or if the existing foundation is considered not yet under construction. Based on The City's decision, it may be obliged to continue under the original Development Permit, limiting this to a single Dwelling Unit with parking for a maximum of two vehicles. Otherwise, if The City considers this building to be not yet under construction, The City cannot permit this proposed building to be enlarged or added to, or structurally altered from the original plans and design. The construction of a four-plex that is larger or higher should not be approved.

4. The variance granted for the reduction of parking spaces from four to three will have a detrimental effect on the neighbourhood, with regards to the street parking. The original development for this cul-de-sac had it designated as Single-family dwellings with driveways for two vehicles. A quick survey of the three original homes on Findlay Pt. show they all have at least two vehicles and some, have additional recreational vehicles parked in their driveways. 8 Findlay Pt. is a four-plex but has enough parking for four vehicles. There are two undeveloped lots on the cul-de-sac. If you look at the layout of all of the lots on Findlay Pt. you will observe that once all of the lots are developed, there will be no street parking available on Findlay Pt. due the shape of the lots. This will force more people to park on Moyle Drive, which from a quick survey will show that even though the majority of the dwelling on the street have two parking spaces and some have garages, as well as a driveway, Moyle Drive is filled with parked vehicles on the street. So, the nature and culture of Findlay Pt. is being disrupted by permitting this variance. Just because The City implemented a new Bylaw in 2022 it does not mean that the "culture" of the community will change overnight.

I am seeking the following relief. The City to cease issuing all residential Development Permits for all R1 Zoned areas until The City amends The Bylaw to clearly define "density" and all of the "set-backs". (Front, side and rear.) The City needs to determine if the foundation at 7 Findlay Pt. is under construction or if it is not under construction and is subject to The Bylaw and will not be enlarged or structurally altered, in accordance with The Act, unless additional variances are approved.

I look forward to notice of the hearing date in relation to this appeal.

Yours very truly,

Bryan Manson

Mr. Bryan Manson
_ ' Moyle Drive
Yellowknife, NT X1A 0B6

30 October 2023

Development Appeal Board
c/o City Clerk's Office
City of Yellowknife
4807 – 52 Street (City Hall)
P.O. Box 580,
Yellowknife, NT X1A 2N4

HAND DELIVERED

Development Appeal Board Hearing –
Submissions for Permit #PL-2022-0151

The following are the issues, bylaws and examples that I request to be considered in the Development Appeal Board (DAB) hearing set for 7 November, 2023 in the City of Yellowknife (Yk) Chambers at 19:00 hrs.

Variance Authority

The Development Officer (DO) has made multiple decision that are outside of their authority and scope due to the fact that it relates to Site Density. I submit that under the City of Yellowknife By-law # 5045 (The By-law), Section 4.8, Variance Authority. This decision must be made by Council upon application by the proponent and not by the DO.

History of 7 Findlay Point

Construction stated on this site at least nine years ago under By-Law 4044. The original structure planned for this site was for a single dwelling unit. The ownership has changed at least twice and multiple Development Permits have been granted and have lapsed. The new owners knew that the existing foundation was not within the existing zoning requirements and guidelines.

Background

The By-law under the Community Planning and Development Act (The Act) requirement listed in Section 18, 1(t), "the control of the density of the population in the municipality". The City has recently published documents and Plans stating that they intend to increase the population density in various locations throughout the City but I have been unable to locate any coherent or consistent, clear definition of "density". While Section 18 of The Act is discretionary, it is odd that the City followed all of The Acts 21 discretionary headings, except "density". The term is ambiguous and lacks the clarity required for such a document. The Act clearly states that, "the purpose of a zoning bylaw is to regulate and control the use and development of land and buildings…." How can The City regulate or control "density" when it is not defined by any metric?

Under the definition in the By-Law, Definitions, Page 2, "Change of Use" an example states that when a Single Dwelling is changed to a Multi-Dwelling Residential, it is considered a change in intensity, therefore the intensity of the land use is increasing and by extension so is density.

Definitions and their application

Many of the definitions used in The By-law are either not defined or are to vague and open to interpretation. This interpretation allows the DO far too much discretion and authority.

Set-Back (all). On drawing A01 (provided) the Rear Set-Back was measured from the foundation. With a requested variance from 6 m to 3.50 m. I would suggest that the Rear Set-Back should be measured from the closest point on the structure, such as the distance from the roof top edge to the property line. On drawing A09, the building has a series of "bump outs" that extend towards the rear property line. The Rear Set-Back might actually be reduced to less than 3.50 m. What that distance is, is not clear and was not provided to me when I asked. I have included City of Ottawa Advisory Notice on Determination of setback and limiting distance. (Attached).

Lot Coverage. The By-law does not define this term. Table 10-21:R1 Regulations states that the Lot Coverage can be a maximum of 55% of the Lot area. The question is what is considered to be coverage? Lot coverage could mean any surface artificially covered or hardened so as to prevent or impede the percolation of water into the soil including, but not limited to, roof tops, paved areas, swimming pools, and decks. I have requested the City to provide their Lot Coverage calculations for this site. I submit that the Lot Coverage should be calculated including the rooftop patio area, plus all of the paved areas and all of the areas covered in paving stones. How did the DO determine 55% Lot Coverage?

Parking Variance

The neighbourhood in this area was generally defined and established by By-Law 4044, which has been repealed and replaced with the current By-Law (5045). I would like to define this neighbourhood as all of Moyle Dr including Yellowknife Condo Corps#45 and 46, Findlay Pt, Stirling Ct, Lyons Pt, McMahon Ct and Haener Dr. This neighbourhood is composed of mostly single-family homes and duplexes. The majority of dwelling contain at least two vehicles per dwelling and a large percentage of those vehicles are pick-up trucks. Many of the dwellings have multiple recreational vehicles such as boats, RVs, trailers, snowmobiles and additional vehicles, like a third vehicle. The two new fourplexes have all been built under By-Law 5045. The two units were able to accommodate four vehicles within the lot lines. The common characteristics of this area is front parking based on dwelling configuration (single of mult-dwelling), some with garages. Findlay Pt has eight lots on the street with five fully developed. By permitting a variance of reduced parking, this changes the general characteristics of the neighbourhood and will increase the already busy and full street parking. By definition, if parking spots are being reduced, that is a change in the density of the land use.

The By-law is inconsistent with The Act

The Act states in Section 28 (1)a that a non-conforming building under construction may be completed in accordance with the Development Permit and may be used. However, in Section 28(1)c,

the building not yet under construction may be constructed in accordance with the Development Permit subject to the conditions set out in Section 28 (2). The conditions state that the building may not be enlarged, added to, rebuilt or structurally altered. The City needs to decide if the exiting foundation is considered a building to be under construction, or if the existing foundation is considered not yet under construction. Based on The City's decision, it may be obliged to continue under the original Development Permit, limiting this to a single Dwelling Unit with parking for a maximum of two vehicles. Otherwise, if The City considers this building to be not yet under construction, The City cannot permit this proposed building to be enlarged or added to, or structurally altered from the original plans and design.

Summary and Conclusions

Based on the original intent of the builder the DAB should consider that this was to be a single dwelling and that by granting any variances this would increase the land use and the density, which is not the purview of the DO, only City Council. The Rear Set-Back variance may actually not be 3.50 m but greater, depending on where the measurements are taken. By reducing the front parking stalls from four to three and increasing the street parking pressures, the City will be changing the character of the neighbourhood.

The By-Law is not consistent with The Act, Section 28 with regards to how to classify this partially constructed structure and existing foundation and how the City is to proceed.

Yours very truly,

Bryan Manson

Effective Date (09/2021)

Advisory

DETERMINATION OF SETBACK AND LIMITING DISTANCE

BUILDING CODE SERVICES

Determination of Setback and Limiting Distance

This Advisory provides context to determine compliance of the building and projection(s) to setback and limiting distance requirements with the City of Ottawa Zoning By-law (ZBL) and Ontario Building Code (OBC).

The proximity of a building foundation, cladding system(s), exposing building face and permitted projections to a setback or property line play a significant role in determining compliance to the OBC and/or ZBL. The relationship of these elements to a setback or property line can vary from the information provided on a site plan or a survey to wall assembly construction above grade. It is common practice to provide dimensions from the property line to outside face of foundation wall (concrete) but not reference the distance from above grade construction (outside of cladding and projections) to a setback or property line. The definitions below provide background information how to determine limiting distance and setback in accordance with the regulation and by-law.

Definitions

2012 Ontario Building Code-Div. A-1.4.1.2

Limiting distance (LD) means the distance from an *exposing building face* to a property line, to the centre line of a *street*, lane or public thoroughfare or to an imaginary line between two *buildings* or *fire compartments* on the same property, measured at right angles to the *exposing building face*.

Exposing building face (EBF) means that part of the exterior wall of a building that faces one direction and is located between ground level and the ceiling of its top storey or, where the building is divided into fire compartments, the exterior wall of a fire compartment that faces one direction.

Zoning-Zoning By-law 2008-250 Part 1-Definitions (Section 54)

Yard setback means the distance required by this By-law between a lot line, not including a corner lot line, and a building, and includes:

Front yard setback which means the shortest distance between the front lot line and any part of a building, not including a projection permitted under Section 65;

Rear yard setback which means the shortest distance between the rear lot line and the nearest point of the principal building, not including a projection permitted under Section 65;

Interior side yard setback which means the shortest distance between the side lot line not abutting a street and any part of a building between the front and rear yards, not including a projection permitted under Section 65; and

Corner side yard setback which means the shortest distance between a side lot line abutting a street and any part of a building between the front and rear yards, not including a projection permitted under Section 65.

Section 65 means permitted projections into required yards.

See Appendix A for determination of yard setback locations.

Example

The example below provides context how setbacks reported on a site plan, to concrete, can differ from the above grade construction and affect compliance to the OBC and ZBL.

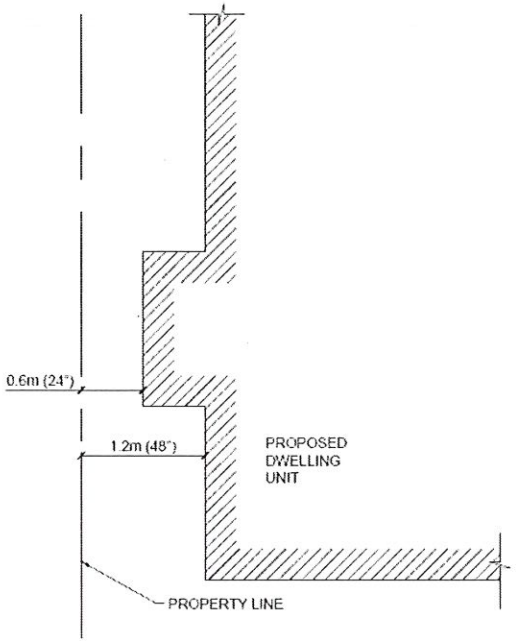


Figure 1-Typical partial site plan

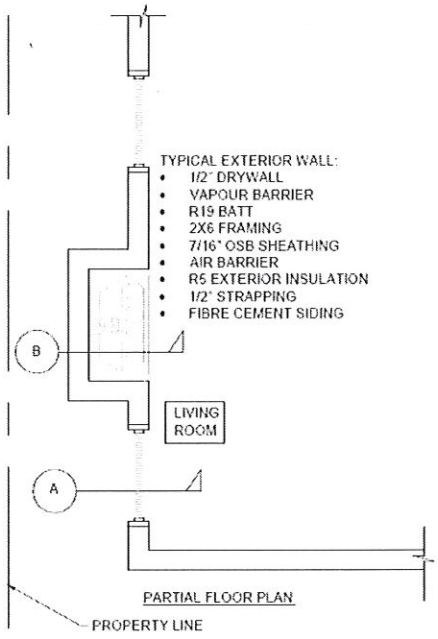


Figure 2-Typical partial floor plan

The partial site plan, shown in Figure 1, provides an example of a typical site plan provided for building permit that demonstrates compliance to the ZBL and OBC. The proposed building is setback 1.2m from the property line. The design also includes a bump-out with a setback of 0.6m from the property line.

The partial floor plan, shown in Figure 2, provides an example of a typical floor plan provided for building permit application. In this example, the construction of the exterior wall assembly uses exterior insulation to satisfy the energy efficiency requirements of SB-12. Exterior insulation can range between 25-50+ mm in thickness. The design includes glazing in the exterior wall referenced to be 1.2m from the property line, as noted on the site plan drawing.

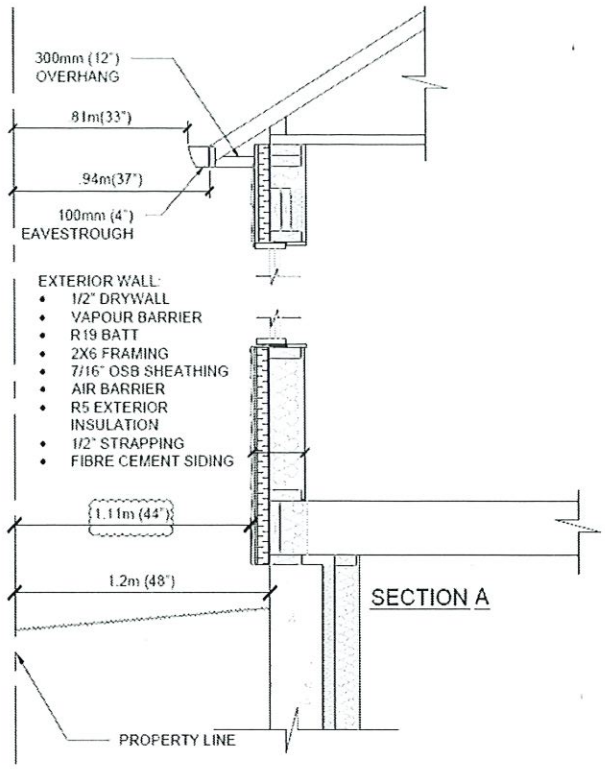


Figure 3-Partial wall section at the 1.2m setback indicated on the site plan.

The building section, shown in Figure 3, provides context how above grade construction can provide challenges in determining compliance to the OBC and ZBL. Designers must review the constructability of the building to determine compliance to the OBC and/or ZBL.

Building Code

Designers shall confirm the limiting distance of the exposing building face to the property line to determine if unprotected openings are permitted along the building façade. The site plan indicates the wall was located at 1.2m from the property line. When reviewing the construction of the exterior wall, the limiting distance of the exposing building face is reduced to 1.11m. Therefore, using the definitions and methodologies for the determination of unprotected openings provided in the OBC, unprotected glazing would not be permitted along this building façade. Additionally, as the exposing building face now has a limiting distance less than 1.2m to the property line, the construction of the exterior wall would also require a fire resistance rating.

Zoning

Designers shall confirm above grade construction as it can impact the location of a building on a property. Using the example above, determining setbacks for combined side yards can alter the total setback by using measurement provided on the site plan versus' the location of the massing above grade.

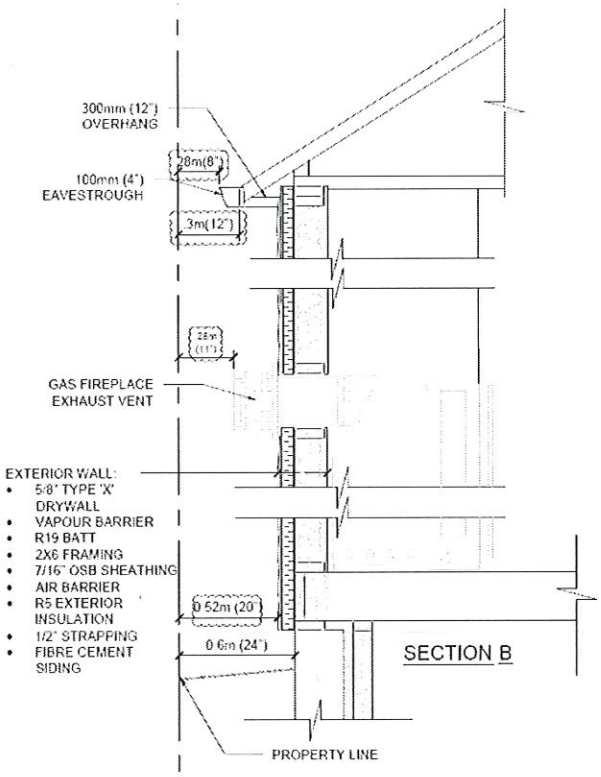


Figure 4-Partial wall section at the 0.6m setback indicated on the site plan.

Similar to Section A, the building section shown in Figure 4 provides context how above grade construction can provide challenges in determining compliance to the OBC and ZBL. The focus of this example is to demonstrate how projecting elements play a critical role in determining compliance to applicable law. Identifying projecting elements outboard of the building footprint is difficult, however, paramount in determining compliance to the OBC and/or ZBL.

Building Code

Designers shall determine required construction of the exposing building face as regulated by the OBC. In the example above, the location of the exposing building face is within 0.6m of the property line. The OBC requires exposing building face be constructed with a fire-resistance rating and cladded in non-combustible cladding.

Zoning

Designers shall be aware of projecting elements and their location to a required setback. As indicated on the partial floor plan, a gas fired fireplace is proposed in the living room alcove. All gas fired appliances require venting to the exterior. In the example above, the fireplace exhaust is located through the exterior wall. The location of the exhaust vent would not satisfy the requirements of Section 65 of the ZBL. Similar to the location of the exhaust vent, the eavestrough would not satisfy the requirements of Section 65 of the ZBL.

Determining setbacks for combined side yards can alter the total setback using the measurements provided on the site plan, to concrete, versus' the location of the massing above grade.

How to determine compliance

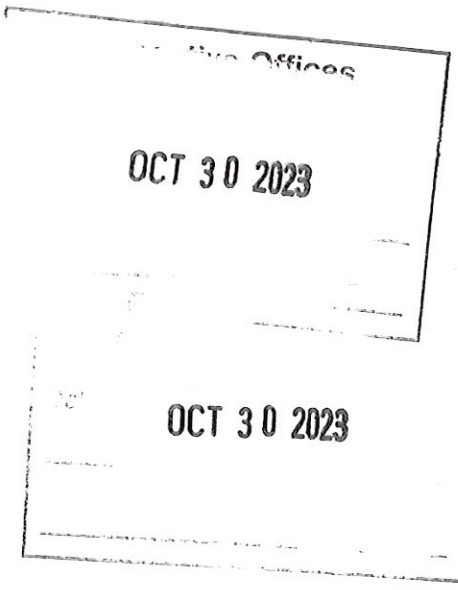
The sections below provide some direction on how designers are to demonstrate compliance with the ZBL and OBC.

New construction:

Buildings located within 300mm of the minimum zoning setback or property line require the designer to provide a wall section to demonstrate compliance of the proposed construction to the OBC and ZBL. The designer must dimension the foundation, exposing building face and permitted projection to the setback and/or property line. An example of required dimensions can be found in Figures 3 and 4.

Existing construction:

Buildings located within 300mm of the minimum zoning setback or property line require the designer to provide an Ontario Land Surveyor's survey (OLS) to establish the location of the existing building on the property.



@4:13pm

IN THE MATTER OF *ZONING BY-LAW NO. 5045* AND AMENDMENTS THERETO

AND IN THE MATTER OF PERMIT #PL-2022-0151

WRITTEN LEGAL BRIEF
OF THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE FOR THE DEVELOPMENT APPEAL BOARD HEARING TO BE HEARD ON NOVEMBER 7, 2023

Contents

PART I - STATEMENT OF FACTS

1. On August, 15 2022 the Municipal Corporation of the City of Yellowknife (the "City") received an application for a development permit for construction of a four-unit dwelling located at Lot 83, Block 308, Plan 4204 (7 Findlay Point).

2. After some revisions the application was approved and Development Permit PL-2022-0151 was posted on September 27, 2023. Development Permit PL-2022-0047 contains four variances:
    i. A reduction of the minimum rear yard setback from 6m to 3.50m;
    ii. A reduction of the minimum side yard setback from 1.50m to 1.00m;
    iii. An increase to the maximum building height from 12m to 14.50m; and
    iv. A reduction of the minimum required number of parking spaces from 4 spaces to 3 spaces.

Development Permit PL-2022-0151

3. There is a partially constructed building foundation on 7 Findlay Point. It was constructed in 2012 by a previous owner under a now expired building permit. No dwelling was ever completed. As per the design in Building Permit PL-2022-0047 the owner intends to build upon the existing foundation.

Development Officer's Report, pg. 4

4. On October 10, 2023 the Appellant appealed PL-2022-0047 to the Development Appeal Board.

PART II – POINTS AT ISSUE

The City submits that the following points are at issue in this hearing:

A. Jurisdiction

5. Are the issues raised by the Appellant valid grounds of appeal within the jurisdiction of the Development Appeal Board ("the Board")?

B. Appeal

6. If the Board determines that the Appellant has raised a valid ground of appeal which requires a decision, the Board must consider whether Development Permit PL-2022-0047 was issued properly?

PART III - SUBMISSIONS

I. There is no valid ground of appeal to the Development Appeal Board

7. The role of the Board as set out in in the *Community Planning and Development Act* and Zoning By-law No. 5045 (The Zoning By-Law) is to review development decisions of the Development Officer made under a zoning by-law. As per the Zoning By-law the Board may confirm, revoke or vary the decision of a Development Officer.

Sections 30-33 of the *Community Planning and Development Act*

Section 5.1.4 of Zoning By-law No. 5045

8. It is well established in Canadian Administrative Law that a board or tribunal may exercise only those powers granted to it by statute. The Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* at paragraph 35 summarized this as follows:

> Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, Administrative Law in Canada (3rd ed. 2001), at pp. 183-84).

9. Section 62 of the *Community Planning and Development Act* sets out on what grounds an appeal may be brought:

> 62. (1) A person other than an applicant for a development permit may only appeal to the appeal board in respect of an approval of an application for a development permit on the grounds that the person is adversely affected and
>
> (a) there was a misapplication of a zoning By-law in the approval of the application;
>
> (b) the proposed development contravenes the zoning By-law, the community plan or an area development plan;
>
> (c) the development permit relates to a use of land or a building that had been permitted at the discretion of a development authority;
>
> (d) the application for the development permit had been approved on the basis that the specific use of land or the building was similar in character and purpose to another use that was included in a zoning By-law for that zone;
>
> (e) the application for the development permit had been approved under circumstances where the proposed development did not fully conform with a zoning By-law; or
>
> (f) the development permit relates to a non-conforming building or non-conforming use.
>
> (2) For greater certainty, an appeal respecting the approval of an application for a development permit for a use specified in a zoning bylaw as a permitted use of land or a building, as referred to in subparagraph 14(1)(c)(i) or (ii) of this Act, may only be made if there is an alleged misapplication of the bylaw in the approval of the application.

10. Section 62 is an exhaustive list, there is no ability for the Board to hear grounds of appeal that are not explicitly set out in the legislation. The legislative intent underlying the establishment of the Board is clear, the Board is tasked with adjudicating matters concerning compliance with existing zoning by-laws and ensuring consistency and fairness in the application of those by-laws.

11. The Appellant has appealed development permit #PL-2022-0151 on the grounds that the terms “set-backs” and “density” are not adequately defined in the Zoning By-law. The relief

sought by the Appellant is for the Board to order the City to cease issuing all R1 residential development permits in R1 zoned areas until the City amends the By-law to clearly define the terms “density” and “setback”.

12. The Appellant has appealed the permit on the basis not that the development permit was incorrectly issued, but instead that the Zoning By-Law itself is incorrect and R1 permits should not be issued under it. The City submits that the Board can not hear an appeal on the grounds that there is in an insufficiency in the Zoning By-Law. The Board’s role is to ensure the Zoning By-law is followed in decisions of a Development officer.

13. It is not the role of the Board to stand in for the City of Yellowknife Council and consider changes to the Zoning By-Law. Section 3.3.3 of the Zoning By-Law states: “Decisions of the Development Appeal Board must be in compliance with this Zoning By-law, the Community Plan and any applicable Area Development Plan.” The Board is tasked with reviewing compliance of the Zoning By-Law – there is no interpretation that permits the Board to alter or consider the sufficiency of the Zoning By-Law.

14. The Appellant has raised issues that at their core are decisions of the City of Yellowknife Council. The Zoning By-Law in section 5.2 permits any person to submit to Council for consideration an amendment to the Zoning By-Law. That is the remedy available to any individual who takes issue with a definition of the Zoning By-Law.

15. The relief sought by the appellant is not a valid remedy within the legislated powers of the Board. Section 3.3.3 of the Zoning By-law sets out the remedies available to the Board. Under section 3.3.3 the Board may reverse, confirm or vary a permit and may impose conditions or limitations that it considers proper and desirable in the circumstances.

16. The circumstances of any appeal before the Board is limited to granting relief on grounds of appeal properly before the Board. As the matters raised on Appeal are not properly before the Board, the relief sought is not within the jurisdiction of the Board. There is no available remedy to the Board to order changes to definitions in the Zoning By-law or order the City to cease issuing future development permits.

17. As such the City submits the Appellant has raised no valid grounds of appeal and as such the Board should dismiss the Appeal.

PART IV – REQUESTED FINDING

18. The City requests that the Board makes a determination that the Appellant has not raised a valid ground of appeal and the appeal be dismissed.

19. In the further alternative that the Board determines that there is a valid ground of appeal, the City requests that the board confirm the permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2023.

THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE

Per: _____
Rylund Johnson
Counsel for the City of Yellowknife

CASELAW

1. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140

City of Calgary *Appellant/Respondent on cross-appeal*

v.

ATCO Gas and Pipelines Ltd. *Respondent/ Appellant on cross-appeal*

and

Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited *Interveners*

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

ATCO Gas and Pipelines Ltd. *Intimée/ Appelante au pourvoi incident*

et

Alberta Energy and Utilities Board, Commission de l'énergie de l'Ontario, Enbridge Gas Distribution Inc. et Union Gas Limited *Intervenantes*

Indexed as: ATCO Gas and Pipelines Ltd. *v.* Alberta (Energy and Utilities Board)

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Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Charron.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

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

Administrative law — Boards and tribunals — Regulatory boards — Jurisdiction — Doctrine of jurisdiction by necessary implication — Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas — Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility — Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale — If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Droit administratif — Organismes et tribunaux administratifs — Organismes de réglementation — Compétence — Doctrine de la compétence par déduction nécessaire — Demande présentée à l'Alberta Energy and Utilities Board par un service public de gaz naturel pour obtenir l'autorisation de vendre des bâtiments et un terrain ne servant plus à la fourniture de gaz naturel — Autorisation accordée à la condition qu'une partie du produit de la vente soit attribuée aux clients du service public — L'organisme avait-il le pouvoir exprès ou tacite d'attribuer le produit de la vente? — Dans l'affirmative, sa décision d'exercer son pouvoir discrétionnaire de protéger l'intérêt public en attribuant aux clients une partie du produit de la vente était-elle raisonnable? — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard

Droit administratif — Contrôle judiciaire — Norme de contrôle — Alberta Energy and Utilities Board

of review applicable to Board's jurisdiction to allocate proceeds from sale of public utility assets to ratepayers — Standard of review applicable to Board's decision to exercise discretion to allocate proceeds of sale — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

ATCO is a public utility in Alberta which delivers natural gas. A division of ATCO filed an application with the Alberta Energy and Utilities Board for approval of the sale of buildings and land located in Calgary, as required by the *Gas Utilities Act* ("GUA"). According to ATCO, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to ratepaying customers. ATCO requested that the Board approve the sale transaction, as well as the proposed disposition of the sale proceeds: to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize that the balance of the profits resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

Persuaded that customers would not be harmed by the sale, the Board approved the sale transaction on the basis that customers would not "be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding". In a second decision, the Board determined the allocation of net sale proceeds. The Board held that it had the jurisdiction to approve a proposed disposition of sale proceeds subject to appropriate conditions to protect the public interest, pursuant to the powers granted to it under s. 15(3) of the *Alberta Energy and Utilities Board Act* ("AEUBA"). The Board applied a formula which recognizes profits realized when proceeds of sale exceed the original cost can be shared between customers and shareholders, and allocated a portion of the net gain on the sale to the ratepaying customers. The Alberta Court of Appeal set aside the Board's decision, referring the matter back to the Board to allocate the entire remainder of the proceeds to ATCO.

Held (McLachlin C.J. and Binnie and Fish JJ. dissenting): The appeal is dismissed and the cross-appeal is allowed.

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of

— Norme de contrôle applicable à la décision de l'organisme concernant son pouvoir d'attribuer aux clients le produit de la vente des biens d'un service public — Norme de contrôle applicable à la décision de l'organisme d'exercer son pouvoir discrétionnaire en attribuant le produit de la vente — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

ATCO est un service public albertain de distribution de gaz naturel. L'une de ses filiales a demandé à l'Alberta Energy and Utilities Board (« Commission ») l'autorisation de vendre des bâtiments et un terrain situés à Calgary, comme l'exigeait la *Gas Utilities Act* (« GUA »). ATCO a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. Elle a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement de la valeur comptable et au recouvrement des frais d'aliénation, et de reconnaître le droit de ses actionnaires au profit net. La ville de Calgary a défendu les intérêts des clients, s'opposant à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

Convaincue que la vente ne serait pas préjudiciable aux clients, la Commission l'a autorisée au motif que « la vente ne risquait pas de leur infliger un préjudice financier qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure ». Dans une deuxième décision, elle a décidé de l'attribution du produit net de la vente. Elle a conclu qu'elle avait le pouvoir d'autoriser l'aliénation projetée en l'assortissant de conditions aptes à protéger l'intérêt public, suivant le par. 15(3) de l'*Alberta Energy and Utilities Board Act* (« AEUBA »). Elle a appliqué une formule reconnaissant que le profit réalisé lorsque le produit de la vente excède le coût historique peut être réparti entre les clients et les actionnaires et elle a attribué aux clients une partie du gain net tiré de la vente. La Cour d'appel de l'Alberta a annulé la décision et renvoyé l'affaire à la Commission en lui enjoignant d'attribuer à ATCO la totalité du produit net.

Arrêt (la juge en chef McLachlin et les juges Binnie et Fish sont dissidents) : Le pourvoi est rejeté et le pourvoi incident est accueilli.

Les juges Bastarache, LeBel, Deschamps et Charron : Compte tenu des facteurs pertinents de l'analyse pragmatique et fonctionnelle, la norme de contrôle

review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [21-34]

The interpretation of the AEUBA, the *Public Utilities Board Act* ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. On their grammatical and ordinary meaning, s. 26(2) GUA, s. 15(3) AEUBA and s. 37 PUBA are silent as to the Board's power to deal with sale proceeds. Section 26(2) GUA conferred on the Board the power to approve a transaction without more. The intended meaning of the Board's power pursuant to s. 15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s. 37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes. While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations. These seemingly broad powers must be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The context indicates that the limits of the Board's powers are grounded in its main function of fixing just and reasonable rates and in protecting the integrity and dependability of the supply system. [7] [41] [43] [46]

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA,

applicable à la décision de la Commission portant sur sa compétence est celle de la décision correcte. En l'espèce, la Commission n'avait pas le pouvoir d'attribuer le produit de la vente des biens de l'entreprise de services publics. La Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui conféraient la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients quelque partie du produit de la vente des biens. [21-34]

L'analyse de l'AEUBA, de la *Public Utilities Board Act* (« PUBA ») et de la GUA mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Suivant le sens grammatical et ordinaire des mots qui y sont employés, le par. 26(2) de la GUA, le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA sont silencieux en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente. Le paragraphe 26(2) de la GUA lui conférait le pouvoir d'autoriser une opération, sans plus. La véritable portée du par. 15(3) de l'AEUBA, qui confère à la Commission le pouvoir d'assortir une ordonnance des conditions qu'elle juge nécessaires dans l'intérêt public, et celle de l'art. 37 de la PUBA, qui l'investit d'un pouvoir général, est occultée lorsque l'on considère isolément ces dispositions. En elles-mêmes, les dispositions sont vagues et sujettes à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. La notion d'« intérêt public » est très large et élastique, mais la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites. Son pouvoir apparemment vaste doit être interprété dans le contexte global des lois en cause, qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Il appert du contexte que les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables et à préserver l'intégrité et la fiabilité du réseau d'alimentation. [7] [41] [43] [46]

Ni l'historique de la réglementation des services publics de l'Alberta en général ni les dispositions législatives conférant ses pouvoirs à l'Alberta Energy and Utilities Board en particulier ne font mention du pouvoir de la Commission d'attribuer le produit de la vente ou de son pouvoir discrétionnaire de porter atteinte au droit de propriété. Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la

the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price — nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. [54-69]

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [39] [77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded

GUA que son principal mandat à l'égard des entreprises de services publics est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première. Les objectifs de viabilité, d'équité et d'efficacité, qui expliquent le mode de fixation des tarifs, sont à l'origine d'un arrangement économique et social qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus. Le paiement du tarif par le client n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens du service public. L'objet de la législation est de protéger le client et l'investisseur, et la Commission a pour mandat d'établir une tarification qui favorise les avantages financiers de l'un et de l'autre. Toutefois, ce subtil compromis ne supprime pas le caractère privé de l'entreprise. Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. Sans compter que l'entreprise n'est pas à l'abri de la perte pouvant en découler. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. [54-69]

Non seulement le pouvoir d'attribuer le produit de la vente n'est pas expressément prévu par la loi, mais on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Pour que s'applique la doctrine de la compétence par déduction nécessaire, la preuve doit établir que l'exercice de ce pouvoir est nécessaire dans les faits à la Commission pour que soient atteints les objectifs de la loi, ce qui n'est pas le cas en l'espèce. Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini, comme celui prévu dans l'AEUBA, la GUA ou la PUBA, d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits. Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut adopter une disposition le prévoyant expressément. [39] [77-80]

Indépendamment de la conclusion que la Commission n'avait pas compétence, la décision d'exercer le pouvoir discrétionnaire de protéger l'intérêt public en répartissant le produit de la vente comme elle l'a fait ne satisfaisait pas à la norme de la raisonnabilité. Lorsqu'elle

that no harm would ensue to customers from the sale of the asset, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Finally, it cannot be concluded that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process. [82-85]

Per McLachlin C.J. and Binnie and Fish JJ. (dissenting): The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's discretion is not unlimited and must be exercised in good faith for its intended purpose. Here, in allocating one third of the net gain to ATCO and two thirds to the rate base, the Board explained that it was proper to balance the interests of both shareholders and ratepayers. In the Board's view to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs, but on the other hand to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business. Although it was open to the Board to allow ATCO's application for the entire profit, the solution it adopted in this case is well within the range of reasonable options. The "public interest" is largely and inherently a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, Alberta's grant of authority to its Board is more generous than most. The Court should not substitute its own view of what is "necessary in the public interest". The Board's decision made in the exercise of its jurisdiction was within the range of established regulatory opinion, whether the proper standard of review in that regard is patent unreasonableness or simple reasonableness. [91-92] [98-99] [110] [113] [122] [148]

a conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients, la Commission n'a pas cerné d'intérêt public à protéger et aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Enfin, on ne peut conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs. [82-85]

La juge en chef McLachlin et les juges Binnie et Fish (dissidents) : La décision de la Commission devrait être rétablie. Le paragraphe 15(3) de l'AEUBA conférait à la Commission le pouvoir d'« imposer les conditions supplémentaires qu'elle juge[ait] nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de vendre le terrain et les bâtiments en cause présentée par ATCO. Dans l'exercice de ce pouvoir, et vu la « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait suivant le par. 22(1) de la GUA, la Commission a réparti le gain net en se fondant sur des considérations d'intérêt public. Son pouvoir discrétionnaire n'est pas illimité et elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré. Dans la présente affaire, en attribuant un tiers du gain net à ATCO et deux tiers à la base tarifaire, la Commission a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients. Selon elle, attribuer aux clients la totalité du profit n'aurait pas incité l'entreprise à accroître son efficacité et à réduire ses coûts et l'attribuer à l'entreprise aurait pu encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'était accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée. La Commission pouvait accueillir la demande d'ATCO et lui attribuer la totalité du profit, mais la solution qu'elle a retenue en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. L'« intérêt public » tient essentiellement et intrinsèquement à l'opinion et au pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. Il n'appartient pas à notre Cour de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer son opinion à celle de la Commission. La décision que la Commission a rendue dans l'exercice de son pouvoir se situe dans les limites des opinions exprimées par les organismes de réglementation, que la norme applicable soit celle du manifestement déraisonnable ou celle du raisonnable simpliciter. [91-92] [98-99] [110] [113] [122] [148]

ATCO's submission that an allocation of profit to the customers would amount to a confiscation of the corporation's property overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the ratepayers carry the costs and the regulator sets the return on investment, not the marketplace. The Board's response cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what is regarded in comparable jurisdictions as an appropriate regulatory allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. Similarly, ATCO's argument that the Board engaged in impermissible retroactive rate making should not be accepted. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective not retroactive. Fixing the going-forward rate of return, as well as general supervision of "all gas utilities, and the owners of them", were matters squarely within the Board's statutory mandate. ATCO also submits in its cross-appeal that the Court of Appeal erred in drawing a distinction between gains on sale of land whose original cost is not depreciated and depreciated property, such as buildings. A review of regulatory practice shows that many, but not all, regulators reject the relevance of this distinction. The point is not that the regulator must reject any such distinction but, rather, that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. Finally, ATCO's contention that it alone is burdened with the risk on land that declines in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. Further, it seems such losses are taken into account in the ongoing rate-setting process. [93] [123-147]

Cases Cited

By Bastarache J.

Referred to: *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65, July 31, 2001; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41, July 5, 2000; *Pushpanathan v.*

La prétention d'ATCO selon laquelle attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé; dans ce dernier cas, les clients supportent les coûts et le taux de rendement est fixé par un organisme de réglementation, et non par le marché. La mesure retenue par la Commission ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. On ne peut non plus faire droit à la prétention d'ATCO voulant que la Commission se soit indûment livrée à une tarification rétroactive. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission. Dans son pourvoi incident, ATCO prétend en outre que la Cour d'appel de l'Alberta a établi à tort une distinction entre le profit tiré de la vente d'un terrain dont le coût historique n'est pas amorti et le profit tiré de la vente d'un bien amorti, comme un bâtiment. Il ressort de la pratique réglementaire que de nombreux organismes de réglementation, mais pas tous, jugent cette distinction non pertinente. Ce n'est pas que l'organisme de réglementation doive l'écarter systématiquement, mais elle n'est pas aussi déterminante que le prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. Enfin, la prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain diminue ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. De plus, il appert qu'une telle perte est prise en considération dans la procédure d'établissement des tarifs. [93] [123-147]

Jurisprudence

Citée par le juge Bastarache

Arrêts mentionnés : *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65, 31 juillet 2001; *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41, 5 juillet 2000; *Pushpanathan c.*

Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19; *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL); *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374; *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453, aff'd [1977] 2 S.C.R. 822; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL); *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731; *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601; *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698; *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945); *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Consumers' Gas Co.*, E.B.R.O. 410-II, 411-II, 412-II, March 23, 1987; *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349;

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Hongkong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167.

By Binnie J. (dissenting)

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353; *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991; *Re Natural Resource Gas Ltd.*, O.E.B., RP-2002-0147, EB-2002-0446, June 27, 2003; *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984.

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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (Wittmann J.A. and LoVecchio J. (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, reversing a decision of the Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Appeal dismissed and cross-appeal allowed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

Brian K. O'Ferrall and *Daron K. Naffin*, for the appellant/respondent on cross-appeal.

Clifton D. O'Brien, *Q.C.*, *Lawrence E. Smith*, *Q.C.*, *H. Martin Kay*, *Q.C.*, and *Laurie A. Goldbach*, for the respondent/appellant on cross-appeal.

J. Richard McKee and *Renée Marx*, for the intervener the Alberta Energy and Utilities Board.

Written submissions only by *George Vegh* and *Michael W. Lyle*, for the intervener the Ontario Energy Board.

Written submissions only by *J. L. McDougall*, *Q.C.*, and *Michael D. Schafler*, for the intervener Enbridge Gas Distribution Inc.

Written submissions only by *Michael A. Penny* and *Susan Kushneryk*, for the intervener Union Gas Limited.

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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (les juges Wittmann et LoVecchio (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, qui a infirmé une décision de l'Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Pourvoi rejeté et pourvoi incident accueilli, la juge en chef McLachlin et les juges Binnie et Fish sont dissidents.

Brian K. O'Ferrall et *Daron K. Naffin*, pour l'appelante/intimée au pourvoi incident.

Clifton D. O'Brien, *c.r.*, *Lawrence E. Smith*, *c.r.*, *H. Martin Kay*, *c.r.*, et *Laurie A. Goldbach*, pour l'intimée/appelante au pourvoi incident.

J. Richard McKee et *Renée Marx*, pour l'intervenante Alberta Energy and Utilities Board.

Argumentation écrite seulement par *George Vegh* et *Michael W. Lyle*, pour l'intervenante la Commission de l'énergie de l'Ontario.

Argumentation écrite seulement par *J. L. McDougall*, *c.r.*, et *Michael D. Schafler*, pour l'intervenante Enbridge Gas Distribution Inc.

Argumentation écrite seulement par *Michael A. Penny* et *Susan Kushneryk*, pour l'intervenante Union Gas Limited.

The judgment of Bastarache, LeBel, Deschamps and Charron JJ. was delivered by

BASTARACHE J. —

1. Introduction

1 At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.

2 Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the

Version française du jugement des juges Bastarache, LeBel, Deschamps et Charron rendu par

LE JUGE BASTARACHE —

1. Introduction

Le présent pourvoi a pour objet la compétence d'un tribunal administratif. Plus précisément, notre Cour doit déterminer, selon la norme de contrôle appropriée, si l'organisme de réglementation a correctement circonscrit ses attributions et son pouvoir discrétionnaire.

De nos jours, rares sont les facettes de notre vie qui échappent à la réglementation. Le service téléphonique, les transports ferroviaire et aérien, le camionnage, l'investissement étranger, l'assurance, le marché des capitaux, la radiodiffusion (licences et contenu), les activités bancaires, les aliments, les médicaments et les normes de sécurité ne constituent que quelques-uns des objets de la réglementation au Canada : M. J. Trebilcock, « The Consumer Interest and Regulatory Reform », dans G. B. Doern, dir., *The Regulatory Process in Canada* (1978), 94. Le pouvoir discrétionnaire est au cœur de l'élaboration des politiques des organismes administratifs, mais son étendue varie d'un organisme à l'autre (voir C. L. Brown-John, *Canadian Regulatory Agencies : Quis custodiet ipsos custodes?* (1981), p. 29). Et, plus important encore, dans l'exercice de son pouvoir discrétionnaire, l'organisme créé par voie législative doit s'en tenir à son domaine de compétence : il ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence (voir D. J. Mullan, *Administrative Law* (2001), p. 9-10).

Le secteur de l'énergie et des services publics n'y échappe pas. En l'espèce, l'intimée est un service public albertain de distribution de gaz naturel. Il ne s'agit en fait que d'une société privée assujettie à certaines contraintes réglementaires. Essentiellement, elle est dans la même situation que toute société privée : elle obtient son financement par l'émission d'actions et d'obligations; ses ressources, ses terrains et ses autres biens lui

sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board ("Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell

appartiennent en propre; elle construit des installations, achète du matériel et, pour fournir ses services, conclut des contrats avec des employés; elle réalise des profits en pratiquant des tarifs approuvés par l'Alberta Energy and Utilities Board (« Commission ») (voir P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234). Cela dit, on ne peut faire abstraction de la caractéristique importante qui rend un service public si distinct : il doit rendre compte à un organisme de réglementation. Les services publics sont habituellement des monopoles naturels : la technologie requise et la demande sont telles que les coûts fixes sont moindres lorsque le marché est desservi par une seule entreprise au lieu de plusieurs faisant double-emploi dans un contexte concurrentiel (voir A. E. Kahn, *The Economics of Regulation : Principles and Institutions* (1988), vol. 1, p. 11; B. W. F. Depoorter, « Regulation of Natural Monopoly », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, « Price Regulation : A (Non-Technical) Overview », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 396, p. 398; A. J. Black, « Responsible Regulation : Incentive Rates for Natural Gas Pipelines » (1992), 28 *Tulsa L.J.* 349, p. 351). Ce modèle favorise l'efficience de la production. Toutefois, les gouvernements ont voulu s'éloigner du concept théorique et ont opté pour ce qu'il convient d'appeler un « monopole réglementé ». La réglementation des services publics vise à protéger la population contre un comportement monopolistique et l'inélasticité de la demande qui en résulte tout en assurant la qualité constante d'un service essentiel (voir Kahn, p. 11).

Comme toute autre entreprise, un service public prend des décisions d'affaires, son objectif ultime étant de maximiser les profits revenant aux actionnaires. Cependant, l'organisme de réglementation restreint son pouvoir discrétionnaire à l'égard de certains éléments clés, dont les prix, les services offerts et l'opportunité d'investir dans des installations et du matériel. Et, plus important encore dans la présente affaire, il restreint également son

assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying customers of the utility when approving the sale. Subsequently, if this first question is answered affirmatively, the Court must consider whether the Board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction: was it allowed, in the circumstances of this case, to allocate a portion of the net gain on the sale of the utility to the rate-paying customers?

6 The customers' interests are represented in this case by the City of Calgary ("City") which argues that the Board can determine how to allocate the proceeds pursuant to its power to approve the sale and protect the public interest. I find this position unconvincing.

7 The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

pouvoir de vendre ses biens en dehors du cours normal de ses activités : son autorisation doit être obtenue pour la vente d'un bien affecté jusqu'alors à la prestation d'un service réglementé (voir MacAvoy et Sidak, p. 234).

C'est dans ce contexte qu'on demande à notre Cour de déterminer si, lorsqu'elle autorise un service public à vendre un bien désaffecté, la Commission peut, suivant ses lois habilitantes, attribuer aux clients une partie du gain net obtenu. Dans l'affirmative, il nous faut décider si la Commission a raisonnablement exercé son pouvoir et respecté les limites de sa compétence : était-elle autorisée, en l'espèce, à attribuer une partie du gain net aux clients?

La ville de Calgary (« Ville ») défend les intérêts des clients dans le cadre du présent pourvoi. Elle soutient que la Commission peut décider de l'attribution du produit de la vente en vertu de son pouvoir d'autoriser ou non l'opération et de protéger l'intérêt public. Cette thèse me paraît peu convaincante.

L'analyse de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45 (« PUBA »), et de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA ») (voir leurs dispositions pertinentes en annexe) mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Son pouvoir apparemment vaste de rendre toute décision et d'imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public doit être interprété dans le contexte global des lois en cause qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables (la tarification) et à préserver l'intégrité et la fiabilité du réseau d'alimentation.

1.1 *Overview of the Facts*

ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land. According to AGS, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners, who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed. The Board was of the view that the test had been satisfied. It was

1.1 *Aperçu des faits*

8 ATCO Gas - South (« AGS »), une filiale d'ATCO Gas and Pipelines Ltd. (« ATCO »), a fait parvenir à la Commission une lettre dans laquelle elle lui demandait, en application du par. 25.1(2) (l'actuel par. 26(2)) de la GUA, l'autorisation de vendre des biens situés à Calgary (le *Calgary Stores Block*). Ces biens étaient constitués d'un terrain et de bâtiments, mais c'est le terrain qui présentait le plus grand intérêt, et l'acquéreur comptait démolir les bâtiments et réaménager le terrain, ce qu'il a d'ailleurs fait. Devant la Commission, AGS a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. AGS a en fait laissé entendre que l'opération se traduirait par une économie pour les clients du fait que la valeur comptable nette des biens ne serait plus prise en compte dans l'établissement de la base tarifaire, diminuant d'autant les tarifs. ATCO a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement du solde de la valeur comptable et au recouvrement des frais d'aliénation, puis de permettre le versement du gain net aux actionnaires. La Commission a examiné la demande sur dossier sans entendre de témoins ni tenir d'audience. La Ville, Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. et des intervenants municipaux ont déposé des observations écrites. Tous s'opposaient à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

1.2 *Historique judiciaire*

1.2.1 La Commission

1.2.1.1 *Décision 2001-78*

9 Dans une première décision relative à la demande d'autorisation de la vente des biens, la Commission a appliqué le critère de l'« absence de préjudice » et soupesé les répercussions possibles sur les tarifs et la qualité des services offerts aux clients, ainsi que l'opportunité de l'opération, compte tenu de l'acquéreur et de la procédure d'appel d'offres ou de vente suivie. Elle a conclu à l'« absence de

persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that those costs could be reviewed by the Board in a future general rate application brought by interested parties.

1.2.1.2 *Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

10 In a second decision, the Board determined the allocation of net sale proceeds. It reviewed the regulatory policy and general principles which affected the decision, although no specific matters are enumerated for consideration in the applicable legislative provisions. The Board had previously developed a "no-harm" test, and it reviewed the rationale for the test as summarized in its Decision 2001-65 (*Re ATCO Gas-North*): "The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest" (p. 16).

11 The Board went on to discuss the implications of the Alberta Court of Appeal decision in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, referring to various decisions it had rendered in the past. Quoting from its Decision 2000-41 (*Re TransAlta Utilities Corp.*), the Board summarized the "*TransAlta Formula*":

> In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between

préjudice ». Elle s'est dite convaincue que la vente ne serait pas préjudiciable aux clients étant donné l'entente de location judicieusement conclue en vue du remplacement des installations vendues. Elle a estimé qu'il n'y aurait pas d'effet négatif sur les tarifs exigés des clients, du moins les cinq premières années de la location. La Commission a en fait jugé que la vente permettrait aux clients d'obtenir les mêmes services à meilleur prix. Elle ne s'est pas prononcée sur les effets de l'opération sur les frais d'exploitation futurs; à titre d'exemple, elle n'a pas tenu compte des frais liés à l'entente de location conclue par ATCO. La Commission a dit que les parties intéressées et elle pourraient se pencher sur ces frais dans le cadre d'une demande générale d'approbation de tarifs.

1.2.1.2 *Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

Dans une deuxième décision, la Commission a décidé de l'attribution du produit net de la vente. Elle a fait état de la politique réglementaire et des principes généraux présidant à la décision, même si les dispositions législatives applicables n'énumèrent pas les facteurs précis devant être pris en compte. Elle a fait mention du critère de l'« absence de préjudice » élaboré auparavant et dont elle avait résumé la raison d'être dans sa décision 2001-65 (*Re ATCO Gas-North*) : [TRADUCTION] « La Commission estime que son pouvoir de limiter ou de compenser le préjudice que pourraient subir les clients en leur attribuant tout ou partie du produit de la vente découle de son vaste mandat de protéger les clients dans l'intérêt public » (p. 16).

La Commission a ensuite analysé les répercussions de l'arrêt *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, de la Cour d'appel de l'Alberta, en se référant à différentes décisions qu'elle avait rendues. Citant sa décision 2000-41 (*Re TransAlta Utilities Corp.*), voici comment elle a résumé la « *formule TransAlta* » :

> [TRADUCTION] Dans des décisions subséquentes, la Commission a conclu que pour la Cour d'appel, lorsque le prix de vente des biens est plus élevé que leur coût historique, les actionnaires ont droit à la valeur comptable nette (en fonction de la valeur historique),

net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale. [para. 27]

les clients ont droit à la différence entre la valeur comptable nette et le coût historique, et toute appréciation des biens (c.-à-d. la différence entre le coût historique et le prix de vente) est répartie entre les actionnaires et les clients. Le montant attribué aux actionnaires est calculé en multipliant le ratio prix de vente/coût historique par la valeur comptable nette et celui qui revient aux clients est obtenu en multipliant ce ratio par la différence entre le coût historique et la valeur comptable nette. Toutefois, lorsque le prix de vente n'est pas supérieur au coût historique, les clients ont droit à la totalité du gain réalisé lors de la vente. [par. 27]

The Board also referred to Decision 2001-65, where it had clarified the following:

La Commission a également cité la décision 2001-65 renfermant les explications suivantes :

> In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the TransAlta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula. [para. 28]

> [TRADUCTION] Selon la Commission, lorsque l'application de la formule TransAlta donne un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit au montant plus élevé. Par contre, lorsqu'elle débouche sur un montant inférieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit à ce dernier montant. De plus, cette approche est compatible avec la manière dont elle a appliqué jusqu'à maintenant la formule TransAlta. [par. 28]

On the issue of its jurisdiction to allocate the net proceeds of a sale, the Board in the present case stated:

12 En ce qui concerne son pouvoir de répartir le produit net de la vente, la Commission a dit :

> The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.

> [TRADUCTION] Le fait qu'un service public réglementé doive obtenir de la Commission l'autorisation de se départir d'un bien montre que l'assemblée législative a voulu limiter son droit de propriété. Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher un service public de se départir d'un bien. Selon nous, il s'ensuit également que la Commission peut autoriser une aliénation en l'assortissant de conditions aptes à protéger les intérêts des clients.
>
> Pour ce qui est de l'argument d'AGS selon lequel l'attribution aux clients d'un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice équivaudrait à une tarification rétroactive, la Commission cite à nouveau l'arrêt *TransAlta* dans lequel la Cour d'appel a reconnu que la Commission pouvait assimiler à un « revenu » un montant payable aux clients pour les indemniser de l'amortissement excédentaire pris en compte dans la tarification antérieure. Il ne saurait y avoir de tarification rétroactive lorsqu'un service public se dessaisit d'un bien auparavant inclus dans la base tarifaire et que la Commission applique la formule TransAlta.

The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset. [paras. 47-49]

L'argument de la société voulant que les biens (le *Calgary Stores Block*) ne soient plus des biens du service public parce qu'ils ne sont plus requis pour fournir le service ne nous convainc pas. La Commission signale que les biens pourraient encore servir à la prestation de services destinés aux clients de l'entreprise réglementée. En fait, les services anciennement fournis grâce aux biens demeurent requis, mais leur prestation sera assurée par des installations existantes et des installations récemment louées. La Commission note de plus que même dans le cas où un bien et le service qu'il fournissait aux clients ne sont plus requis, elle a déjà attribué plus que le montant obtenu par l'application du critère de l'absence de préjudice lorsque le produit de l'aliénation a été supérieur au coût historique. [par. 47-49]

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

La Commission a ensuite appliqué le critère de l'absence de préjudice aux faits de l'espèce. Elle a signalé que, dans sa décision relative à la demande d'autorisation, elle avait conclu au respect de ce critère, mais n'avait alors tiré aucune conclusion concernant l'incidence sur les frais d'exploitation, notamment l'entente de location obtenue par ATCO.

14 The Board then reviewed the submissions with respect to the allocation of the net gain and rejected the submission that if the new owner had no use of the buildings on the land, this should affect the allocation of net proceeds. The Board held that the buildings did have some present value but did not find it necessary to fix a specific value. The Board recognized and confirmed that the *TransAlta Formula* was one whereby the "windfall" realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. It held that it should apply the formula in this case and that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings.

Puis, après avoir examiné les observations portant sur l'attribution du gain net, la Commission a rejeté l'argument selon lequel le fait que le nouveau propriétaire n'utiliserait pas les bâtiments situés sur le terrain était déterminant à cet égard. Elle a conclu que les bâtiments avaient alors une certaine valeur, mais elle n'a pas jugé nécessaire de la préciser. Elle a reconnu et confirmé que suivant la *formule TransAlta*, le profit inattendu réalisé lorsque le produit de la vente excède le coût historique pouvait être réparti entre les clients et les actionnaires. Elle a estimé qu'il y avait lieu en l'espèce d'appliquer la formule et de tenir compte de la totalité du gain issu de l'opération sans dissocier la partie attribuable au terrain et celle correspondant aux bâtiments.

15 With respect to allocation of the gain between customers and shareholders of ATCO, the Board tried to balance the interests of both the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on the investment made by the company:

Pour ce qui est de la répartition du gain entre les clients et les actionnaires d'ATCO, la Commission a tenté de mettre en balance la volonté des clients d'obtenir des services à la fois sûrs et fiables à un prix raisonnable et celle des investisseurs de toucher un rendement raisonnable :

To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.

Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred. [paras. 112-13]

The Board went on to conclude that the sharing of the net gain on the sale of the land and buildings collectively, in accordance with the *TransAlta Formula*, was equitable in the circumstances of this application and was consistent with past Board decisions.

The Board determined that from the gross proceeds of $6,550,000, ATCO should receive $465,000 to cover the cost of disposition ($265,000) and the provision for environmental remediation ($200,000), the shareholders should receive $2,014,690, and $4,070,310 should go to the customers. Of the amount credited to shareholders, $225,245 was to be used to remove the remaining net book value of the property from ATCO's accounts. Of the amount allocated to customers, $3,045,813 was allocated to ATCO Gas - South customers and $1,024,497 to ATCO Pipelines - South customers.

1.2.2 Court of Appeal of Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, allowing the appeal and setting aside the Board's decision. The

[TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.

À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation. [par. 112-113]

16 La Commission a poursuivi en concluant que le partage du gain net résultant globalement de la vente du terrain et des bâtiments, selon la *formule TransAlta*, était équitable dans les circonstances et conforme à ses décisions antérieures.

17 Elle a décidé de répartir le produit brut de la vente (6 550 000 $) comme suit : 465 000 $ à ATCO pour les frais d'aliénation (265 000 $) et la dépollution (200 000 $), 2 014 690 $ aux actionnaires et 4 070 310 $ aux clients. Un montant de 225 245 $ devait être prélevé de la somme attribuée aux actionnaires pour radier des registres d'ATCO la valeur comptable nette des biens vendus. De la somme attribuée aux clients, 3 045 813 $ étaient alloués aux clients d'ATCO Gas - South et 1 024 497 $ à ceux d'ATCO Pipelines - South.

1.2.2 La Cour d'appel de l'Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

18 ATCO a interjeté appel de la décision. Elle a fait valoir que la Commission n'avait pas compétence pour attribuer le produit de la vente, qui aurait dû revenir en entier aux actionnaires. Selon elle, en touchant une partie du produit de la vente, les clients gagnaient sur tous les tableaux puisqu'ils n'avaient pas supporté le coût de la rénovation des biens vendus et qu'ils profiteraient d'économies grâce à l'entente de location. La Cour d'appel de l'Alberta lui a donné raison, accueillant l'appel et annulant la décision. Elle a renvoyé l'affaire à la

matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled "Remainder to be Shared" to ATCO. For the reasons that follow, the Court of Appeal's decision should be upheld, in part; it did not err when it held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 *Issues*

19 There is an appeal and a cross-appeal in this case: an appeal by the City in which it submits that, contrary to the Court of Appeal's decision, the Board had jurisdiction to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the Board approved the sale, and a cross-appeal by ATCO in which it questions the Board's jurisdiction to allocate any of ATCO's proceeds from the sale to customers. In particular, ATCO contends that the Board has no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years. No matter how the issue is framed, it is evident that the crux of this appeal lies in whether the Board has the jurisdiction to distribute the gain on the sale of a utility company's asset.

20 Given my conclusion on this issue, it is not necessary for me to consider whether the Board's allocation of the proceeds in this case was reasonable. Nevertheless, as I note at para. 82, I will direct my attention briefly to the question of the exercise of discretion in view of my colleague's reasons.

2.2 *Standard of Review*

21 As this appeal stems from an administrative body's decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittmann J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board's

Commission, lui enjoignant d'attribuer à ATCO la totalité du solde à répartir selon la ligne 11 du tableau d'attribution du produit de la vente. Pour les motifs qui suivent, il y a lieu de confirmer en partie le jugement de la Cour d'appel, qui n'a pas eu tort de statuer que la Commission n'avait pas le pouvoir d'attribuer le produit de la vente aux clients.

2. Analyse

2.1 *Questions en litige*

Nous sommes saisis d'un pourvoi et d'un pourvoi incident. Dans son pourvoi, la Ville affirme que contrairement à ce qu'a estimé la Cour d'appel, la Commission avait le pouvoir d'attribuer aux clients une partie du gain net résultant de la vente d'un bien affecté au service public même si elle avait conclu, au moment d'autoriser la vente, qu'aucun préjudice ne serait causé au public. Dans son pourvoi incident, ATCO conteste le pouvoir de la Commission d'attribuer aux clients toute partie du produit de la vente. Elle soutient en particulier que la Commission n'a pas le pouvoir de leur attribuer l'équivalent de l'amortissement calculé les années antérieures. Peu importe la formulation de la question en litige, notre Cour est appelée en l'espèce à décider si la Commission a le pouvoir d'attribuer le gain net tiré de la vente d'un bien d'une entreprise de services publics.

Vu la conclusion à laquelle j'arrive, point n'est besoin de se demander si la Commission a raisonnablement réparti le produit de la vente. Néanmoins, comme je le signale au par. 82, vu les motifs de mon collègue, je me penche brièvement sur la question de l'exercice du pouvoir discrétionnaire.

2.2 *Norme de contrôle*

Une décision administrative étant à l'origine du présent pourvoi, il faut déterminer le degré de déférence auquel a droit l'organisme qui l'a rendue. S'exprimant au nom de la Cour d'appel, le juge Wittmann a conclu que la question de la compétence de la Commission commandait l'application de la norme de la décision correcte. ATCO en convient, et moi aussi. Il n'y a pas lieu de faire preuve de

decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

Although it is not necessary to conduct a full analysis of the standard of review in this case, I will address the issue briefly in light of the fact that Binnie J. deals with the exercise of discretion in his reasons for judgment. The four factors that need to be canvassed in order to determine the appropriate standard of review of an administrative tribunal decision are: (1) the existence of a privative clause; (2) the expertise of the tribunal/board; (3) the purpose of the governing legislation and the particular provisions; and (4) the nature of the problem (*Pushpanathan*, at paras. 29-38).

In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

First, s. 26(1) of the AEUBA grants a right of appeal, but in a limited way. Appeals are allowed on a question of jurisdiction or law and only after leave to appeal is obtained from a judge:

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

déférence à l'égard de la décision de la Commission concernant son pouvoir d'attribuer le gain net tiré de la vente des biens. L'examen des facteurs énoncés par notre Cour dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, confirme cette conclusion, tout comme son raisonnement dans l'arrêt *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19.

22 Bien qu'il ne soit pas nécessaire d'approfondir la question de la norme de contrôle applicable en l'espèce, je l'examinerai brièvement puisque, dans ses motifs, le juge Binnie se prononce sur l'exercice du pouvoir discrétionnaire. Les quatre facteurs à considérer pour déterminer la norme de contrôle applicable à la décision d'un tribunal administratif sont les suivants : (1) l'existence d'une clause privative; (2) l'expertise du tribunal ou de l'organisme; (3) l'objet de la loi applicable et des dispositions en cause; (4) la nature du problème (*Pushpanathan*, par. 29-38).

23 Dans la présente affaire, il faut se garder de conclure hâtivement que la question en litige en est une de « compétence » puis de laisser tomber l'analyse pragmatique et fonctionnelle. L'examen exhaustif des facteurs s'impose.

24 Premièrement, le par. 26(1) de l'AEUBA prévoit un droit d'appel restreint qui ne peut être exercé que sur une question de compétence ou de droit et seulement avec l'autorisation d'un juge :

[TRADUCTION]

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

In addition, the AEUBA includes a privative clause which states that every action, order, ruling or decision of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court (s. 27).

25 The presence of a statutory right of appeal on questions of jurisdiction and law suggests a more searching standard of review and less deference to the Board on those questions (see *Pushpanathan*, at para. 30). However, the presence of the privative clause and right to appeal are not decisive, and one must proceed with the examination of the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (Div. Ct.), at para. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), at para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilities.

27 Nevertheless, the Court is concerned not with the general expertise of the administrative decision maker, but with its expertise in relation to the specific nature of the issue before it. Consequently, while normally one would have assumed that the Board's expertise is far greater than that of a court, the nature of the problem at bar, to adopt the language of the Court of Appeal (para. 35), "neutralizes" this deference. As I will elaborate below, the expertise of the Board is not engaged when deciding the scope of its powers.

De plus, l'AEUBA renferme une clause d'immunité de contrôle (ou clause privative) prévoyant que toute mesure, ordonnance ou décision de la Commission est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire (art. 27).

Le fait que la loi prévoit un droit d'appel sur une question de compétence ou de droit seulement permet de conclure à l'application d'une norme de contrôle plus stricte et donne à penser que notre Cour doit se montrer moins déférente vis-à-vis de la Commission relativement à ces questions (voir *Pushpanathan*, par. 30). Cependant, l'existence d'une clause d'immunité de contrôle et d'un droit d'appel n'est pas décisive, de sorte qu'il nous faut examiner la nature de la question à trancher et l'expertise relative du tribunal administratif à cet égard.

Deuxièmement, comme l'a fait remarquer la Cour d'appel, nul ne conteste que la Commission est un organisme spécialisé doté d'une grande expertise en ce qui concerne les ressources et les services publics de l'Alberta dans le domaine énergétique (voir, p. ex., *Consumers' Gas Co. c. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (C. div.), par. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant c. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), par. 14. Il s'agit en fait d'un tribunal administratif permanent qui régit depuis nombre d'années les services publics réglementés.

Quoi qu'il en soit, notre Cour s'intéresse non pas à l'expertise générale de l'instance administrative, mais à son expertise quant à la question précise dont elle est saisie. Par conséquent, même si l'on tiendrait normalement pour acquis que l'expertise de la Commission est beaucoup plus grande que celle d'une cour de justice, la nature de la question en litige « neutralise », pour reprendre le terme employé par la Cour d'appel (par. 35), la déférence qu'appelle cette considération. Comme je l'explique plus loin, l'expertise de la Commission n'est pas mise à contribution lorsqu'elle se prononce sur l'étendue de ses pouvoirs.

Third, the present case is governed by three pieces of legislation: the PUBA, the GUA and the AEUBA. These statutes give the Board a mandate to safeguard the public interest in the nature and quality of the service provided to the community by public utilities: *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), at paras. 20-22, aff'd [1977] 2 S.C.R. 822. The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting, as I will explain later.

28 Troisièmement, trois lois s'appliquent en l'espèce : la PUBA, la GUA et l'AEUBA. Suivant ces lois, la Commission a pour mission de protéger l'intérêt public quant à la nature et à la qualité des services fournis à la collectivité par les entreprises de services publics : *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576; *Dome Petroleum Ltd. c. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), par. 20-22, conf. par [1977] 2 R.C.S. 822. L'objet premier de ce cadre législatif est de réglementer adéquatement un service de gaz dans l'intérêt public ou, plus précisément, de réglementer un monopole dans l'intérêt public, grâce principalement à l'établissement des tarifs. J'y reviendrai.

The particular provision at issue, s. 26(2)(d)(i) of the GUA, which requires a utility to obtain the approval of the regulator before it sells an asset, serves to protect the customers from adverse results brought about by any of the utility's transactions by ensuring that the economic benefits to customers are enhanced (MacAvoy and Sidak, at pp. 234-36).

29 La disposition qui nous intéresse au premier chef, le sous-al. 26(2)d)(i) de la GUA, qui exige qu'un service public obtienne de l'organisme de réglementation l'autorisation de vendre un bien, vise à protéger les clients contre les effets préjudiciables de toute opération de l'entreprise en veillant à l'accroissement des avantages financiers qu'ils en tirent (MacAvoy et Sidak, p. 234-236).

While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

30 Même si, à première vue, on peut considérer que l'objet des lois pertinentes et la raison d'être de la Commission sont de réaliser un équilibre délicat entre divers intéressés — le service public et les clients — et, par conséquent, qu'ils impliquent un processus décisionnel polycentrique (*Pushpanathan*, par. 36), l'interprétation des lois habilitantes et des dispositions en cause (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) n'est pas, contrairement à ce qu'a conclu la Cour d'appel, une question polycentrique. Il s'agit plutôt de déterminer si, interprétées correctement, les lois habilitantes confèrent à la Commission le pouvoir d'attribuer le profit tiré de la vente d'un bien. Lorsque aucune question de principe n'est soulevée, le mandat premier de la Commission n'est pas d'interpréter l'AEUBA, la GUA ou la PUBA de manière abstraite, mais de veiller à ce que la tarification soit toujours juste et raisonnable (voir *Atco Ltd.*, p. 576). En l'espèce, ce rôle de protection n'entre pas en jeu. Partant, le troisième facteur commande l'application d'une norme de contrôle moins déférente.

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

Quatrièmement, la nature du problème n'est pas la même pour chacune des questions en litige. Les parties demandent en substance à notre Cour de répondre à deux questions (énoncées précédemment). Premièrement, le pouvoir d'attribuer le produit de la vente relève-t-il du mandat légal de la Commission? Dans sa décision, cette dernière a statué qu'elle avait le pouvoir d'attribuer aux clients une partie du produit de la vente des biens d'un service public. Elle a invoqué à l'appui ses pouvoirs légaux, les principes d'équité inhérents au « pacte réglementaire » (voir par. 63 des présents motifs) et ses décisions antérieures. Il s'agit clairement d'une question de droit et de compétence. L'on pourrait soutenir que la Commission ne possède pas une plus grande expertise qu'une cour de justice à cet égard. Une cour de justice est appelée à interpréter des dispositions ne comportant aucun aspect technique, ce qui n'était pas le cas de la disposition en litige dans l'arrêt *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28, par. 86. Qui plus est, l'interprétation de notions générales comme l'« intérêt public » et l'« imposition de conditions » (que l'on retrouve à l'al. 15(3)d) de l'AEUBA), n'est pas étrangère à une cour de justice et n'appartient pas à un domaine dans lequel il a été jugé qu'un tribunal administratif avait une plus grande expertise qu'une cour de justice. Deuxièmement, la méthode employée en l'espèce et l'attribution en résultant étaient-elles raisonnables? Pour répondre à cette question, il faut examiner la jurisprudence, les considérations de principe et la pratique d'autres organismes, ainsi que le détail de l'attribution en l'espèce. Il s'agit en somme d'une question mixte de fait et de droit.

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction"

Au vu des quatre facteurs, je conclus que chacune des questions en litige appelle une norme de contrôle distincte. Statuer sur le pouvoir de la Commission d'attribuer le produit de la vente d'un bien d'un service public requiert l'application de la norme de la décision correcte. Comme l'a dit la Cour d'appel, l'accent est mis sur les dispositions invoquées et interprétées par la Commission (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) et la

(*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

> . . . the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

As will be shown in the analysis below, I am of the view that the Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate *any* portion of the proceeds of sale of the property to ratepayers.

2.3 *Was the Board's Decision as to Its Jurisdiction Correct?*

Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they

question « touche la compétence » (*Pushpanathan*, par. 28). De plus, gardant présents à l'esprit tous les facteurs considérés, le caractère général de la proposition est un autre élément qui milite en faveur de la norme de la décision correcte, comme je l'ai dit dans l'arrêt *Pushpanathan* (par. 38) :

> . . . plus les propositions avancées sont générales, et plus les répercussions de ces décisions s'écartent du domaine d'expertise fondamental du tribunal, moins il est vraisemblable qu'on fasse preuve de retenue. En l'absence d'une intention législative implicite ou expresse à l'effet contraire manifestée dans les critères qui précèdent, on présumera que le législateur a voulu laisser aux cours de justice la compétence de formuler des énoncés de droit fortement généralisés.

33 La deuxième question, qui porte sur la méthode employée par la Commission pour attribuer le produit de la vente, appelle vraisemblablement une norme de contrôle plus déférente. D'une part, l'expertise de la Commission, dans ce domaine en particulier, son vaste mandat, la technicité de la question et l'objet général des lois en cause portent à croire que sa décision justifie un degré relativement élevé de déférence. D'autre part, l'absence d'une clause d'immunité de contrôle visant les questions de compétence et la nécessité de se référer au droit pour trancher la question, appellent l'application d'une norme de contrôle moins déférente privilégiant le caractère raisonnable de la décision. Il n'est toutefois pas nécessaire que je précise quelle norme de contrôle aurait été applicable en l'espèce.

34 Comme le montre l'analyse qui suit, je suis d'avis que la Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui confèrent la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients *quelque* partie du produit de la vente des biens.

2.3 *La Commission a-t-elle rendu une décision correcte au sujet de sa compétence?*

35 Un tribunal ou un organisme administratif est une création de la loi : il ne peut outrepasser les pouvoirs que lui confère sa loi habilitante, il doit

must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada* (3rd ed. 2001), at pp. 183-84).

36 In order to determine whether the Board's decision that it had the jurisdiction to allocate proceeds from the sale of a utility's asset was correct, I am required to interpret the legislative framework by which the Board derives its powers and actions.

2.3.1 General Principles of Statutory Interpretation

37 For a number of years now, the Court has adopted E. A. Driedger's modern approach as the method to follow for statutory interpretation (*Construction of Statutes* (2nd ed. 1983), at p. 87):

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

(See, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 186-87; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 54; *Barrie Public Utilities*, at paras. 20 and 86; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63, at para. 19.)

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

39 The City submits that it is both implicit and explicit within the express jurisdiction that has been

[TRADUCTION] « s'en tenir à son domaine de compétence et ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence » : Mullan, p. 9-10 (voir également S. Blake, *Administrative Law in Canada* (3e éd. 2001), p. 183-184).

Pour décider si la Commission a eu raison de conclure qu'elle avait le pouvoir d'attribuer le produit de la vente des biens d'un service public, je dois interpréter le cadre législatif à l'origine de ses attributions et de ses actes.

2.3.1 Principes généraux d'interprétation législative

Depuis un certain nombre d'années, notre Cour fait sienne l'approche moderne d'E. A. Driedger en matière d'interprétation des lois (*Construction of Statutes* (2e éd. 1983), p. 87) :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

(Voir, p. ex., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 186-187; *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6, par. 54; *Barrie Public Utilities*, par. 20 et 86; *Contino c. Leonelli-Contino*, [2005] 3 R.C.S. 217, 2005 CSC 63, par. 19.)

Toutefois, dans le domaine du droit administratif, plus particulièrement, la compétence des tribunaux et des organismes administratifs a deux sources : (1) l'octroi exprès par une loi (pouvoir explicite) et (2) la common law, suivant la doctrine de la déduction nécessaire (pouvoir implicite) (voir également D. M. Brown, *Energy Regulation in Ontario* (éd. feuilles mobiles), p. 2-15).

La Ville soutient que le pouvoir exprès de la Commission d'autoriser la vente des biens d'un

conferred upon the Board to approve or refuse to approve the sale of utility assets, that the Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be "implied" from the statutory regime as necessarily incidental to the explicit powers. I agree with ATCO's submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

As a preliminary submission, the City argues that given that ATCO applied to the Board for approval of both the sale transaction *and* the disposition of the proceeds of sale, this suggests that ATCO recognized that the Board has authority to allocate the proceeds as a condition of a proposed sale. This argument does not hold any weight in my view. First, the application for approval cannot be considered on its own an admission by ATCO of the jurisdiction of the Board. In any event, an admission of this nature would not have any bearing on the applicable law. Moreover, knowing that in the past the Board had decided that it had jurisdiction to allocate the proceeds of a sale of assets and had acted on this power, one can assume that ATCO was asking for the approval of the disposition of the proceeds should the Board not accept their argument on jurisdiction. In fact, a review of past Board decisions on the approval of sales shows that utility companies have constantly challenged the Board's jurisdiction to allocate the net gain on the sale of assets (see, e.g., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and 15(3)(d) of the AEUBA and

service public englobe — implicitement et explicitement — celui de décider de l'attribution du produit de la vente. ATCO réplique que non seulement ce pouvoir n'est pas expressément prévu par la loi, mais qu'on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Je suis d'accord avec elle et voici pourquoi.

2.3.2 Pouvoir explicite : sens grammatical et ordinaire

40 La Ville soutient à titre préliminaire qu'en lui demandant d'autoriser la vente des biens *et* l'attribution du produit de l'opération, ATCO a reconnu le pouvoir de la Commission d'imposer, comme condition de l'autorisation, une certaine attribution du produit de la vente projetée. À mon avis, l'argument ne tient pas. D'abord, la demande d'autorisation ne peut à elle seule être considérée comme une reconnaissance de la compétence de la Commission. De toute manière, une telle reconnaissance ne serait pas déterminante quant au droit applicable. De plus, sachant que, par le passé, la Commission avait jugé être investie du pouvoir d'attribuer le produit de la vente et avait exercé ce pouvoir, on peut présumer qu'ATCO lui a demandé d'autoriser l'attribution du produit de la vente pour le cas où elle rejetterait sa prétention relative à la compétence. En fait, il appert des décisions antérieures de la Commission d'autoriser ou non une opération que les entreprises de services publics contestent systématiquement son pouvoir d'attribuer le gain net en résultant (voir, p. ex., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

41 L'analyse exige au départ qu'on se penche sur le sens ordinaire des dispositions au cœur du litige, savoir le sous-al. 26(2)d)(i) de la GUA, le par. 15(1) et l'al. 15(3)d) de l'AEUBA et l'art. 37 de la

s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

GUA

26. . . .

(2) No owner of a gas utility designated under subsection (1) shall

. . .

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them

. . .

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

AEUBA

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB [Energy Resources Conservation Board] and the PUB [Public Utilities Board] that are granted or provided for by any enactment or by law.

. . .

(3) Without restricting subsection (1), the Board may do all or any of the following:

. . .

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

. . .

PUBA. Pour faciliter leur consultation, en voici le texte :

[TRADUCTION]

GUA

26. . . .

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

. . .

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

. . .

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

AEUBA

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB [Energy Resources Conservation Board] et à la PUB [Public Utilities Board].

. . .

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

. . .

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

. . .

PUBA

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

Some of the above provisions are duplicated in the other two statutes (see, e.g., PUBA, ss. 85(1) and 101(2)(d)(i); GUA, s. 22(1); see Appendix).

There is no dispute that s. 26(2) of the GUA contains a prohibition against, among other things, the owner of a utility selling, leasing, mortgaging or otherwise disposing of its property outside of the ordinary course of business without the approval of the Board. As submitted by ATCO, the power conferred is to approve without more. There is no mention in s. 26 of the grounds for granting or denying approval or of the ability to grant conditional approval, let alone the power of the Board to allocate the net profit of an asset sale. I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm"

PUBA

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

42 Certaines de ces dispositions figurent également dans les deux autres lois (voir, p. ex., le par. 85(1) et le sous-al. 101(2)d)(i) de la PUBA; le par. 22(1) de la GUA; texte en annexe).

43 Nul ne conteste que le par. 26(2) de la GUA interdit entre autres au propriétaire d'un service public d'aliéner ses biens, notamment par vente, location ou constitution d'hypothèque, sans l'autorisation de la Commission, sauf dans le cours normal des activités de l'entreprise. Comme l'a fait valoir ATCO, la Commission a le pouvoir d'autoriser l'opération, sans plus. L'article 26 ne fait aucune mention des raisons pour lesquelles l'autorisation peut être accordée ou refusée ni de la faculté d'autoriser l'opération à certaines conditions, encore moins du pouvoir d'attribuer le profit net réalisé. Je signale au passage que le pouvoir conféré au par. 26(2) suffit à dissiper la crainte de la Commission que le service public soit tenté de vendre ses biens à fort profit, au détriment des clients, si le bénéfice tiré de la vente lui revient entièrement.

44 Il est intéressant de noter que le par. 26(2) ne s'applique pas à tous les types de vente (ainsi que de location, de constitution d'hypothèque, d'aliénation, de grèvement ou de fusion). En effet, il prévoit une exception pour la vente effectuée dans le cours normal des activités de l'entreprise. Si le régime législatif conférait à la Commission le pouvoir d'attribuer le produit de la vente des biens d'un service public, comme on le prétend en l'espèce, il va de soi que le par. 26(2) s'appliquerait à toute vente de biens ou, à tout le moins, ne prévoirait une exception que pour la vente n'excédant pas un certain montant. Il appert que l'attribution du produit de la vente aux clients n'est pas l'un de ses objets.

test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

45 Therefore, a simple reading of s. 26(2) of the GUA does permit one to conclude that the Board does not have the power to allocate the proceeds of an asset sale.

46 The City does not limit its arguments to s. 26(2); it also submits that the AEUBA, pursuant to s. 15(3), is an express grant of jurisdiction because it authorizes the Board to impose any condition to any order so long as the condition is necessary in the public interest. In addition, it relies on the general power in s. 37 of the PUBA for the proposition that the Board may, in any matter within its jurisdiction, make any order pertaining to that matter that is not inconsistent with any applicable statute. The intended meaning of these two provisions, however, is lost when the provisions are simply read in isolation as proposed by the City: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735; *Marche*, at paras. 59-60; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26, at para. 105. These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of "public interest" found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale

D'ailleurs, en ce qui concerne les biens non affectés au service public et étrangers à la prestation du service, l'application de cette disposition, à supposer qu'elle s'applique, est nécessairement limitée (surtout lorsque la vente satisfait au critère de l'« absence de préjudice »). Le paragraphe 26(2) ne peut avoir qu'un seul objet, soit garantir que le bien n'est pas affecté au service public, de manière que son aliénation ne nuise ni à la prestation du service ni à sa qualité.

Par conséquent, la simple lecture du par. 26(2) de la GUA permet de conclure que la Commission n'a pas le pouvoir d'attribuer le produit de la vente d'un bien.

La Ville ne fonde pas son argumentation que sur le par. 26(2); elle fait aussi valoir que le par. 15(3) de l'AEUBA, qui autorise la Commission à assortir ses ordonnances des conditions qu'elle estime nécessaires dans l'intérêt public, confère un pouvoir exprès à la Commission. De plus, elle invoque le pouvoir général que prévoit l'art. 37 de la PUBA pour soutenir que la Commission peut, dans les domaines de sa compétence, rendre toute ordonnance qui n'est pas incompatible avec une disposition législative applicable. Or, considérer ces deux dispositions isolément comme le préconise la Ville fait perdre de vue leur véritable portée : R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 21; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735; *Marche*, par. 59-60; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26, par. 105. En eux-mêmes, le par. 15(3) et l'art. 37 sont vagues et sujets à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. De plus, la notion d'« intérêt public » à laquelle renvoie le par. 15(3) est très large et élastique; la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites.

Même si, à l'issue de la première étape du processus d'interprétation législative, je suis enclin à

proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

2.3.3 Implicit Powers: Entire Context

The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:

> As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

conclure que la loi est silencieuse en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente, je poursuis l'analyse car on peut néanmoins soutenir que les dispositions sont jusqu'à un certain point ambiguës et incohérentes.

48 Notre Cour a affirmé maintes fois que le sens grammatical et ordinaire d'une disposition n'est pas déterminant et ne met pas fin à l'analyse. Il faut tenir compte du contexte global de la disposition, même si, à première vue, le sens de son libellé peut paraître évident (voir *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3, par. 34; Sullivan, p. 20-21). Je vais donc examiner l'objet et l'esprit des lois habilitantes, l'intention du législateur et les normes juridiques pertinentes.

2.3.3 Pouvoir implicite : contexte global

49 Les dispositions en cause figurent dans des lois qui font elles-mêmes partie d'un cadre législatif plus large dont on ne peut faire abstraction :

> Œuvre d'un législateur rationnel et logique, la loi est censée former un système : chaque élément contribue au sens de l'ensemble et l'ensemble, au sens de chacun des éléments : « chaque disposition légale doit être envisagée, relativement aux autres, comme la fraction d'un ensemble complet » . . .
>
> (P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 388)

Comme dans le cadre de toute interprétation législative, appelée à circonscrire les pouvoirs d'un organisme administratif, une cour de justice doit tenir compte du contexte qui colore les mots et du cadre législatif. L'objectif ultime consiste à dégager l'intention manifeste du législateur et l'objet véritable de la loi tout en préservant l'harmonie, la cohérence et l'uniformité des lois en cause (*Bell ExpressVu*, par. 27; voir également l'*Interpretation Act*, R.S.A. 2000, ch. I-8, art. 10, à l'annexe). « L'interprétation législative est [. . .] l'art de découvrir l'esprit du législateur qui imprègne les textes législatifs » : *Bristol-Myers Squibb Co.*, par. 102.

50 Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Le pouvoir discrétionnaire que le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA confèrent à la Commission n'est donc pas absolu. Comme le dit ATCO, la Commission doit l'exercer en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois (voir Sullivan, p. 154-155). Dans le même ordre d'idées, le passage suivant de l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1756, se révèle pertinent :

> Les pouvoirs d'un tribunal administratif doivent évidemment être énoncés dans sa loi habilitante, mais ils peuvent également découler implicitement du texte de la loi, de son économie et de son objet. Bien que les tribunaux doivent s'abstenir de trop élargir les pouvoirs de ces organismes de réglementation par législation judiciaire, ils doivent également éviter de les rendre stériles en interprétant les lois habilitantes de façon trop formaliste.

Il incombe à notre Cour de déterminer l'intention du législateur et d'y donner effet (*Bell ExpressVu*, par. 62) sans franchir la ligne qui sépare l'interprétation judiciaire de la formulation législative (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 26; *Bristol-Myers Squibb Co.*, par. 174). Cela dit, cette règle permet l'application de « la doctrine de la compétence par déduction nécessaire » : sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l'objectif du régime législatif : voir Brown, p. 2-16.2; *Bell Canada*, p. 1756. Par le passé, les cours de justice canadiennes ont appliqué la doctrine de manière à investir les organismes administratifs de la compétence nécessaire à l'exécution de leur mandat légal :

> [TRADUCTION] Lorsque l'objet de la législation est de créer un vaste cadre réglementaire, le tribunal administratif doit posséder les pouvoirs qui, par nécessité pratique et déduction nécessaire, découlent du pouvoir réglementaire qui lui est expressément conféré.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

I understand the City's arguments to be as follows: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 *Historical Background and Broader Context*

The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

Pursuant to *The Public Utilities Act*, the first public utility board was established as a

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (H.C. Ont.), p. 658-659, conf. par (1983), 42 O.R. (2d) 731 (C.A.) (voir également *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601 (C.A.); *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174).

52 Voici quelles sont selon moi les prétentions de la Ville : (1) en acquittant leurs factures, les clients acquièrent un droit sur les biens du propriétaire du service public et ont donc droit à une partie du profit tiré de leur vente; (2) le pouvoir de la Commission d'autoriser ou non la vente des biens d'un service public emporte, par nécessité, celui d'assujettir l'autorisation à une certaine répartition du produit de la vente. La doctrine de la compétence par déduction nécessaire est au cœur de la deuxième prétention de la Ville. Je ne peux faire droit ni à l'une ni à l'autre de ces prétentions qui, à mon avis, sont diamétralement contraires au droit applicable, comme le révèle ci-après l'examen du contexte global.

53 Après un bref rappel historique, je me pencherai sur la principale fonction de la Commission, l'établissement des tarifs, puis sur les pouvoirs accessoires qui peuvent être déduits du contexte.

2.3.3.1 *Historique et contexte général*

54 Les services publics sont réglementés en Alberta depuis la création en 1915 de l'organisme appelé Board of Public Utility Commissioners en vertu de la loi intitulée *The Public Utilities Act*, S.A. 1915, ch. 6, inspirée d'une loi américaine similaire : H. R. Milner, « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101, p. 101. Bien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question.

55 Suivant *The Public Utilities Act*, la première commission des services publics, composée de

three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

56 The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

57 In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA, the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b));

2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a); PUBA, s. 101(2)(a));

3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));

4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and

trois membres, surveillait de manière générale tous les services publics (art. 21), enquêtait sur les tarifs (art. 23), rendait des ordonnances concernant l'équipement (art. 24) et exigeait que chacun des services publics lui remette la liste complète de ses tarifs (art. 23). Signalons pour les besoins du présent pourvoi que la loi de 1915 exigeait également d'un service public qu'il obtienne de l'organisme l'autorisation de vendre un bien en dehors du cours normal de ses activités (al. 29g)).

La Commission a été créée en février 1995 par le fusionnement de l'Energy Resources Conservation Board et de la Public Utilities Board (voir Institut canadien du droit des ressources, *Canada Energy Law Service : Alberta* (éd. feuilles mobiles), p. 30-3101). Dès lors, toutes les affaires qui étaient du ressort des organismes fusionnés relevaient de sa compétence exclusive. La Commission a tous les pouvoirs, les droits et les privilèges des organismes auxquels elle a succédé (AEUBA, art. 13, par. 15(1); GUA, art. 59).

Outre les pouvoirs prévus dans la loi de 1915, qui sont pratiquement identiques à ceux que confère actuellement la PUBA, la Commission est aujourd'hui investie des pouvoirs exprès suivants :

1. rendre une ordonnance concernant l'amélioration du service ou du produit (PUBA, al. 80b));

2. autoriser l'entreprise de services publics à émettre des actions, des obligations ou d'autres titres d'emprunt (GUA, al. 26(2)a); PUBA, al. 101(2)a));

3. autoriser l'entreprise de services publics à aliéner ou à grever ses biens, concessions, privilèges ou droits, notamment en les louant ou en les hypothéquant (GUA, sous-al. 26(2)d)(i); PUBA, sous-al. 101(2)d)(i));

4. autoriser la fusion ou le regroupement des biens, concessions, privilèges ou droits de l'entreprise de services publics (GUA, sous-al. 26(2)d)(ii); PUBA, sous-al. 101(2)d)(ii));

5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50 percent of the outstanding capital stock of the owner of the public utility (GUA, s. 27(1); PUBA, s. 102(1)).

5. autoriser la vente d'actions de l'entreprise de services publics à une société ou l'inscription dans ses registres de toute cession d'actions à une société lorsque la vente ou la cession ferait en sorte que cette société détienne plus de 50 pour 100 des actions en circulation du propriétaire de l'entreprise de services publics (GUA, par. 27(1); PUBA, par. 102(1)).

It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

58 Il appert donc de cette énumération qu'une entreprise de services publics a une marge de manœuvre très limitée. Il n'est fait mention ni du pouvoir d'attribuer le produit de la vente ni du pouvoir discrétionnaire de porter atteinte au droit de propriété.

Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

59 Même lorsque le législateur a décidé de créer la Commission en 1995, il n'a pas jugé opportun de modifier la PUBA ou la GUA pour donner au nouvel organisme le pouvoir d'attribuer le produit d'une vente. Pourtant, la question suscitait déjà la controverse (voir, p. ex., *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, et *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116). Selon un principe bien établi, le législateur est présumé connaître parfaitement le droit existant, qu'il s'agisse de la common law ou du droit d'origine législative (voir Sullivan, p. 154-155). Il est également censé être au fait de toutes les circonstances entourant l'adoption de la nouvelle loi.

Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

60 Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la GUA que son principal mandat, à l'égard des entreprises de services publics, est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première (voir Milner, p. 102; Brown, p. 2-16.6). S'exprimant au nom des juges majoritaires dans *Atco Ltd.*, le juge Estey a abondé dans ce sens (p. 576) :

It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the

Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par

community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board. [Emphasis added.]

In fact, even the Board itself, on its website (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm), describes its functions as follows:

> We regulate the safe, responsible, and efficient development of Alberta's energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City's first argument.

2.3.3.2 *Rate Setting*

62 Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:

> . . . the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. . . . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".

(R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory

les entreprises de services publics. Un régime de réglementation aussi vaste doit, pour être efficace, comprendre le droit de contrôler les réunions ou, pour reprendre l'expression du législateur, « l'union » des entreprises et installations existantes. Cela a sans aucun doute un rapport direct avec la fonction de fixation des tarifs qui constitue un des pouvoirs les plus importants attribués à la Commission. [Je souligne.]

Voici d'ailleurs comment la Commission décrit elle-même ses fonctions sur son site Internet (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm) :

> [TRADUCTION] La Commission réglemente l'exploitation sûre, responsable et efficiente des ressources énergétiques de l'Alberta — pétrole, gaz naturel, sables bitumineux, charbon et électricité — ainsi que les pipelines et les lignes de transport servant à l'acheminement vers les marchés. En ce qui a trait aux services publics, elle réglemente les tarifs des services de gaz naturel, d'électricité et d'eau appartenant au privé et le niveau de service y afférent, ainsi que les principaux réseaux de transport de gaz en Alberta, afin que les clients obtiennent des services sûrs et fiables à un prix juste et raisonnable. [Je souligne.]

Le processus par lequel la Commission fixe les tarifs est donc fondamental et son examen s'impose pour statuer sur la première prétention de la Ville.

2.3.3.2 *Établissement des tarifs*

La réglementation tarifaire a plusieurs objectifs — viabilité, équité et efficacité — qui expliquent le mode de fixation des tarifs :

> [TRADUCTION] . . . l'entreprise réglementée doit être en mesure de financer ses activités et tout investissement nécessaire à la poursuite de ses activités. [. . .] L'équité est liée à la redistribution de la richesse dans la société. L'objectif de la viabilité suppose déjà que les actionnaires ne doivent pas réaliser un « trop faible » rendement (défini comme la gratification requise pour assurer l'investissement continu dans l'entreprise), alors que celui de l'équité implique qu'ils ne doivent pas obtenir un rendement « trop élevé ».

(R. Green et M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities : A Manual for Regulators* (1999), p. 5)

Ces objectifs sont à l'origine d'un arrangement économique et social appelé « pacte

compact", which ensures that all customers have access to the utility at a fair price — nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 ("*Northwestern 1929*"), at pp. 192-93).

Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer *and* the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable . . . rates" (PUBA, s. 89(a); GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern 1979*"), at p. 691, adopted the following description of the process:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to

réglementaire » qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus, et qui, je l'explique plus loin, ne transmet aucun droit de propriété aux clients. Le pacte réglementaire accorde en fait aux entreprises réglementées le droit exclusif de vendre leurs services dans une région donnée à des tarifs leur permettant de réaliser un juste rendement au bénéfice de leurs actionnaires. En contrepartie de ce monopole, elles ont l'obligation d'offrir un service adéquat et fiable à tous les clients d'un territoire donné et voient leurs tarifs et certaines de leurs activités assujettis à la réglementation (voir Black, p. 356-357; Milner, p. 101; *Atco Ltd.*, p. 576; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186 (« *Northwestern 1929* »), p. 192-193).

64 Par conséquent, lorsqu'il s'agit d'interpréter les vastes pouvoirs de la Commission, on ne peut faire abstraction de ce subtil compromis servant de toile de fond à l'interprétation contextuelle. L'objet de la législation est de protéger le client *et* l'investisseur (Milner, p. 101). Le pacte ne supprime pas le caractère privé de l'entreprise. La Commission a essentiellement pour mandat d'établir une tarification qui accroît les avantages financiers des consommateurs et des investisseurs.

65 Elle tient son pouvoir de fixer les tarifs à la fois de la GUA (art. 16 et 17 et art. 36 à 45) et de la PUBA (art. 89 à 95). Il lui incombe de fixer des [TRADUCTION] « tarifs [. . .] justes et raisonnables » (PUBA, al. 89a); GUA, al. 36a)). Pour le faire, elle doit [TRADUCTION] « établi[r] une base tarifaire pour les biens du propriétaire » et « fixe[r] un juste rendement par rapport à cette base tarifaire » (GUA, par. 37(1)). Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern 1979* »), p. 691, notre Cour a décrit le processus comme suit :

> La PUB approuve ou fixe pour les services publics des tarifs destinés à couvrir les dépenses et à permettre à l'entreprise d'obtenir un taux de rendement ou profit convenable. Le processus s'accomplit en deux étapes. Dans la première étape, la PUB établit une base de tarification en calculant le montant des fonds investis par la compagnie en terrains, usines et équipements, plus le montant alloué au fonds de roulement, sommes dont

provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

il faut établir la nécessité dans l'exploitation de l'entreprise. C'est également à cette première étape qu'est calculé le revenu nécessaire pour couvrir les dépenses d'exploitation raisonnables et procurer un rendement convenable sur la base de tarification. Le total des dépenses d'exploitation et du rendement donne un montant appelé le revenu nécessaire. Dans une deuxième étape, les tarifs sont établis de façon à pouvoir produire, dans des conditions météorologiques normales, « le revenu nécessaire prévu ». Ces tarifs restent en vigueur tant qu'ils ne sont pas modifiés à la suite d'une nouvelle requête ou d'une plainte, ou sur intervention de la Commission. C'est également à cette seconde étape que les tarifs provisoires sont confirmés ou réduits et, dans ce dernier cas, qu'un remboursement est ordonné.

(See also *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-2.)

(Voir également *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984, p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (C. div. Ont.), p. 701-702.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

Pour établir la base tarifaire, la Commission tient donc compte (GUA, par. 37(2)) :

[TRADUCTION]

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

(b) to necessary working capital.

b) du capital nécessaire.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process:

Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. L'entreprise n'est d'ailleurs pas non plus à l'abri de la perte pouvant en découler. Il ressort du libellé des dispositions précitées que les biens appartiennent à l'entreprise de services publics. Droit de propriété sur les biens et droit au profit ou à la perte lors de leur réalisation vont de pair. L'investisseur s'attend à toucher le produit net, une fois tous les frais payés, soit l'équivalent de la valeur actualisée de l'investissement initial. Le versement aux clients d'une partie du produit net restant, à l'issue d'une nouvelle répartition, sape le processus d'investissement : MacAvoy et Sidak, p. 244. À vrai dire, les

MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

opérations de spéculation seraient encore plus fréquentes si le service public et ses actionnaires ne touchaient pas le profit éventuel, car les investisseurs s'attendraient à obtenir une meilleure prime de la seule manière alors possible, le rendement de la mise de fonds initiale; en outre, ils seraient moins disposés à courir un risque.

Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

68 La Ville a-t-elle raison alors de prétendre que les clients ont un droit de propriété sur le service public? Absolument pas. Sinon, les principes fondamentaux du droit des sociétés seraient dénaturés. En acquittant sa facture, le client paie pour le service réglementé un montant équivalant au coût du service et des ressources nécessaires. Il ne se porte pas implicitement acquéreur des biens des investisseurs. Le paiement n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens. Le client acquitte le prix du service, à l'exclusion du coût de possession des biens eux-mêmes : [TRADUCTION] « Le client d'un service public n'en est pas le propriétaire puisqu'il n'a pas droit au reliquat des biens » : MacAvoy et Sidak, p. 245 (voir également p. 237). Le client n'a rien investi. Les actionnaires, eux, ont investi des fonds et assument tous les risques car ils touchent le profit restant. Le client court seulement le [TRADUCTION] « risque que le prix change par suite de la modification (autorisée) du coût du service, ce qui n'arrive que périodiquement lors de la révision des tarifs par l'organisme de réglementation » (MacAvoy et Sidak, p. 245).

In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

69 Je suis d'accord avec ce qu'affirme ATCO à ce sujet au par. 38 de son mémoire :

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

> [TRADUCTION] Les biens en cause appartiennent au propriétaire du service public tout comme ses autres biens. Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

Wittmann J.A., at the Court of Appeal, said it best when he stated:

Comme l'a si bien dit le juge Wittmann, de la Cour d'appel :

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the

> [TRADUCTION] Le client d'un service public paie un service, mais n'obtient aucun droit de propriété sur les

assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945).

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case,

biens de cette entreprise. Lorsque le tarif établi correspond au prix du service pour la période considérée, le client n'acquiert à l'égard des biens non amortissables aucun droit fondé sur l'equity ou issu de la loi lorsqu'il n'a payé que pour l'utilisation de ces biens. [Je souligne; par. 64.]

Je suis entièrement d'accord. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. Alors que l'entreprise a été rémunérée pour le service fourni, les clients n'ont versé aucune contrepartie en échange du profit tiré de la vente des biens. L'argument voulant que les biens achetés soient pris en compte dans l'établissement de la base tarifaire ne doit pas embrouiller la question de savoir qui est le véritable titulaire du droit de propriété sur les biens et qui supporte les risques y afférents. Les biens comptent effectivement parmi les facteurs considérés pour fixer les tarifs, et un service public ne peut vendre un bien affecté à la prestation du service pour réaliser un profit et, ce faisant, diminuer la qualité du service ou majorer son prix. Même si les biens du service public sont pris en compte dans l'établissement de la base tarifaire, les actionnaires sont les seuls touchés lorsque la vente donne lieu à un profit ou à une perte. L'entreprise absorbe les pertes et les gains, l'appréciation ou la dépréciation des biens, eu égard à la conjoncture économique et aux défaillances techniques imprévues, mais elle continue de fournir un service fiable sur le plan de la qualité et du prix. Le client peut courir le risque que l'entreprise manque à ses obligations, mais cela ne lui donne pas droit au reliquat des biens. Sans m'appuyer indûment sur la jurisprudence américaine, je signale qu'aux États-Unis, l'arrêt de principe en la matière est *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), qui s'appuie sur le même principe que celui appliqué dans l'arrêt *Market St. Ry. Co. c. Railroad Commission of State of California*, 324 U.S. 548 (1945).

De plus, il faut reconnaître qu'une entreprise de services publics n'est pas une société d'État, une association d'assistance mutuelle, une coopérative ou une société mutuelle même si elle sert « l'intérêt public » en fournissant à la collectivité un service

the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 *The Power to Attach Conditions*

As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It

nécessaire (en l'occurrence, la distribution du gaz naturel). Son capital ne provient pas des pouvoirs publics ou des clients, mais d'investisseurs privés qui escomptent un rendement aussi élevé que celui offert par d'autres placements présentant les mêmes caractéristiques d'attractivité, de stabilité et de certitude (voir *Northwestern 1929*, p. 192). Les actionnaires s'attendent donc nécessairement à toucher le gain ou à subir la perte résultant de l'aliénation d'un élément d'actif de l'entreprise, comme un terrain ou un bâtiment.

71 Il appert de l'analyse qui précède portant sur le droit de propriété que la Commission ne pouvait effectuer un remboursement tacite en attribuant aux clients le profit tiré de la vente des biens au motif que les tarifs avaient été excessifs dans le passé. C'est pourquoi la première prétention de la Ville doit être rejetée. La Commission a tenté de remédier à une supposée rétribution excessive de l'entreprise de services publics par ses clients. Or, aucune des lois applicables ne lui confère le pouvoir d'effectuer un tel remboursement à partir d'une telle perception erronée. La jurisprudence des différentes provinces confirme que les organismes de réglementation n'ont pas le pouvoir de modifier les tarifs rétroactivement (*Northwestern 1979*, p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (C.A. Alb.), p. 715, autorisation d'appel refusée, [1981] 2 R.C.S. vii; *Re Dow Chemical Canada Inc.* (C.A.), p. 734-735). Qui plus est, on ne peut même pas dire qu'il y a eu paiement excessif : la tarification est un processus conjectural où clients et actionnaires assument ensemble leur part du risque lié aux activités de l'entreprise de services publics (voir MacAvoy et Sidak, p. 238-239).

2.3.3.3 *Le pouvoir d'imposer des conditions*

72 La Ville soutient en second lieu que le pouvoir d'attribuer le produit de la vente des biens d'un service public est nécessairement accessoire aux pouvoirs exprès que confèrent à la Commission l'AEUBA, la GUA et la PUBA. Elle fait valoir que la Commission a nécessairement ce pouvoir lorsqu'elle exerce celui — discrétionnaire — d'autoriser ou non la vente d'éléments d'actifs, puisqu'elle

submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

* [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
* [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
* [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
* [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
* [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

(See also Brown, at p. 2-16.3.)

74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the

peut assortir de toute condition l'ordonnance autorisant la vente. Je ne suis pas d'accord.

La Ville semble tenir pour acquis que la doctrine de la compétence par déduction nécessaire s'applique tout autant aux pouvoirs « définis largement » qu'à ceux qui sont « biens circonscrits ». Ce ne saurait être le cas. Dans sa décision *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, 23 mars 1987, par. 4.73, la Commission de l'énergie de l'Ontario a énuméré les situations dans lesquelles s'applique la doctrine de la compétence par déduction nécessaire :

[TRADUCTION]

* la compétence alléguée est nécessaire à la réalisation des objectifs du régime législatif et essentielle à l'exécution du mandat de la Commission;
* la loi habilitante ne confère pas expressément le pouvoir de réaliser l'objectif législatif;
* le mandat de la Commission est suffisamment large pour donner à penser que l'intention du législateur était de lui conférer une compétence tacite;
* la Commission n'a pas à exercer la compétence alléguée en s'appuyant sur des pouvoirs expressément conférés, démontrant ainsi l'absence de nécessité;
* le législateur n'a pas envisagé la question et ne s'est pas prononcé contre l'octroi du pouvoir à la Commission.

(Voir également Brown, p. 2-16.3.)

Il est donc clair que la doctrine de la compétence par déduction nécessaire sera moins utile dans le cas de pouvoirs largement définis que dans celui de pouvoirs bien circonscrits. Les premiers seront nécessairement interprétés de manière à ne s'appliquer qu'à ce qui est rationnellement lié à l'objet de la réglementation. C'est ce qu'explique la professeure Sullivan, à la p. 228 :

[TRADUCTION] En pratique, toutefois, l'analyse téléologique rend les pouvoirs conférés aux organismes administratifs presque infiniment élastiques. Un pouvoir bien circonscrit peut englober, par « déduction nécessaire », tout ce qui est requis pour que le responsable

purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

ou l'organisme puisse accomplir l'objet de son octroi. À l'inverse, on considère qu'un pouvoir largement défini vise uniquement ce qui est rationnellement lié à son objet. Il s'ensuit qu'un pouvoir a une portée qui augmente ou diminue au besoin, en fonction de son objet. [Je souligne.]

In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

75 En l'espèce, l'art. 15 de l'AEUBA, qui permet à la Commission d'imposer des conditions supplémentaires dans le cadre d'une ordonnance, paraît à première vue conférer un pouvoir dont la portée est infiniment élastique. J'estime cependant que la Ville ne saurait y avoir recours pour accroître les pouvoirs que le par. 26(2) de la GUA confère à la Commission. Notre Cour doit interpréter le par. 15(3) de l'AEUBA conformément à l'objet du par. 26(2).

MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;

2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and

3. It specifically seeks to prevent favoritism toward investors.

76 Dans leur article, MacAvoy et Sidak avancent trois raisons principales d'exiger qu'une vente soit autorisée par la Commission (p. 234-236) :

1. éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients;

2. garantir que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou d'autres intéressés;

3. éviter précisément que les investisseurs ne soient favorisés.

Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in

77 Par conséquent, pour qu'un organisme de réglementation ait le pouvoir d'attribuer le produit d'une vente, la preuve doit établir que ce pouvoir lui est nécessaire dans les faits pour atteindre les objectifs de la loi, ce qui n'est pas le cas en l'espèce (voir l'arrêt *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275 (C.A.)). Pour satisfaire aux trois exigences susmentionnées, il n'est pas nécessaire que la Commission détermine qui touchera le produit de la vente. Le volet intérêt public ne peut à lui seul lui conférer le pouvoir d'attribuer la totalité du profit tiré de la vente de biens. En fait, il n'est pas nécessaire à l'accomplissement de son mandat qu'elle puisse ordonner à l'entreprise de services

carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

79 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

publics de céder la plus grande partie du produit de la vente en contrepartie de l'autorisation accordée. La Commission dispose, dans les limites de sa compétence, d'autres moyens que l'appropriation du produit de la vente, le plus évident étant le refus d'autoriser une vente qui, à son avis, nuira à la qualité ou à la quantité des services offerts ou occasionnera des frais d'exploitation supplémentaires. Ce qui ne veut pas dire qu'elle ne peut jamais assujettir son autorisation à une condition. Par exemple, elle pourrait autoriser la vente à la condition que l'entreprise prenne des engagements en ce qui concerne le remplacement des biens en cause et leur rentabilité. Elle pourrait aussi exiger le réinvestissement d'une partie du produit de la vente dans l'entreprise afin de préserver un système d'exploitation moderne assurant une croissance optimale.

J'estime que permettre la confiscation du gain net tiré de la vente sous prétexte de protéger les clients et d'agir dans l'« intérêt public » c'est se méprendre grandement sur le pouvoir de la Commission d'autoriser ou non une vente et faire totalement abstraction des fondements économiques de la tarification exposés précédemment. S'approprier ainsi un produit net extraordinaire pour le compte des clients serait d'un opportunisme très poussé qui, en fin de compte, se traduirait par une hausse du coût du capital pour l'entreprise (MacAvoy et Sidak, p. 246). Au risque de me répéter, une entreprise de services publics est avant tout une entreprise privée dont l'objectif est de réaliser des profits. Cela n'est pas contraire au régime législatif, même si le pacte réglementaire modifie les principes économiques habituellement applicables, les lois habilitantes prévoyant explicitement différentes limitations. Aucune des trois lois pertinentes en l'espèce ne confère à la Commission le pouvoir d'attribuer le produit de la vente d'un bien et d'empiéter de la sorte sur le droit de propriété de l'entreprise de services publics.

Il est bien établi qu'une disposition législative susceptible d'avoir un effet confiscatoire doit être interprétée avec prudence afin de ne pas dépouiller les parties intéressées de leurs droits lorsque ce

legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 *Other Considerations*

Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 *If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?*

In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether

n'est pas l'intention manifeste du législateur (voir Sullivan, p. 400-403; Côté, p. 607-613; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64, par. 26; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349, p. 357; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167, p. 197). Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits, ce qui irait à l'encontre des principes d'interprétation susmentionnés.

80 Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut le prévoir expressément dans la loi, à l'instar de certains États américains (le Connecticut, par exemple).

2.4 *Autres considérations*

81 Dans le cadre du pacte réglementaire, les clients sont protégés par la procédure d'établissement des tarifs à l'issue de laquelle la Commission doit rendre une décision pondérée. Il appert du dossier que la Ville n'a pas saisi la Commission d'une demande d'approbation du tarif général en réponse à celle présentée par ATCO afin d'obtenir l'autorisation de vendre des biens. Néanmoins, si elle l'avait fait, la Commission aurait pu, de son propre chef, convoquer les parties intéressées à une audience afin de fixer de nouveaux tarifs justes et raisonnables tenant dûment compte de la situation financière nouvelle devant résulter de la vente (PUBA, al. 89a); GUA, art. 24, al. 36a), par. 37(3), art. 40) (texte en annexe).

2.5 *À supposer que la Commission ait eu le pouvoir de répartir le produit de la vente, a-t-elle exercé ce pouvoir de manière raisonnable?*

82 Vu ma conclusion touchant à la compétence, il n'est pas nécessaire de déterminer si la Commission

the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to *protect the customers* (i.e., was the order *necessary in the public interest*?); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine *if it should allocate* part of the sale proceeds to ratepayers. Rather, it merely guides the Board on *what to allocate and how to allocate it* (if it should do so in the first place). It is also interesting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed

a exercé son pouvoir discrétionnaire de façon raisonnable en répartissant le produit de la vente comme elle l'a fait. Toutefois, vu les motifs de mon collègue le juge Binnie, je me penche très brièvement sur la question. Le règlement du pourvoi aurait été le même si j'avais conclu que la Commission avait ce pouvoir, car j'estime que la décision qu'elle a rendue sur son fondement ne satisfaisait pas à la norme de la raisonnabilité.

Je ne vois pas très bien comment on pourrait conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs et ayant en outre conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients. À mon avis, une cour de justice appelée à contrôler la décision au fond doit se livrer à une analyse en deux étapes. Premièrement, elle doit déterminer si l'ordonnance était justifiée au vu de l'obligation de la Commission de *protéger les clients* (c.-à-d. l'ordonnance était-elle *nécessaire dans l'intérêt public*?). Deuxièmement, dans l'affirmative, elle doit déterminer si la Commission a bien appliqué la *formule TransAlta* (voir le par. 12 des présents motifs), qui renvoie à la différence entre la valeur comptable nette des biens et leur coût historique, d'une part, et à l'appréciation des biens, d'autre part. Pour les besoins de l'analyse, je ne vois dans la deuxième étape qu'une opération mathématique, rien de plus. Je ne crois pas que la *formule TransAlta* oriente la décision de la Commission *d'attribuer ou non* une partie du produit de la vente aux clients. Elle ne préside qu'à la détermination de *ce qui sera attribué et des modalités d'attribution* (lorsqu'elle a décidé qu'il y avait lieu d'attribuer le produit de la vente). Il importe également de signaler que nul ne conteste que seule la valeur comptable figurant dans les états financiers de l'entreprise de services publics doit être utilisée pour le calcul.

Je le répète, la Commission n'était même pas justifiée, à mon sens, d'exercer le pouvoir d'attribuer le produit de la vente. Suivant son raisonnement même, elle ne doit exercer son pouvoir discrétionnaire d'agir dans l'intérêt public que lorsque les

or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation:

> With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.

(Decision 2002-037, at para. 54)

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude

clients subiraient ou seraient susceptibles de subir un préjudice. Or sa conclusion à ce sujet est claire : aucun préjudice ou risque de préjudice n'était associé à l'opération projetée :

> [TRADUCTION] Comme les mêmes services seront offerts à partir d'autres installations, et vu l'acceptation de ce transfert par les clients, la Commission est convaincue que la vente ne devrait pas avoir de répercussions sur le niveau de service. Quoi qu'il en soit, elle considère que le niveau de service offert pourra au besoin faire l'objet d'un examen et d'une mesure corrective dans le cadre d'une procédure ultérieure.

(Décision 2002-037, par. 54)

Après avoir déclaré que, tout bien considéré, les clients ne seraient pas lésés, la Commission a statué au vu des éléments de preuve présentés qu'ils réaliseraient apparemment des économies. Aucun droit légitime des clients ne pouvait ni ne devait être protégé par un refus d'autorisation ou un octroi assorti de la condition de répartir le produit de la vente d'une certaine manière. Même si la Commission avait conclu à la possibilité que la vente ait un effet préjudiciable, comment pouvait-elle, à ce stade, attribuer le produit de la vente en fonction d'une perte éventuelle indéterminée? La mauvaise foi présumée d'ATCO qui paraît sous-tendre la détermination de la Commission à protéger le public contre un risque éventuel, en l'absence de tout fondement factuel, me préoccupe également. De toute manière, je l'ai déjà dit, cette détermination à protéger l'intérêt public est également difficile à concilier avec le pouvoir exprès de la Commission de prévenir tout préjudice causé aux clients en refusant d'autoriser la vente des biens d'un service public. Je rappelle que la Commission jouit d'un pouvoir discrétionnaire considérable dans l'établissement des tarifs futurs afin de protéger l'intérêt public.

85 Par conséquent, je suis d'avis que la Commission n'a pas cerné d'intérêt public à protéger et qu'aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Indépendamment de ma conclusion au sujet de la compétence de la Commission, je conclus que sa décision d'exercer son pouvoir discrétionnaire

that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e., context, legislative intention and objective. Going further than required by reading in *unnecessary* powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

88 BINNIE J. (dissenting) — The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board ("Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the

de protéger l'intérêt public ne satisfaisait pas à la norme de la raisonnabilité.

3. Conclusion

Le rôle de notre Cour dans le présent pourvoi a été d'interpréter les lois habilitantes en tenant compte comme il se doit du contexte, de l'intention du législateur et de l'objectif législatif. Aller plus loin et conclure à l'issue d'une interprétation large que l'organisme administratif jouit de pouvoirs *non nécessaires* n'est pas conforme aux règles d'interprétation législative. Une telle approche est particulièrement dangereuse lorsqu'un droit de propriété est en jeu.

La Commission n'avait pas le pouvoir d'attribuer le produit de la vente d'un bien du service public; sa décision ne satisfaisait pas à la norme de la décision correcte. Par conséquent, je suis d'avis de rejeter le pourvoi de la Ville et d'accueillir le pourvoi incident d'ATCO, avec dépens dans les deux instances. Je suis également d'avis d'annuler la décision de la Commission et de lui renvoyer l'affaire en lui enjoignant d'autoriser la vente des biens d'ATCO et de reconnaître son droit au produit de la vente.

Version française des motifs de la juge en chef McLachlin et des juges Binnie et Fish rendus par

LE JUGE BINNIE (dissident) — L'intimée, ATCO Gas and Pipelines Ltd. (« ATCO »), fait partie d'une grande société qui, directement et par l'entremise de diverses filiales, exploite à la fois des entreprises réglementées et des entreprises non réglementées. L'Alberta Energy and Utilities Board (« Commission ») estime qu'il n'est pas dans l'intérêt public d'encourager les entreprises de services publics à jumeler leurs activités dans les deux secteurs. Plus particulièrement, elle a adopté des politiques afin de dissuader les entreprises de services publics de faire de leur secteur réglementé un lieu de spéculation foncière et d'augmenter ainsi le rendement de leurs investissements indépendamment du cadre réglementaire. En attribuant une partie du profit à l'entreprise de services publics (et à ses actionnaires), la Commission récompense la diligence avec laquelle elle se départit de biens qui ne sont

profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

plus productifs ou qui pourraient l'être davantage s'ils étaient employés autrement. Toutefois, en portant une partie du profit au crédit de la base tarifaire de l'entreprise (c.-à-d. en la déduisant d'autres coûts), la Commission tente d'empêcher les entreprises de services publics de céder à la tentation d'infléchir les décisions afférentes à leurs activités réglementées pour favoriser la réalisation de profits indus. De son point de vue, un tel compromis est nécessaire dans l'intérêt du public, celui-ci conférant à ATCO un monopole dans un secteur d'activité. Dans la recherche de ce compromis, la Commission a autorisé ATCO à vendre un terrain et un entrepôt situés au centre-ville de Calgary, mais refusé qu'elle conserve, au bénéfice de ses actionnaires, la totalité du profit découlant de l'appréciation du terrain dont le coût d'acquisition était pris en compte, depuis 1922, pour la tarification du gaz naturel. La Commission a ordonné que le profit tiré de la vente soit attribué à raison d'un tiers à ATCO et que les deux tiers servent à réduire ses coûts, contribuant à contenir toute hausse des tarifs et favorisant ainsi la clientèle.

I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

89 J'ai lu avec intérêt les motifs de mon collègue le juge Bastarache, mais, en toute déférence, je ne suis pas d'accord avec ses conclusions. Comme nous le verrons, le par. 15(3) de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), confère à la Commission le pouvoir d'assujettir la vente aux [TRADUCTION] « conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Il appartenait à la Commission de décider de la nécessité d'imposer des conditions dans l'intérêt public. La Cour d'appel de l'Alberta a infirmé la décision de la Commission. En toute déférence, j'estime que la Commission était mieux placée que la Cour d'appel ou que notre Cour pour juger de la nécessité de protéger l'intérêt public dans ce domaine. J'accueillerais le pourvoi et rétablirais la décision de la Commission.

I. Analysis

ATCO's argument boils down to the proposition announced at the outset of its factum:

In the absence of any property right or interest and of any harm to the customers arising from the

I. Analyse

90 La thèse d'ATCO se résume à ce qu'elle affirme au début de son mémoire :

[TRADUCTION] À défaut de tout droit de propriété et de tout préjudice causé à la clientèle par le

withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.

(Respondent's factum, at para. 2)

91 For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "conside[r] necessary in the public interest".

A. *The Board's Statutory Authority*

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA"), provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them . . .". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions):

In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property.

dessaisissement, rien ne justifiait qu'on puise dans les poches de l'entreprise. En fait, le présent pourvoi doit être réglé au regard du droit de propriété.

(Mémoire de l'intimée, par. 2)

Pour les motifs qui suivent, je ne crois pas que le litige ressortisse au droit de propriété. ATCO a choisi d'investir dans un secteur réglementé, celui de la distribution du gaz, où le rendement est établi par la Commission, et non par le marché. À mon avis, la question en litige est essentiellement de savoir si la Cour d'appel de l'Alberta était justifiée de restreindre les conditions que la Commission pouvait « juge[r] nécessaires dans l'intérêt public ».

A. *Les pouvoirs légaux de la Commission*

La première question qui se pose est celle de la compétence. D'où la Commission tient-elle le pouvoir de rendre l'ordonnance que conteste ATCO? La réponse de la Commission comporte trois volets. Le paragraphe 22(1) de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA »), prévoit entre autres que [TRADUCTION] « [l]a Commission assure la surveillance générale des services de gaz et de leurs propriétaires . . . ». Selon la Commission, cette disposition lui confère le vaste pouvoir d'établir des politiques qui débordent le cadre du règlement de demandes au cas par cas (approbation de tarifs, etc.). Élément plus pertinent encore, le sous-al. 26(2)d)(i) de la même loi interdit à l'entreprise réglementée de vendre ses biens, de les louer ou de les grever par ailleurs sans l'autorisation de la Commission. (Voir dans le même sens le sous-al. 101(2)d)(i) de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45.) Tous conviennent que cette limitation s'applique à la vente projetée par ATCO du terrain et de l'entrepôt situés au centre-ville de Calgary et que si les circonstances l'avaient justifié, la Commission aurait pu simplement refuser son autorisation. En l'espèce, la Commission a décidé d'autoriser la vente et de l'assujettir à certaines conditions. Elle a statué que le pouvoir plus large de refuser d'autoriser la vente englobait celui, plus restreint, de l'autoriser en l'assujettissant à certaines conditions :

[TRADUCTION] Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher une

In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

(Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576, Estey J., for the majority, stated:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what *the Board* considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. ATCO says the Board overstepped even these generous limits. In ATCO's submission:

> Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

(Respondent's factum, at para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate

entreprise de services publics de se départir d'un bien. Il s'ensuit donc qu'elle peut autoriser une aliénation et l'assortir de conditions susceptibles de bien protéger les intérêts du consommateur.

(Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), par. 47)

Il n'est toutefois pas nécessaire qu'elle s'appuie sur un tel pouvoir implicite pour établir des conditions. Je le répète, le par. 15(3) de l'AEUBA confère explicitement à la Commission le pouvoir de [TRADUCTION] « rendre toute autre ordonnance et [d']imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Dans *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576, le juge Estey a dit au nom des juges majoritaires :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par les entreprises de services publics. [Je souligne.]

Le paragraphe 15(3) dispose que les conditions fixées sont celles que *la Commission* juge nécessaires. Évidemment, son pouvoir discrétionnaire n'est pas illimité. Elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré : *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29. ATCO prétend que la Commission a même outrepassé un aussi large pouvoir. Voici un extrait de son mémoire :

> [TRADUCTION] Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

(Mémoire de l'intimée, par. 38)

À mon avis, toutefois, la Commission devait déterminer la hauteur du profit qu'ATCO était admise à tirer de son investissement dans une entreprise réglementée.

93

Subsidiairement, ATCO soutient que la Commission s'est indûment livrée à une

making". But Alberta is an "original cost" jurisdiction, and no one suggests that the Board's original cost rate making during the 80-plus years this investment has been reflected in ATCO's ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of "all gas utilities, and the owners of them" were matters squarely within the Board's statutory mandate.

B. *The Board's Decision*

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate-making responsibilities. However, I do not agree that the hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

> the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the Board was not engaged in fixing rates (if that could provide any justification, which is denied).
>
> (Respondent's factum, at para. 98)

95 It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171. That case (which I will refer to as *TransAlta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174:

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve

« tarification rétroactive ». Or, l'Alberta a opté pour la tarification selon le « coût historique » et personne ne laisse entendre que, depuis plus de 80 ans, la Commission applique à tort cette méthode qui prend en compte l'investissement d'ATCO pour l'établissement de sa base tarifaire. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale [TRADUCTION] « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission.

B. *La décision de la Commission*

ATCO soutient que la décision de la Commission doit être considérée isolément, sans égard aux attributions de l'organisme en matière de tarification. Toutefois, je ne crois pas que l'audience tenue pour l'application de l'art. 26 puisse être ainsi dissociée des attributions générales de la Commission à titre d'organisme de réglementation. Dans son mémoire, ATCO fait valoir ce qui suit :

> [TRADUCTION] . . . la demande d'[ATCO] n'avait rien à voir avec l'approbation de tarifs et la Commission n'était pas engagée dans un processus de tarification (à supposer que cela ait pu la justifier, ce qui est nié).
>
> (Mémoire de l'intimée, par. 98)

Il semble que la Commission ait entendu la demande d'autorisation fondée sur l'art. 26 indépendamment d'une demande d'approbation de tarifs en raison, premièrement, de la manière dont ATCO avait engagé l'instance et, deuxièmement, de l'approbation de cette démarche par la Cour d'appel de l'Alberta dans *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171 (« *TransAlta (1986)* »). Il s'agit de l'arrêt de principe albertain en ce qui concerne l'attribution du profit réalisé lors de l'aliénation d'un bien affecté à un service public, et la Cour d'appel y a énoncé la *formule TransAlta* que la Commission a appliquée en l'espèce. Voici ce qu'a dit le juge Kerans à ce sujet (p. 174) :

> [TRADUCTION] Je signale en passant que je comprends maintenant que toutes les parties ont intérêt à ce que

issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted:

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding.* On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Underlining and italics added.]

(Decision 2002-037, at para. 13)

In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

les questions de cette nature soient, si possible, résolues avant l'audition de la demande générale de majoration tarifaire de manière à ne pas alourdir cette procédure déjà complexe.

96 Fort de ces propos de la Cour d'appel de l'Alberta, j'accorderais peu d'importance à l'argument procédural d'ATCO. Nous le verrons, la décision de la Commission est directement liée à la tarification générale, les deux tiers du profit étant déduits des coûts à partir desquels sont ultimement déterminés les besoins en revenus d'ATCO. Je l'ai déjà dit, le profit tiré de la vente des biens d'ATCO situés à Calgary constituera une rentrée courante (et non historique), et si la décision de la Commission est confirmée, les deux tiers du profit tiré de l'opération seront pris en compte pour la tarification ultérieure (et non de manière rétroactive).

97 L'audience tenue pour l'application de l'art. 26 s'est déroulée en deux étapes. La Commission a d'abord décidé qu'elle ne refusait pas d'autoriser la vente projetée vu l'« absence de préjudice », un critère qu'elle avait élaboré au fil des ans, mais qui n'était pas prévu dans les lois (décision 2001-78). Cependant, elle a lié son autorisation à l'examen subséquent des conséquences financières. Comme elle l'a elle-même fait remarquer :

> [TRADUCTION] Dans la décision 2001-78, la Commission a autorisé la vente parce qu'il avait été établi que les clients ne s'opposaient pas à l'opération, qu'ils ne subiraient pas une diminution de service et que la vente ne risquait pas de leur infliger un préjudice financier *qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure.* Elle a donc conclu à l'absence de préjudice et décidé que la vente pouvait avoir lieu. [Soulignements et italiques ajoutés.]

(Décision 2002-037, par. 13)

98 ATCO fait abstraction de ce qui figure en italique dans cet extrait. Elle soutient que la Commission était *functus officio* après la première étape de l'audience. Or, elle avait elle-même consenti au déroulement de la procédure en deux étapes, et la deuxième partie de l'audience a effectivement été consacrée à sa demande d'attribution du profit tiré de la vente.

99 In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called "the regulatory compact" (Decision 2002-037, at para. 44). In the Board's view:

(a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;

(b) decisions made about the utility should be driven by both parties' interests;

(c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and

(d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

100 For purposes of this appeal, it is important to set out the Board's policy reasons in its own words:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.
>
> The Board believes that some method of balancing both parties' interests will result in optimization

Au cours de la deuxième étape de l'audition de la demande fondée sur l'art. 26, la Commission a attribué un tiers du profit net à ATCO et deux tiers à la base tarifaire (au bénéfice des clients). Elle a exposé les raisons pour lesquelles elle jugeait cette répartition nécessaire à la protection de l'intérêt public. Elle a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients dans le cadre de ce qu'elle a appelé [TRADUCTION] « le pacte réglementaire » (décision 2002-037, par. 44). Selon la Commission :

a) il faut mettre en balance les intérêts des clients et ceux des propriétaires de l'entreprise de services publics;

b) les décisions visant l'entreprise doivent tenir compte des intérêts des deux parties;

c) attribuer aux clients la totalité du profit tiré de la vente n'inciterait pas l'entreprise à accroître son efficacité et à réduire ses coûts;

d) en attribuer la totalité à l'entreprise pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée.

Pour les besoins du présent pourvoi, il importe de rappeler les considérations de principe invoquées par la Commission :

> [TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.
>
> À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation.
>
> La Commission croit qu'une certaine mise en balance des intérêts des deux parties permettra la

of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. *Standard of Review*

The Court's modern approach to this vexed question was recently set out by McLachlin C.J. in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that the Board considers necessary in the public interest" (s. 15(3)(d) of the AEUBA).

réalisation optimale des objectifs de l'entreprise dans son propre intérêt et dans celui de ses clients. Par conséquent, elle estime équitable en l'espèce et conforme à ses décisions antérieures de partager selon la formule TransAlta le profit net tiré de la vente du terrain et des bâtiments. [Je souligne; par. 112-114.]

101 On a informé notre Cour que les deux tiers du profit attribués aux clients seraient déduits des coûts considérés pour l'établissement de la base tarifaire d'ATCO, puis amortis sur un certain nombre d'années.

C. *La norme de contrôle*

102 L'approche actuelle de notre Cour à l'égard de cette question épineuse a récemment été précisée par la juge en chef McLachlin dans l'arrêt *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26 :

> Selon l'analyse pragmatique et fonctionnelle, la norme de contrôle est déterminée en fonction de quatre facteurs contextuels — la présence ou l'absence dans la loi d'une clause privative ou d'un droit d'appel; l'expertise du tribunal relativement à celle de la cour de révision sur la question en litige; l'objet de la loi et de la disposition particulière; la nature de la question — de droit, de fait ou mixte de fait et de droit. Les facteurs peuvent se chevaucher. L'objectif global est de cerner l'intention du législateur, sans perdre de vue le rôle constitutionnel des tribunaux judiciaires dans le maintien de la légalité.

103 Je n'entends pas reprendre les propos de mon collègue le juge Bastarache à ce sujet. Nous convenons que la norme applicable en matière de compétence est celle de la décision correcte. Nous convenons également qu'en ce qui a trait à l'*exercice* de sa compétence par la Commission, une déférence accrue s'impose. Il ne peut être interjeté appel d'une décision de la Commission que sur une question de droit ou de compétence. La Commission en sait bien davantage qu'une cour de justice sur les services de gaz et les limites qui doivent leur être imposées « dans l'intérêt public » lorsqu'ils effectuent des opérations relatives à des biens dont le coût est inclus dans la base tarifaire. De plus, il est difficile d'imaginer un pouvoir discrétionnaire plus vaste que celui

The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, at p. 34:

> The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), vol. 1, at para. 14:2622: "'*Objective' and 'Subjective' Grants of Discretion*".

105 The expert qualifications of a regulatory Board are of "utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause", as stated by Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335. He continued:

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.
>
> (This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

— conféré à la Commission — d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » (al. 15(3)d) de l'AEUBA). L'élément subjectif de ce pouvoir (« qu'elle juge nécessaires »), l'expertise du décideur et la nature de la décision (« dans l'intérêt public ») appellent à mon avis la plus grande déférence et l'application de la norme de la décision manifestement déraisonnable.

En ce qui a trait à l'élément « qu'elle juge nécessaires », le juge Martland a dit ce qui suit dans l'arrêt *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24, p. 34 :

> [TRADUCTION] En l'espèce, il n'appartient pas à une cour de justice de déterminer si les terrains de l'intimé étaient ou non « nécessaires », mais bien si le ministre a « estimé » qu'ils l'étaient.

Voir également D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (éd. feuilles mobiles), vol. 1, par. 14:2622 : « *"Objective" and "Subjective" Grants of Discretion* ».

Comme l'a dit le juge Sopinka dans l'arrêt *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 335, l'expertise que possède un organisme de réglementation est « de la plus haute importance pour ce qui est de déterminer l'intention du législateur quant au degré de retenue dont il faut faire preuve à l'égard de la décision d'un tribunal en l'absence d'une clause privative intégrale ». Il a ajouté :

> Même lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel, comme c'était le cas dans l'affaire *Bell Canada* [*c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722], on a souligné qu'il y avait lieu pour le tribunal d'appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.
>
> (Cette opinion incidente a été citée avec approbation dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 592.)

A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In *TransAlta (1986)*, the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, where this Court stated, at p. 357:

> [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest . . . . [Emphasis added.]

This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185, at p. 190:

> It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R. F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)), who wrote in *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

106 L'exercice d'un pouvoir de réglementation « dans l'intérêt public » exige nécessairement la conciliation d'intérêts économiques divergents. Il est depuis longtemps établi que la question de savoir ce qui est « dans l'intérêt public » n'est pas véritablement une question de droit ou de fait, mais relève plutôt de l'opinion. Dans *TransAlta (1986)*, la Cour d'appel de l'Alberta a fait (au par. 24) un parallèle entre la portée des mots « intérêt public » et celle de l'expression bien connue « la commodité et les besoins du public » en citant l'arrêt *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353, où notre Cour avait dit ce qui suit à la p. 357 :

> [TRADUCTION] [L]a question de savoir si la commodité et les besoins du public nécessitent l'accomplissement de certains actes n'est pas une question de fait. C'est avant tout l'expression d'une opinion. Il faut évidemment que la décision de la Commission se fonde sur des faits mis en preuve, mais cette décision ne peut être prise sans que la discrétion administrative y joue un rôle important. En conférant à la Commission ce pouvoir discrétionnaire, la Législature a délégué à cet organisme la responsabilité de décider, dans l'intérêt du public . . . [Je souligne.]

107 Dans cet extrait, notre Cour reprenait l'opinion incidente du juge Rand dans l'arrêt *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185, p. 190 :

> [TRADUCTION] On a prétendu, et la Cour a semblé d'accord, que l'appréciation de la commodité et des besoins du public est elle-même une question de fait, mais je ne puis souscrire à cette opinion : il ne s'agit pas de déterminer si objectivement telle situation existe. La décision consiste à exprimer une opinion, en l'espèce, l'opinion du Comité et du Comité seulement. [Je souligne.]

108 Évidemment, même un pouvoir aussi vaste n'est pas absolu. Mais reconnaître qu'il puisse faire l'objet d'abus n'implique pas qu'il doive être restreint. Je suis d'accord sur ce point avec l'avis exprimé par le juge Reid (coauteur de R. F. Reid et H. David, *Administrative Law and Practice* (2e éd. 1978), et coéditeur de P. Anisman et R. F. Reid, *Administrative Law Issues and Practice* (1995)), dans la décision *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (C. div.), p. 97, au sujet des pouvoirs de la Commission des valeurs mobilières de l'Ontario :

. . . when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 42.)

109 "Patent unreasonableness" is a highly deferential standard:

A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.

(*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my colleague sees it). As will be seen, the Board's response is well within the range of established regulatory opinions. Hence, even if the Board's conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. *Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order "In the Public Interest"?*

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from

[TRADUCTION] . . . lorsque la Commission a agi de bonne foi en se souciant clairement et véritablement de l'intérêt public et en fondant son opinion sur des éléments de preuve, le risque que l'étendue de son pouvoir discrétionnaire puisse un jour l'inciter à l'exercer abusivement et à se placer ainsi au-dessus de la loi ne fait pas de l'existence de ce pouvoir une mauvaise chose en soi et n'exige pas l'annulation de la décision de la Commission.

(Notre Cour a fait mention, apparemment avec approbation, de la décision *C.T.C. Dealer Holdings* dans l'arrêt *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37, par. 42.)

La norme du « manifestement déraisonnable » appelle un degré élevé de déférence judiciaire :

La méthode de la décision correcte signifie qu'il n'y a qu'une seule réponse appropriée. La méthode du caractère manifestement déraisonnable signifie que de nombreuses réponses appropriées étaient possibles, sauf celle donnée par le décideur.

(*S.C.F.P.*, par. 164)

Cela dit, il importe peu à mon sens que la norme applicable soit celle du manifestement déraisonnable (comme je le pense) ou celle du raisonnable *simpliciter* (comme le croit mon collègue). Nous le verrons, la décision de la Commission se situe dans les limites des opinions exprimées par les organismes de réglementation. Même si une norme moins déférente s'appliquait aux conditions imposées par la Commission, je ne verrais aucune raison d'intervenir.

D. *La Commission avait-elle le pouvoir d'assortir son autorisation des conditions en cause « dans l'intérêt public »?*

ATCO prétend que la Commission n'avait pas le pouvoir d'imposer des conditions ayant un effet « confiscatoire ». Or, en s'exprimant ainsi, elle présume de la question en litige. La bonne démarche n'est pas de supposer qu'ATCO avait droit au profit net tiré de la vente, puis de se demander si la Commission pouvait le confisquer. L'investissement de 83 000 $ d'ATCO a graduellement été pris en

time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

compte dans sa base tarifaire réglementaire puisque l'acquisition du terrain s'est échelonnée de 1922 à 1965. Dans un secteur réglementé, le rendement juste et équitable est déterminé par l'organisme de réglementation compétent et non par le marché spéculatif et aléatoire de l'immobilier.

I do not think the legal debate is assisted by talk of "confiscation". ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board's jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

112 Je ne crois pas que l'allégation d'effet « confiscatoire » apporte quoi que ce soit au débat juridique. La loi interdit à ATCO de se départir de ses biens sans l'autorisation de la Commission et investit cette dernière du pouvoir d'assortir son autorisation de conditions. Ce n'est donc pas l'*existence* de la compétence qui est en litige, mais plutôt la manière dont la Commission l'a *exercée* en imposant des conditions et, plus particulièrement, en répartissant le profit net tiré de la vente.

E. *Did the Board Improperly Exercise the Jurisdiction It Possessed to Impose Conditions the Board Considered "Necessary in the Public Interest"?*

E. *La Commission a-t-elle exercé sa compétence irrégulièrement en imposant les conditions qu'elle jugeait « nécessaires dans l'intérêt public »?*

There is no doubt that there are many approaches to "the public interest". Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most. ATCO concedes that its "property" claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

113 Il y a évidemment de nombreuses façons de concevoir « l'intérêt public ». Celle de la Commission tient essentiellement (et de manière inhérente) à son opinion et à son pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre et qu'aux États-Unis, la pratique doit être interprétée à la lumière de la protection constitutionnelle du droit de propriété, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. ATCO reconnaît que sa prétention fondée sur le « droit de propriété » ne saurait tenir face à l'intention contraire du législateur, mais elle affirme qu'une telle intention ne ressort pas des lois.

Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers

114 La plupart des organismes de réglementation, sinon tous, sont appelés à décider de l'attribution du profit tiré d'un bien dont le coût historique est inclus dans la base tarifaire, mais qui n'est plus nécessaire pour fournir le service. Lorsqu'elle formule ses politiques, la Commission peut tenir compte (et elle tient compte) d'une foule de précédents provenant de nombreux ressorts. Trouver le bon

and investors is a common preoccupation of comparable boards and agencies:

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favoritism toward investors to the detriment of ratepayers affected by the transaction.

(P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234)

115 The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over $2 million. The Board stated:

> The Station "B" property was not purchased by Consumers' for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital. In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

116 Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), the regulator allocated a gain on the sale of land to ratepayers, stating:

compromis dans la répartition du profit entre les clients et les investisseurs est une préoccupation commune aux organismes apparentés à la Commission :

> [TRADUCTION] D'abord, cela permet d'éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients. Deuxièmement, elle garantit que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou à d'autres intéressés. Troisièmement, elle vise précisément à ce que les investisseurs ne soient pas favorisés au détriment des clients touchés par l'opération.

(P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234)

Ce n'est pas d'hier que les organismes de réglementation canadiens examinent de près les opérations de spéculation foncière auxquelles se livrent les services publics qui leur sont assujettis. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976, la Commission de l'énergie de l'Ontario s'est demandé comment devait être considéré le profit de 2 millions de dollars, après impôt, tiré de la vente d'un terrain par une entreprise de services publics. Elle a dit :

> [TRADUCTION] Consumers' n'a pas acquis le bien-fonds (Station B) à des fins de spéculation, mais bien pour les besoins d'un service public. Même si cet investissement n'était pas amortissable, des intérêts et un risque lié à leur taux devaient être absorbés par les revenus et, jusqu'à ce que l'usine de production de gaz ne devienne obsolescente, l'aliénation du bien-fonds n'était pas possible. Par conséquent, si la commission permettait que seuls les actionnaires bénéficient du profit tiré de la vente d'un terrain, elle encouragerait la spéculation sur les biens des services publics. À son avis, ces gains en capital doivent être partagés entre les actionnaires et les clients. [Je souligne; par. 326.]

Certains organismes de réglementation américains jugent également opportun de déduire le profit, en tout ou en partie, de coûts pris en compte dans la base tarifaire. Dans *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), l'organisme de réglementation a attribué aux clients le profit tiré de la vente d'un terrain :

The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

[TRADUCTION] La société et ses actionnaires ont touché un rendement sur l'utilisation de ces parcelles de terrain le temps que leur coût a été inclus dans la base tarifaire, et ils n'ont droit à aucun rendement supplémentaire découlant de leur vente. Conclure le contraire équivaudrait à dire qu'une entreprise de services publics peut tirer avantage d'un bien non amortissable et que même si elle a obtenu de ses clients un rendement raisonnable à l'égard de ce bien, elle peut toucher en sus un profit inattendu en le vendant. Nous estimons que, dans le cas d'une installation en service, il s'agirait d'une situation risques/avantages inhabituelle pour une entreprise réglementée. [Je souligne; p. 26.]

Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991, the Ontario Energy Board determined that a $1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

117 Au Canada, d'autres organismes de réglementation que la Commission craignent que la perspective de vendre des terrains à profit n'infléchisse les décisions des entreprises de services publics en ce qui concerne leurs activités réglementées. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 465, 1er mars 1991, la Commission de l'énergie de l'Ontario a statué que le profit de 1,9 million de dollars réalisé lors de la vente d'un terrain devait être réparti également entre les actionnaires et les clients :

the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary. [para. 3.3.8]

[TRADUCTION] . . . attribuer 100 p. 100 du profit tiré de la vente d'un terrain soit aux actionnaires de l'entreprise, soit à ses clients, pourrait diminuer l'attention accordée aux préoccupations légitimes de la partie exclue. Par exemple, le moment de l'acquisition d'un terrain et l'intensité des négociations la précédant pourraient être déterminés de façon à favoriser le bénéficiaire ultime de l'opération, ou à en faire fi. [par. 3.3.8]

The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, June 27, 2003, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

118 Le principe appliqué par la Commission, soit le partage du profit entre les investisseurs et les clients, est également conforme à la décision *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, 27 juin 2003, dans laquelle la Commission de l'énergie de l'Ontario, après s'être penchée sur la question du profit tiré de la vente d'un terrain et de bâtiments, a de nouveau conclu :

The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction. [para. 45]

[TRADUCTION] La Commission juge raisonnable, dans les circonstances, de répartir les gains en capital à parts égales entre l'entreprise et ses clients. Pour arriver à cette conclusion, elle a tenu compte du caractère non récurrent de l'opération. [par. 45]

The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta (1986)*, at pp. 175-76, including *Re Boston Gas Co.*

119 Dans *TransAlta (1986)*, p. 175-176, le juge Kerans a signalé que le sort réservé à de tels gains variait considérablement d'un organisme de

mentioned earlier. In *TransAlta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

> I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58 (Y.C.A.), at para. 85.

120 A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions

réglementation à l'autre, mentionnant à titre d'exemple la décision *Re Boston Gas Co.*, précitée. Dans cette affaire, la Commission avait assimilé à un « revenu » au sens de la *Hydro and Electric Energy Act*, R.S.A. 1980, ch. H-13, le profit réalisé par TransAlta lors de la vente d'un terrain et de bâtiments appartenant à sa « concession » d'Edmonton. (La décision ne portait donc pas sur le pouvoir de la Commission d'imposer les conditions qu'« elle juge nécessaires dans l'intérêt public ».) Le juge Kerans a précisé (p. 176) :

> [TRADUCTION] Pour les motifs exposés ci-après, je ne suis pas d'accord avec la décision de la Commission, mais il serait absurde de ne pas reconnaître que [le mot « revenu »] puisse raisonnablement avoir le sens qu'elle lui prête.

Il a ajouté que [TRADUCTION] « l'indemnisation visait, à toutes fins utiles, à compenser la perte d'une concession » (p. 180), de sorte que, dans « ces circonstances exceptionnelles » (p. 179), le gain ne pouvait en droit être qualifié de revenu suivant la norme de la décision correcte. Dans l'arrêt *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58 (C.A.Y.), par. 85, le juge Goldie a lui aussi relevé la diversité de la pratique réglementaire à l'égard du « gain tiré d'une vente ».

Les décisions récentes d'organismes de réglementation des États-Unis révèlent que le sort réservé au gain réalisé lors de la vente d'un terrain non amorti y est aussi très variable et comprend tant la solution préconisée par ATCO que celle retenue par la Commission :

> [TRADUCTION] Certains ressorts ont conclu que, sur le plan de l'équité, seuls les actionnaires doivent bénéficier du gain tiré d'un terrain qui s'est apprécié, car en général, les clients des entreprises de services publics paient les taxes foncières et non le coût d'acquisition et les charges d'amortissement. Suivant ce raisonnement, les clients n'assument aucun risque de perte et n'acquièrent aucun droit sur le bien, y compris en equity.
>
> D'autres estiment que les clients ont droit à une partie des profits résultant de la vente d'un terrain affecté à un service public. Les ressorts qui ont opté pour une répartition équitable conviennent que l'examen des décisions des organismes de réglementation et des cours de

on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.

(P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44, at p. 44)

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), at p. 361:

To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility's stockholders are not *automatically* entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility's rates. [Emphasis in original.]

Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders.

The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at

justice sur la question ne permet pas de dégager l'exigence générale que le profit soit attribué aux seuls actionnaires, mais seulement une interdiction générale de le répartir lorsque le coût du terrain n'a jamais été inclus dans la base tarifaire.

(P. S. Cross, « Rate Treatment of Gain on Sale of Land : Ratepayer Indifference, A New Standard? » (1990), 126 *Pub. Util. Fort.* 44, p. 44)

La décision *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), illustre le point de vue américain favorable à la solution retenue par la Commission dans la présente affaire (p. 361) :

[TRADUCTION] Les principes généraux qui peuvent être dégagés des décisions rendues dans d'autres ressorts, s'il en est, sont les suivants : (1) les actionnaires d'une entreprise de services publics n'ont pas *automatiquement* droit au gain réalisé lors de toute vente d'un bien affecté au service public; (2) les clients n'ont pas droit à la totalité ou à une partie du profit tiré lors de la vente d'un bien qui n'a jamais été pris en compte pour l'établissement des tarifs. [En italique dans l'original.]

121 La composition de l'actif dont le coût est pris en compte dans la base tarifaire varie au gré des acquisitions et des aliénations, mais l'entreprise, elle, demeure. La démarche de la Commission en l'espèce est tout à fait compatible avec le principe de la « pérennité de l'entreprise » appliqué notamment dans *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). Dans cette affaire, Southern California Water avait sollicité l'autorisation de vendre un vieil établissement, et la commission devait décider de l'attribution du profit tiré de l'opération. La commission a conclu :

[TRADUCTION] Partant du principe de la « pérennité de l'entreprise », le profit tiré de l'opération doit être affecté à l'exploitation du service public, et non attribué à court terme aux actionnaires ou aux clients directement.

Ce principe n'est ni nouveau ni absolu. Il a clairement été énoncé dans la décision de principe que la commission a rendue en 1989 concernant le gain réalisé lors d'une vente (D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*)). En termes simples, lorsqu'une entreprise de services publics réalise un profit en vendant un bien qu'elle remplace par un autre ou par un titre de créance,

the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation. [p. 604]

122 In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. *ATCO's Arguments*

123 Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

124 Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount to a confiscation of the corporation's property.

125 Secondly, ATCO says its retention of 100 percent of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

126 Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

sans que son obligation de servir la clientèle ne soit supprimée ou réduite, le profit doit être affecté à l'exploitation de l'entreprise. [p. 604]

À mon avis, ni les lois de l'Alberta ni la pratique réglementaire dans cette province et dans d'autres ressorts ne commandaient une décision en particulier. La Commission aurait pu accueillir la demande d'ATCO et lui attribuer la totalité du profit. Mais la solution qu'elle a retenue n'outrepassait aucunement sa compétence légale et ne justifie pas une intervention judiciaire.

F. *L'argumentation d'ATCO*

Les principaux arguments d'ATCO ont pour la plupart été abordés, mais, par souci de clarté, je les rappellerai. ATCO ne conteste pas vraiment le pouvoir de la Commission d'assortir de conditions la vente d'un terrain. Elle soutient plutôt que la Commission a violé en l'espèce un certain nombre de garanties et nous demande de restreindre sa marge de manœuvre.

Premièrement, ATCO prétend que les clients n'acquièrent aucun droit de propriété sur les biens de l'entreprise. C'est elle, et non ses clients, qui a initialement acheté le bien en question et qui en est devenue propriétaire, ce qui lui donnait droit à tout profit tiré de sa vente. Selon elle, attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise.

Deuxièmement, ATCO prétend que son droit à la totalité du profit n'a rien à voir avec le « pacte réglementaire ». Ses clients ont payé un prix que, d'une année à l'autre, la Commission a jugé raisonnable en contrepartie d'un service sûr et fiable. C'est ce qu'ils ont obtenu et c'est tout ce à quoi ils avaient droit. En leur attribuant une partie du profit, la Commission s'est indûment livrée à une tarification « rétroactive ».

Troisièmement, une entreprise de services publics ne peut *amortir* un terrain dans sa base tarifaire, de sorte que les clients n'ont pas défrayé ATCO de quelque partie du coût historique du terrain en question, encore moins en fonction de sa valeur actuelle. Le traitement réservé au profit tiré de la vente d'un bien amorti ne s'applique donc pas.

Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

Quatrièmement, ATCO reproche à la solution de la Commission de créer une disparité. Les clients se voient attribuer une partie du profit résultant de l'appréciation d'un terrain sans pour autant être tenus, advenant une contraction du marché, d'assumer une partie des pertes subies lors de son aliénation. 127

In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

À mon avis, ce sont toutes des prétentions qui devaient être dûment formulées devant la Commission (et qui l'ont été). Certaines décisions d'organismes de réglementation étayent la thèse d'ATCO, d'autres appuient celle de ses clients. Il appartenait à la Commission de décider, au vu des circonstances, quelles conditions étaient nécessaires dans l'intérêt public. Comme je vais m'efforcer de le démontrer, la solution adoptée par la Commission en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. 128

1. The Confiscation Issue

In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, at para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. In *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) ("*SoCalGas*"), the regulator pointed out:

1. La question de l'effet confiscatoire

Dans son mémoire, ATCO affirme que [TRADUCTION] « [l]es biens appartenaient au propriétaire du service public et que la répartition projetée par la Commission ne peut avoir qu'un effet confiscatoire » (mémoire de l'intimée, par. 6). Cet argument ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. Dans la décision *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) (« *SoCalGas* »), l'organisme de réglementation a fait remarquer : 129

In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation

[TRADUCTION] Dans le secteur privé, qui exclut donc les services publics, l'investisseur n'est pas assuré d'un rendement raisonnable sur un tel investissement irrécupérable. Bien que les actionnaires et les détenteurs d'obligations fournissent le capital initial, les clients paient au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du bien, de sorte que la personne qui investit dans un service public ne risque pas d'avoir à supporter ces coûts. Les clients paient également un rendement raisonnable pendant que le bien (terrain

accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

compris) est inclus dans la base tarifaire, ils indemnisent l'entreprise de la dépréciation d'un bien amortissable selon la méthode de la prise en charge par amortissement et ils courent le risque de payer l'amortissement et un rendement pour un bien inclus dans la base tarifaire qui est mis hors service prématurément. [p. 103]

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate-making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

(La Commission ne fait évidemment pas main basse sur le produit de la vente. Pour les besoins de la tarification, un montant *équivalant* aux deux tiers du profit est en fait pris en compte pour établir la base tarifaire actuelle d'ATCO. Le profit est donc réparti de manière abstraite entre les intéressés concurrents.)

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). In that case, the assets at issue were parcels of real estate which had been employed in mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

L'argument d'ATCO est fréquemment invoqué aux États-Unis sur le fondement de la protection constitutionnelle du « droit de propriété », laquelle n'a toutefois pas empêché que tout ou partie du profit en cause soit attribué aux clients de services publics américains. L'un des arrêts de principe aux États-Unis est *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). Dans cette affaire, des parcelles de terrain affectées au transport en commun étaient devenues superflues lorsque l'entreprise avait remplacé ses trolleybus par des autobus. L'organisme de réglementation a attribué aux actionnaires le profit tiré de la vente des terrains dont la valeur s'était appréciée, mais la cour d'appel a infirmé la décision en tenant un raisonnement directement applicable à l'effet « confiscatoire » allégué par ATCO :

We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis — sometimes articulated, sometimes implicit — that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful

[TRADUCTION] Nous ne voyons aucun obstacle, constitutionnel ou autre, à la reconnaissance d'un principe de tarification permettant aux clients de bénéficier de l'appréciation d'un bien survenue pendant son affectation au service public. Nous croyons que la doctrine fondant essentiellement les décisions contraires n'est plus pertinente. Un principe juridique et économique fondamental — parfois formulé en termes exprès, parfois implicite —, sous-tend ces décisions, savoir qu'un bien affecté à un service public demeure la propriété des seuls investisseurs de l'entreprise et que son appréciation est un élément indissociable et inviolable de ce droit de propriété. La notion de propriété privée qui imprègne notre jurisprudence a naturellement mené à l'application de ce principe, lequel a obtenu un certain appui dans les premières décisions en matière de tarification. S'il est encore valable, ce principe étaye la

exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away. [p. 800]

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. [p. 32]

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Re Arizona Public Service Co.*:

> In *New York Telephone*, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. . . . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay

prétention de l'investisseur. Après mûre réflexion, nous pensons que ses fondements se sont depuis longtemps effrités et que la conclusion qu'il semblait dicter ne vaut plus. [p. 800]

Ces « décisions » qui ne sont « plus pertinente[s] » englobent sans doute *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976), une décision invoquée par ATCO en l'espèce et dans laquelle la Cour suprême des États-Unis a dit :

> [TRADUCTION] Les clients paient un service, et non le bien servant à sa prestation. Leurs paiements ne sont pas affectés à l'amortissement ou aux autres frais d'exploitation, non plus qu'au capital de l'entreprise. En acquittant leurs factures, les clients n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service ou sur les fonds de l'entreprise. Les biens acquis avec les sommes reçues en contrepartie des services appartiennent à l'entreprise, tout comme ceux achetés avec les fonds obtenus par l'émission d'actions et d'obligations. [p. 32]

Dans cette affaire, ayant conclu tardivement que l'amortissement autorisé pour New York Telephone Company les années précédentes était trop élevé, l'organisme de réglementation avait tenté de corriger la situation pendant l'exercice en cours en rajustant rétroactivement la base tarifaire. La cour a statué que l'organisme n'avait pas le pouvoir de réviser une tarification antérieure. Les avantages financiers découlant des erreurs commises par l'organisme étaient désormais acquis à l'entreprise. Le contexte n'est pas le même en l'espèce. Nul ne prétend que la tarification antérieure établie par la Commission en fonction du coût historique était erronée. En 2001, lorsqu'elle a été saisie de l'affaire, la Commission avait le pouvoir d'autoriser ou non la vente projetée. L'opération n'avait pas encore été conclue. La réalisation d'un profit par ATCO n'était qu'une possibilité. Comme on l'a expliqué dans *Re Arizona Public Service Co.* :

> [TRADUCTION] Dans *New York Telephone*, le tribunal devait déterminer si l'organisme de réglementation de l'État en question pouvait affecter à la réduction des tarifs l'excédent accumulé aux fins d'amortissement les années précédentes et ainsi fixer des tarifs qui ne produisaient pas un rendement raisonnable. [. . .] [L]a Cour a simplement repris un truisme en l'expliquant : les

current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

tarifs doivent être établis de façon que les revenus permettent d'acquitter les charges (raisonnables) d'exploitation courantes et que les investisseurs de l'entreprise obtiennent un rendement raisonnable. Lorsque, pour une raison ou une autre, les tarifs fixés produisent trop de revenus ou pas assez, on ne peut revenir en arrière. On augmente les tarifs ou on les réduit pour tenir compte de la situation actuelle; leur fixation ne vise pas la restitution de profits excessifs antérieurs ou la compensation de pertes d'exploitation antérieures. En l'espèce, il s'agit plutôt de déterminer si, pour l'établissement des tarifs, le revenu provenant de la fourniture d'un service public pendant une année de référence peut comprendre le produit de la vente de biens de l'entreprise de services publics. La décision *New York Telephone* de la Cour suprême des États-Unis ne porte pas sur cette question. [Je souligne; p. 361.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

Plus récemment, dans la décision *SoCalGas*, la commission californienne de surveillance des services publics s'est penchée sur la question de l'attribution du profit tiré d'une aliénation. Comme dans la présente affaire, l'entreprise de services publics (SoCalGas) souhaitait vendre un terrain et des bâtiments situés (dans ce cas) au centre-ville de Los Angeles. La commission a réparti le profit entre les actionnaires et les clients de l'entreprise et a conclu :

We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold. [p. 100]

[TRADUCTION] Nous croyons que la question de savoir à qui appartient le bien affecté au service public est devenue un faux problème en l'espèce et que la propriété ne permet pas à elle seule de déterminer qui a droit au profit lorsque ce bien cesse d'être inclus dans la base tarifaire et est vendu. [p. 100]

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas*, the regulator disposed of this point as follows:

ATCO soutient dans son mémoire que les clients [TRADUCTION] « n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service, non plus que sur les fonds de l'entreprise » (par. 2). À cet égard, voici ce qu'a conclu l'organisme de réglementation dans *SoCalGas* :

No one seriously argues that ratepayers acquire title to the physical property assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service. [p. 100]

[TRADUCTION] Personne ne prétend sérieusement que les clients acquièrent un droit de propriété sur les biens affectés au service public; la DRA [Division of Ratepayer Advocates] soutient que le profit tiré de leur vente doit être retranché des besoins en revenus ultérieurs non pas parce que les clients sont propriétaires de ces biens, mais parce qu'ils en ont payé les coûts et assumé les risques pendant leur affectation au service public et leur inclusion dans la base tarifaire. [p. 100]

This "risk" theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

Cette considération liée aux « risques » vaut également en Alberta. Pendant les 80 dernières années, le marché albertain de l'immobilier a connu des fluctuations considérables, mais durant toute cette période, que la conjoncture ait été favorable ou non, les clients ont garanti à ATCO un rendement juste et équitable pour le terrain et les bâtiments *considérés en l'espèce*.

The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

133 L'approche suivant laquelle le partage des risques emporte le partage du gain net a également été retenue dans *SoCalGas* :

> Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base. [p. 110]

> [TRADUCTION] Même si les actionnaires et les détenteurs d'obligations ont fourni le capital initial, les clients ont payé au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du terrain et des bâtiments et ils ont assuré à l'entreprise un rendement raisonnable selon la valeur non amortie du terrain et des bâtiments pendant la période où leur coût a été inclus dans la base tarifaire. [p. 110]

In other words, even in the United States, where property rights are constitutionally protected, ATCO's "confiscation" point is rejected as an oversimplification.

Autrement dit, même aux États-Unis où le droit de propriété est protégé par la Constitution, la thèse de l'effet « confiscatoire » avancée par ATCO est rejetée au motif qu'elle est simpliste.

My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply is that the Board's response in this case cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

134 Je ne prétends pas que l'attribution du profit en l'espèce convient nécessairement en toute circonstance. D'autres organismes de réglementation ont jugé que l'intérêt public commande une attribution différente. La Commission tranche au cas par cas. Je dis simplement que la mesure retenue ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et qu'elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. La déférence s'impose en l'espèce et, à mon avis, la décision de la Commission n'aurait pas dû être annulée.

2. The Regulatory Compact

2. Le pacte réglementaire

The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly

135 Dans sa décision, la Commission renvoie au « pacte réglementaire », notion aux contours flous selon laquelle, en contrepartie d'un monopole

and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

> The ratemaking process involves fundamentally "a balancing of the investor and the consumer interests". The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation. [p. 806]

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. stated, at p. 691:

> It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) ratemaking exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years :

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so

conféré par la loi et d'un revenu calculé suivant la méthode du coût d'achat majoré, l'entreprise de services publics accepte de voir son rendement limité de même que sa liberté de se départir des biens dont le coût est pris en compte pour établir sa base tarifaire. C'est ce qui ressort de l'arrêt *Washington Metropolitan Area Transit* de la Cour d'appel des États-Unis (circuit du district de Columbia) :

> [TRADUCTION] Le processus de tarification consiste essentiellement à « mettre en balance l'intérêt de l'investisseur et celui du consommateur ». L'intérêt de l'investisseur est de protéger son investissement et d'avoir une possibilité raisonnable de toucher un rendement acceptable. L'intérêt du consommateur réside dans la protection gouvernementale contre la tarification déraisonnable de services fournis dans un contexte monopolistique. Pour ce qui est de l'appréciation d'un bien, l'équilibre optimal est atteint lorsque les intérêts de l'un et de l'autre sont respectés le plus possible. [p. 806]

ATCO estime que la manière dont la Commission a attribué le profit contrevient au pacte réglementaire non seulement en raison de son effet confiscatoire, mais aussi parce qu'il s'agit d'une « tarification rétroactive ». Dans l'arrêt *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684, le juge Estey a dit ce qui suit à la p. 691 :

> Il ressort clairement de plusieurs dispositions de *The Gas Utilities Act* que la Commission n'agit que pour l'avenir et ne peut fixer des tarifs qui permettraient à l'entreprise de recouvrer des dépenses engagées antérieurement et que les tarifs précédents n'avaient pas suffi à compenser.

Je le répète, la Commission était appelée à se prononcer sur une rentrée projetée et elle a décidé que les deux tiers devraient être pris en compte dans la tarification ultérieure (et non antérieure), ce qui est conforme à la pratique réglementaire. Par exemple, dans la décision *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960), l'organisme de réglementation a statué que le profit réalisé lors de la vente d'un terrain devrait servir à réduire les tarifs pour les 17 années suivantes :

> [TRADUCTION] Lorsqu'un terrain est vendu à profit, le gain doit être ajouté à l'amortissement cumulé, c.-à-d.

that there is a corresponding reduction of the rate base and resulting return. [p. 864]

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

More recently, in *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), the regulator commented:

> . . . we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in rate-base. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the utility to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former property. [p. 529]

The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the Board doing what it did in this case.

3. Land as a Non-Depreciable Asset

The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus, in this case, the land was still carried on ATCO's books at its original price of $83,720 whereas the original $596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of $141,525.

« porté à son crédit », de manière à réduire proportionnellement la base tarifaire et, par conséquent, le rendement. [p. 864]

L'ordonnance a été confirmée par la Cour suprême de l'État de New York (section d'appel).

Plus récemment, dans la décision *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), l'organisme de réglementation a dit : 138

> [TRADUCTION] . . . nous avons jugé approprié de déduire la plus grande partie du profit des coûts futurs liés au siège de l'entreprise parce que les clients avaient assumé les risques et les charges pendant l'inclusion du bien dans la base tarifaire. Nous avons également jugé équitable d'attribuer une partie du profit aux actionnaires afin d'inciter raisonnablement l'entreprise à obtenir le meilleur prix de vente possible et d'indemniser les actionnaires des risques inhérents à la possession du bien. [p. 529]

Toutes ces décisions mettent l'accent sur la mise en balance des intérêts des actionnaires et des clients, ce qui est tout à fait compatible avec la théorie du « pacte réglementaire » qui sous-tend la décision de la Commission en l'espèce. 139

3. Le terrain en tant que bien non amortissable

La Cour d'appel de l'Alberta a établi une distinction entre le profit tiré de la vente d'un terrain, dont le coût historique n'est pas amorti (et qui n'est donc pas graduellement remboursé par le truchement de la base tarifaire), et le profit tiré de la vente d'un bien amorti, comme un bâtiment, pour lequel la base tarifaire opère un certain remboursement du capital et qui, en ce sens, « a été payé » par les clients. Elle a conclu que la Commission avait eu raison d'inclure dans la base tarifaire l'équivalent de l'amortissement consenti pour les bâtiments (l'objet du pourvoi incident d'ATCO). Ainsi, en l'espèce, alors que la valeur du terrain était encore reportée dans les comptes d'ATCO au coût historique de 83 720 $, les bâtiments, payés initialement 596 591 $, avaient été amortis dans les tarifs exigés des consommateurs et leur valeur comptable nette s'établissait à 141 525 $. 140

141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Re Boston Gas Co.* for example (cited in *TransAlta (1986)*, at p. 176), the regulator held:

> . . . the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land. [p. 26]

142 In *SoCalGas*, as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating: "We see little reason why land sales should be treated differently" (p. 107). The decision continued:

> In short, whether an asset is depreciated for rate-making purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets. [Emphasis added; p. 107.]

143 In *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), the regulator commented that:

> Our decisions generally find no reason to treat gain on the sale of nondepreciable property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use]. [p. 105]

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the

Il ressort de la pratique réglementaire que de nombreux organismes de réglementation (et non tous) refusent de faire une distinction (à cette fin) entre les biens amortissables et les biens non amortissables. Dans la décision *Re Boston Gas Co.* (citée dans *TransAlta (1986)*, p. 176), par exemple, l'organisme a conclu :

> [TRADUCTION] . . . les clients de l'entreprise ont versé un rendement et payé tous les autres coûts afférents à l'utilisation du terrain. Le fait qu'il s'agit d'un bien non amortissable — son utilisation ne diminuant habituellement pas sa valeur d'usage — n'a rien à voir avec la question de savoir qui a droit au produit de sa vente. [p. 26]

Dans *SoCalGas*, l'organisme de réglementation a également refusé de faire une distinction entre le profit réalisé lors de la vente d'un bien amortissable et celui issu de la vente d'un bien non amortissable, affirmant à la p. 107, qu'[TRADUCTION] « [i]l ne voyait pas pourquoi des ventes de terrains devraient être traitées différemment » et ajoutant :

> [TRADUCTION] En somme, les clients s'engagent à verser un rendement selon la valeur comptable, que le bien soit amorti ou non pour les besoins de la tarification, et ce, tant que le bien est employé et susceptible de l'être. L'amortissement tient simplement compte du fait que certains biens, contrairement à d'autres, se détériorent durant leur affectation au service public. Fondamentalement, la relation entre l'entreprise et ses clients demeure la même qu'il s'agisse de biens amortissables ou non. [Je souligne; p. 107.]

Dans *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), l'organisme de réglementation a fait la remarque suivante :

> [TRADUCTION] Dans nos décisions, nous concluons généralement qu'il n'y a pas lieu de traiter différemment le profit réalisé lors de la vente d'un bien non amortissable, comme un terrain nu, et celui issu de la vente d'un bien amortissable dont le coût a été inclus dans la base tarifaire ou d'un terrain détenu pour usage ultérieur. [p. 105]

Encore une fois, je ne dis pas que l'organisme de réglementation *doit* systématiquement écarter toute distinction entre un bien amortissable et un bien non amortissable. Je dis simplement que la distinction n'est pas aussi déterminante que le

Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. La limitation du pouvoir discrétionnaire de la Commission, alléguée par ATCO sur le fondement de différents points de vue doctrinaux, n'est pas compatible avec les termes généraux employés par le législateur albertain et doit être rejetée.

4. Lack of Reciprocity

4. L'absence de réciprocité

145 ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

145 ATCO soutient que les clients ne devraient pas tirer avantage d'un marché haussier, car c'est elle, et non eux, qui subirait la perte si la valeur du terrain diminuait. Toutefois, la documentation présentée à notre Cour donne à penser que la Commission tient compte des profits *et* des pertes. Dans les décisions mentionnées ci-après, elle énonce et rappelle, puis rappelle encore, le « principe général » :

the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility. [Emphasis added.]

[TRADUCTION] . . . la Commission estime que les profits ou les pertes (soit la différence entre la valeur comptable nette et le produit de la vente) résultant de la vente de biens affectés à un service public doivent être attribués aux clients de l'entreprise de services publics, et non à son propriétaire. [Je souligne.]

(See *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984, at p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984, at p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23.)

(Voir *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984, p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84115, 12 octobre 1984, p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n^{o} E84113, 12 octobre 1984, p. 23.)

146 In *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984, the Board reviewed a number of regulatory approaches (including *Re Boston Gas Co.*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

146 Dans *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984, la Commission a examiné un certain nombre de décisions d'organismes de réglementation (y compris *Re Boston Gas Co.*, précitée) portant sur le profit tiré d'une vente et a dit ce qui suit au sujet de ses propres décisions (p. 12) :

The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

[TRADUCTION] La Commission est consciente de n'avoir pas appliqué une formule ou une règle uniforme permettant de déterminer automatiquement la procédure comptable à suivre à l'égard du profit ou de la perte résultant de l'aliénation d'un bien affecté à un service public. Il en est ainsi parce qu'elle décide de ce qui est juste et raisonnable en fonction du fond ou des faits de chaque affaire.

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

> If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property. [p. 107]

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulated in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

III. Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

La prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain *diminue* ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. Comme il a été signalé dans *SoCalGas* :

> [TRADUCTION] Si la valeur du terrain devenait inférieure à son coût historique, on pourrait prétendre que le rendement constant versé au fil des ans [par les clients] pour le terrain a en fait surindemnisé les investisseurs. Le rapport entre les risques et les avantages est tout aussi symétrique pour un terrain que pour un bien amortissable lorsque leur coût est pris en compte pour l'établissement de la base tarifaire. [p. 107]

II. Conclusion

En résumé, le par. 15(3) de l'AEUBA conférait à la Commission le pouvoir d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de la vente du terrain et des bâtiments en cause. Dans l'exercice de ce pouvoir, et vu la [TRADUCTION] « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait (GUA, par. 22(1)), la Commission a attribué le gain comme elle l'a fait pour les considérations d'intérêt public énoncées dans sa décision. Le pouvoir aurait peut-être été exercé différemment par un autre organisme de réglementation ou dans un autre ressort, mais il reste que la Commission était autorisée à répartir le gain tiré de la vente d'un bien qu'ATCO souhaitait soustraire à la base tarifaire. Il ne nous appartient pas de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer notre opinion à celle de la Commission.

III. Dispositif

Je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de l'Alberta et de rétablir la décision de la Commission, avec dépens payables à la ville de Calgary dans toutes les cours. Le pourvoi incident d'ATCO devrait être rejeté avec dépens.

APPENDIX

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

Jurisdiction

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

Powers of the Board

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

(3) Without restricting subsection (1), the Board may do all or any of the following:

(a) make any order that the ERCB or the PUB may make under any enactment;

(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

(e) make an order granting the whole or part only of the relief applied for;

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in

ANNEXE

Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17

[TRADUCTION]

Compétence

13 La Commission connaît de toute question dont peut connaître l'ERCB ou la PUB suivant un texte législatif ou le droit par ailleurs applicable, et sa compétence est exclusive.

Pouvoirs de la Commission

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB et à la PUB.

(2) La Commission peut agir d'office à l'égard de tout renvoi, demande, plainte, directive ou requête auquel l'ERCB, la PUB ou la Commission peut donner suite.

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

a) rendre toute ordonnance que l'ERCB ou la PUB peut rendre suivant un texte législatif;

b) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que l'ERCB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

c) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que la PUB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

e) rendre une ordonnance accordant en tout ou en partie la réparation demandée;

f) lorsqu'elle l'estime juste et convenable, accorder en partie la réparation demandée ou en accorder

addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Appeals

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

. . .

Exclusion of prerogative writs

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

Gas Utilities Act, R.S.A. 2000, c. G-5

Supervision

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

une autre en sus ou en lieu et place comme si tel était l'objet de la demande.

Appel

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

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Immunité de contrôle

27 Sous réserve de l'article 26, toute mesure, ordonnance ou décision de la Commission ou de la personne exerçant ses pouvoirs ou ses fonctions est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire.

Gas Utilities Act, R.S.A. 2000, ch. G-5

[TRADUCTION]

Surveillance

22(1) La Commission assure la surveillance générale des services de gaz et de leurs propriétaires et peut, en ce qui concerne notamment le matériel, les appareils, les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne application d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

(2) La Commission mène toute enquête nécessaire à l'obtention de renseignements complets sur la façon dont le propriétaire d'un service de gaz se conforme à la loi ou sur tout ce qui est par ailleurs de son ressort suivant la présente loi.

Investigation of gas utility

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

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Designated gas utilities

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

(2) No owner of a gas utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

Enquêtes

24(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à un service de gaz.

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Services de gaz désignés

26(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires de services de gaz assujettis au présent article et à l'article 27.

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

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Prohibited share transactions

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

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Powers of Board

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

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Incessibilité des actions

27(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'un service de gaz désigné en application du paragraphe 26(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire du service de gaz.

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Pouvoirs de la Commission

36 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement et d'autres tarifs spéciaux opposables au propriétaire d'un service de gaz et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'un service de gaz, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'un service de gaz, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) exiger que le propriétaire d'un service de gaz construise, entretienne et exploite,

compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs, fixes or imposes.

Rate base

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the

conformément à la présente loi et à toute autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire du service de gaz justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension;

e) exiger que le propriétaire d'un service de gaz approvisionne en gaz certaines personnes, à certaines fins, en contrepartie de certains tarifs, prix et charges, et à certaines conditions, selon ce qu'elle détermine.

Base tarifaire

37(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire d'un service de gaz servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'un service de gaz par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qu'elle estime pertinents.

Recettes excédentaires ou insuffisantes

40 Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de

fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

General powers of Board

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the *Public Utilities Board Act* conferred on the Board in the case of a public utility under that Act.

Public Utilities Board Act, R.S.A. 2000, c. P-45

Jurisdiction and powers

36(1) The Board has all the necessary jurisdiction and power

fixation des tarifs, des taux ou des charges, ou de leurs barèmes,

(ii) un exercice ultérieur,

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa b) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

d) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas b) ou c) et la période, y compris tout exercice ultérieur, au cours de laquelle il convient de le faire.

Pouvoirs généraux

59 Pour l'application de la présente loi, la Commission a, à l'égard des installations, des locaux, du matériel, des services, de l'organisation de la production, de la distribution et de la vente de gaz en Alberta, ainsi que du propriétaire d'un service de gaz et de son entreprise, les pouvoirs que lui confère la *Public Utilities Board Act* à l'égard d'une entreprise de services publics au sens de cette loi.

Public Utilities Board Act, R.S.A. 2000, ch. P-45

[TRADUCTION]

Compétence et pouvoirs

36(1) La Commission a la compétence et les pouvoirs nécessaires

(a) to deal with public utilities and the owners of them as provided in this Act;

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

General power

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

Investigation of utilities and rates

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature

a) pour agir à l'égard des entreprises de services publics et de leurs propriétaires conformément à la présente loi;

b) pour agir à l'égard des entreprises de services publics et connaître de questions connexes touchant une région adjacente à une ville, conformément à la présente loi.

(2) Outre la compétence et les pouvoirs mentionnés au paragraphe (1), la Commission a la compétence et les pouvoirs nécessaires pour exercer les fonctions qui lui sont légalement dévolues.

(3) La Commission a et est réputée avoir toujours eu compétence pour fixer, sur demande, le prix et les conditions d'une acquisition effectuée par un conseil municipal sous le régime de l'article 47 de la *Municipal Government Act*

a) avant que le conseil n'exerce son droit d'acquisition suivant cet article, et sans qu'il soit tenu de procéder à l'acquisition ou

b) lorsque l'acquisition est soumise à son approbation suivant cet article, avant que la Commission n'entende la demande et ne statue sur elle.

Pouvoirs généraux

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

Enquêtes sur les services publics et les tarifs

80 Lorsqu'il lui est démontré à l'audition d'une demande présentée par le propriétaire d'une entreprise de services publics ou par une municipalité ou une personne ayant un intérêt actuel ou éventuel dans l'objet de la demande, qu'il y a lieu de croire que les taux établis par le propriétaire d'une entreprise de services publics excèdent ce qui est juste et raisonnable eu égard à la nature et à la qualité du service ou du produit en cause, la Commission

a) peut enquêter comme elle le juge utile sur toute question liée à la nature et à la qualité du

and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

Supervision by Board

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

. . .

Investigation of public utility

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of its owner, the Board shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect of it required by the Board.

service ou du produit en cause, ou à l'exécution du service et aux taux ou charges y afférents;

b) peut, en ce qui concerne l'amélioration du service ou du produit et les taux et charges y afférents, rendre toute ordonnance qu'elle estime juste et raisonnable;

c) peut écarter ou modifier, comme elle l'estime raisonnable, les taux ou les charges qu'elle juge excessifs, injustes ou déraisonnables, ou indûment discriminatoires envers une personne, y compris une municipalité, sous réserve toutefois des dispositions qu'elle considère justes et raisonnables d'un contrat liant le propriétaire de l'entreprise de services publics et une municipalité au moment de la demande.

Surveillance

85(1) La Commission assure la surveillance générale des entreprises de services publics et de leurs propriétaires et peut, en ce qui concerne notamment les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne exécution d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

. . .

Enquêtes

87(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à une entreprise de services publics.

(2) Lorsqu'elle estime nécessaire d'enquêter sur une entreprise de services publics ou sur les activités de son propriétaire, la Commission a accès aux livres, documents et dossiers relatifs à l'entreprise qui sont en la possession du propriétaire, d'une municipalité, d'un organisme public ou d'un ministère, et elle peut les utiliser.

(3) La personne qui exerce un pouvoir direct ou indirect sur l'entreprise d'un propriétaire de services publics en Alberta et toute société dont cette personne est actionnaire majoritaire est tenue de donner à la Commission ou à son représentant l'accès aux livres, documents et dossiers relatifs à l'entreprise du propriétaire ou de communiquer tout renseignement y afférent exigé par la Commission.

Fixing of rates

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;

(d) repealed;

(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Determining rate base

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to

Établissement des tarifs

89 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement, des tarifs au mille ou au kilomètre et d'autres tarifs spéciaux opposables au propriétaire de l'entreprise de services publics et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'une entreprise de services publics, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'une entreprise de services publics, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) abrogé;

e) exiger qu'un propriétaire d'entreprise de services publics construise, entretienne et exploite, conformément à toute autre disposition de la présente loi ou d'une autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire de l'entreprise de services publics justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension.

Base tarifaire

90(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services public et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire de l'entreprise de services publics servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte :

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur

the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

Revenue and costs considered

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of such a period,

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,

(d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the hearing and determining of the matter, and

d'acquisition pour le propriétaire de l'entreprise de services publics, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'une entreprise de services publics par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qui, selon elle, sont pertinents.

Prise en compte des recettes et des dépenses

91(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services publics et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation des tarifs, des taux ou des charges, ou de leurs barèmes;

(ii) un exercice ultérieur;

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) tient compte de l'incidence de la *Small Power Research and Development Act* sur les recettes et les dépenses du propriétaire relatives à la production, au transport et à la distribution d'électricité;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

d) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa c) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

(2) No owner of a public utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

e) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas c) ou d) et la période (y compris tout exercice ultérieur) au cours de laquelle il convient de le faire.

Services de gaz désignés

101(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires d'entreprises de services publics assujettis au présent article et à l'article 102.

(2) Le propriétaire d'une entreprise de services publics désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

. . .

Prohibited share transaction

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

. . .

Interpretation Act, R.S.A. 2000, c. I-8

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Appeal dismissed with costs and cross-appeal allowed with costs, McLachlin C.J. *and* Binnie *and* Fish JJ. *dissenting.*

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

102(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'une entreprise de services publics désignée en application du paragraphe 101(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire de l'entreprise de services publics.

. . .

Interpretation Act, R.S.A. 2000, ch. I-8

[TRADUCTION]

Principe et interprétation

10 Tout texte est réputé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Pourvoi rejeté avec dépens et pourvoi incident accueilli avec dépens, la juge en chef McLachlin *et les juges* Binnie *et* Fish *sont dissidents.*

Procureurs de l'appelante/intimée au pourvoi incident : McLennan Ross, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident : Bennett Jones, Calgary.

Procureur de l'intervenante Alberta Energy and Utilities Board : J. Richard McKee, Calgary.

Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Procureur de l'intervenante la Commission de l'énergie de l'Ontario : Commission de l'énergie de l'Ontario, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Procureurs de l'intervenante Enbridge Gas Distribution Inc. : Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Procureurs de l'intervenante Union Gas Limited : Torys, Toronto.

Development Appeal Board

November 7, 2023

Development Permit: PL-2022-0151

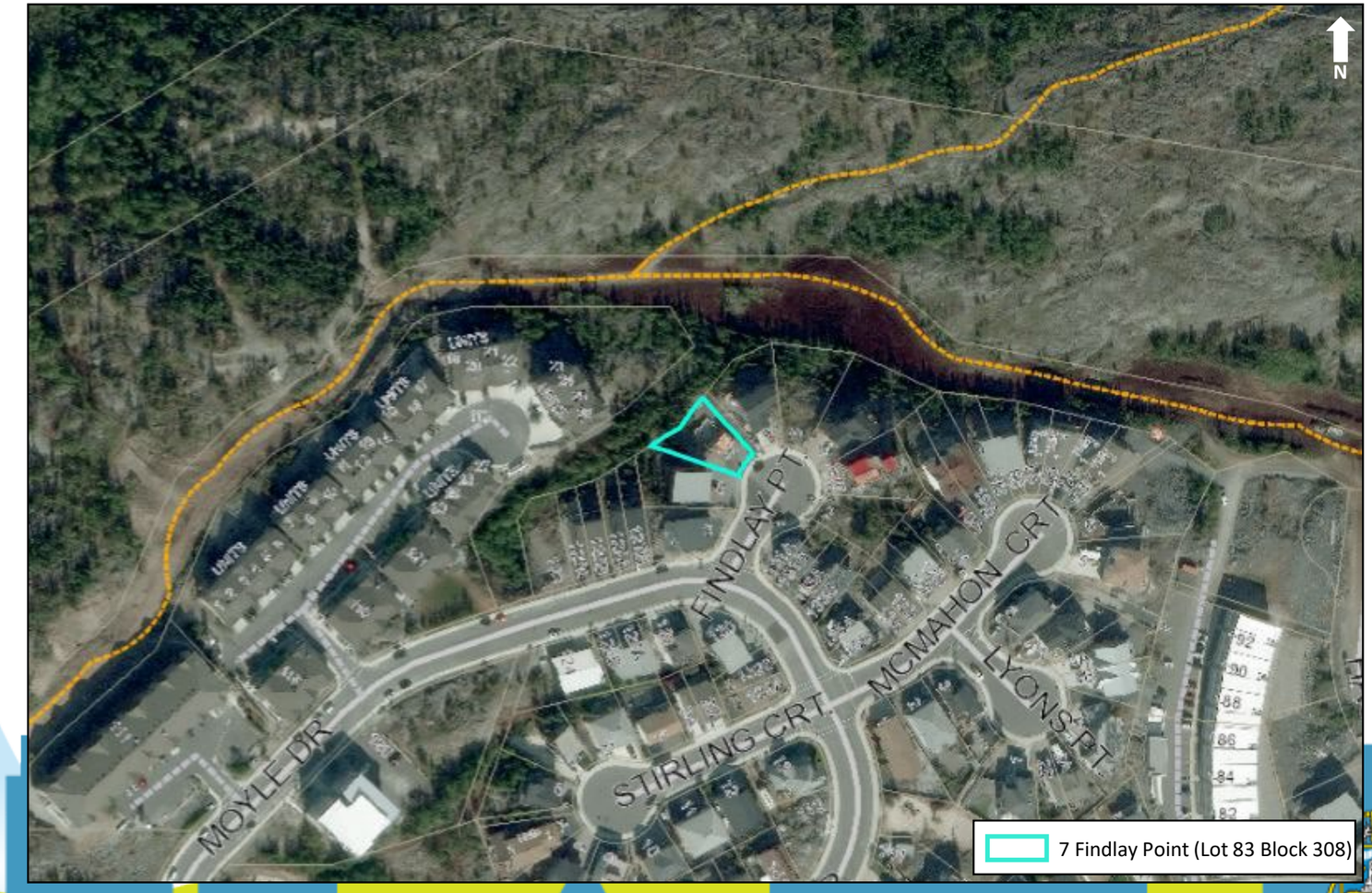
Lot 83, Block 308, Plan 4204

(7 Findlay Point, Yellowknife, NT)

Presented By: Andrew Treger

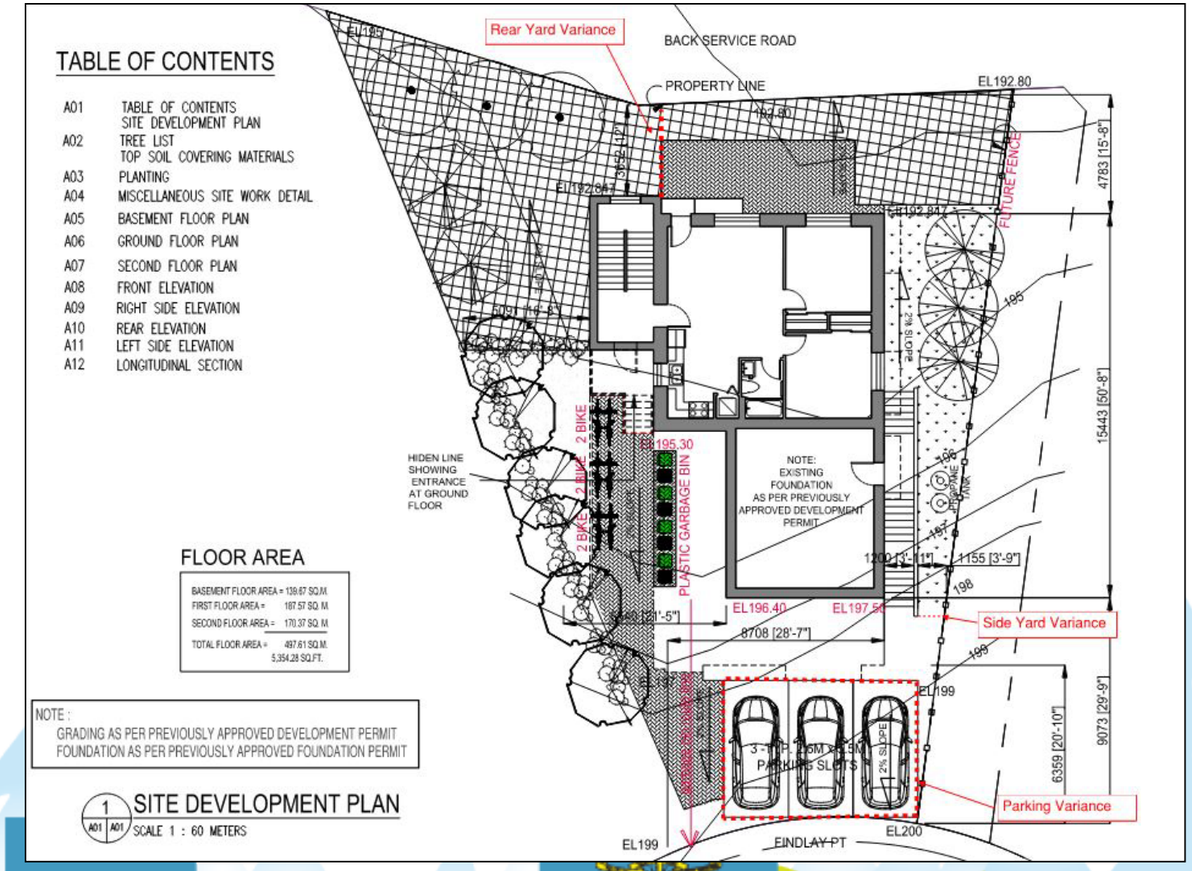
Planner

The Subject Property



The Development Proposal

- A Multi-unit dwelling (4-unit)
- Four variances:
  - A reduction of the minimum rear yard setback from 6m to 3.50m;
  - a reduction of the minimum side yard setback from 1.50m to 1.00m;
  - an increase to the maximum building height from 12m to 14.50m; and
  - a reduction of the minimum minimum required number of parking spaces from 4 spaces to 3 spaces.



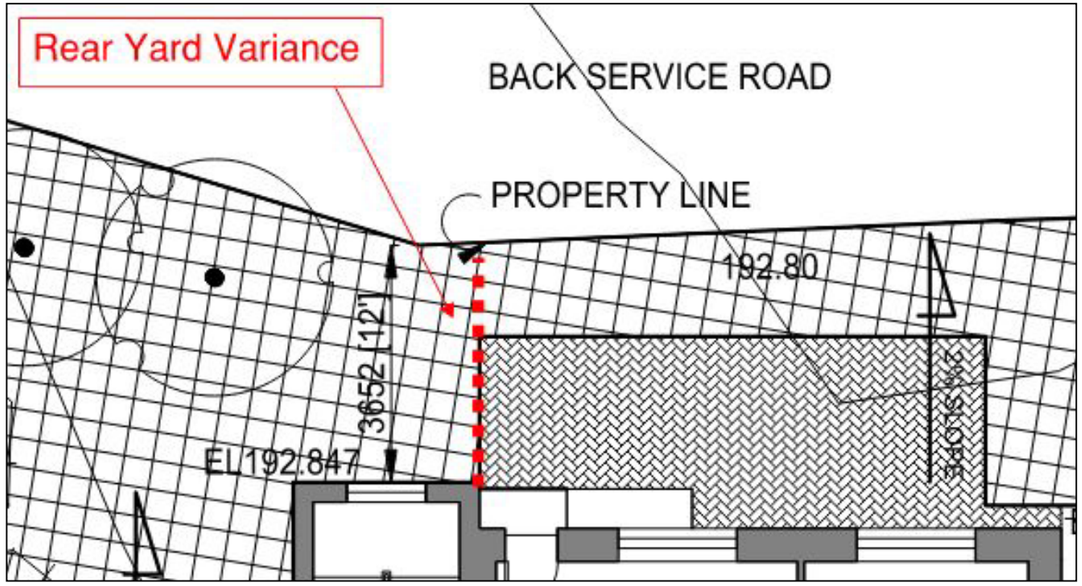
The Development Proposal

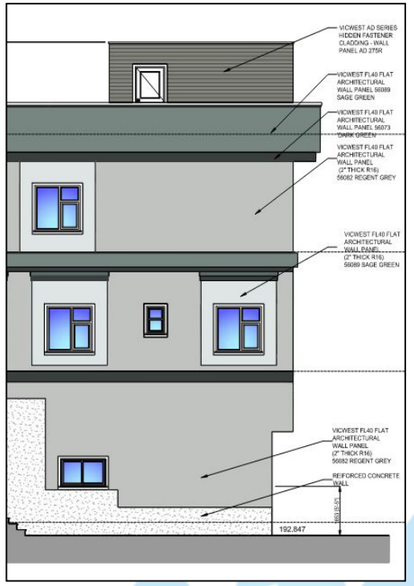
- Community Planning and Development Act, s.25 (i):

  “A development authority shall, subject to any applicable conditions, approve an application for a development permit for a use specified in a zoning bylaw as a permitted use of land or of a building, as referred to in subparagraph 14(1)(c)(i) or (ii) of this Act, if the development authority is satisfied that the applicant meets all the requirements of the bylaw.”

Rear Yard setback

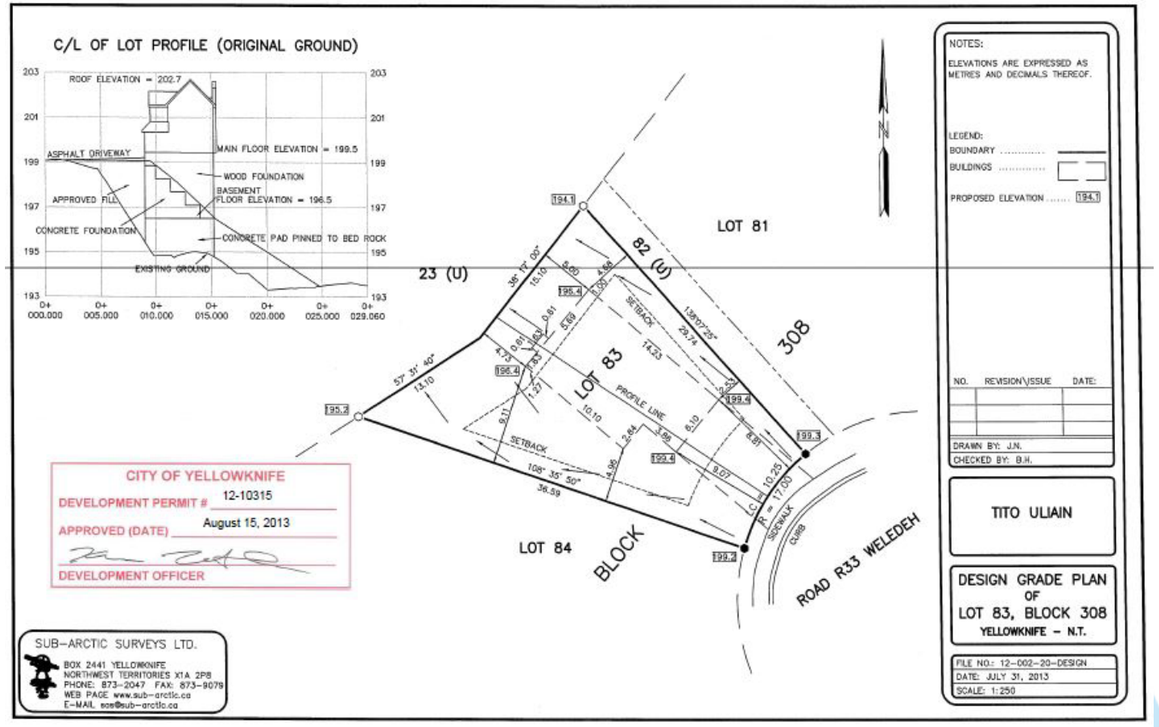
- Minimum setback requirement: **6.0m**
  - Per Table 10-2 *Regulations*
- The Rear Yard setback proposed: **3.5m**
  - Variance of 2.5m





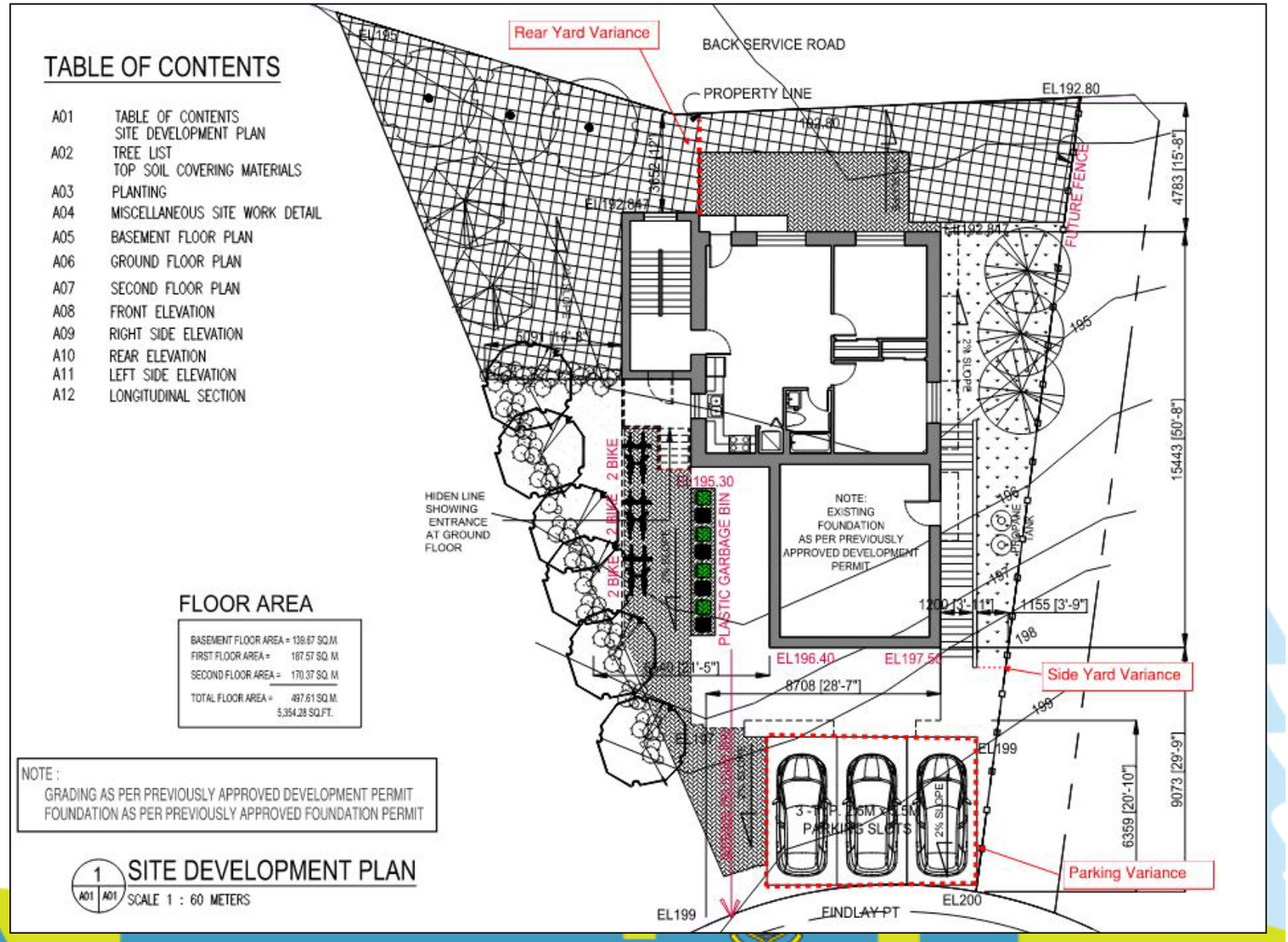
Development Permit 12-10315

- Building and Development Permits from 2012 and 2013 have expired



Parking

- Minimum required parking: **4 spaces**
  - Per table 7-3 *Minimum Parking Space Requirements*
- Parking proposed: **3 spaces**
  - Variance of 1 parking space



Development Officer’s Decision

- The proposed development meets the criteria set out in section 4.9 of the Zoning By-law No. 5045 and with all other zoning regulations; therefore, the Development Officer approved the PL-2022-0151 with conditions.

In Conclusion

- The City requests that the Board makes a determination that the Appellant has not raised a valid ground of appeal and the appeal be dismissed.

- In the further alternative that the Board determines that there is a valid ground of appeal, the City requests that the board confirm the decision of the Development Officer.

DEVELOPMENT APPEAL PL-2023-0151
DEVELOPMENT OFFICER'S REPORT
OCTOBER 27, 2023

ISSUE

An appeal of the decision of the Development Officer to issue Development Permit PL-2022-0151.

LOCATION MAP

Figure 1 – Location Map

DEVELOPMENT PROPOSAL

This application is for the development of a multi-unit (4-unit) residential dwelling on Lot 83 Block 308 Plan 4204 (7 Findlay Point). The application requested a decision on the following four variances:

1. a reduction of the minimum rear yard setback from 6m to 3.50m;
2. a reduction of the minimum side yard setback from 1.50m to 1.00m;
3. an increase to the maximum building height from 12m to 14.50m; and
4. a reduction of the minimum required number of parking spaces from 4 spaces to 3 spaces.

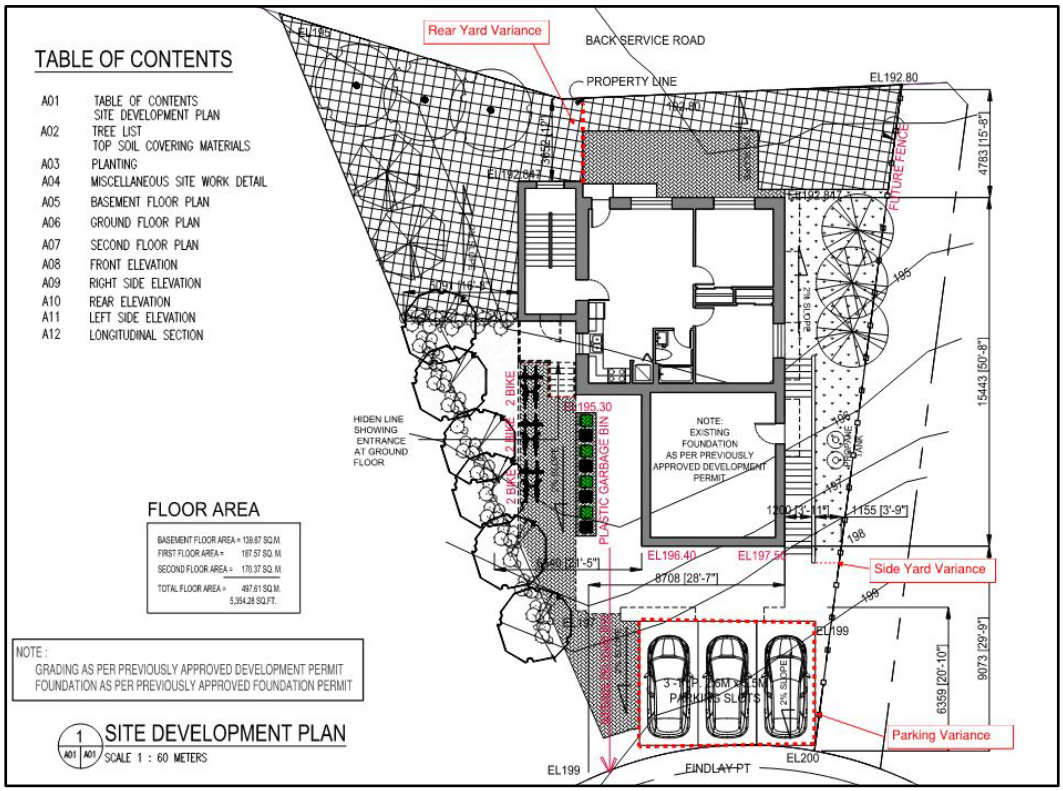


Figure 2 – Site Plan Showing Rear Yard, Side Yard, and Parking Variances

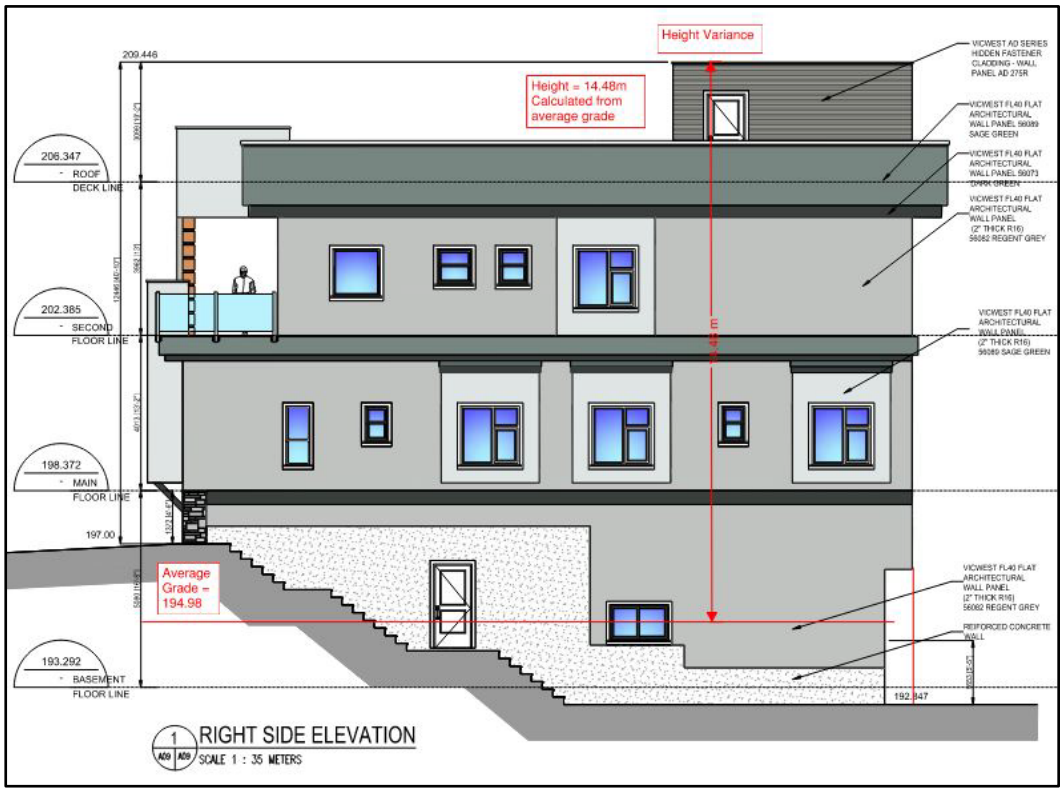


Figure 3 –Right Side Elevation Showing Height Variance

BACKGROUND OF NIVEN DEVELOPMENT

The Niven Lake Development Scheme has undergone several revisions to date, primarily due to rezoning and expansion since 1995.
In 1995 the first Niven Lake Development Scheme/ By-law No. 3794 was adopted. Followed by four major Development Schemes or Area Development Plans from 2002 to 2007.

- Niven Lake Development Scheme 2002 By-law No. 4181 was adopted in 2002;
- Niven Lake Development Scheme 2003 By-law No. 4269 was adopted in 2003;
- Niven Lake Development Scheme 2004 By-law No. 4339 was adopted in 2004 and Phases 5 and 6 were proposed;
- Niven Lake Development Scheme 2007 By-law No. 4438 was adopted in 2007. Phase 7 was proposed; and
- Niven Lake Phase 8 has been undeveloped. In 2013, a servicing feasibility study was conducted for the Niven Lake Phase 8 Subdivision.

CHRONOLOGICAL ORDER OF DEVEOPMENT FOR 7 FINDLAY (LOT 83 BLOCK 308

2012-02-24 Execution of Purchase Agreement between the City and Rahman Tito
2012-09-24 Development Permit for Single Detached Dwelling with a variance to increase the maximum height from 8m to 9.49m
2013-08-15 Revision of Development Permit 12-10315 to reduce the rear yard setback from 6m to 4.73 due to an error in siting and for site services
2013-10-14 Building Permit Issued
2013-10-31 Building Permit Pre-pour inspection was signed
2014-04-29 Building Permit Expired
2021-12-17 Development Permit PL-2021-0202 is issued for the creation of a single detached dwelling with a variance to decrease the minimum rear setback from 6m to 4.25m and increase the maximum building height from 8m to 11.57m.
2022-08-15 Development Permit application PL-2022-0151 received
2023-06-23 Notice of Application was sent to neighbours for comment
2023-08-30 Planning Report was reviewed by the Manager of Planning and Environment
2023-09-23 Signed Memorandum to City Manager Regarding Garbage Collection at 7 Findlay
2023-09-27 Development Permit PL-2022-0151 is issued for the development of a Multi-unit dwelling (4-unit)
2023-09-27 Notice of Development Approval posted on site
2023-09-27 Notice letter to neighbours within 30m mailed
2023-09-29 Notice included in the City's Capital Update
2023-10-10 Appeal submitted by Bryan Manson
2023-10-11 Last Date to Appeal
2023-10-18 Development Appeal Board hearing is scheduled on November 7, 2023.

BACKGROUND OF THE DEVELOPMENT PERMIT APPLICATION PROCESS

In 2012, Development Permit PL-12-10315 approved the development of a single detached dwelling on 7 Findlay Point. On August 15, 2013 a revision of PL-12-10315 was approved to allow for a variance to reduce the minimum rear yard setback from 6m to 4.73m due to an error in the siting of the building. While the construction of the foundation began, the dwelling was never completed.

The current owner of the property wishes to reuse the existing foundation in the development of a new a multi-unit dwelling. Upon review of application PL-2022-0151 it was determined that Rear Yard, Side Yard, and Height variances were required. In addition, upon review of a previous version of the Plans (April 2023), which provided four parking spaces on site, the Development Officer recommended that the applicant remove one parking space from the plans and apply for a variance to parking. The rationale for the removal of one parking space was that it enhances the overall quality of the site by creating a larger landscaped area and view from the street. If this development included four parking spaces as originally proposed, it would have resulted in eight paved parking spaces across the frontage of 7 and 8 Findlay. Ultimately, four variances were required for the Plans submitted to the City.

DECISION-MAKING PROCESS OF THE DEVELOPMENT PERMIT PL-2022-0151

Pursuant to section 25 (1) of the Community Planning and Development Act, a development authority shall, subject to any applicable conditions, approve an application for a development permit for a use specified in a zoning bylaw as a permitted use of land or of a building, as referred to in subparagraph 14(1)(c)(i) or (ii) of this Act, if the development authority is satisfied that the applicant meets all the requirements of the bylaw. Furthermore, pursuant to section 4.6.2 of the Zoning By-law, in making a decision on an application for a Development Permit for a Permitted Use, the Development Officer shall approve, with or without conditions, the application if the proposed Development conforms with this By-law.

Multi-unit dwellings are a Permitted Use in the R1 zone and the Development Officer is satisfied that the applicant has met all of the requirements of the By-law.

The applicant requested variances for the Rear and Side Yards, Height, and amount of on-site Parking provided. The development proposal has been thoroughly reviewed by the Planning and Environment Division, taking into account the evaluation criteria outlined in section 4.9 of the Zoning By-law adhering to best planning practices. Based on this assessment, it has been determined that the variances should be approved, albeit with certain conditions.

RESPONSE TO APPELLANT'S APPEAL DATED ON OCTOBER 10, 2023

1. The term "rear set-back" is not clearly defined in the Bylaw.

   DO Response: The Zoning By-law defines yard, rear is "means a yard extending across the full width of a lot and situated between the rear lot line and the nearest portion of the principal building" (page 29, Zoning By-law No. 5045).

a. By not clearly defining rear set-back, the DO has no guidelines to follow as to measuring the set-back consistently and fairly. Some Canadian jurisdictions define set-back in general as the distance from the nearest element of a structure to the property line. (Ottawa Zoning By-law 2008 250 Part 1-Definitions (Section 54)).

   DO Response: The regulations of ZBL 5045 as compared to By-laws in other Canadian jurisdictions are not relevant to this development application and decision, as such; the City has no comment to this opinion.

b. The Bylaw uses the edge of the foundation to the property line as the reference distance for the rear set- back distance. The Bylaw does not provide a simple graphic or detailed description of this term. The drawings provided to me shows that the rear of the proposed building has three distinct construction features that protrude past the foundation, towards the rear property line. I submit that the Bylaw's definition of rear set-back does not adequately address this and that the proposed variance. I submit that the actual variance grant exceeds The Bylaw definition of rear setback, and that the rear set-back is substantially less than 3.5 m.

DO Response: The City measures the required front, side, and rear yard setbacks from the exterior wall of buildings. This is supported by previous planning practice at the City and the City's requirement for a Real Property Report to identify the location of the exterior walls. Drawing No. A01: Site Plan demonstrates that the nearest portion of the building will be located 3.652m from the lot line. This is supported by Drawing No. A11: Left Side Elevation, which demonstrates that the stairway access is the nearest building element to the rear property line..

2. The Bylaw fails to meet the Act's requirement listed in Section 18, 1(t), "the control of the density of the population in the municipality". The City has recently published documents and Plans stating that they intend to increase the population density in various locations throughout the City but I have been unable to locate any coherent or consistent, clear definition of "density". While Section 18 is discretionary, it is odd that the City followed all of The Acts 21 discretionary headings, except "density". The term is ambiguous and lacks the clarity required for such a document. The Act clearly states that, "the purpose of a zoning bylaw is to regulate and control the use and development of land and buildings...." How can The City regulate or control "density" when it is not defined by any metric? This leaves far too much discretion to the DO.

DO Response: The application and decision before the board relate to requested variances to the Zoning By-law. The Zoning By-law definitions relative to the Community Planning and Development Act are not part of the decision.

3. The City proports that a variance granted in 2012(?), when the first Development Permit was issued for this lot under the repealed City of Yellowknife Consolidated Zoning Bylaw# 4044 to construct a Single-Family Dwelling is still valid and that this process is to demonstrate transparency by The City. I disagree and I assert that under The Act this is not the case for the following reasons.

a. I was provided a drawing (A01) that states, "Note: Existing foundation as per previously approved development permit."

DO Response: The referenced note included on the Plans was added by the applicant and forms part of the application. The City requested that the applicant indicate in their application that the existing foundation was present on site and that the foundation was intended to be reused for this project rather than demolished. The City notes on a drawing are presented in a red text box. The City is in support of the adaptive reuse of building elements when it is feasible and safe to do so while meeting all of the regulatory requirements.

b. There were multiple gaps in the various Landowners of 7 Findlay Pt. possessing and maintaining a valid Development Permit for the property. I know of gaps in 2014 and 2017; there may be more. Under the Act, Discontinued Use, Section 27(2), the non-conforming use is discontinued after one year. Therefore, the variance granted under Bylaw 4044 should be void and would no longer apply. Additionally, for The City to say that it was granted in the past and grandfathered today is incorrect. The drawings provided clearly states, "existing foundation as per previously approved Development Permit." Grandfathering of any Development Permit is not addressed in the Act nor The Bylaw.

DO Response: The Building Permit for the existing foundation expired on April 30, 2014 and subsequently, Development Permit 12-10315 for the single detached dwelling became void per Zoning Bylaw 4404 section 3.9 (7). The City does not use the term 'grandfathered' and no existing variance related to 12-10315 has been continued or permitted for this project. The foundation does not meet the definition of a Non-conforming Use in both the Community Planning and Development Act and the Zoning By-law.

c. The Act states in Section 28 (1)a that a non-conforming building under construction may be completed in accordance with the Development Permit and may be used. However, in Section 28(1)c, the building not yet under construction may be constructed in accordance with the Development Permit subject to the conditions set out in Section 28 (2). The conditions state that the building may not be enlarged, added to, rebuilt or structurally altered. The City needs to decide if the exiting foundation is considered a building to be under construction, or if the existing foundation is considered not yet under construction. Based on The City's decision, it may be obliged to continue under the original Development Permit, limiting this to a single Dwelling Unit with parking for a maximum of two vehicles. Otherwise, if The City considers this building to be not yet under construction, The City cannot permit this proposed building to be enlarged or added to, or structurally altered from the original plans and design. The construction of a four-plex that is larger or higher should not be approved.

DO Response: The existing foundation is not a Non-conforming Use and therefore Section 28 does not apply.

4. The variance granted for the reduction of parking spaces from four to three will have a detrimental effect on the neighbourhood, with regards to the street parking.

a. The original development for this cul-de-sac had it designated as Single-family dwellings with driveways for two vehicles. A quick survey of the three original homes on Findlay Pt. show they all have at least two vehicles and some, have additional recreational vehicles parked in their driveways. 8 Findlay Pt. is a four-plex but has enough parking for four vehicles. There are two undeveloped lots on the cul-de- sac. If you look at the layout of all of the lots on Findlay Pt. you will observe that once all of the lots are developed, there will be no street parking available on Findlay Pt. due the shape of the lots. This will force more people to park on Moyle Drive, which from a quick survey will show that even though the majority of the dwelling on the street have two parking spaces and some have garages, as well as a driveway, Moyle Drive is filled with parked vehicles on the street. So, the nature and culture of Findlay Pt. is being disrupted by permitting this variance.

DO Response: Findlay point is located adjacent to a transit route and is near enough to downtown that it is a walkable or cycle distance. In support of the Development Officer's decision to allow a variance reduce the minimum amount of parking provided is that car-focused development is not supported by best planning practices. Reasons for this include:

1. ***Environmental Sustainability:*** *Car-focused development often leads to increased emissions of greenhouse gases and air pollution, contributing to climate change and negatively affecting air quality. Best planning practices aim to reduce the environmental impact of transportation by promoting alternatives such as public transit, cycling, and walking.*
2. ***Congestion and Traffic Issues:*** *Relying heavily on cars can lead to traffic congestion, which reduces the efficiency and safety of transportation systems. Best practices seek to alleviate traffic congestion by promoting modes of transportation that use road space more efficiently.*
3. ***Health and Well-being:*** *Car-dependent lifestyles are associated with a sedentary lifestyle, which can lead to health issues such as obesity and heart disease. Encouraging active transportation (e.g., walking and cycling) is a key component of best planning practices to promote the health and well-being of residents.*
4. ***Urban Design and Walkability:*** *Car-focused development often results in sprawling, low-density urban environments, which can be less walkable and less conducive to community interaction. Best practices emphasize compact, mixed-use development that promotes walkability and fosters a sense of place.*
5. ***Land Use Efficiency:*** *Car-centric development typically requires more land for roads and parking, which can lead to the inefficient use of valuable urban space. Best planning practices advocate for denser, more efficient land use patterns that reduce the need for excessive roadways and parking lots.*
6. ***Economic Vitality:*** *Focusing on cars to the exclusion of other transportation options can lead to a decline in the economic vitality of a community. Walkable and transit-friendly areas often attract businesses and contribute to a vibrant local economy.*
7. ***Equity and Accessibility:*** *Car-centric development can create challenges for those who do not have access to a private vehicle, such as low-income residents, the elderly, and people with disabilities. Best practices aim to ensure equitable access to transportation for all members of the community.*
8. ***Infrastructure Costs:*** *Building and maintaining road infrastructure for car-focused development can be expensive for municipalities. Reducing the dependence on cars can lead to cost savings and more efficient allocation of resources.*
9. ***Climate Goals:*** *Many communities have set climate action goals to reduce carbon emissions. Reducing car dependency is a key strategy to meet these goals.*

Streets are part of the public right-of-way and are not regulated by the Zoning By-law or the development permit process; as such, this forum is not the appropriate time or place to discuss the street parking privileges granted to residents, nor is it appropriate to hold the applicant of Development Permit PL-2022-0151 responsible to accommodate the on-street parking requests of neighbours or visitors to Findlay Point.

b . Just because The City implemented a new Bylaw in 2022 it does not mean that the "culture" of the community will change overnight.

DO Response: Schedule 1-A of the Niven Lake Development Scheme 2007 By-law No. 4339 identifies that that the area which is now Findlay Point was intended to provide for 'detached, duplex, multi-attached and multi-family dwellings. Furthermore, the City of Yellowknife Community Plan which was approved by the Minister of Municipal and Community Affairs on the 5th day of July, 2020 following public review, and came into effect on the 27th of July 2020 supports the Permitted development of a variety of residential single unit and multiple unit dwelling types. This development is in keeping with the intended character of Niven.

5. I am seeking the following relief. The City to cease issuing all residential Development Permits for all R1 Zoned areas until The City amends The Bylaw to clearly define "density" and all of the "set-backs". (Front, side and rear.)

DO Response: This requested relief is outside of the scope of these appeal proceedings and is not within the authority of the Development Appeal Board.

The City needs to determine if the foundation at 7 Findlay Pt. is under construction or if it is not under construction and is subject to The Bylaw and will not be enlarged or structurally altered, in accordance with The Act, unless additional variances are approved.

DO Response: The existing foundation has no status under Zoning By-law No. 5045. The decision to approve with conditions, the variances, will bring it into conformance with the Zoning By-law No. 5045.

Property Information/Details

Location Description	Lot 83 Block 308 Plan 4204
City of Yellowknife Community Plan No. 5007	Section 4.5 Niven Residential Section 5.1 Environment and Climate Section 5.3 Municipal Infrastructure
City of Yellowknife Zoning By-law No. 5045, as amended	Section 3.1. Development Officer Section 4.0. Development Permit Process Section 4.8. Variance Authority Section 4.9. Evaluation Criteria for a Variance Section 4.11. Notice of Decisions Section 5.1. Development Appeal Process Section 7.1. Site Planning Considerations Section 7.3. Grade Section 7.4. Vehicular Access and On-Site Traffic Section 7.5. General Landscaping Regulations Section 7.8. Parking Section 8.1. General Development Section 8.2 Specific Use Regulations Applicable to Residential Zones Section 10.1. R1 – Low Density Residential
Civic Address:	7 Findlay Point
Access:	Findlay Point
Municipal Services	Piped water and sewer services

Recommendation:

That Planning and Development Department approve development application PL-2022-0151, with conditions.

Proposal:

The applicant proposes to develop a multi-unit (4-unit) residential dwelling on Lot 83 Block 308 Plan 4204 (7 Findlay Point.).

Background:

GENERAL STATEMENT

The subject property is located in the R1 zone with its access on Findlay Point. The surrounding neighbourhood, Niven Lake, is predominantly occupied by a mix of residential dwelling types including single detached, duplex and multi-unit dwellings. A municipally-owned parcel, zoned PR, lies to the rear

of the subject property. A second municipally-owned parcel lies adjacent to the property on the northeast side of the lot which zoned R1 and currently being used as a utility parcel.

The site contains an existing unfinished structure that was approved for construction of a single family dwelling in 2012 via development permit #12-10315 (see attached). While the foundation of this development was built, the remainder of the approved structure left unfinished to date. The applicant, the owner of the property, wishes to utilize the existing foundation for this application with an intention of converting it to a multi-unit dwelling. The current development proposal is subject to its existing placement which has implications regarding the variances proposed as part of this development. These include: the maximum building height, minimum side and rear yard setbacks, and minimum parking requirement.

SUPPORTING STUDIES AND REPORTS

- Lot 83 Block 308 Technical Review Report Development Permit No. PL-2022-0151, DM# 736680.
- Development Permit #12-10315

Assessment of the Application:

JUSTIFICATION

A development permit is required for any development that is accompanied by a variance, as per sections 4.2 and 4.8 of Zoning By-law No. 5045, authorized under section 23(1) of the *Community Planning and Development Act*.

LEGISLATION

Community Planning and Development Act

Section 3 states that the purpose of a community plan is to provide a policy framework to guide the physical development of a municipality, having regard to sustainability/the environment, and the economic, social and cultural development of the community.

Section 12 states that the purpose of a zoning bylaw is to regulate and control the use and development of land and buildings in a municipality in a manner that conforms to a community plan, and if applicable/to prohibit the use or development of land or buildings in particular areas of a municipality.

Pursuant to section 23 (1) and 25 (1), (2), an authorized development authority reviews the variance application and makes a decision.

Zoning By-law No. 5045

The Development Officer processes the application according to section 3.1.1. (Development officer's roles and responsibilities) and applicable sections of Chapter 4. (Development Permit Process) of the By-

law. The Development Officer also evaluates the variance application based on the criteria set in section 4.9 of the By-law.

PLANNING ANALYSIS

City of Yellowknife Community Plan 2020 (the Plan)

The City of Yellowknife Community Plan was approved by the Minister of Municipal and Community Affairs on the 5th day of July, 2020. The Community Plan/ By-law No. 5007, received Third and Final Reading by City Council on the 27th day of July, 2020 and came into effect.

> *Community Plan, By-law No. 5007*
> *The Community Plan is a comprehensive outline of the goals and objectives for the City with directive policies to accomplish the objectives. Policies of the Community Plan are to be read together and all applicable policies are to be considered and applied at the time of development.*

The subject property is designated Niven Residential in the Plan. The area is characterized by a mix of low, medium and high density residential uses with some mixed use activities. Much of the recent development in Niven has included the development of vacant parcels created in earlier development phases.

For each land use designation, the Community Plan provides Planning and Development Objectives and Policies in order to guide the growth and shape the physical, social, and economic aspects of the community. These objectives and policies provide a framework for decision-making and action, and help ensure that development occurs in a coordinated, sustainable, and responsible manner. The following Planning and Development Objectives and Policies are included in section 4.5 for the Niven Residential Designation:

Policy #4: “A variety of residential single unit and multiple unit dwelling types will be permitted”.

The proposed development aligns with the intent and policies of the Community Plan. Allowing the proposed development is expected to provide additional dwelling options for residents and help address the housing availability shortage affecting Yellowknife.

Section 5.1 Environment and Climate Change

The Community Plan outlines that development is to have consideration toward Climate Change mitigation and adaptation. Accomplishing this will require focusing development within the existing built areas of the City and avoiding the expansion of municipal infrastructure and services. Many policies in the Plan support higher density/infill development, because it is more energy efficient than sprawling development. Higher density development in and adjacent to existing services lessens the need to use a personal motor vehicle and reduces the associated carbon emissions. Community Plan policies support and encourage compact urban development at higher densities.

Many interconnected policies are found in this section of the Community Plan which relate to residential development. Administration considered the environmental impacts as a whole, and specifically

considered if there would be negative impacts from the proposed development. It is determined that development on the infill lot will have no negative land use impacts as a residential dwelling from the perspective of Climate Change.

The development serves the objectives of the related policies as it will utilize existing infrastructure, services and increased density will reduce overall energy loses. Also, the development is taking place on land which has remained vacant for years and where infrastructure is nearby and able to be utilized. The development will not only efficiently use municipal services but will landscape the lot. Finalization of the development will improve the aesthetics of the area and create a connection to adjacent vegetated areas as well as manage the impacts of storm-water, reducing impacts to the surrounding environment. The location adjacent to downtown has potential to reduce air pollution by providing residents with shorter commuting options due to its close proximity to the downtown core.

Section 5.1 Transportation

Within the City transportation systems are important to ensure safe and efficient movement of people and goods through the community. The proposed development site includes parking available on site; is adjacent to the City trail network; is in close proximity to the City Transit Services and is situated to afford cycling and other multi-modal opportunities. While off-street parking will be available, the numerous multi-modal transportation options are available to support residents and the City toward reducing vehicle kilometers travelled. The Community Plan notes in Yellowknife a higher proportion of residents walk or bike to work.

Section 5.3 Municipal Infrastructure

The City of Yellowknife provides piped water and waste water services to properties within the area. To keep cost lower (for operations and users) higher utilization and connection to the existing system is important for municipal finance. The development of the subject property will connect to existing services located up the right of way. No extension of municipal piped services is required to facilitate the development.

Zoning

City of Yellowknife Zoning By-law No. 5045

Section 12 of the *Act* identifies the purpose of a Zoning By-law is: 12(1) The purpose of a zoning by-law is to regulate and control the use and development of land and buildings in a municipality in a manner that conforms with a community plan/ and if applicable, to prohibit the use or development of land or buildings in particular areas of a municipality.

The City of Yellowknife Zoning By-law No. 5045, received Third and Final Reading by City Council on the 14th day of March, 2022.

Zoning By-law No. 5045, Section 4 – Development Permit Process

Specifies which developments require a development permit, the process of applying for a development permit, the authority of a Development Officer particularly in relation to a variance, the evaluation criteria for a variance, as well as the notice of decisions.

Based on a review of zoning and site regulations, saved in DM#736680, the proposed development meets the applicable requirements with the exception of the minimum rear and side yard setbacks, maximum building height, and the number of parking spaces provided. Analysis of the proposed variances are below.

Variance Requests (Section 10.1, Table 10-2)

Variances are defined in the Zoning Bylaw as "*an alteration or change to a standard prescribed by this By-law that is authorized by the Development Officer, Council or the Development Appeal Board*". Sections 4.8 and 4.9 of the Zoning By-law identify the authority given to the Development Officer and Council with respect to Variances and the Evaluation Criteria by which the Development Officer or Council may grant them. With respect to the development application PL-2022-0151, the Development Officer has reviewed the variance requests listed below as per the Bylaw and granted the requests as follows:

1. The minimum rear yard setback to be decreased from 6m to 3.50m;
2. The minimum side yard setback to be decreased from 1.50m to 1.00m;
3. The maximum building height to be increased from 12m to 14.50m; and
4. The minimum required number of parking spaces to be reduced from 4 spaces to 3 spaces.

Evaluation Criteria and Analysis Summary of Proposed Variances.

Evaluation Criteria
The following criteria described in section 4.9.1 a) to f) of the By-law are used to determine if the proposed variance is acceptable and be granted.

a) the proposed Variance would not result in a development that will:

   i. unduly interfere with the amenities of the neighbourhood; or,
   ii. materially interfere with or affect the Use, enjoyment or value of neighbouring parcels of land.

b) the subject Site has irregular Lot Lines or is a size or shape that presents challenges to development;

c) the subject Site has Physical Limitations relating to terrain, topography or grade that may create difficulties in meeting the zoning regulations as prescribed in this By-law;

d) the subject Site has natural features such as rock outcrops or vegetation that may create difficulties in meeting the zoning regulations as prescribed in this By-law;

e) an error has occurred in the siting of a Structure during construction; and

f) the proposed Development conforms to the Uses prescribed in this By-law, any applicable Area Development Plan, and the objectives and policies of the Community Plan.

<u>Reduced Rear and Side Yard Setbacks</u>:

Neither yard directly abuts private property as the Rear Yard is adjacent to Parks and Recreational land and the north-easterly Side Yard is adjacent to a City-owned utility parcel. Therefore, the Rear and Side Yard setback variance would not impede the future and current development potential of neighbouring lots. The Development Officer's opinion is that physical impacts of the variance to the adjacent properties would be minimal or none. Furthermore, it is not anticipated that the proposed variances for either yard setback will unduly interfere with the amenities of the neighbourhood; or, materially interfere with or unreasonably affect the use, enjoyment or value of neighbouring parcels of land.

Reduced required parking spaces:

It is the Development Officer's opinion that the reduction in parking will not unduly interfere with the amenities of the neighbourhood, nor will it materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. There is very limited existing on-street parking available for vehicles on Findlay Point as frontage of each lot is narrow enough only to accommodate access to the lot and small landscaped area. Therefore, no additional street parking resulting from this development is anticipated on Findlay. The Development Officer is also in support of the variance due to the affect that the reduction in parking will result in an increase landscaped area (as demonstrated on the Plans) and an improved the view of the development from the street. Conversely, by increasing the landscaped area and decreasing the amount of paved parking provided, the relationship between the development and the street will be enhanced rather than negatively impacted.

Increased building height:

It is the opinion of the Development Officer that the relaxation of the maximum building height is acceptable and will not result in a development that will unduly interfere with the amenities of the neighbourhood; or, materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. Furthermore, the subject site has physical limitations relating to terrain, topography and Grade that create difficulties in meeting the zoning regulations as prescribed in the By-law. According to the By-law, height of the building is calculated as the vertical distance measured from the average finished grade of the corners of the proposed building or structure to the top of a building or structure. Due to the steep elevation toward the rear of the parcel, the difference in the proposed grade between the front and rear of the building is approximately 4.2m. That difference in height results in a lower average elevation from which to measure the building's height.

Importantly, the height of the structure viewed from the street front will conform to what is permitted if the site had normal grading. Drawings A01 and A09 from the Plans show that the grade at the street is approximately 199.5m.a.s.l and that the proposed height of the roof is 209.4m.a.s.l. This demonstrates that, when viewed from the street, the height of the building will be approximately 9.9m. The Development Officer's opinion is the impact of the increased maximum building height is minimal and acceptable. In addition, it is the opinion of the Development Officer that the nature in the irregularity of the subject site's shape and size provides reasonable justification to allow the proposed variances. The lot is located in a cul-de-sac with the result that the lot is pie-shaped as opposed to rectangular. The narrow lot frontage restricts how near to the front yard the existing foundation was placed as well as restricts the design of the new building, accessory stairs, parking area, and landscaping. The existing foundation and proposed building are shaped to fit the lot (narrower front), however, the site's shape presents challenges to the proposed development. The Lot is also smaller in area (554.04m^2) than other

lots along the street. The average size of lots on Findlay Pt. is 724.36m^2; resulting in additional restrictions to development.

An error has occurred in the siting of a structure during construction:

The existing foundation located on site was approved as part of Development Permit #12-10315 in 2012. While the foundation was built, the dwelling was never completed. The current owner of 7 Findlay Pt. wishes to use the existing foundation as part of their current development, however, this restricts the development potential of the lot, as they cannot move the existing foundation. At the time of construction, the foundation was incorrectly sited and does not align with either former or current zoning requirements. Development Permit #12-10315 was approved for a variance to reduce the rear yard setback to 4.73m, however, based on the Plans submitted as part of this application, the foundation was placed further back toward the rear affecting yard setback and height requirements.

Specific site development factors that have been considered as part of this evaluation are included below:

Land Use (Section 10.1):

Lot 83 Block 308 is zoned R1 – Low Density Residential. This proposal is for the development of a multi-unit (4-unit) residential dwelling. Multi-unit dwellings are permitted in the R1 Zone (Table 10-1).

Drainage and Grading (Section 7.3):

Site grading was completed prior to the construction of the existing foundation and is not proposed to be altered. The proposed finished Grade aligns with the Niven Lake Phase V11 Surface Grading Plan.

Landscaping (Section 7.5):

In R1 Zone, a minimum of 100% of the minimum front yard area is required to be landscaped, which makes up approximately 60.69m^2 of the site. A portion front yard area is being utilized as a driveway. The remainder of the front yard area shall be landscaped, and this requirement will be noted on the approved drawing for PL-2023-0054. Any part of a Lot which is not occupied by existing natural areas shall be maintained as Landscaped area.

Parking and Driveways (Sections 7.4 and 7.8):

Three ‘type B’ parking spaces are currently accommodated for on the existing driveway. A variance to reduce the minimum required on-site parking from four (4) spaces to three (3) is requested.

Multi-Unit Dwellings (Section 8.2.6)

This development provides for an appropriate provision and arrangement of access for emergency vehicles, garbage and compost storage, light between buildings, pedestrian access, and safety and security features.

Servicing/Safety/Park&Rec/Community/Reconciliation

The neighborhood where the subject property lies is serviced by piped water and sewer. Following review by the Public Works Division it was determined that garbage collection for 7 Findlay Point would not be serviceable by residential garage carts and that the owner is responsible to arranging its own waste collection services. The arrangement is to be ensured through the associated Development Agreement between the owner of the property and the City. The Agreement runs with the land, so the change of ownership will not affect this requirement.

Traffic Impact Analysis

A traffic analysis is not required for Permitted Uses. A traffic Impact analysis is only required if deemed necessary by the Development Officer. It was the Development Officer's decision that a Traffic Analysis was not required for this development given that the development is only proposing to add four units of residential development to an area intended for such uses as per the City of Yellowknife's Zoning Bylaw.

Public Consultation

LEGISLATIVE AND POLICY REQUIREMENTS

A Variance Notice was mailed to neighboring residents within 30m of the subject property, on June 5, 2023, per section 23. (2) (b) of the *Community Planning and Development Act.* If approved, a public notice will be posted at the site, as well as on the City's Capital Update, in conjunction with the date of approval of the permit. A notice of decision will also be mailed to neighboring residents within 30m of the subject property, per section 15. (1) (h) of the *Community Planning and Development Act,* and per section 4.11.6 of Zoning By-law No. 5045. The application will be subject to a 14-day appeal period, commencing on the date of the approval. If not appealed within this 14-day period, the development will be considered effective starting on the 15th day.

As a result of the variance notice, the following written submissions were received and considered by the City of Yellowknife.

No.	Comments	Consideration
1.&2.	**Comment 1:** I have issues with the reduced setbacks. I would like additional information please. I am currently out of YK and except to return about 27 June. When is the hearing scheduled? How do I make my views known? Do I need to complete any particular City form? **Comment 2:** I have observed that over the last number of years, the City has routinely reduced the set back limits on property lots. This potentially increases the potential for fire migrating from one structure to the next, due to the reduced gap between structures. The specific issue with the Findlay Pt property is by reducing the set backs, this permits the owner to build a 4 plex in a lot that was never really intended to have such a structure. Without the variances, the structure would not fit within the existing footprint. This clearly indicates that a 4 plex should not be given the variances.	Comment 1 regards the neighbours seeking additional information. Comment 2 regards the implication of reduced setback limits for fire and the intention of setbacks as they relate to the scale of development.

3&4.	**Comment 1:** I am taking the time to submit my point against another multi unit dwelling in Findlay point due to parking and traffic concerns. Currently there are a number of them and will only congest the small cul de sac more and more. I'm sure the city won't take this into consideration but as it stands there are a number of multi dwelling units in an already small cul de sac. I have great concern with my young family and how many vehicles will be in there. Having lived in a Yellowknife cul de sac I can assure you it gets congested and traffic issues. You may say well, we have by law officers to address that. Well I can assure you I see very little being done by that department. I'm sure when you drive downtown you have to stop in the middle of the road on a green for pedestrians. Not to mention this was approved as a house which is great for property value and a quieter neighbourhood. We purposely recently purchased there due to that fact. In concept it may look fine with small vehicles but not everyone has a compact car. I can only envision this getting packed so uncomfortable like many other places in the city it drives people south. In discussions it appears the Findlay point residents are much opposed to this so it would be nice if the city took us into consideration. Thank you **Comment 2:** Thank you for your reply. We just received the letter regarding 7 Findlay last night so I was only able to do some further research into the matter today. Therefore, in addition please see the following: We have just purchased 6 Findlay Point (we are due to move in on June 30th) and are very alarmed at the potential 4 plex as there is already the possibly of a duplex beside us at 5 Findlay. I have attached that approval paper as well. So that would mean figuring out room for minimum 6 to upwards of 10+ more people, animals, 6 more parking spots & 6 more garbage bins etc. this is a lot for one little area. We have a young son who loves to run around and we purposely bought in a peaceful quiet cul de sac for our young family. Now we will need to navigate our kids around at least 6 more vehicles coming in and out everyday. Please consider all of the responses provided as this is the exact reason Findlay cul de sac is so appealing. There will be no way to manage this many dwellings. There already are 3 duplexes, a 4 plex & potentially another duplex and this 4 plex… this will be so cramped up for all.	These comments regard concerns the residents have on parking and traffic congestion on Findlay Point given its existing context and other recent developments. A Traffic Impact Analysis is not a requirement for Permitted Uses.

	There are big safety risks and parking concerns. Not enough room for all of these vehicles and the likelihood of them all being small compact cars is not likely. There for certain will be some trucks etc. in the mix. I have also attached some material gathered from 130 Moyle, at the entrance of Findlay cul de sac as this again makes it a congested area. I have attached a few images of the parking concerns from this document as they will be repeat concerns with vehicles trying to get in and out crossing in front of our property etc. There also is a trail between our house #6 and with #7, therefore we foresee a lot of issues with parking obscuring onto this and into our yard as this is a very tight area. A lot of the parking concerns addressed in the 130 Moyle document resonate with the concerns regarding parking and space with adding another 4 plex in the mix! The original approval for a single dwelling at 7 Findlay: https://www.yellowknife.ca/en/resources/en/resources/news/DEVELOPMENTPERMITSADVERTISEMENTWEEKOFDECEMBER242021.pdf The approval for a duplex at 5 Findlay: https://www.yellowknife.ca/en/resources/en/resources/news/DevelopmentPermitsAdvertisementWeekofJuly312020.pdf The document regarding 130 Moyle: https://www.yellowknife.ca/en/city-government/resources/Current_Committees_of_Council/Development-Appeal-Board/DAB-Agenda-March-14,-2023---MOYLE-DRIVE/DEVELOPMENT-APPEAL-BOARD-AGENDA-MARCH-14,-2023.pdf Thank you again and we look forward to hearing back on the progression of this issue.	
5.	Thank you for the opportunity to provide comments: It is hard to see from the plans provided if the variance space includes space and access for the 8 garbage/compost bins required for all 4 units. There is barely room for the cars and walkways so just checking. For consideration,	This comment regards whether enough space has been provided for the storage and movement of garbage and compost bins .
6.	The letter regarding the proposed 4 plex on Findlay point is a very bad idea. there is no room on the street to allow for the additional parking that this would entail. as the resident of lot 81 i do not think this is a good idea, and it will destroy the street and would not make a good thing.	This comment regards a concern for the lack of space for vehicles and impacts traffic

	i do not this this should be approved. This is a very bad idea.	congestion on Findlay Point should the development go forward.
7.	As an interested party who is an owner and resident of 9 Findlay Point, I make the following submission in regards to Notice of Application PL-2022-0151. This submission does not object to the variance request per se but I do recommend instructions and actions by the Applicant and the City to ensure the trail access right-of-way (ROW) to the Back Bay Trail system is maintained and enhanced. I appreciate the challenges of building on an uneven and irregular lot, but I want to ensure a reduced setback will not impede public access to public lands. The reduced setback can make it "feel" like you are trespassing on someone's property when in fact you are not. Given the location of the reduced setback request it is important to take actions to protect, promote, and enhance access to the Back Bay trail system. These actions also aim to respect the private property of the Applicant and adjacent owners by delineating the trail access ROW so the public does not need to cross private property to access the trail system and the boundaries are made clear. Between the lots of 6 and 7 Findlay Point is a trail access right-of-way measuring approximately 3 metres wide and 30 metres in length. This provides access to the Back Bay trail system, ski club trails, and greenspace. The trail access ROW is not currently signed or marked. There is personal property (which I do not believe belongs to the Applicant) and construction materials/debris and an outhouse (which I do believe is that of the Applicant) on the concrete/brick pad that is intended to delineate the trail access at the sidewalk. I frequently see people looking at the maps on their phone trying to find the trail access. On Google Maps the ROW is identified as "Findlay Point Trail Access." One comment posted states "It is in a residential area on someone's residential property." Unless you know how to access the trail or are shown by someone, it would appear there is no actual trail access in that location. Many people, myself included, regularly cross through the lot at 7 Findlay Point for trail access since the ROW is obstructed at the street level by personal property and construction debris. Approximately two years ago when construction was re-started on this property I submitted a request to the City of Yellowknife through the online click-and-fix portal requesting the trail access be signed and marked. I did not receive any follow-up to this submission. It is not reasonable	This comment regards the potential for impact to the City Utility parcel directly adjacent to the development.

to expect the Applicant to be responsible for providing access via their property.

At the bottom of the hill at the north end of the ROW is a steep rock face that drops approximately 3 metres. This requires individuals to turn left (west) along the north edge of the property of 7 Findlay Point to access the trail system. See the map image with the dashed blue line. This point is relevant to protecting public access along the north end of the property line and the actions that already impede into this space.

During the re-start of construction two years ago, trees and brush were piled on the ROW, and there are currently construction materials piled along the north edge of the property outside the property lines. Therefore, it is not currently possible to use the trail access without crossing on to the property of 7 Findlay Point. (see photo).

A weeping tile drainage line also extends off the property into the area used to access the trail along the north edge of the property which was placed during construction work 2 years ago. (see photo). Additional fill was placed off the north side of the property to cover the weeping tile drain that extends approximately 5 metres on to public land and created an uneven surface compared to its previous condition. It created a very muddy area and was quite soft when wet. It has settled somewhat since its original placement, but when wet does create a large, soft muddy area that must be crossed to access the trail leaving people and dogs with the consequences.

The Applicant should have as a condition of the variance, or be otherwise instructed:

1. to remove all brush and debris placed on the trail access or any areas outside the property lines.
2. to remove all construction materials currently stored outside of property lines.
3. to not store or place any materials, equipment, debris, or otherwise obstruct the ROW or other public areas outside the property line, even temporarily.
4. to cover the weeping tile drain located off the north edge of the property with appropriate material to a suitable depth and in a manner that the drain is not visible, does not obstruct trail access, and will prevent further soil erosion from its placement, and place additional graded material on the filled area that extends on to public land in a manner that provides a surface condition and grade similar to it was previous to disruption (i.e. not muddy); or, if placing material and drainage lines in this manner is not permitted the City should order

	removal and appropriate remediation by the Applicant to restore the surface to its original condition. 5. to ensure the site drainage plan does not negatively impact the trail ROW or the adjoining public areas required to access the trail system. 6. to remove fill material placed along the ROW that created an uneven grade, or grade the fill to provide a level surface along the ROW. In order to protect, promote, and enhance access to the Back Bay trail system, and to respect the property boundaries of the Applicant and adjacent properties, the City should: 1. ensure the entrance and ROW to the trail system is unobstructed. 2. place signage at the street entrance identifying the location as public trail access. 3. mark both sides of the ROW to ensure the access points at either side are clearly identifiable, as well as both sides of the ROW at regular intervals, such as posts, stakes, or other means (there is no fencing or topography that delineates the sides of the trail access). 4. mark the additional boundaries along the north side of the property at 7 Findlay Point in a similar manner to ensure it is clearly identified as public access. 5. ensure site drainage plans do not negatively impact the trail ROW or the adjoining public areas required to access the trail system. 6. enhance trail accessibility particularly along the steepest areas of the ROW, such as by adding or removing material, constructing terraced levels, or other suitable measures.	

City Departmental Consultation

As directed in section 4.5.1 comments from City Departments were reviewed and considered. Comments received by City departments are summarized in the table below:

No.	City Department	Comments	Consideration
1	Fire Division	We recommend fire protections sprinklers.	None.
2	Public Safety	No comment.	None.
3.	Public Works and Engineering	This development will not be able to be serviced by residential garbage carts as there is no more room in the court for garbage carts due to the density of residences. This	A memo was provided to the City

		development will need to determine their own solution for providing garbage and organics collection with a contractor. With regards to the garbage collection for 7 Findlay Point, the Solid Waste Management By-Law No. 4376 states the following: 4.(1) The Senior Administrative Officer is authorized, at his or her sole discretion, to: (h) designate a premise having five (5) or more residential units as a single family unit for the purposes of collection, and to designate a premise having four (4) or fewer residential units as a multi-family unit premise for the purposes of the orderly collection of household waste including the application of the solid waste levy; 9.(16) All owners of multi-family unit premises and commercial premises shall ensure that adequate arrangements for the timely removal and disposal of those types of solid waste are maintained at all times. 9.(17) All owners of multi-family unit premises and commercial premises shall ensure that collection occurs at least every two (2) weeks if food product comprises a portion of the household or commercial waste to be collected. Item 4(1)(h) is this item of the By-Law that Public Works is applying to this development as there is not enough physical space in the court for each unit of this 4-plex to have a garbage cart that is placed on the roadway for collection on the designated residential waste collection day. Items 9.(16) & (17) are the requirements for waste collection for multi-family premises. The City is requiring that this development work with one of the waste collection companies in town to determine how best to service this property for waste collection. This may include the waste contractor providing the development with carts for each residence that are clearly marked as belonging to the contractor and differentiated from the City's residential carts, and collected by the waste contractor on a day of the week other than the regular waste collection day scheduled for residential garbage pick-up.	Manager to designate the proposed development as a multi-unit premise (per the Waste Management Bylaw) for the purposes of the orderly collection of household waste. (DM# 744218)
4.	Lands and Building Services?	IFC drawings for Architectural, Structural and Mechanical are required for a complete Plan Review. An Energy Review of the Building Design will also be required. Location and height of retaining walls is required – follow requirements set out in By-	N/A

		law 5058. No details on foundation type or design have been provided. Window size has not been provided. NBC 9.10.14 must be followed for Spatial Separation Between Buildings.	

Conditions of Approval:

1. The development shall comply with the approved and stamped drawing for PL-2022-0151 and with all By-laws in effect for the City of Yellowknife;
2. The developer shall enter into a Development Agreement with the City prior to the issuance of the Building Permit;
3. The minimum rear yard setback has been decreased from 6.0m to 3.50m;
4. The minimum side yard setback has been decreased from 1.50m to 1.00m;
5. The maximum building height has been increased from 12m to 14.50m; and
6. The minimum required number of parking spaces has been reduced from 4 spaces to 3 spaces.

Conclusion:

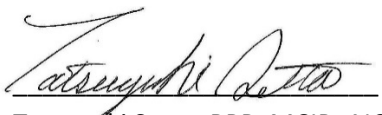
Development Permit application PL-2022-0151 is recommended for approval with the above mentioned conditions as it conforms to Community Plan By-law No. 5007, satisfies section 23. (1) of the *Community Planning and Development Act*, complies with regulations of Zoning By-law No. 5045. A Development Agreement to be signed and executed between the City and the Developer prior to the issuance of the Building Permit.

Reviewed [and Approved] by:

_____ August 29, 2023

Andrew Treger, MCP, BSc. Date
Planner, Planning and Environment

Concurrence by:



_____ August 30, 2023

Tatsuyuki Setta, RPP, MCIP, AICP Date
Manager, Planning and Environment

Attachments:

Lot 83 Block 308 Technical Review Report Development Permit No. PL-2022-0151, Prepared by D.O. Andrew Treger, DM# 736680

Lot 83 Block 308 Variance Notice to Neighbours Development Permit No. PL-2022-0151, Prepared by D.O. Andrew Treger, DM# 734315

Lot 83 Block 308 Revised Development Permit No. 12-10315, Prepared by D.O. Karin Kronstal, DM# 373886

Lot 83 Block 308 Stamped Plans, Prepared by D.O. Andrew Treger, DM# 742032

TABLE OF CONTENTS

Planner's Note:
As per section 7.5.1.a) any part of a Lot which is not occupied by existing natural areas shall be maintained as Landscaped area.

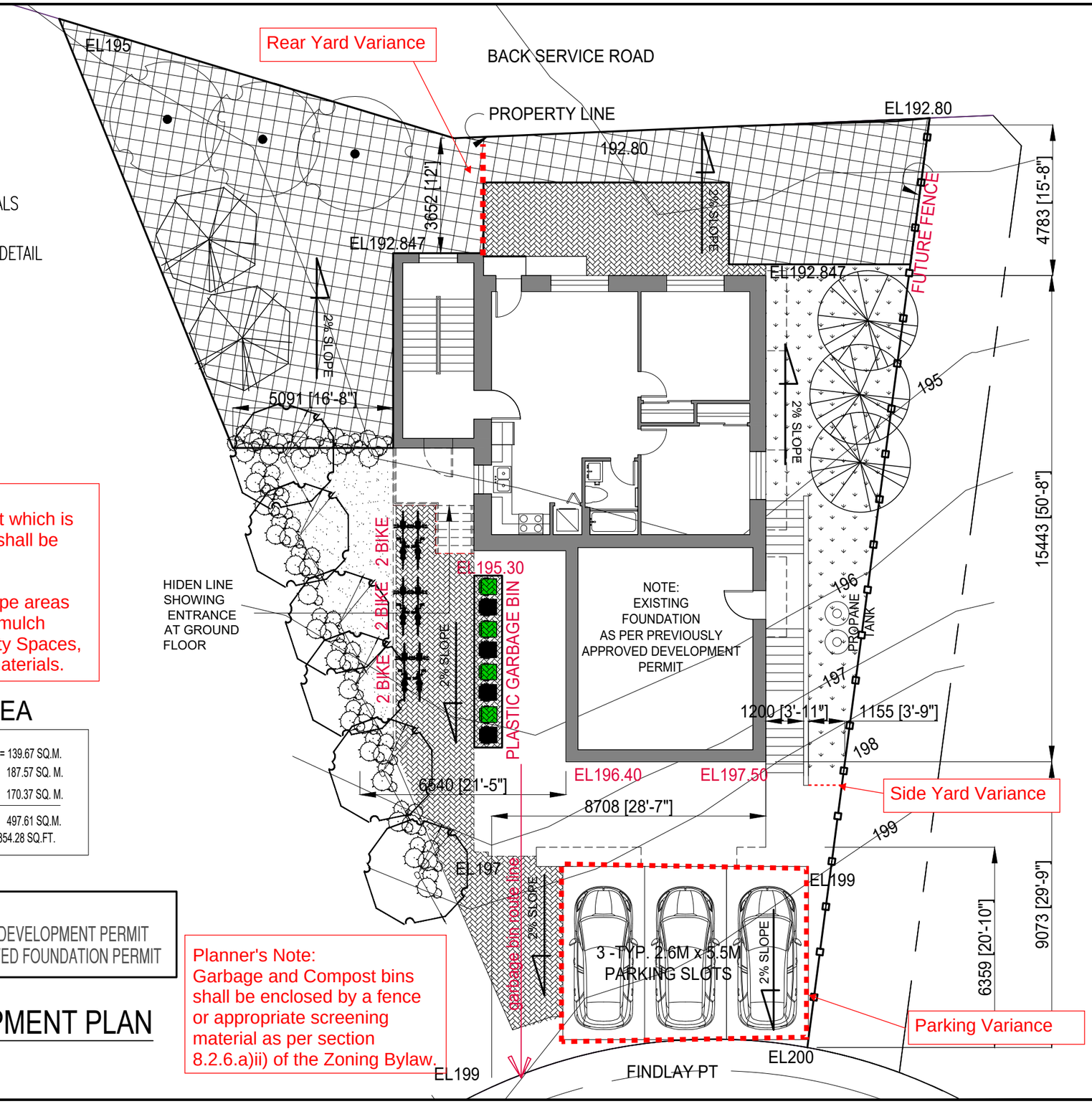
As per section 7.5.3 Required Landscape areas must be covered with either seed/sod, mulch beds, paving stones, walkways, Amenity Spaces, raised planters or other Landscaping materials.

FLOOR AREA

BASEMENT FLOOR AREA =	139.67 SQ.M.
FIRST FLOOR AREA =	187.57 SQ. M.
SECOND FLOOR AREA =	170.37 SQ. M.
TOTAL FLOOR AREA =	497.61 SQ.M.
	5,354.28 SQ.FT.

NOTE :
GRADING AS PER PREVIOUSLY APPROVED DEVELOPMENT PERMIT
FOUNDATION AS PER PREVIOUSLY APPROVED FOUNDATION PERMIT

1 / A01 | A01 — SITE DEVELOPMENT PLAN
SCALE 1 : 60 METERS



Planner's Note:
Garbage and Compost bins shall be enclosed by a fence or appropriate screening material as per section 8.2.6.a)ii) of the Zoning Bylaw.

SITE NORTH

City of Yellowknife
Development Permit # PL-2022-0151
Approved August 29 (Page 1 of 12)
Development Officer Andrew Treger

A DETAIL NO.
B LOCATION DRAWING NO.
C DETAIL DRAWING NO.

Client
Mr. HAZEM KOBAISSI
YELLOWKNIFE, NT.

CONSULTANT:
ST Arctic Design Planning Corp.
CONSULTANT
15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

revisions

PROJECT TITLE
MULTI UNIT RESIDENTIAL
7 FINDLAY PT, YELLOWKNIFE NT
LOT 83, BLOCK 308, PLAN 4204

DATE	ISSUED FOR
6 FEB 23	FOR D.P.
1 JULY 23	FOR D.P.

DRAWING TITLE
SITE DEVELOPMENT PLAN

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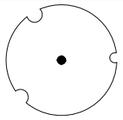
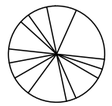
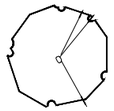
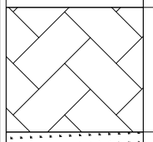
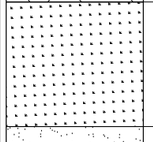
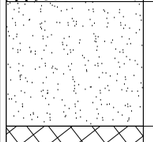
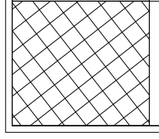
DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A01 -

PROJECT NO. 220815-01
SCALE 1: 60 M

TREE LIST

SYM	KEY	QTY	COMMON NAME BOTANICAL NAME	SIZE / REMARKS
	A	3	Patmore Green Ash Fraxinus Pennsylvanica 'Padmore'	3000mm Ht. Min., Single Leader, 50mm caliper, B & B
	B	3	White Birch Betula Papyrifera	3000mm Ht. Min., Single Leader, 50mm caliper, B & B
	C	6	Thunderchild Crab Malus x Adstringens 'Thunderchild'	3000mm Ht. Min., Single Leader, 50mm caliper, B & B
	D	2	Schubert Chokecherry Prunus Virginiana 'Schubert'	3000mm Ht. Min., Single Leader, 50mm caliper, B & B

TOP SOIL COVERING MATERIALS LIST

SYM	QTY	DISCRIPTION	REMARKS
	-	Inter Locking Paver Block on 150mm Depth Sand Bed on 150mm Depth Gravel Bed	Sand & Gravel from a Local Source
	-	Turf Seed Mix Over 150mm Depth Topsoil	50% Kentucky Bluegrass; 30% Creeping Red Fescue; 20% Perennial Rye Grass
	-	150mm Depth Topsoil for Tree Beds	Topsoil From Stock Pile or From a Local Source
	-	Naturalized Planting Bed	

City of Yellowknife
Development Permit # PL-2022-0151
Approved August 29 (Page 2 of 12)
Development Officer Andrew Treger

A DETAIL NO.
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C DETAIL DRAWING NO.

Client
Mr. HAZEM KOBAISSI
YELLOWKNIFE, NT.

CONSULTANT:
ST Arctic Design Planning Corp.
CONSULTANT
15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

revisions

PROJECT TITLE
MULTI UNIT RESIDENTIAL
7 FINDLAY PT, YELLOWKNIFE NT
LOT 83, BLOCK 308, PLAN 4204

DATE	ISSUED FOR
6 FEB 23	FOR D.P.
1 JULY 23	FOR D.P.

DRAWING TITLE
TREE LIST
TOP SOIL COVERING MATERIALS

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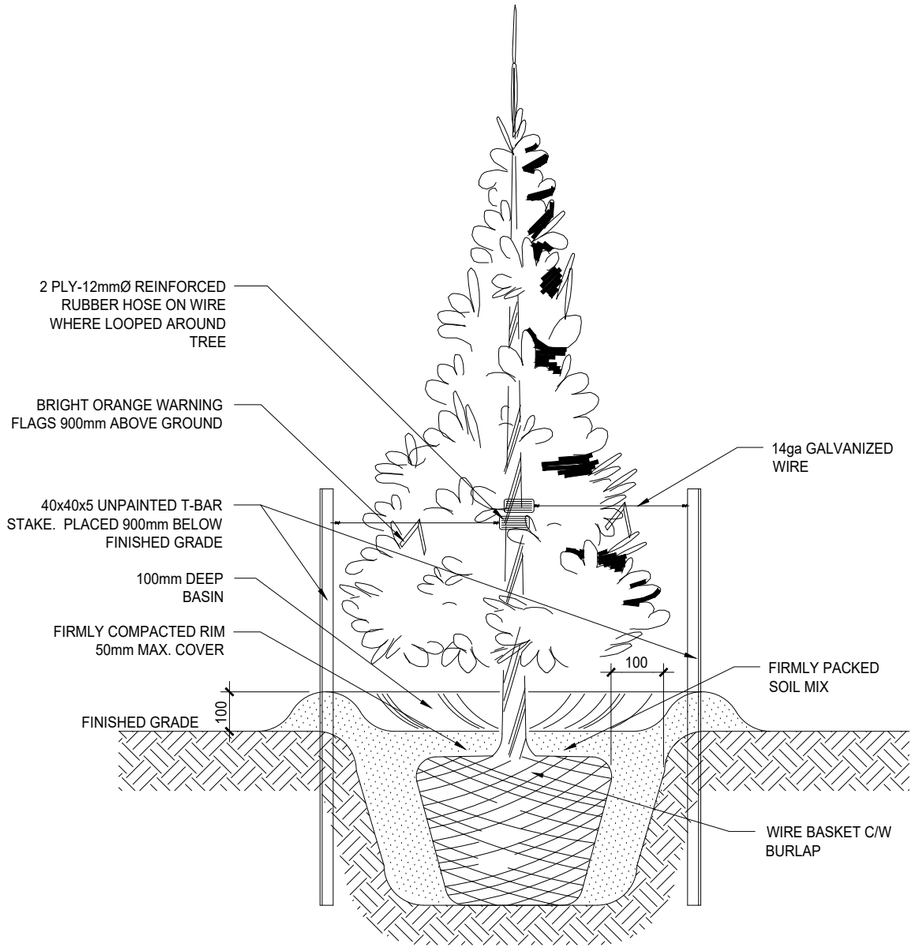
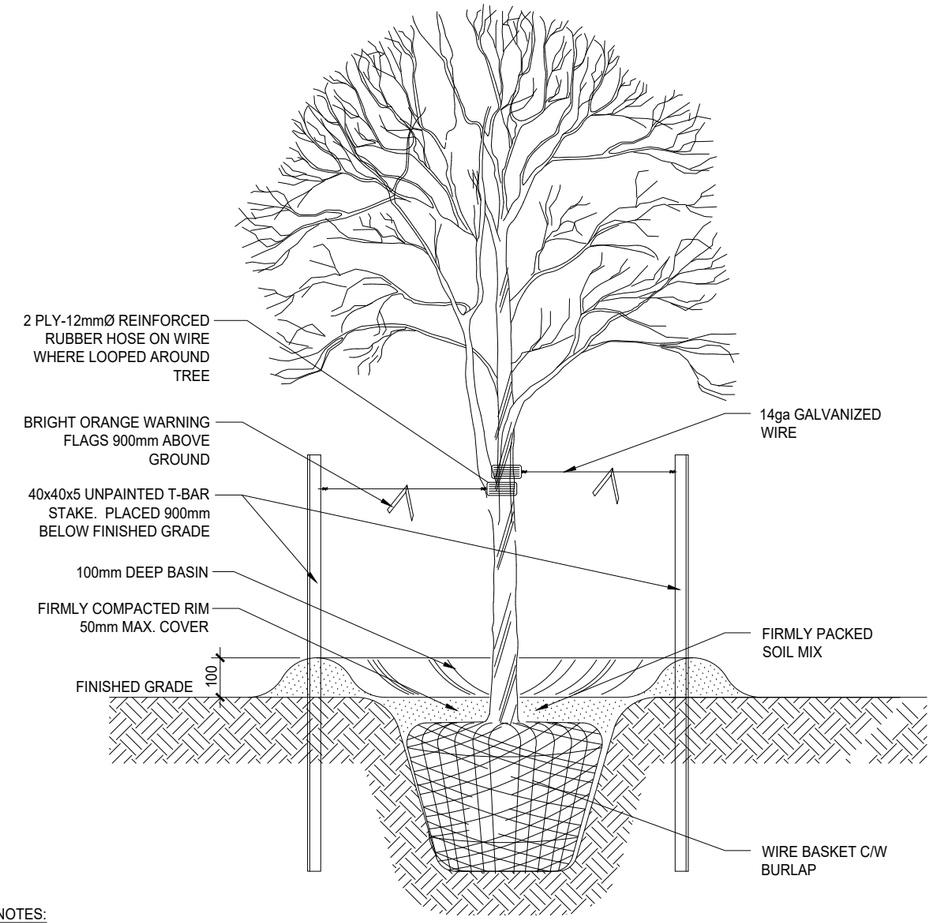
DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A02
PROJECT NO.		-
220815-01		
SCALE NTS		



NOTES:
1. PRUNE OUT AND TREAT BROKEN, DISEASED & WEAK BRANCHES. RETAIN NORMAL SHAPE OF TREE.
2. ALL EXCESS EXCAVATED MATERIAL SHALL BE DISPOSED OF AS DIRECTED BY OWNER'S REPRESENTATIVE.
3. THIS DETAIL SHALL BE READ IN REFERENCE TO THE SPECIFICATIONS.

1 CONIFEROUS TREE PLANTING
A03 | A03

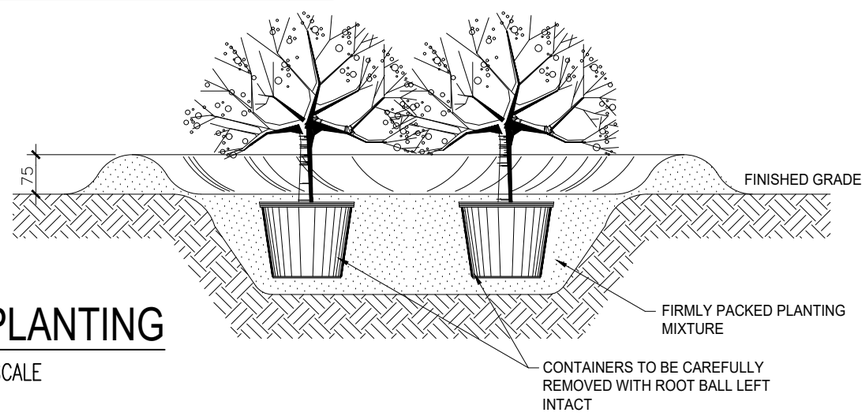
DRAWN NOT TO SCALE



NOTES:
1. PRUNE OUT AND TREAT BROKEN, DISEASED & WEAK BRANCHES. RETAIN NORMAL SHAPE OF TREE.
2. ALL EXCESS EXCAVATED MATERIAL SHALL BE DISPOSED OF AS DIRECTED BY OWNER'S REPRESENTATIVE.
3. THIS DETAIL SHALL BE READ IN REFERENCE TO THE SPECIFICATIONS.
4. PLANTING PIT TO BE EXCAVATED USING A HYDRAULIC TREE SPADE. PITS SHALL BE OF SIZE EQUAL TO THE ROOT CORE. IN HEAVY, DENSE SOILS, SCARIFY WALL OF PIT IMMEDIATELY PRIOR TO PLANTING.

2 DECIDUOUS TREE PLANTING
A03 | A03

DRAWN NOT TO SCALE



3 SHRUB PLANTING
A03 | A03

DRAWN NOT TO SCALE

NOTES:
1. PRUNE OUT AND TREAT BROKEN, DISEASED & WEAK BRANCHES. RETAIN NORMAL SHAPE OF TREE.
2. ALL EXCESS EXCAVATED MATERIAL SHALL BE DISPOSED OF AS DIRECTED BY OWNER'S REPRESENTATIVE.
3. THIS DETAIL SHALL BE READ IN REFERENCE TO THE SPECIFICATIONS. SHRUBS TO BE PLANTED WITH SAME ORIENTATION AS PRIOR TO TRANSPLANTING.
4. PITS SHALL BE OF SIZE EQUAL TO THE ROOT CORE.

City of Yellowknife

Development Permit # PL-2022-0151

Approved August 29 (Page 3 of 12)

Development Officer Andrew Treger

A DETAIL NO.
B LOCATION DRAWING NO.
C DETAIL DRAWING NO.

Client

Mr. HAZEM KOBAISSI

YELLOWKNIFE, NT.

CONSULTANT:

ST Arctic Design Planning Corp.
CONSULTANT
15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

revisions

PROJECT TITLE

MULTI UNIT RESIDENTIAL

7 FINDLAY PT, YELLOWKNIFE NT
LOT 83, BLOCK 308, PLAN 4204

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6 FEB 23	FOR D.P.
1 JULY 23	FOR D.P.

DRAWING TITLE

PLANTING

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DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A03
PROJECT NO.		-
220815-01		
SCALE 1: 30 M		

1. CONFIRM ALL DIMENSIONS AGAINST ARCHITECTURAL AND EXISTING CONDITIONS PRIOR TO COMMENCING CONSTRUCTION.

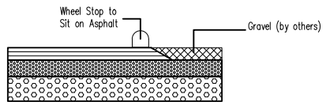
2. CONFIRM LOCATION ON SITE UTILITIES PRIOR TO COMMENCING CONSTRUCTION.

3. CONTRACTOR SHALL CONFIRM ALL DIMENSIONS AND LOCATIONS OF EXISTING FACILITIES ON SITE PRIOR TO COMMENCING CONSTRUCTION.

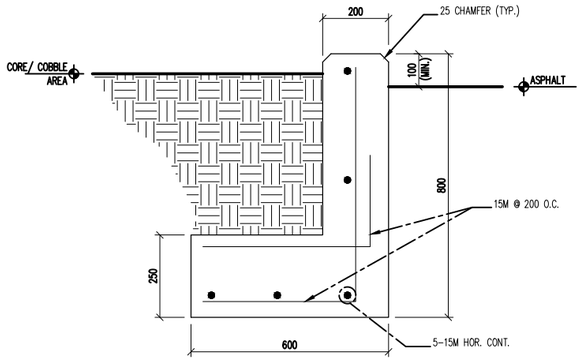
4. ALL ELEVATION TIE-INS MUST BE TO THE SATISFACTION OF THE CITY ENGINEER.

5. CONTRACTOR TO CONFIRM ALL EXISTING ELEVATIONS PRIOR TO PROCEEDING WITH CONSTRUCTION.

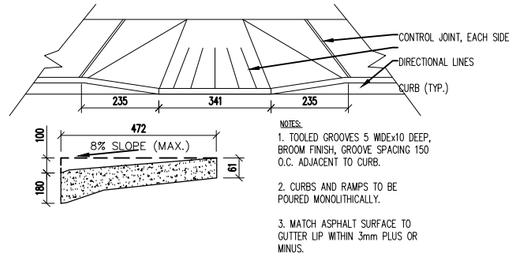
6. SCOPE OF PAVING WORK TO INCLUDE:
   - -sub grade and subbase supply, placement, grading, and compaction
   - -hot mix asphalt concrete supply and placement
   - -placement of wheel stops on finished surface
   - -landscaping, concrete, and other details by others



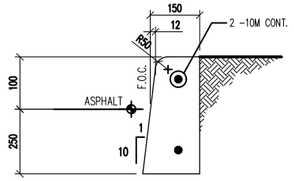
TYPICAL PARKING STALL CROSS SECTION
1:8



TYPICAL RETAINING WALL DETAIL
1:8



TYPICAL PARAPALEGIC RAMP DETAIL
1:8



TYPICAL STRAIGHT-FACED CURB DETAIL
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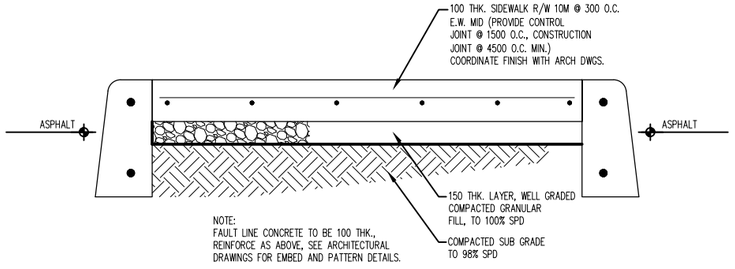
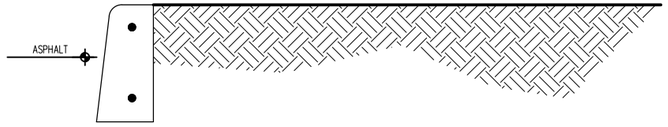
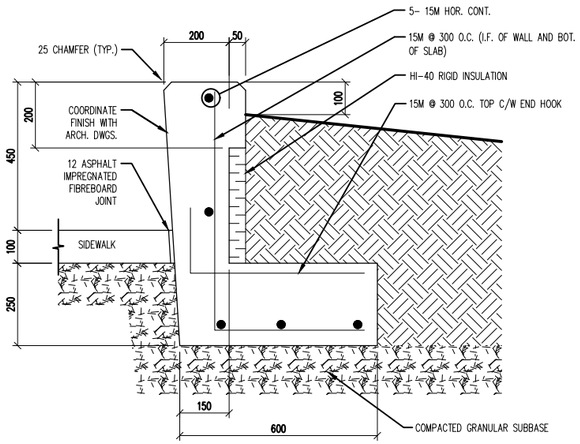


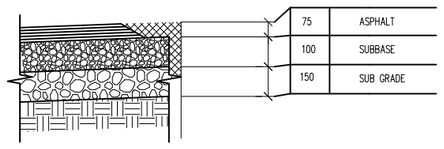
TYPICAL SIDEWALK/CONCRETE SECTION
1:8



TYPICAL CURB/LANDSCAPE SECTION
1:8



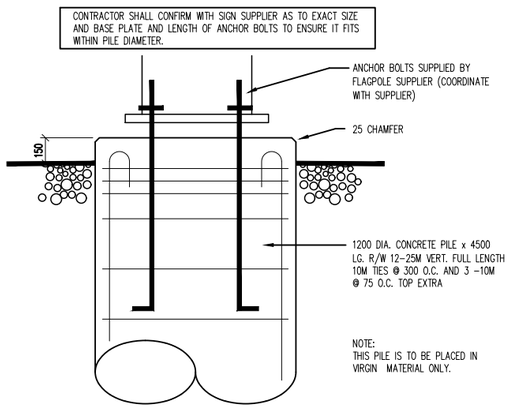
TYPICAL LANDSCAPE RETAINING WALL DETAIL
1:8



SUBBASE: SOIL CEMENT OR WELL-GRADED COMPACTED GRANULAR FILL (20mm AGGREGATE MAX.), COMPACTED TO 100% S.P.D.

SUB GRADE: REMOVE ALL ALL SOFT SPOTS, RECOMPACT TOP 150mm TO 100% S.P.D.

TYPICAL PAVEMENT CROSS SECTION
1:8



TYPICAL FLAGPOLE / LIGHT FIXTURES POLE / BASE SECTION
1:8

1 / A04 A04

MISCELLANEOUS SITE WORK DETAIL

SCALE 1 : AS SHOWN

City of Yellowknife
Development Permit # PL-2022-0151
Approved August 29 (Page 4 of 12)
Development Officer Andrew Treger

A DETAIL NO.
B LOCATION DRAWING NO.
C DETAIL DRAWING NO.

Client
Mr. HAZEM KOBAISSI
YELLOWKNIFE, NT.

CONSULTANT:
ST Arctic Design Planning Corp.
CONSULTANT
15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

revisions

PROJECT TITLE
MULTI UNIT RESIDENTIAL
7 FINDLAY PT, YELLOWKNIFE NT
LOT 83, BLOCK 308, PLAN 4204

DATE	ISSUED FOR
6 FEB 23	FOR D.P.
1 JULY 23	FOR D.P.

DRAWING TITLE
MISCELLANEOUS SITE WORK DETAIL

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DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A04
PROJECT NO. 220815-01		-
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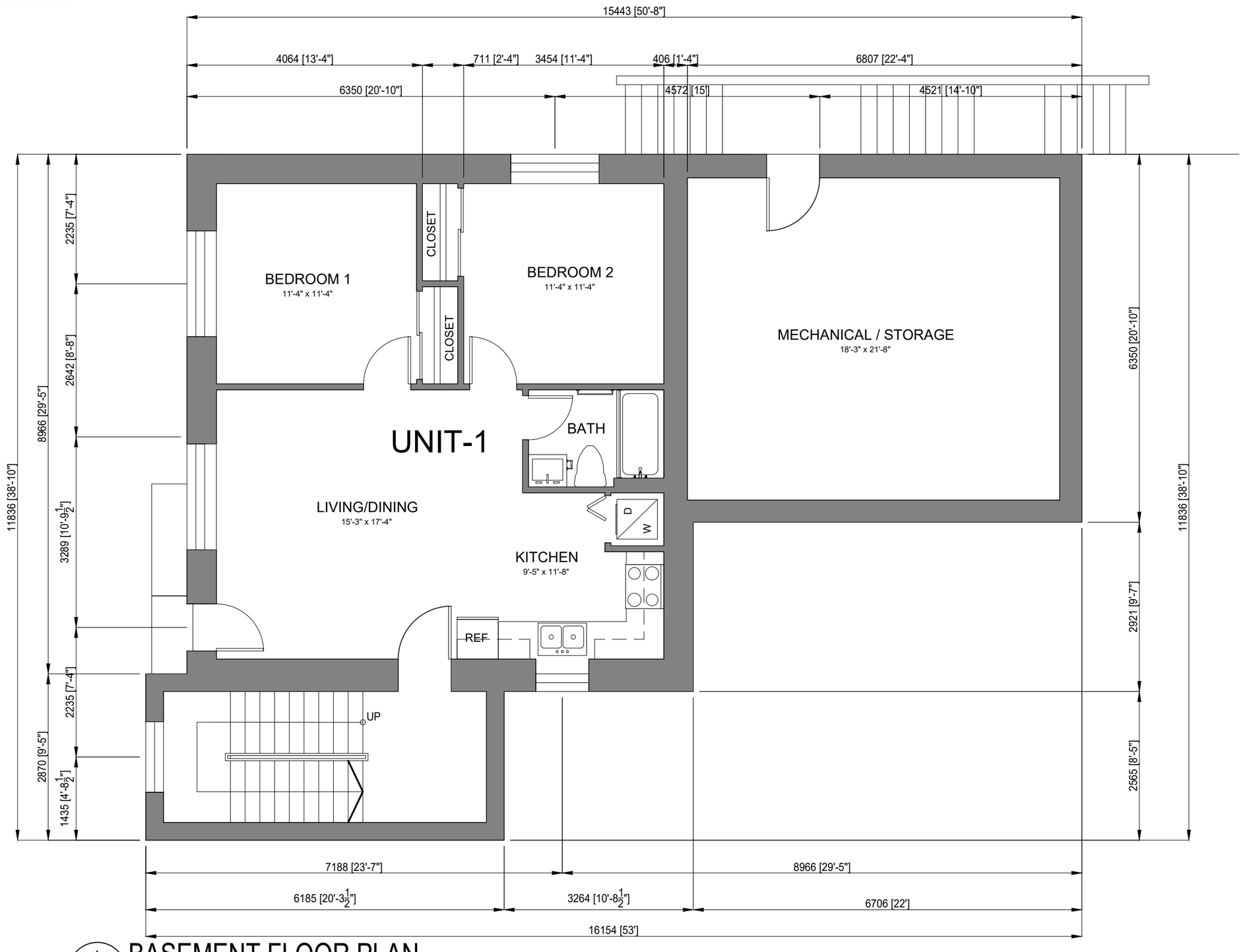

1 / A05 | A05

BASEMENT FLOOR PLAN

SCALE 1 : 30 METERS

City of Yellowknife
Development Permit # PL-2022-0151
Approved August 29 (Page 5 of 12)
Development Officer Andrew Treger

A DETAIL NO.
B LOCATION DRAWING NO.
C DETAIL DRAWING NO.

Client
Mr. HAZEM KOBAISSI
YELLOWKNIFE, NT.

CONSULTANT:
ST Arctic Design Planning Corp.
CONSULTANT
15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

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MULTI UNIT RESIDENTIAL
7 FINDLAY PT, YELLOWKNIFE NT
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DRAWING TITLE
BASEMENT FLOOR PLAN

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DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A05
PROJECT NO.		-
220815-01		
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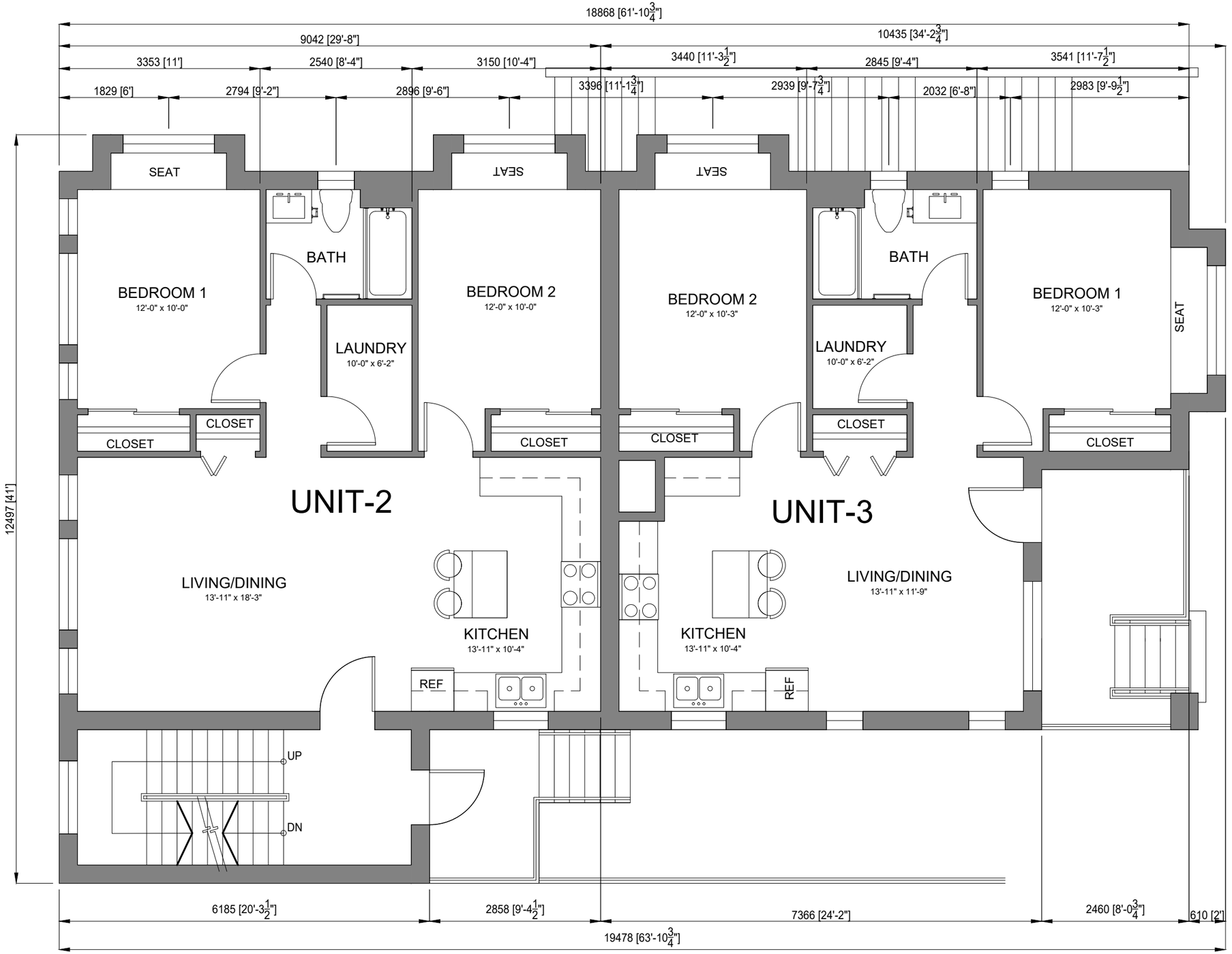

1 / A06 | A06

GROUND FLOOR PLAN

SCALE 1 : 30 METERS

City of Yellowknife
Development Permit # PL-2022-0151
Approved August 29 (Page 6 of 12)
Development Officer Andrew Treger

A DETAIL NO.
B LOCATION DRAWING NO.
C DETAIL DRAWING NO.

Client
Mr. HAZEM KOBAISSI
YELLOWKNIFE, NT.

CONSULTANT:
ST Arctic Design Planning Corp.
CONSULTANT
15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

revisions

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MULTI UNIT RESIDENTIAL
7 FINDLAY PT, YELLOWKNIFE NT
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DRAWING TITLE
GROUND FLOOR PLAN

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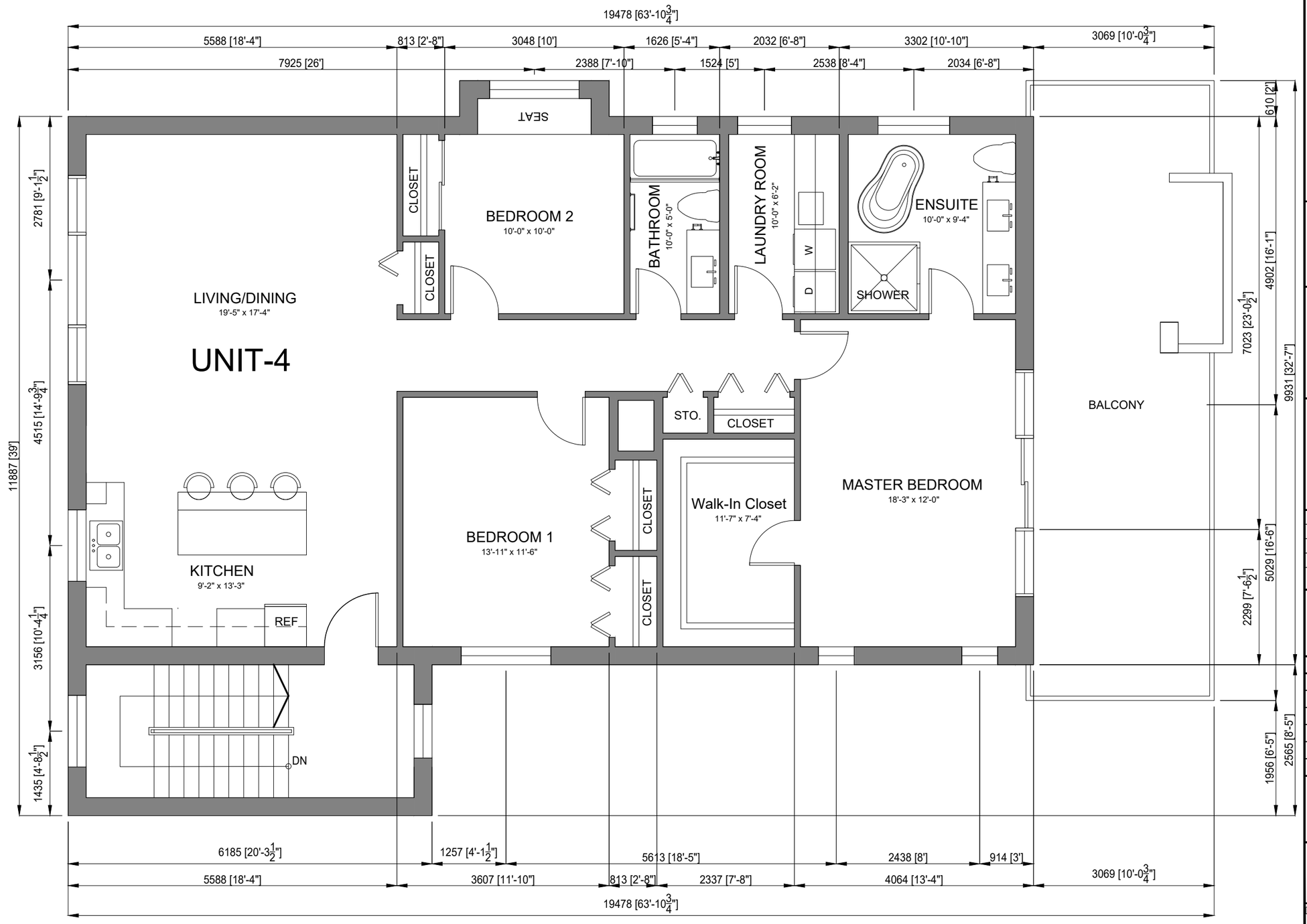
DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A06
PROJECT NO.		-
220815-01		
SCALE 1: 30 M		



1 / A07 | A07

SECOND FLOOR PLAN

SCALE 1 : 30 METERS

City of Yellowknife

Development Permit # PL-2022-0151

Approved August 29 (Page 7 of 12)

Development Officer Andrew Treger

A DETAIL NO.

B LOCATION DRAWING NO.

C DETAIL DRAWING NO.

Client

Mr. HAZEM KOBAISSI

YELLOWKNIFE, NT.

CONSULTANT:

ST Arctic Design Planning Corp.

CONSULTANT

15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

revisions

PROJECT TITLE

MULTI UNIT RESIDENTIAL

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1 JULY 23	FOR D.P.

DRAWING TITLE

SECOND FLOOR PLAN

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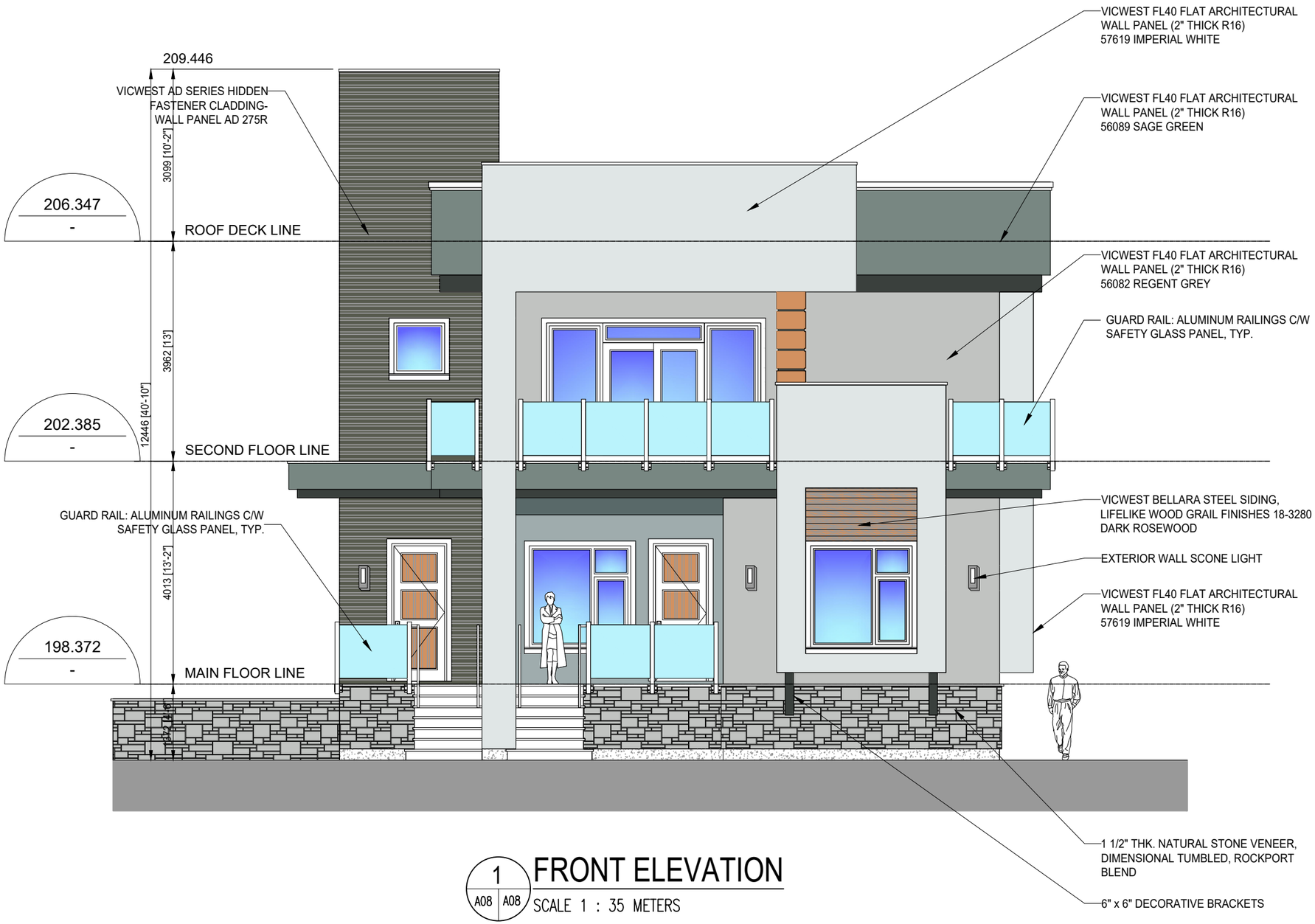
DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A07
PROJECT NO.		-
220815-01		
SCALE 1: 30 M		



1 / A08 | A08 FRONT ELEVATION

SCALE 1 : 35 METERS

City of Yellowknife
Development Permit # PL-2022-0151
Approved August 29 (Page 8 of 12)
Development Officer Andrew Treger

A DETAIL NO.
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Client
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YELLOWKNIFE, NT.

CONSULTANT:
ST Arctic Design Planning Corp.
CONSULTANT
15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

revisions

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DATE	ISSUED FOR
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1 JULY 23	FOR D.P.

DRAWING TITLE
FRONT ELEVATION

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DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A08
PROJECT NO.		-
220815-01		
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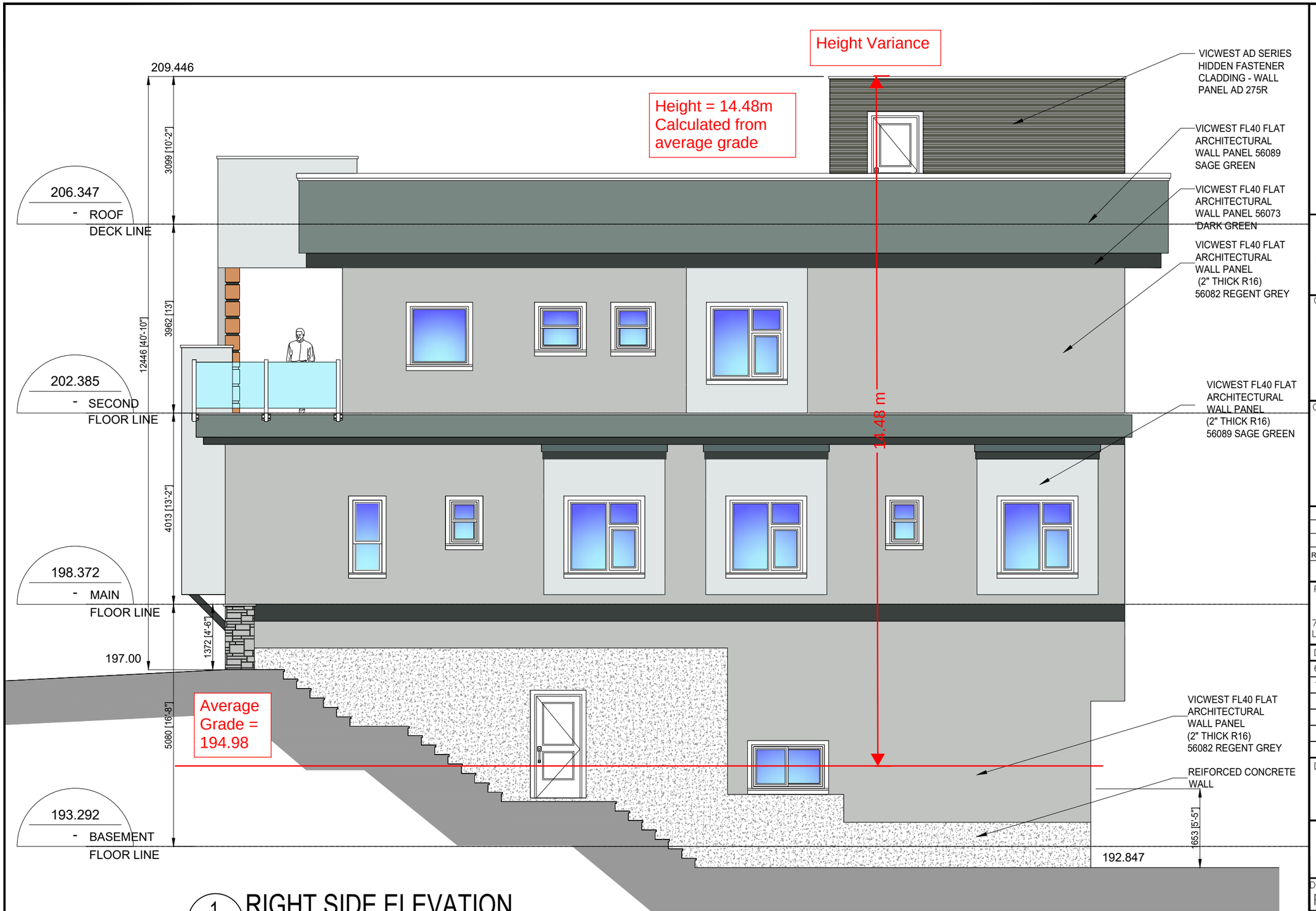

1 A09 A09 RIGHT SIDE ELEVATION

SCALE 1 : 35 METERS

City of Yellowknife
Development Permit # PL-2022-0151
Approved August 29 (Page 9 of 12)
Development Officer Andrew Treger

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ST Arctic Design Planning Corp.
CONSULTANT
15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

revisions

PROJECT TITLE
MULTI UNIT RESIDENTIAL
7 FINDLAY PT, YELLOWKNIFE NT
LOT 83, BLOCK 308, PLAN 4204

DATE	ISSUED FOR
6 FEB 23	FOR D.P.
1 JULY 23	FOR D.P.

DRAWING TITLE
RIGHT SIDE ELEVATION

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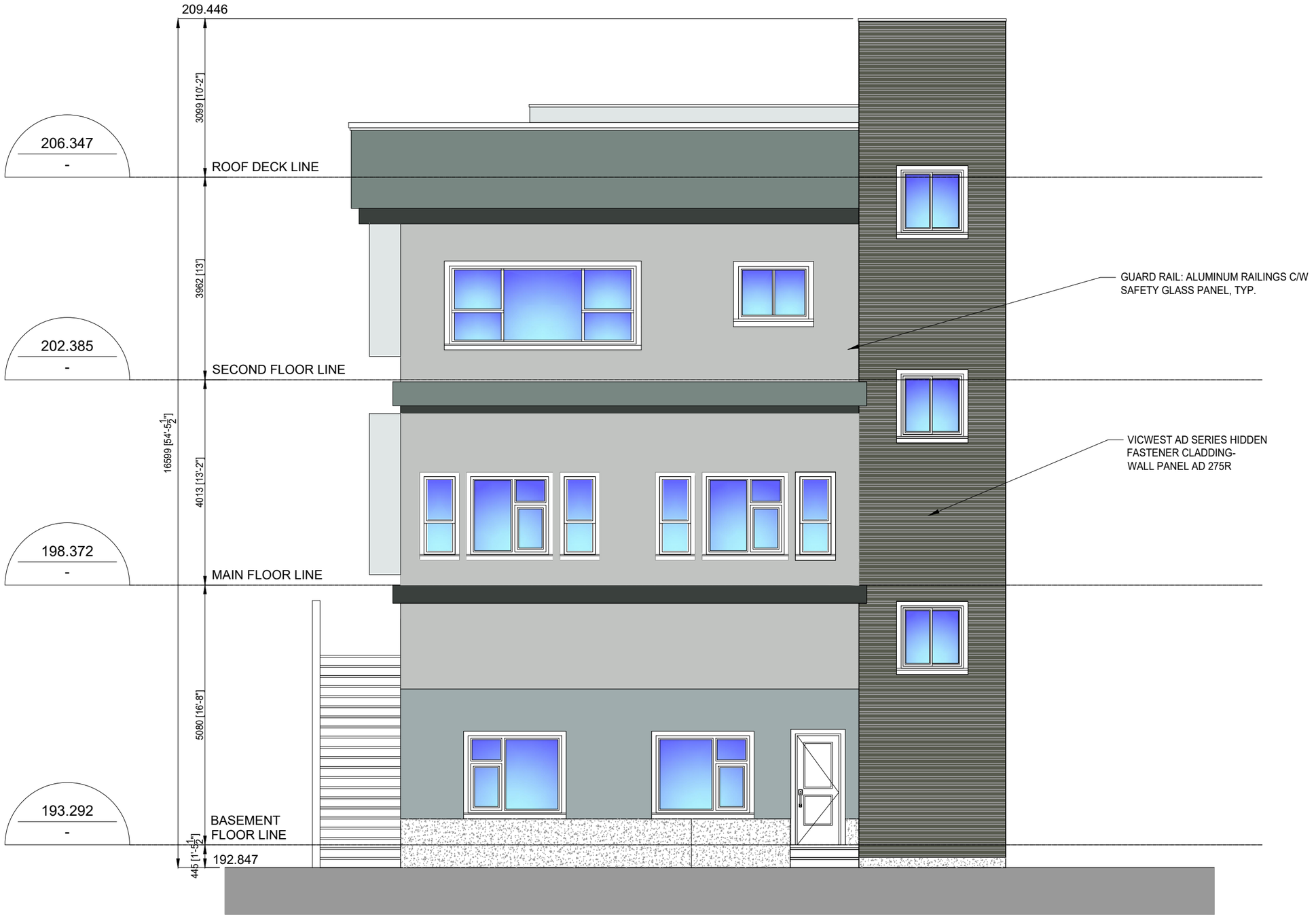
DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A09
PROJECT NO.		-
220815-01		
SCALE 1: 35 M		



1 REAR ELEVATION

SCALE 1 : 35 METERS

City of Yellowknife
Development Permit # PL-2022-0151
Approved August 29 (Page 10 of 12)
Development Officer Andrew Treger

A DETAIL NO.
B LOCATION DRAWING NO.
C DETAIL DRAWING NO.

Client
Mr. HAZEM KOBAISSI
YELLOWKNIFE, NT.

CONSULTANT:
ST Arctic Design Planning Corp.
CONSULTANT
15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

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PROJECT TITLE
MULTI UNIT RESIDENTIAL
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DRAWING TITLE
REAR ELEVATION

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DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A10
PROJECT NO. 220815-01		-
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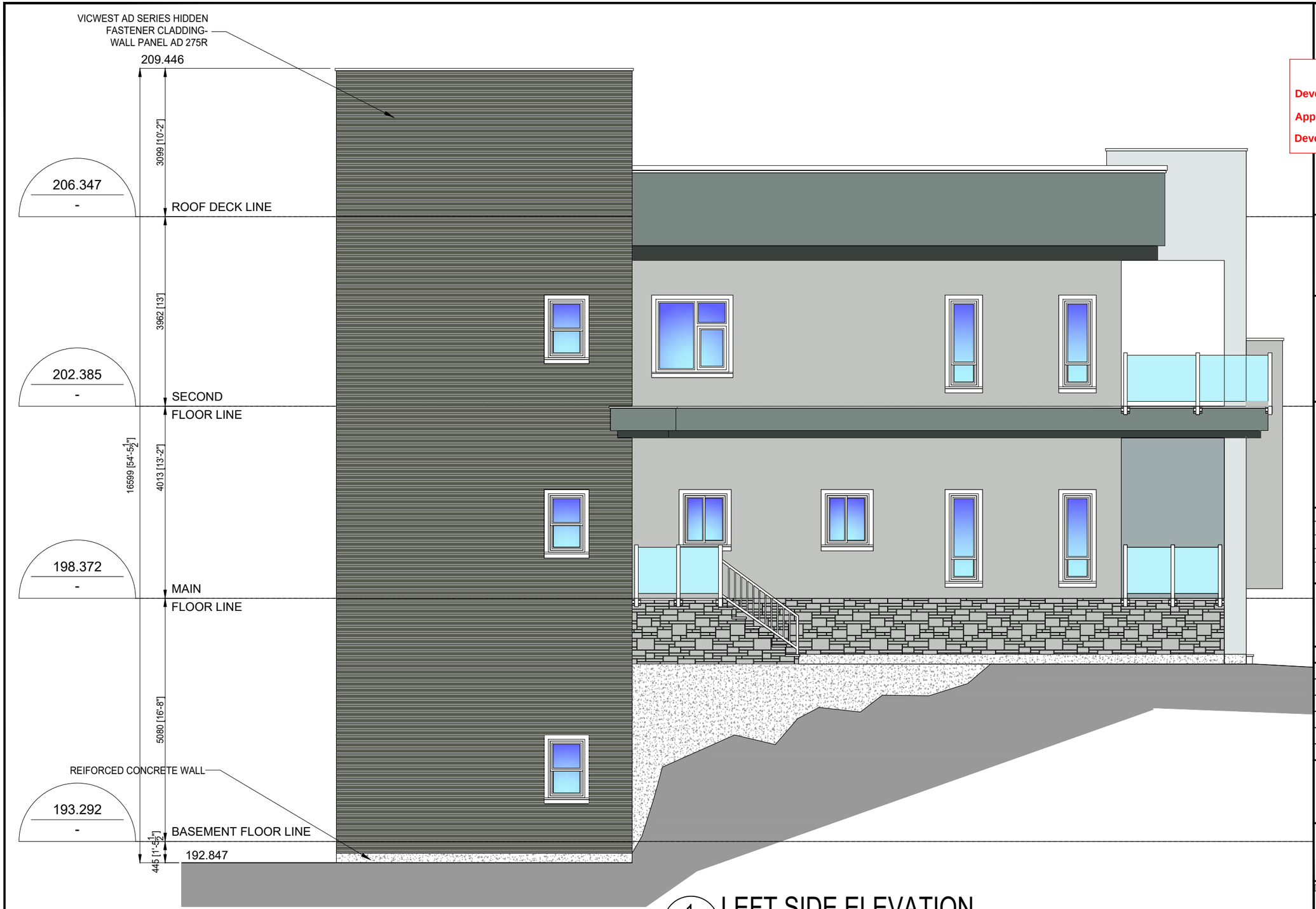

1 A11 A11 LEFT SIDE ELEVATION

SCALE 1 : 35 METERS

City of Yellowknife

Development Permit # PL-2022-0151

Approved August 29 (Page 11 of 12)

Development Officer Andrew Treger

A DETAIL NO.

B LOCATION DRAWING NO.

C DETAIL DRAWING NO.

Client

Mr. HAZEM KOBAISSI

YELLOWKNIFE, NT.

CONSULTANT:

ST Arctic Design Planning Corp.

CONSULTANT

15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

revisions

PROJECT TITLE

MULTI UNIT RESIDENTIAL

7 FINDLAY PT, YELLOWKNIFE NT
LOT 83, BLOCK 308, PLAN 4204

DATE	ISSUED FOR
6 FEB 23	FOR D.P.
1 JULY 23	FOR D.P.

DRAWING TITLE

LEFT SIDE ELEVATION

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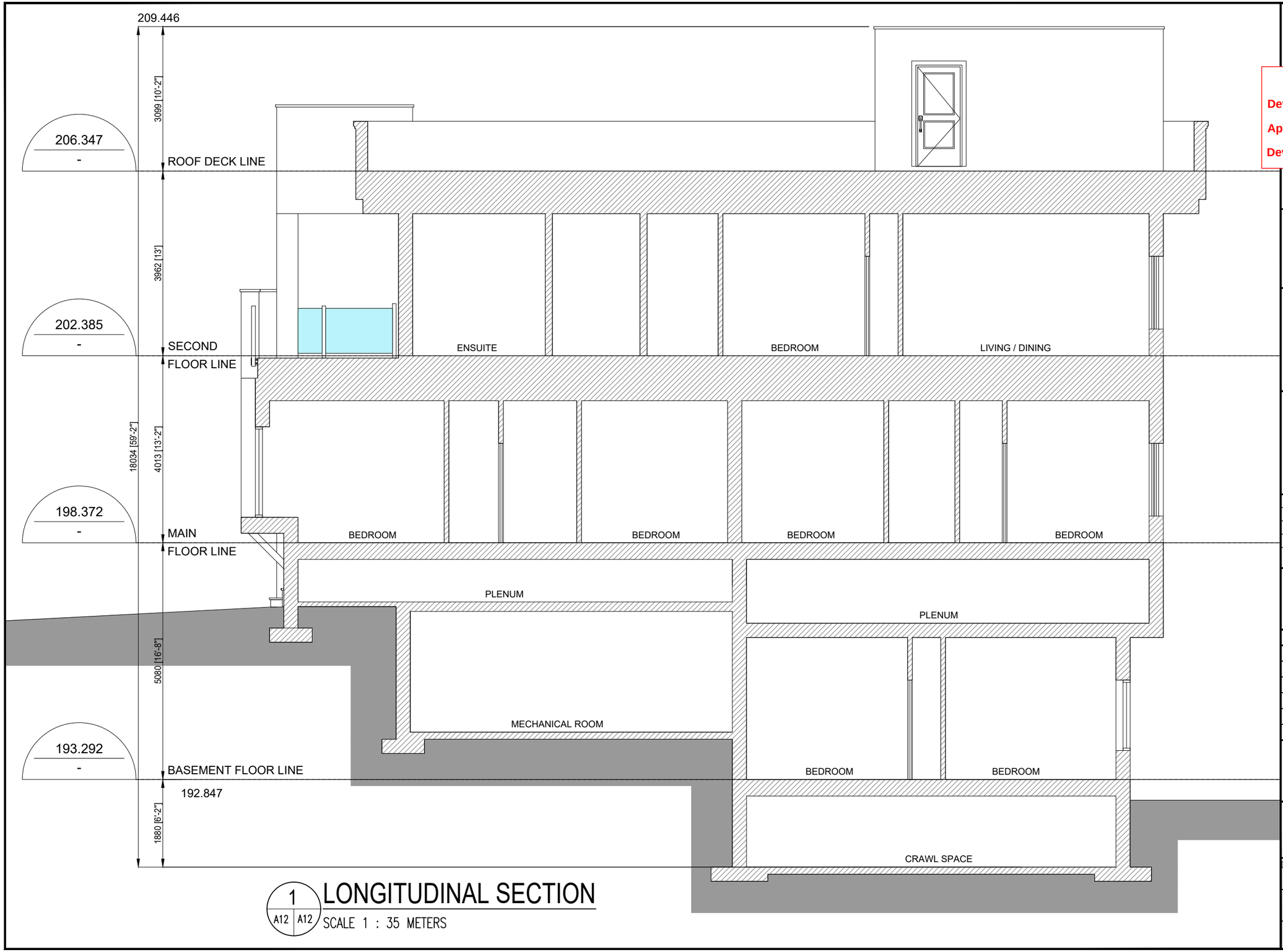
DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A11
PROJECT NO.		-
220815-01		
SCALE 1: 35 M		



1 / A12 | A12 LONGITUDINAL SECTION

SCALE 1 : 35 METERS

City of Yellowknife

Development Permit # PL-2022-0151

Approved August 29 (Page 12 of 12)

Development Officer Andrew Treger

A DETAIL NO.

B LOCATION DRAWING NO.

C DETAIL DRAWING NO.

Client

Mr. HAZEM KOBAISSI

YELLOWKNIFE, NT.

CONSULTANT:

ST Arctic Design Planning Corp.

CONSULTANT

15 Coronation Dr, Yellowknife, NT X1A 0G4

REV	REVISION	DATE

revisions

PROJECT TITLE

MULTI UNIT RESIDENTIAL

7 FINDLAY PT, YELLOWKNIFE NT
LOT 83, BLOCK 308, PLAN 4204

DATE	ISSUED FOR
6 FEB 23	FOR D.P.
1 JULY 23	FOR D.P.

DRAWING TITLE

LONGITUDINAL SECTION

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DESIGN	DRAWN	DWG. NO.
RS/TT	RS	A12
PROJECT NO.		-
220815-01		
SCALE 1: 35 M		

PUBLIC NOTICE

CITY OF YELLOWKNIFE – ZONING BY-LAW NO. 5045

NOTICE OF DECISION

Development Permit Application No. PL-2022-0151, dated the 15 day of August, 2022, for a development taking place at the following location: 7 FINDLAY PT [Roll: 0308008300]

Lot 83 Block 308 Plan # 4204

Intended Development: Multi-Unit Dwelling (4-Unit)

1. The development shall comply with the approved and stamped drawings for PL-2022-0151 and with all By-laws in effect for the City of Yellowknife;
2. The developer shall enter into a Development Agreement with the City prior to the issuance of the Building Permit;
3. The minimum rear yard setback has been decreased from 6.0m to 3.50m;
4. The minimum side yard setback has been decreased from 1.50m to 1.00m;
5. The maximum building height has been increased from 12m to 14.50m; and
6. The minimum required number of parking spaces has been reduced from 4 spaces to 3 spaces.

DATE of Issue of this Notice of Decision: September 27, 2023
EFFECTIVE DATE: October 12, 2023

Development Officer

NOTICE:

Any persons claiming to be adversely affected by the development may, in accordance with the C*ommunity Planning and Development Act*, appeal to the Development Appeal Board, c/o City Clerk's Office, tel. 920-5646, City of Yellowknife, P.O. Box 580, Yellow knife, NT X1A 2N4. Please note that your notice of appeal must be in writing, comply with the *Community Planning and Development Act,* include your contact information and include the payment of the $25 appeal fee (the appeal fee will be reimbursed if the decision of the Development Officer is reversed). The appeal must be received on or before 4:30 p.m. on the 11 day of October, A.D., 20 23.

AFTER THE EFFECTIVE DATE OF THIS PERMIT, THE OWNER OF THE SUBJECT PROPERTY IS AUTHORIZED TO REMOVE THIS NOTICE. ALL OTHER PERSONS FOUND REMOVING THIS NOTICE WILL BE PROSECUTED.

CITY OF YELLOWKNIFE

Development Permit Notification Letter

Date September 27, 2023 File: Lots 83 Block 308 Plan 4204

Kobaissi, Hazem
PO Box .
Yellowknife, NT X1A 2P9

Dear Kobaissi, Hazem,

Re: Approval of Development Permit: Multi-Family Dwelling:Application Number: PL-2022-0151

The City of Yellowknife Planning and Lands Division has approved your application for Development Permit: PL-2022-0151 for a Multi-Unit Dwelling (4-Units) at Lot: 83 Block 308 Plan 4204 at 7 FINDLAY PT [Roll: 0308008300] .

A Public Notice will be posted on the property with the permit effective on the date indicated. The Public Notice must be left up until the effective date, after which you may take it down. Please note a Development Permit is not a Building Permit, you must apply for and receive a Building Permit before beginning construction.

The application was approved with the following conditions:

1. The development shall comply with the approved and stamped drawing for PL-2022-0151 and with all By-laws in effect for the City of Yellowknife;
2. The developer shall enter into a Development Agreement with the City prior to the issuance of the Building Permit;
3. The minimum rear yard setback has been decreased from 6.00m to 3.50m;
4. The minimum side yard setback has been decreased from 1.50m to 1.00m;
5. The maximum building height has been increased from 12.00m to 14.50m; and
6. The minimum required number of parking spaces has been reduced from 4 spaces to 3 spaces.

If you have any questions or concerns, please do not hesitate to contact the undersigned between regular business hours.

Sincerely,

Andrew Treger
Planning and Lands Division
City of Yellowknife

Development Appeal Board

CITY OF YELLOWKNIFE

P.O. BOX 580,
YELLOWKNIFE, NT
X1A 2N4

Tel (867) 920-5646
Fax (867) 920-5649

October 18, 2023 200-D1-H2-23

REGISTERED MAIL

Mr. Bryan Manson

Yellowknife, NT X1A OB6

Dear Mr. Manson,

Re: Appeal of Development Permit #PL-2022-0151

We acknowledge receipt of your letter appealing the decision of the Development Officer to issue a Development Permit #PL-2022-0151 for a Multi-Unit Dwelling (4-Unit) on Lot 83, Block 308, Plan 4204 (7 Findlay Point).

This letter is to confirm that a hearing of the City of Yellowknife Development Appeal Board, to consider your appeal, has been scheduled for Tuesday, November 7, 2023, at 7:00 p.m. in the City Hall Council Chamber.

With respect to the submission of written documentation for the Appeal Board's consideration, please be advised that, pursuant to section 5.1.6.(a) of the Yellowknife Zoning By-law, all maps, plans, drawings and written material that you intend to submit in support of your appeal must be filed with the Secretary of the Appeal Board no later than ten days before the day fixed for the appeal. You have until 4:30 p.m. on Friday, October 27 , 2023 to submit your documentation to the Secretary of the Appeal Board at City Hall or via email to cityclerk@yellowknife.ca. Should your submission be too large to email, please contact me and we will make arrangements to provide you with our File Transfer Site.

Enclosed are copies of the sections of the *Community Planning and Development Act* of the Northwest Territories and the City of Yellowknife Zoning By-law that describe the Appeal Board's composition and procedures.

Please contact me should you have any questions with respect to the appeal.

Yours truly,

Cole Caljouw
Secretary, Development Appeal Board

Enclosure DM#745697

c) approve, add any specific provision(s), or deny all applications for an amendment to this By-law ; and

d) make a decision and recommend any terms and conditions on any other planning, or Development matter referred to it by the Development Officer.

3.3. Development Appeal Board

3.3.1. The Development Appeal Board is hereby established in accordance with Section 30 (1) of the *Act*.

3.3.2. The Development Appeal Board shall:

a) be composed of at least three persons and not more than seven, and one shall be a member of Council, but shall not include employees of the City;

b) elect one member as a chairperson;

c) elect one member as a vice-chairperson;

d) hold a hearing within 30 days after an appeal has been received;

e) ensure that reasonable notice of the hearing is given to the appellant, Landowners and lessees within 30 m of the boundary of land in respect of which the appeal relates, and all persons who in the opinion of the Development Appeal Board may be affected;

f) consider each appeal having due regard to the circumstances and merits of the case and to the purpose, scope and intent of the Community Plan, Area Development Plan, and any Council approved plans or policies, and to this By-law;

g) where an appeal is heard, the Development Appeal Board shall provide the persons referred to in Section 66 (2) of the *Act* the opportunity to be heard as referenced in Section 68 of the *Act.*

h) render its decision in writing with reasons and provide a copy of the decision to the appellant and any other parties, as described in Section 69 (3) of the *Act* within 60 calendar days after the date on which the hearing is concluded; and

i) conduct a hearing pursuant to Section 5.1 of this By-law.

3.3.3. The Development Appeal Board may:

a) in determining an appeal, confirm, reverse or vary the decision appealed from and may impose conditions or limitations that it considers proper and desirable in the circumstances. Decisions of the Development Appeal Board must be in compliance with this Zoning By-law, the Community Plan and any applicable Area Development Plan; and

b) appoint the City Clerk to act as Secretary for the Development Appeal Board.

3.4. Secretary to the Development Appeal Board

3.4.1. The Secretary for the Development Appeal Board shall:

a) ensure that reasonable notice of the hearing is given to the appellant, Landowners and lessees within 30 m of the boundary of land in respect of which the appeal relates, and all persons who in the opinion of the Development Appeal Board may be affected;

b) prepare and maintain a file of the minutes of the business transacted at all meetings of the Development Appeal Board;

c) issue the decision of the Development Appeal Board with reasons and provide a copy of the decision to the appellant and any other parties, as described in Section 69 (3) of the *Act* within 60 calendar days after the date on which the hearing is concluded; and

d) carry out administrative duties as the Development Appeal Board may specify.

5. Appeals and Amendments

5.1. Development Appeal Process

5.1.1. A person whose application for a Development Permit is refused, or who is approved for a Development Permit subject to a condition that they consider to be unreasonable, may appeal the refusal or the condition to the Development Appeal Board pursuant to Section 61 of the *Act* by serving written notice of appeal to the Secretary of the Development of the Appeal Board within 14 days after the day the application for the Development Permit is approved or refused.

5.1.2. A person claiming to be affected by a decision of the Development Officer or Council made under this By-law may appeal to the Development Appeal Board pursuant to Section 62 of the *Act*, by serving written notice of appeal to the Secretary of the Development Appeal Board within 14 days after the day the application for the Development Permit is approved.

5.1.3. Filing for an appeal must include the information listed in Section 65 (1) of the *Act*.

5.1.4. Where an appeal is made, a Development Permit shall not come into effect until a decision by the Development Appeal Board has been made to either confirm, reverse or vary the decision of the Development Officer pursuant to Section 69 of the *Act*.

5.1.5. An appeal must be heard by a quorum of the Development Appeal Board, and a quorum shall consist of at least two members and the Chairperson or a Vice-Chairperson.

5.1.6. Hearing procedures are as follows:

a) the appellant and any other interested party shall, not later than ten days before the day fixed for the hearing of the appeal, file with the Secretary of the Development Appeal Board all maps, plans, drawings and written material that they intend to submit to the Development Appeal Board or use at the hearing;

b) the Development Officer or Council shall, if required by the Development Appeal Board, transmit to the Secretary of the Development Appeal Board, before the day fixed for the hearing of the appeal, the original or true copies of maps, plans, drawings and written material in its possession relating to the subject matter of the appeal;

c) all maps, plans, drawings and written material, or copies thereof, filed or transmitted pursuant to Section 5.1 of this By-law shall, unless otherwise ordered by the Development Appeal Board, be retained by the Development Appeal Board and be part of its permanent records; but, pending the hearing of the appeal, all the material shall be made available for the inspection of any interested person;

d) where a member of the Development Appeal Board has a conflict of interest in the matter before the Development Appeal Board, that member is not entitled to participate, deliberate, or vote thereon;

e) in determining the decision of an appeal, the Development Appeal Board shall not:

    i approve Development that is not consistent with the regulations in the Zoning By-law;

    ii approve Development in a manner that is incompatible with the Community Plan;

f) a decision concurred with by a majority of the Development Appeal Board present at the hearing is the decision of the Development Appeal Board;

g) the decision of the Development Appeal Board shall be based on the facts and merits of the case and shall be in the form of a written decision. The decision shall include a summary of all representations made at the hearing and setting forth the reasons for the decision. Decisions may be signed by the chair, acting chair or vice-chair;

h) the Secretary shall issue, within 60 days of the conclusion of the hearing, the decision to all parties of the hearing; and

i) a decision of the Development Appeal Board is final and binding on all parties and there is no right to appeal from the decision of the Development Appeal Board, pursuant to Section 70 of the *Act*.

Use and development restricted

(2) On the registration of a caveat,

(a) the order binds the heirs, executors, administrators, assigns, transferees and successors in title of the owner of the land affected by the order; and

(b) until the caveat is withdrawn, no use or development of the land or buildings located on it may take place except in accordance with the order.

Usage et aménagement restreints

(2) Dès l'enregistrement de l'opposition :

a) d'une part, l'ordonnance lie, à l'égard du propriétaire du bien-fonds touché, ses héritiers, exécuteurs, administrateurs, cessionnaires et destinataires du transfert;

b) d'autre part, jusqu'au retrait de l'opposition, aucun usage ou aménagement du bien-fonds ou des bâtiments situés sur celui-ci n'est possible si ce n'est conformément à l'ordonnance.

Withdrawal

(3) A municipal corporation shall withdraw the caveat when the order of the Supreme Court has been complied with.

Retrait

(3) La municipalité retire l'opposition lorsque l'ordonnance de la Cour suprême est respectée.

Debt owed to municipal corporation

60. Any expenses and costs of an action taken by a municipal corporation under subsection 58(4) to carry out an order of the Supreme Court are a debt owing to the municipal corporation by the person required by the order to comply, and may be recovered from the person in default by civil action for debt, or by charging it against real property of which the person is the owner in the same manner as arrears of property taxes under the *Property Assessment and Taxation Act*.

Créance de la municipalité

60. Les dépenses et les frais d'une action que prend la municipalité en vertu du paragraphe 58(4), en vue d'exécuter une ordonnance de la Cour suprême, constituent une créance de la municipalité à l'égard de la personne visée dans l'ordonnance, qui peut être recouvrée auprès de la personne en défaut soit en intentant une poursuite civile, soit en constituant une charge sur le bien réel dont la personne est le propriétaire évalué comme s'il s'agissait d'arriérés d'impôt foncier visés par la *Loi sur l'évaluation et l'impôt fonciers*.

DIVISION B - APPEALS

Development Appeals

DIVISION B - APPELS

Appels en matière d'aménagement

Appeal of refusal or conditions

61. (1) A person whose application to a development authority for a development permit is refused, or who is approved for a development permit subject to a condition that he or she considers to be unreasonable, may appeal the refusal or the condition to the appeal board.

Appel du refus ou des conditions

61. (1) La personne dont la demande de permis d'aménagement a été refusée par l'autorité d'aménagement ou dont le permis d'aménagement est assorti d'une condition qu'elle estime déraisonnable peut en appeler du refus ou de la condition à la commission d'appel.

Exception

(2) A condition that is required by a zoning bylaw to be on a development permit is not subject to appeal under subsection (1).

Exception

(2) La condition obligatoirement assortie au permis d'aménagement en vertu d'un règlement de zonage ne peut faire l'objet d'un appel en vertu du paragraphe (1).

Application deemed refused

(3) For the purposes of subsection (1), an application to a development authority for a development permit is, at the option of the applicant, deemed to be refused if the decision of the development authority is not made within 40 days after the day the application is received in its complete and final form.

Demande réputée refusée

(3) Aux fins du paragraphe (1), la demande de permis d'aménagement auprès d'une autorité d'aménagement est, au choix de son auteur, réputée refusée si la décision de l'autorité d'aménagement n'est pas prise dans un délai de 40 jours à compter de la date de réception de la demande sous forme finale.

Commencing development appeal

(4) An appeal under subsection (1) must be commenced by providing a written notice of appeal to the appeal board within 14 days after the day the application for a development permit is approved or refused.

Formation de l'appel en matière d'aménagement

(4) L'appel en vertu du paragraphe (1) se forme au moyen d'un avis d'appel écrit donné à la commission d'appel au plus tard 14 jours après la date d'approbation ou de refus de la demande de permis d'aménagement.

Appeal of development permit

62. (1) A person other than an applicant for a development permit may only appeal to the appeal board in respect of an approval of an application for a development permit on the grounds that the person is adversely affected and

(a) there was a misapplication of a zoning bylaw in the approval of the application;
(b) the proposed development contravenes the zoning bylaw, the community plan or an area development plan;
(c) the development permit relates to a use of land or a building that had been permitted at the discretion of a development authority;
(d) the application for the development permit had been approved on the basis that the specific use of land or the building was similar in character and purpose to another use that was included in a zoning bylaw for that zone;
(e) the application for the development permit had been approved under circumstances where the proposed development did not fully conform with a zoning bylaw; or
(f) the development permit relates to a non-conforming building or non-conforming use.

Appel d'un permis d'aménagement

62. (1) Toute personne à l'exception de l'auteur d'une demande de permis d'aménagement peut en appeler à la commission d'appel concernant l'approbation d'une demande de permis d'aménagement au motif qu'elle est lésée et que, selon le cas :

a) il y a eu une erreur dans l'application du règlement de zonage lors de l'approbation de la demande;
b) le projet d'aménagement contrevient au règlement de zonage, au plan directeur ou a plan d'aménagement régional;
c) le permis d'aménagement vise un usage d'un bien-fonds ou d'un bâtiment qui avait été permis à la discrétion d'une autorité d'aménagement;
d) la demande de permis d'aménagement avait été approuvée sur le fondement que l'usage particulier du bien-fonds ou du bâtiment était semblable quant à sa nature et à son but à un autre usage prévu dans le règlement de zonage à l'égard de cette zone;
e) la demande de permis d'aménagement avait été approuvée à l'égard d'un projet d'aménagement qui ne respectait pas en tous points le règlement de zonage;
f) le permis d'aménagement vise un bâtiment dérogatoire ou un usage non conforme.

Restriction

(2) For greater certainty, an appeal respecting the approval of an application for a development permit for a use specified in a zoning bylaw as a permitted use of land or a building, as referred to in subparagraph 14(1)(c)(i) or (ii) of this Act, may only be made if there is an alleged misapplication of the bylaw in the approval of the application.

Restriction

(2) Il est entendu qu'un appel portant sur l'approbation d'une demande de permis d'aménagement visant un usage qu'un règlement de zonage précise comme usage permis d'un bien-fonds ou d'un bâtiment, visé aux sous-alinéas 14(1)c)(i) ou (ii) de la présente loi, n'est possible qu'en présence d'erreur présumée dans l'application du règlement de zonage lors de l'approbation de la demande.

Commencing appeal of permit

(3) An appeal under subsection (1) must be commenced by providing a written notice of appeal to the appeal board within 14 days after the day the application for the development permit is approved.

Formation de l'appel du permis

(3) L'appel en vertu du paragraphe (1) se forme au moyen d'un avis d'appel écrit donné à la commission d'appel au plus tard 14 jours après la date d'approbation de la demande de permis d'aménagement.

Appeal of Order

Appel d'un ordre

Appeal to appeal board

63. (1) A person who is subject to an order issued by a development officer under subsection 57(1) of this Act, or under a zoning bylaw, may appeal the order to the appeal board.

Appel à la commission d'appel

63. (1) La personne visée dans un ordre de l'agent d'aménagement en vertu du paragraphe 57(1) de la présente loi ou d'un règlement de zonage peut en appeler de l'ordre à la commission d'appel.

Commencing appeal of order

(2) An appeal under subsection (1) must be commenced by providing a written notice of appeal to the appeal board within 14 days after the day the order of the development officer is served on the person.

Formation de l'appel d'un ordre

(2) L'appel en vertu du paragraphe (1) se forme au moyen d'un avis d'appel écrit donné à la commission d'appel au plus tard 14 jours après la date à laquelle l'ordre de l'agent d'aménagement a été signifié à la personne qu'il vise.

Subdivision Appeals

Appels en matière de lotissement

Appeal of refusal of application

64. (1) A person whose application under subsection 43(1) to a municipal subdivision authority for approval of a proposed subdivision is refused, may appeal the refusal to the appeal board.

Appel du refus d'une demande

64. (1) La personne dont la demande visant un projet de lotissement présentée à l'autorité de lotissement municipale en vertu du paragraphe 43(1) est refusée peut en appeler du refus à la commission d'appel.

Appeal of rejection of plan

(2) A person whose plan of subdivision, submitted to a municipal subdivision authority under section 46, is rejected, may appeal the rejection to the appeal board.

Appel du rejet d'un plan

(2) La personne dont le plan de lotissement présenté à l'autorité de lotissement municipale en vertu de l'article 46 est rejeté peut en appeler du rejet à la commission d'appel.

Commencing subdivision appeal

(3) An appeal under subsection (1) or (2) must be commenced within 30 days after the day an application for approval of a proposed subdivision is refused or a plan of subdivision is rejected.

Formation de l'appel en matière de lotissement

(3) L'appel en vertu des paragraphes (1) ou (2) doit être interjeté au plus tard 30 jours après la date du refus d'une demande d'approbation d'un projet de lotissement ou du rejet d'un plan de lotissement.

Appeal Board Procedure, Evidence and Hearing

Règles de procédure, présentation de la preuve et audition de l'appel

Notice of appeal

65. (1) A notice of appeal to the appeal board must
- (a) state the reasons for the appeal;
- (b) summarize the supporting facts for each reason;
- (c) indicate the relief sought; and
- (d) if applicable, be submitted with the filing fee required by the zoning bylaw.

Avis d'appel

65. (1) L'avis d'appel à la commission d'appel doit, à la fois :
- a) indiquer les motifs d'appel;
- b) résumer les faits à l'appui des allégations;
- c) préciser le redressement demandé;
- d) être accompagné des droits de dépôt prévus dans le règlement de zonage, s'il y a lieu.

Person adversely affected

(2) A notice of appeal by a person appealing the approval of an application for a development permit under subsection 62(1) must state how he or she is adversely affected.

Personne lésée

(2) La personne qui interjette appel de l'approbation d'une demande de permis d'aménagement en vertu du paragraphe 62(1) doit préciser les motifs pour lesquels elle se sent lésée.

Hearing within 30 days

66. (1) The appeal board shall commence hearing an appeal within 30 days after the day the notice of appeal is received, and shall complete the hearing as soon as is reasonably practicable.

Délai d'audition de 30 jours

66. (1) La commission d'appel commence l'audition de l'appel au plus tard 30 jours après la date de réception de l'avis d'appel et la termine dans les meilleurs délais.

Notice

(2) The appeal board shall ensure that reasonable notice of a hearing is served on
- (a) the appellant;

Avis

(2) La commission d'appel veille à ce que les personnes suivantes reçoivent signification d'un avis d'audition raisonnable :

(b) owners and lessees of land within 30 metres of the boundary of the land in respect of which the appeal relates;
(c) the development authority, in the case of an appeal of a decision of a development authority;
(d) the development authority and the development officer, in the case of an appeal of an order of a development officer; and
(e) the municipal subdivision authority, in the case of an appeal of a decision of a municipal subdivision authority.

a) l'appelant;
b) les propriétaires et les locataires d'un bien-fonds dans un rayon de 30 mètres des limites du bien-fonds visé dans l'appel;
c) l'autorité d'aménagement, s'il s'agit de l'appel de sa décision;
d) l'autorité d'aménagement et l'agent d'aménagement, s'il s'agit de l'appel d'un ordre de l'agent d'aménagement;
e) l'autorité de lotissement municipale, s'il s'agit de l'appel de sa décision.

Service

(3) Notice of a hearing may be served by
(a) personal service;
(b) registered mail; or
(c) such other method as may be authorized by the regulations.

(3) L'avis d'audition peut être signifié, selon le cas :
a) à personne;
b) par courrier recommandé;
c) de toute autre façon prévue par règlement, le cas échéant.

Signification

Rules of procedure

67. (1) Subject to this Act, the regulations and the zoning bylaw, an appeal board may establish rules of procedure for appeals.

67. (1) Sous réserve de la présente loi, des règlements et du règlement de zonage, la commission d'appel peut fixer les règles de procédure applicables aux appels.

Règles de procédure

Evidence

(2) Subject to the regulations, evidence may be given before the appeal board in any manner that it considers appropriate, including by telephone or by an audiovisual method, and the appeal board is not bound by the rules of evidence pertaining to actions and proceedings in courts of justice, but may proceed to ascertain the facts in the manner that it considers appropriate.

(2) Sous réserve des règlements, la présentation de la preuve devant la commission d'appel peut se faire par tout moyen que cette dernière estime indiquée, notamment par téléphone ou par méthode audiovisuelle; la commission d'appel n'est pas tenue aux règles de preuve qui régissent les actions et les poursuites devant les tribunaux judiciaires, et elle peut procéder à la vérification des faits de la façon qu'elle estime indiquée.

Présentation de la preuve

Oaths, affirmations

(3) The chairperson of the appeal board may administer oaths and affirmations, or in his or her absence an acting chairperson or vice-chairperson may do so.

(3) Le président de la commission d'appel peut faire prêter serment et recevoir les affirmations solennelles ou, en son absence, le président suppléant ou le vice-président peut le faire.

Serments, affirmations solennelles

Quorum

(4) A majority of members of the appeal board constitute a quorum for hearing an appeal, but subject to subsection (5), if a member is disqualified from hearing the matter or becomes unable to continue with a hearing, the appeal board may, in the absence of the member or members, conduct or continue the hearing with less than a majority.

(4) La majorité des membres de la commission d'appel constitue le quorum pour siéger à un appel. Toutefois, sous réserve du paragraphe (5), si un membre est dessaisi ou est incapable de poursuivre l'audition de l'appel, la commission d'appel peut, dans l'absence du ou des membres, instruire ou poursuivre l'appel en présence d'un nombre inférieur à la majorité.

Quorum

Requirement

(5) An appeal board may not conduct or continue a hearing with fewer than three members.

(5) La commission d'appel ne peut siéger à un appel ou le poursuivre en présence de moins de trois membres.

Exigence

Hearing public

(6) A hearing of the appeal board must be open to the public.

(6) L'audition devant la commission d'appel est publique.

Audition publique

Hearing

68. (1) At a hearing, the appeal board shall provide the persons referred to in subsection 66(2) with the opportunity to be heard, and may hear from any other persons that it considers necessary.

68. (1) Lors de l'audition de l'appel, la commission d'appel donne aux personnes visées au paragraphe 66(2) l'occasion de témoigner et peut entendre le témoignage de toute autre personne qu'elle juge essentiel.

Audition

Absence of person

(2) The appeal board may, on proof of service of notice of a hearing on a person referred to in subsection 66(2), proceed with the hearing in the absence of the person and determine the appeal in the same manner as if that person had attended.

(2) La commission d'appel peut, sur preuve de signification d'un avis d'appel à une personne visée au paragraphe 66(2), procéder à l'audition de l'appel en l'absence de cette personne et trancher l'appel comme si la personne y avait été présente.

Personne absente

Decision of Appeal Board

Décision de la commission d'appel

Decision

69. (1) The appeal board may confirm, reverse or vary a decision appealed, and may impose conditions that it considers appropriate in the circumstances.

69. (1) La commission d'appel peut confirmer, infirmer ou modifier la décision portée en appel et peut imposer les conditions qu'elle juge indiquées en l'espèce.

Décision

Conflict with plans

(2) A decision of the appeal board on an appeal must not conflict with a zoning bylaw, subdivision bylaw, community plan or area development plan.

(2) La décision de la commission d'appel à la suite d'un appel ne doit pas être contraire au règlement de zonage, au règlement de lotissement, au plan directeur ou plan d'aménagement régional.

Incompatibilité avec les plans

Time limit

(3) The appeal board shall, within 60 days after the day on which a hearing is concluded, issue a written decision with reasons and provide a copy of the decision to the appellant and other parties to the appeal.

(3) La commission d'appel, dans un délai de 60 jours à compter de la fin d'une audition, rend une décision par écrit et motivée et en remet une copie à l'appelant et aux autres parties à l'appel.

Délai

Signature

(4) Decisions and other documents may be signed on behalf of the appeal board by the chairperson or by an acting chairperson or vice-chairperson, and when so signed may be admitted in evidence as proof of the decision or document without proof of the signature or the designation.

(4) Les décisions et les autres documents peuvent être signés au nom de la commission d'appel par le président, ou par le président suppléant ou le vice-président; cette signature est admissible en preuve et fait foi de la décision ou du document sans qu'il soit nécessaire de faire la preuve de l'authenticité de la signature ou de la désignation.

Signature

Decision public record

(5) A decision of the appeal board is a public record.

(5) La décision de la commission d'appel constitue un document public.

Document public

No appeal

70. A decision of the appeal board is final and binding on all parties and is not subject to appeal.

70. La décision de la commission d'appel est finale et exécutoire, et elle est sans appel.

Aucun appel

Subdivision Appeal to Arbitrator

Recours à l'arbitrage en matière de lotissement

Arbitration: refusal of proposed subdivision

71. (1) If an application to the Director of Planning under subsection 43(1) for approval of a proposed subdivision is refused, the subdivision applicant may initiate an arbitration for the purpose of determining an appeal of the refusal.

71. (1) L'auteur d'une demande de lotissement dont la demande d'approbation d'un projet de lotissement présentée au directeur de la planification en vertu du paragraphe 43(1) est refusée peut prendre l'initiative d'un arbitrage pour décider de l'appel du refus.

Arbitrage : refus du projet de lotissement

Development Appeal Board

CITY OF YELLOWKNIFE

P.O. BOX 580,
YELLOWKNIFE, NT
X1A 2N4

Tel (867) 920-5646
Fax (867) 920-5649

October 18, 2023 200-D1-H2-23

REGISTERED MAIL

Hazem Kobaissi

Yellowknife, NT X1A 2P9

Dear Mr. Kobaissi:

Re: Development Appeal Board Hearing - Permit #PL-2022-0151
Lot 83, Block 308, Plan 4204 (7 Findlay Point)

This letter is to formally notify you that Development Permit #PL-2022-0151, which the City issued to you on September 27, 2023 for a Multi-Unit Dwelling (4-Unit) has been appealed to the City's Development Appeal Board.

Pursuant to Section 5.1.4. of the City of Yellowknife's Zoning By-law, your Development Permit shall not come into effect until the appeal is determined and the permit confirmed, reversed, or varied.

The Appeal Board will hold a public hearing on Tuesday, November 7, 2023 at 7:00 p.m. in the City Hall Council Chamber to consider this appeal.

With respect to the submission of written documentation for the Appeal Board's consideration, you are hereby informed that, pursuant to section 5.1.6.(a) of the Yellowknife Zoning By-law, all maps, plans, drawings and written material that you intend to submit in support of your development must be filed with the Secretary of the Appeal Board no later than ten days before the day fixed for the appeal. You have until 4:30 p.m. on Friday, October 27, 2023 to submit your documentation to the Secretary of the Appeal Board at City Hall or via email to cityclerk@yellowknife.ca. Should your submission be too large to email, please contact me and we will make arrangements to provide you with our File Transfer Site.

Enclosed are copies of the sections of the *Community Planning and Development Act* of the Northwest Territories and the City of Yellowknife Zoning By-law that describe the Appeal Board's composition and procedures.

Please contact me should you have any questions with respect to the appeal.

Yours truly,

Cole Caljouw
Secretary,
Development Appeal Board

CC/sj

Enclosure

DM#745700

c) approve, add any specific provision(s), or deny all applications for an amendment to this By-law ; and

d) make a decision and recommend any terms and conditions on any other planning, or Development matter referred to it by the Development Officer.

3.3. Development Appeal Board

3.3.1. The Development Appeal Board is hereby established in accordance with Section 30 (1) of the *Act*.

3.3.2. The Development Appeal Board shall:

a) be composed of at least three persons and not more than seven, and one shall be a member of Council, but shall not include employees of the City;

b) elect one member as a chairperson;

c) elect one member as a vice-chairperson;

d) hold a hearing within 30 days after an appeal has been received;

e) ensure that reasonable notice of the hearing is given to the appellant, Landowners and lessees within 30 m of the boundary of land in respect of which the appeal relates, and all persons who in the opinion of the Development Appeal Board may be affected;

f) consider each appeal having due regard to the circumstances and merits of the case and to the purpose, scope and intent of the Community Plan, Area Development Plan, and any Council approved plans or policies, and to this By-law;

g) where an appeal is heard, the Development Appeal Board shall provide the persons referred to in Section 66 (2) of the *Act* the opportunity to be heard as referenced in Section 68 of the *Act.*

h) render its decision in writing with reasons and provide a copy of the decision to the appellant and any other parties, as described in Section 69 (3) of the *Act* within 60 calendar days after the date on which the hearing is concluded; and

i) conduct a hearing pursuant to Section 5.1 of this By-law.

3.3.3. The Development Appeal Board may:

a) in determining an appeal, confirm, reverse or vary the decision appealed from and may impose conditions or limitations that it considers proper and desirable in the circumstances. Decisions of the Development Appeal Board must be in compliance with this Zoning By-law, the Community Plan and any applicable Area Development Plan; and

b) appoint the City Clerk to act as Secretary for the Development Appeal Board.

3.4. Secretary to the Development Appeal Board

3.4.1. The Secretary for the Development Appeal Board shall:

a) ensure that reasonable notice of the hearing is given to the appellant, Landowners and lessees within 30 m of the boundary of land in respect of which the appeal relates, and all persons who in the opinion of the Development Appeal Board may be affected;

b) prepare and maintain a file of the minutes of the business transacted at all meetings of the Development Appeal Board;

c) issue the decision of the Development Appeal Board with reasons and provide a copy of the decision to the appellant and any other parties, as described in Section 69 (3) of the *Act* within 60 calendar days after the date on which the hearing is concluded; and

d) carry out administrative duties as the Development Appeal Board may specify.

5. Appeals and Amendments

5.1. Development Appeal Process

5.1.1. A person whose application for a Development Permit is refused, or who is approved for a Development Permit subject to a condition that they consider to be unreasonable, may appeal the refusal or the condition to the Development Appeal Board pursuant to Section 61 of the *Act* by serving written notice of appeal to the Secretary of the Development of the Appeal Board within 14 days after the day the application for the Development Permit is approved or refused.

5.1.2. A person claiming to be affected by a decision of the Development Officer or Council made under this By-law may appeal to the Development Appeal Board pursuant to Section 62 of the *Act*, by serving written notice of appeal to the Secretary of the Development Appeal Board within 14 days after the day the application for the Development Permit is approved.

5.1.3. Filing for an appeal must include the information listed in Section 65 (1) of the *Act*.

5.1.4. Where an appeal is made, a Development Permit shall not come into effect until a decision by the Development Appeal Board has been made to either confirm, reverse or vary the decision of the Development Officer pursuant to Section 69 of the *Act*.

5.1.5. An appeal must be heard by a quorum of the Development Appeal Board, and a quorum shall consist of at least two members and the Chairperson or a Vice-Chairperson.

5.1.6. Hearing procedures are as follows:

a) the appellant and any other interested party shall, not later than ten days before the day fixed for the hearing of the appeal, file with the Secretary of the Development Appeal Board all maps, plans, drawings and written material that they intend to submit to the Development Appeal Board or use at the hearing;

b) the Development Officer or Council shall, if required by the Development Appeal Board, transmit to the Secretary of the Development Appeal Board, before the day fixed for the hearing of the appeal, the original or true copies of maps, plans, drawings and written material in its possession relating to the subject matter of the appeal;

c) all maps, plans, drawings and written material, or copies thereof, filed or transmitted pursuant to Section 5.1 of this By-law shall, unless otherwise ordered by the Development Appeal Board, be retained by the Development Appeal Board and be part of its permanent records; but, pending the hearing of the appeal, all the material shall be made available for the inspection of any interested person;

d) where a member of the Development Appeal Board has a conflict of interest in the matter before the Development Appeal Board, that member is not entitled to participate, deliberate, or vote thereon;

e) in determining the decision of an appeal, the Development Appeal Board shall not:

    i approve Development that is not consistent with the regulations in the Zoning By-law;

    ii approve Development in a manner that is incompatible with the Community Plan;

f) a decision concurred with by a majority of the Development Appeal Board present at the hearing is the decision of the Development Appeal Board;

g) the decision of the Development Appeal Board shall be based on the facts and merits of the case and shall be in the form of a written decision. The decision shall include a summary of all representations made at the hearing and setting forth the reasons for the decision. Decisions may be signed by the chair, acting chair or vice-chair;

h) the Secretary shall issue, within 60 days of the conclusion of the hearing, the decision to all parties of the hearing; and

i) a decision of the Development Appeal Board is final and binding on all parties and there is no right to appeal from the decision of the Development Appeal Board, pursuant to Section 70 of the *Act*.

Use and development restricted

(2) On the registration of a caveat,

(a) the order binds the heirs, executors, administrators, assigns, transferees and successors in title of the owner of the land affected by the order; and

(b) until the caveat is withdrawn, no use or development of the land or buildings located on it may take place except in accordance with the order.

Usage et aménagement restreints

(2) Dès l'enregistrement de l'opposition :

a) d'une part, l'ordonnance lie, à l'égard du propriétaire du bien-fonds touché, ses héritiers, exécuteurs, administrateurs, cessionnaires et destinataires du transfert;

b) d'autre part, jusqu'au retrait de l'opposition, aucun usage ou aménagement du bien-fonds ou des bâtiments situés sur celui-ci n'est possible si ce n'est conformément à l'ordonnance.

Withdrawal

(3) A municipal corporation shall withdraw the caveat when the order of the Supreme Court has been complied with.

Retrait

(3) La municipalité retire l'opposition lorsque l'ordonnance de la Cour suprême est respectée.

Debt owed to municipal corporation

60. Any expenses and costs of an action taken by a municipal corporation under subsection 58(4) to carry out an order of the Supreme Court are a debt owing to the municipal corporation by the person required by the order to comply, and may be recovered from the person in default by civil action for debt, or by charging it against real property of which the person is the owner in the same manner as arrears of property taxes under the *Property Assessment and Taxation Act*.

Créance de la municipalité

60. Les dépenses et les frais d'une action que prend la municipalité en vertu du paragraphe 58(4), en vue d'exécuter une ordonnance de la Cour suprême, constituent une créance de la municipalité à l'égard de la personne visée dans l'ordonnance, qui peut être recouvrée auprès de la personne en défaut soit en intentant une poursuite civile, soit en constituant une charge sur le bien réel dont la personne est le propriétaire évalué comme s'il s'agissait d'arriérés d'impôt foncier visés par la *Loi sur l'évaluation et l'impôt fonciers*.

DIVISION B - APPEALS

Development Appeals

DIVISION B - APPELS

Appels en matière d'aménagement

Appeal of refusal or conditions

61. (1) A person whose application to a development authority for a development permit is refused, or who is approved for a development permit subject to a condition that he or she considers to be unreasonable, may appeal the refusal or the condition to the appeal board.

Appel du refus ou des conditions

61. (1) La personne dont la demande de permis d'aménagement a été refusée par l'autorité d'aménagement ou dont le permis d'aménagement est assorti d'une condition qu'elle estime déraisonnable peut en appeler du refus ou de la condition à la commission d'appel.

Exception

(2) A condition that is required by a zoning bylaw to be on a development permit is not subject to appeal under subsection (1).

Exception

(2) La condition obligatoirement assortie au permis d'aménagement en vertu d'un règlement de zonage ne peut faire l'objet d'un appel en vertu du paragraphe (1).

Application deemed refused

(3) For the purposes of subsection (1), an application to a development authority for a development permit is, at the option of the applicant, deemed to be refused if the decision of the development authority is not made within 40 days after the day the application is received in its complete and final form.

Demande réputée refusée

(3) Aux fins du paragraphe (1), la demande de permis d'aménagement auprès d'une autorité d'aménagement est, au choix de son auteur, réputée refusée si la décision de l'autorité d'aménagement n'est pas prise dans un délai de 40 jours à compter de la date de réception de la demande sous forme finale.

Commencing development appeal

(4) An appeal under subsection (1) must be commenced by providing a written notice of appeal to the appeal board within 14 days after the day the application for a development permit is approved or refused.

Formation de l'appel en matière d'aménagement

(4) L'appel en vertu du paragraphe (1) se forme au moyen d'un avis d'appel écrit donné à la commission d'appel au plus tard 14 jours après la date d'approbation ou de refus de la demande de permis d'aménagement.

Appeal of development permit

62. (1) A person other than an applicant for a development permit may only appeal to the appeal board in respect of an approval of an application for a development permit on the grounds that the person is adversely affected and

(a) there was a misapplication of a zoning bylaw in the approval of the application;
(b) the proposed development contravenes the zoning bylaw, the community plan or an area development plan;
(c) the development permit relates to a use of land or a building that had been permitted at the discretion of a development authority;
(d) the application for the development permit had been approved on the basis that the specific use of land or the building was similar in character and purpose to another use that was included in a zoning bylaw for that zone;
(e) the application for the development permit had been approved under circumstances where the proposed development did not fully conform with a zoning bylaw; or
(f) the development permit relates to a non-conforming building or non-conforming use.

Appel d'un permis d'aménagement

62. (1) Toute personne à l'exception de l'auteur d'une demande de permis d'aménagement peut en appeler à la commission d'appel concernant l'approbation d'une demande de permis d'aménagement au motif qu'elle est lésée et que, selon le cas :

a) il y a eu une erreur dans l'application du règlement de zonage lors de l'approbation de la demande;
b) le projet d'aménagement contrevient au règlement de zonage, au plan directeur ou a plan d'aménagement régional;
c) le permis d'aménagement vise un usage d'un bien-fonds ou d'un bâtiment qui avait été permis à la discrétion d'une autorité d'aménagement;
d) la demande de permis d'aménagement avait été approuvée sur le fondement que l'usage particulier du bien-fonds ou du bâtiment était semblable quant à sa nature et à son but à un autre usage prévu dans le règlement de zonage à l'égard de cette zone;
e) la demande de permis d'aménagement avait été approuvée à l'égard d'un projet d'aménagement qui ne respectait pas en tous points le règlement de zonage;
f) le permis d'aménagement vise un bâtiment dérogatoire ou un usage non conforme.

Restriction

(2) For greater certainty, an appeal respecting the approval of an application for a development permit for a use specified in a zoning bylaw as a permitted use of land or a building, as referred to in subparagraph 14(1)(c)(i) or (ii) of this Act, may only be made if there is an alleged misapplication of the bylaw in the approval of the application.

Restriction

(2) Il est entendu qu'un appel portant sur l'approbation d'une demande de permis d'aménagement visant un usage qu'un règlement de zonage précise comme usage permis d'un bien-fonds ou d'un bâtiment, visé aux sous-alinéas 14(1)c)(i) ou (ii) de la présente loi, n'est possible qu'en présence d'erreur présumée dans l'application du règlement de zonage lors de l'approbation de la demande.

Commencing appeal of permit

(3) An appeal under subsection (1) must be commenced by providing a written notice of appeal to the appeal board within 14 days after the day the application for the development permit is approved.

Formation de l'appel du permis

(3) L'appel en vertu du paragraphe (1) se forme au moyen d'un avis d'appel écrit donné à la commission d'appel au plus tard 14 jours après la date d'approbation de la demande de permis d'aménagement.

Appeal of Order

Appeal to appeal board

63. (1) A person who is subject to an order issued by a development officer under subsection 57(1) of this Act, or under a zoning bylaw, may appeal the order to the appeal board.

Commencing appeal of order

(2) An appeal under subsection (1) must be commenced by providing a written notice of appeal to the appeal board within 14 days after the day the order of the development officer is served on the person.

Subdivision Appeals

Appeal of refusal of application

64. (1) A person whose application under subsection 43(1) to a municipal subdivision authority for approval of a proposed subdivision is refused, may appeal the refusal to the appeal board.

Appeal of rejection of plan

(2) A person whose plan of subdivision, submitted to a municipal subdivision authority under section 46, is rejected, may appeal the rejection to the appeal board.

Commencing subdivision appeal

(3) An appeal under subsection (1) or (2) must be commenced within 30 days after the day an application for approval of a proposed subdivision is refused or a plan of subdivision is rejected.

Appeal Board Procedure, Evidence and Hearing

Notice of appeal

65. (1) A notice of appeal to the appeal board must

(a) state the reasons for the appeal;
(b) summarize the supporting facts for each reason;
(c) indicate the relief sought; and
(d) if applicable, be submitted with the filing fee required by the zoning bylaw.

Person adversely affected

(2) A notice of appeal by a person appealing the approval of an application for a development permit under subsection 62(1) must state how he or she is adversely affected.

Hearing within 30 days

66. (1) The appeal board shall commence hearing an appeal within 30 days after the day the notice of appeal is received, and shall complete the hearing as soon as is reasonably practicable.

Notice

(2) The appeal board shall ensure that reasonable notice of a hearing is served on

(a) the appellant;

Appel d'un ordre

Appel à la commission d'appel

63. (1) La personne visée dans un ordre de l'agent d'aménagement en vertu du paragraphe 57(1) de la présente loi ou d'un règlement de zonage peut en appeler de l'ordre à la commission d'appel.

Formation de l'appel d'un ordre

(2) L'appel en vertu du paragraphe (1) se forme au moyen d'un avis d'appel écrit donné à la commission d'appel au plus tard 14 jours après la date à laquelle l'ordre de l'agent d'aménagement a été signifié à la personne qu'il vise.

Appels en matière de lotissement

Appel du refus d'une demande

64. (1) La personne dont la demande visant un projet de lotissement présentée à l'autorité de lotissement municipale en vertu du paragraphe 43(1) est refusée peut en appeler du refus à la commission d'appel.

Appel du rejet d'un plan

(2) La personne dont le plan de lotissement présenté à l'autorité de lotissement municipale en vertu de l'article 46 est rejeté peut en appeler du rejet à la commission d'appel.

Formation de l'appel en matière de lotissement

(3) L'appel en vertu des paragraphes (1) ou (2) doit être interjeté au plus tard 30 jours après la date du refus d'une demande d'approbation d'un projet de lotissement ou du rejet d'un plan de lotissement.

Règles de procédure, présentation de la preuve et audition de l'appel

Avis d'appel

65. (1) L'avis d'appel à la commission d'appel doit, à la fois :

a) indiquer les motifs d'appel;
b) résumer les faits à l'appui des allégations;
c) préciser le redressement demandé;
d) être accompagné des droits de dépôt prévus dans le règlement de zonage, s'il y a lieu.

Personne lésée

(2) La personne qui interjette appel de l'approbation d'une demande de permis d'aménagement en vertu du paragraphe 62(1) doit préciser les motifs pour lesquels elle se sent lésée.

Délai d'audition de 30 jours

66. (1) La commission d'appel commence l'audition de l'appel au plus tard 30 jours après la date de réception de l'avis d'appel et la termine dans les meilleurs délais.

Avis

(2) La commission d'appel veille à ce que les personnes suivantes reçoivent signification d'un avis d'audition raisonnable :

(b) owners and lessees of land within 30 metres of the boundary of the land in respect of which the appeal relates;
(c) the development authority, in the case of an appeal of a decision of a development authority;
(d) the development authority and the development officer, in the case of an appeal of an order of a development officer; and
(e) the municipal subdivision authority, in the case of an appeal of a decision of a municipal subdivision authority.

a) l'appelant;
b) les propriétaires et les locataires d'un bien-fonds dans un rayon de 30 mètres des limites du bien-fonds visé dans l'appel;
c) l'autorité d'aménagement, s'il s'agit de l'appel de sa décision;
d) l'autorité d'aménagement et l'agent d'aménagement, s'il s'agit de l'appel d'un ordre de l'agent d'aménagement;
e) l'autorité de lotissement municipale, s'il s'agit de l'appel de sa décision.

Service

(3) Notice of a hearing may be served by
(a) personal service;
(b) registered mail; or
(c) such other method as may be authorized by the regulations.

(3) L'avis d'audition peut être signifié, selon le cas :
a) à personne;
b) par courrier recommandé;
c) de toute autre façon prévue par règlement, le cas échéant.

Signification

Rules of procedure

67. (1) Subject to this Act, the regulations and the zoning bylaw, an appeal board may establish rules of procedure for appeals.

67. (1) Sous réserve de la présente loi, des règlements et du règlement de zonage, la commission d'appel peut fixer les règles de procédure applicables aux appels.

Règles de procédure

Evidence

(2) Subject to the regulations, evidence may be given before the appeal board in any manner that it considers appropriate, including by telephone or by an audiovisual method, and the appeal board is not bound by the rules of evidence pertaining to actions and proceedings in courts of justice, but may proceed to ascertain the facts in the manner that it considers appropriate.

(2) Sous réserve des règlements, la présentation de la preuve devant la commission d'appel peut se faire par tout moyen que cette dernière estime indiquée, notamment par téléphone ou par méthode audiovisuelle; la commission d'appel n'est pas tenue aux règles de preuve qui régissent les actions et les poursuites devant les tribunaux judiciaires, et elle peut procéder à la vérification des faits de la façon qu'elle estime indiquée.

Présentation de la preuve

Oaths, affirmations

(3) The chairperson of the appeal board may administer oaths and affirmations, or in his or her absence an acting chairperson or vice-chairperson may do so.

(3) Le président de la commission d'appel peut faire prêter serment et recevoir les affirmations solennelles ou, en son absence, le président suppléant ou le vice-président peut le faire.

Serments, affirmations solennelles

Quorum

(4) A majority of members of the appeal board constitute a quorum for hearing an appeal, but subject to subsection (5), if a member is disqualified from hearing the matter or becomes unable to continue with a hearing, the appeal board may, in the absence of the member or members, conduct or continue the hearing with less than a majority.

(4) La majorité des membres de la commission d'appel constitue le quorum pour siéger à un appel. Toutefois, sous réserve du paragraphe (5), si un membre est dessaisi ou est incapable de poursuivre l'audition de l'appel, la commission d'appel peut, dans l'absence du ou des membres, instruire ou poursuivre l'appel en présence d'un nombre inférieur à la majorité.

Quorum

Requirement

(5) An appeal board may not conduct or continue a hearing with fewer than three members.

(5) La commission d'appel ne peut siéger à un appel ou le poursuivre en présence de moins de trois membres.

Exigence

Hearing public

(6) A hearing of the appeal board must be open to the public.

(6) L'audition devant la commission d'appel est publique.

Audition publique

Hearing

68. (1) At a hearing, the appeal board shall provide the persons referred to in subsection 66(2) with the opportunity to be heard, and may hear from any other persons that it considers necessary.

68. (1) Lors de l'audition de l'appel, la commission d'appel donne aux personnes visées au paragraphe 66(2) l'occasion de témoigner et peut entendre le témoignage de toute autre personne qu'elle juge essentiel.

Audition

Absence of person

(2) The appeal board may, on proof of service of notice of a hearing on a person referred to in subsection 66(2), proceed with the hearing in the absence of the person and determine the appeal in the same manner as if that person had attended.

(2) La commission d'appel peut, sur preuve de signification d'un avis d'appel à une personne visée au paragraphe 66(2), procéder à l'audition de l'appel en l'absence de cette personne et trancher l'appel comme si la personne y avait été présente.

Personne absente

Decision of Appeal Board

Décision de la commission d'appel

Decision

69. (1) The appeal board may confirm, reverse or vary a decision appealed, and may impose conditions that it considers appropriate in the circumstances.

69. (1) La commission d'appel peut confirmer, infirmer ou modifier la décision portée en appel et peut imposer les conditions qu'elle juge indiquées en l'espèce.

Décision

Conflict with plans

(2) A decision of the appeal board on an appeal must not conflict with a zoning bylaw, subdivision bylaw, community plan or area development plan.

(2) La décision de la commission d'appel à la suite d'un appel ne doit pas être contraire au règlement de zonage, au règlement de lotissement, au plan directeur ou plan d'aménagement régional.

Incompatibilité avec les plans

Time limit

(3) The appeal board shall, within 60 days after the day on which a hearing is concluded, issue a written decision with reasons and provide a copy of the decision to the appellant and other parties to the appeal.

(3) La commission d'appel, dans un délai de 60 jours à compter de la fin d'une audition, rend une décision par écrit et motivée et en remet une copie à l'appelant et aux autres parties à l'appel.

Délai

Signature

(4) Decisions and other documents may be signed on behalf of the appeal board by the chairperson or by an acting chairperson or vice-chairperson, and when so signed may be admitted in evidence as proof of the decision or document without proof of the signature or the designation.

(4) Les décisions et les autres documents peuvent être signés au nom de la commission d'appel par le président, ou par le président suppléant ou le vice-président; cette signature est admissible en preuve et fait foi de la décision ou du document sans qu'il soit nécessaire de faire la preuve de l'authenticité de la signature ou de la désignation.

Signature

Decision public record

(5) A decision of the appeal board is a public record.

(5) La décision de la commission d'appel constitue un document public.

Document public

No appeal

70. A decision of the appeal board is final and binding on all parties and is not subject to appeal.

70. La décision de la commission d'appel est finale et exécutoire, et elle est sans appel.

Aucun appel

Subdivision Appeal to Arbitrator

Recours à l'arbitrage en matière de lotissement

Arbitration: refusal of proposed subdivision

71. (1) If an application to the Director of Planning under subsection 43(1) for approval of a proposed subdivision is refused, the subdivision applicant may initiate an arbitration for the purpose of determining an appeal of the refusal.

71. (1) L'auteur d'une demande de lotissement dont la demande d'approbation d'un projet de lotissement présentée au directeur de la planification en vertu du paragraphe 43(1) est refusée peut prendre l'initiative d'un arbitrage pour décider de l'appel du refus.

Arbitrage : refus du projet de lotissement