Barrie Public Utilities v. Canadian Cable Television Assn.

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Judges: McLachlin, Beverley; Gonthier, Charles Doherty; Major, John C.; Bastarache, Michel; Arbour, Louise; LeBel, Louis; Deschamps, Marie
On appeal from: Federal Court of Appeal
Subjects: Administrative law
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Barrie Public Utilities *v.* Canadian Cable Television Assn., [2003] 1 S.C.R. 476, 2003 SCC 28

Canadian Cable Television Association *Appellant*

v.

Barrie Public Utilities, Essex Public Utilities Commission, Guelph Hydro, Innisfil Hydro, Leamington Public Utilities Commission, Markham Hydro Electric Commission, Mississauga Hydro Electric Commission, Niagara-on-the-Lake Hydro Electric Commission, The Hydro Electric Commission of North Bay, Oakville Hydro, Orillia Water, Light and Power, Perth Public Utilities Commission, Richmond Hill Hydro Electric Commission, Shelburne Hydro, Stoney Creek Hydro-Electric Commission, Stratford Public Utility Commission, Toronto Hydro-Electric Commission (formerly Hydro Electric Commission of the City of North York and Public Utilities Commission of the City of Scarborough),
Waterloo North Hydro and Kitchener-Wilmot Hydro *Respondents*

and

Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of New Brunswick,
Attorney General of Manitoba, Attorney General of British Columbia,
Attorney General for Saskatchewan, Attorney General of Alberta,
Saskatchewan Power Corporation, Federation of Canadian Municipalities,
GT Group Telecom Services Corp., Aliant Telecom Inc., AT & T Canada,
Bell Canada, Bell West Inc., MTS Communications Inc. and
TELUS Communications Inc. *Interveners*

Indexed as: Barrie Public Utilities *v.* Canadian Cable Television Assn.

Neutral citation: 2003 SCC 28.

File No.: 28826.

2003: February 19; 2003: May 16.

Present: McLachlin C.J. and Gonthier, Major, Bastarache, Arbour, LeBel and Deschamps JJ.

on appeal from the federal court of appeal

Administrative law — Judicial review — Standard of review — Canadian Radio-television and Telecommunications Commission — Commission ordering provincially regulated electric power companies to grant cable television companies access to their power poles — Whether Court of Appeal properly reviewed Commission's decision on correctness standard — Telecommunications Act, S.C. 1993, c. 38, s. 43(5).

Broadcasting — Telecommunications — Access to power poles — Canadian Radio-television and Telecommunications Commission ordering provincially regulated electric

power companies to grant cable television companies access to their power poles — Whether phrase "the supporting structure of a transmission line" in s. 43(5) of Telecommunications Act includes power poles of provincially regulated electric power companies — Telecommunications Act, S.C. 1993, c. 38, s. 43(5).

The appellant CCTA seeks access to the power poles of the respondent power utilities for the purpose of supporting cable television transmission lines. In the past, the CCTA's members have rented space from the utilities under private contract. Since 1996, the parties have been unable to reach agreement. The CCTA obtained an order from the CRTC requiring the utilities to grant it access to their power poles on terms stipulated by the CRTC. The CRTC found that the phrase "the supporting structure of a transmission line" in s. 43(5) of the *Telecommunications Act*, read in context and in the light of telecommunications and broadcasting policy objectives, was broad enough to grant it authority over the utilities' power poles. The CRTC found that this interpretation was *intra vires* Parliament under s. 91of the *Constitution Act, 1867*. The utilities successfully appealed this order to the Federal Court of Appeal, which reviewed the decision on a correctness standard and held that s. 43(5), properly interpreted, does not give the CRTC jurisdiction over the power poles of provincially regulated electric power companies.

Held (Bastarache J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Major, Arbour, LeBel and Deschamps JJ.: The standard of review applicable to the CRTC's decision is correctness. All four factors of the pragmatic and functional approach point to that conclusion. Section 64(1) of the *Telecommunications Act* grants a right of appeal to the Federal Court of Appeal with leave of that court on any question of law or of jurisdiction. While the presence of a statutory right of appeal is not decisive of a correctness standard, it is a factor suggesting a more searching standard of review. With respect to relative

expertise, deference to the decision maker is called for only when it is in some way more expert than the court and the question under consideration is one that falls within the scope of its greater expertise. The proper interpretation of the phrase "the supporting structure of a transmission line" in s. 43(5) is not a question that engages the CRTC's special expertise in the regulation and supervision of Canadian broadcasting and telecommunications. Rather, it is a purely legal question and is therefore ultimately within the province of the judiciary. The court's expertise in matters of pure statutory interpretation is superior to that of the CRTC, which suggests a less deferential approach. The purposes of the legislation and the provision in particular also point to a less deferential standard of review. While much of the CRTC's work involves the elaboration and implementation of telecommunications policy, s. 43(5) accords the CRTC the essentially adjudicative role of considering applications from, and providing redress to, public service providers who cannot gain access to the supporting structure of a transmission line on terms acceptable to them. Finally, regarding the nature of the problem, even pure questions of law may be granted a wide degree of deference where other factors suggest the legislature so intended. But that is not the case here.

Section 43(5) cannot bear the broad meaning given to it by the CRTC and advanced by the CCTA. Looking for the moment at the subsection alone, three points arise. First, the phrase "a person who provides services to the public" in s. 43(5) includes but is broader than the phrase "Canadian carrier or distribution undertaking" found elsewhere in the section. Second, the phrase "constructed on a highway or other public place" qualifies the phrase "transmission line" and therefore, the CRTC may not grant access to transmission lines situated on private land. The utilities' power poles sometimes stand on private land pursuant to public utility rights-of-way. Third, the subsection speaks of "transmission lines" rather than "distribution lines". The utilities' power poles support distribution lines, not transmission lines. Parliament should be taken to know this distinction. Had Parliament intended to submit the utilities' power poles to the jurisdiction of the CRTC, it would have referred to distribution lines. Looking next to s. 43 as a whole, the CRTC's

interpretation of subs. (5) is at odds with the rest of the section. The phrase "transmission lines" may not be given a broader meaning in subs. (5) than occurs in the rest of the section. The absence of the phrase "Canadian carrier or distribution undertaking" in subs. (5) does not justify such a broader interpretation. The definition of "transmission facility" in s. 2 must also be taken into account. A transmission facility is defined as a facility for the transmission of "intelligence". The utilities' power poles do not serve to transmit intelligence. They serve to transmit electricity. One must conclude that the "transmission lines" referred to in s. 43(5) are the same as those constructed, maintained and operated pursuant to s. 43(2) to (4). They do not include the utilities' power poles.

The CRTC's heavy reliance on the policy objectives of the *Telecommunications Act* and the *Broadcasting Act* was in error. The consideration of legislative objectives is one aspect of the modern approach to statutory interpretation. Yet the CRTC relied on policy objectives to set aside Parliament's discernible intent as revealed by the plain meaning of s. 43(5), s. 43 generally and the Act as a whole.

Per Bastarache J. (dissenting): The constitutional question whether s. 43(5), as construed by the CRTC, is *ultra vires* Parliament has been important at every level of this case. The CRTC canvassed the issue thoroughly in its reasons. The Federal Court of Appeal referred to the constitutional issue. The Chief Justice of this Court certified a constitutional question. The Federal Court of Appeal erred by failing to separate the constitutional question from the statutory interpretation question. Judicial review of the CRTC's order requires a separation of that decision into two main questions. One is the constitutional question, which is whether any interpretation argued for s. 43(5) of the Act would make that provision *ultra vires* Parliament. The other is the more general question of the CRTC's interpretation of s. 43(5) and exercise of its power in issuing its decision. Combining a constitutional question and a statutory interpretation question may skew the standard of review for an agency's decision. In addition, where a constitutional question is raised, reviewing the agency's ordinary statutory interpretation without isolating the constitutional question

can limit the agency's ability to give the legislation at issue the full import intended by the legislature. The Federal Court of Appeal did not rule on the constitutionality of the CRTC's interpretation of s. 43(5), but was clearly concerned by the possibility that it might be *ultra vire*s. This concern was erroneous. According to the doctrine of the presumption of constitutionality, a statute should be presumed constitutional unless proven unconstitutional. Where a statute is ambiguous and more than one construction is possible, the presumption of constitutionality does not empower a decision maker to reject a plausible construction on the basis that it may be unconstitutional or that its unconstitutionality has been merely alleged. Before rejecting the CRTC's interpretation of s. 43(5), the Federal Court of Appeal should have ruled on the constitutional question.

It is settled law that application of the pragmatic and functional approach to a question of constitutional law will yield a correctness standard and therefore the CRTC's constitutional determination is reviewable on that standard. However, in the present appeal, the main question was the appropriateness of the CRTC's access order issued under s. 43(5). The constitutional question was raised only as an attack on the CRTC's order. If the allegation the provision is unconstitutional is meritless, the constitutional question should not serve nevertheless to dictate the level of scrutiny by the court reviewing the administrative decision.

Review of the administrative decision itself consists of two questions. The first is the CRTC's interpretation of s. 43(5). This is a question of law. The second is the appropriateness of the specific terms of the decision, which is a question of mixed law and fact. It is uncontroversial that the reviewing court owes the CRTC deference on the specific terms of an order and therefore the standard of review of the specific terms of the decision in question is reasonableness *simpliciter*.

The standard of review for the CRTC's interpretation of s. 43(5) is also reasonableness *simpliciter*. While a statutory right of appeal suggests a more searching standard of review and militates against deference, it is necessary to consider the other factors before making the final determination of the degree of deference. Expertise is the most important of the factors that a court must consider in settling on a standard of review. Expertise is to be understood as a relative, not an absolute concept. The court is perhaps better positioned than the CRTC to interpret general legal terms of wide usage; however, the CRTC will have greater expertise *vis-à-vis* the reviewing court for technical and policy-related matters, including determination of legal questions associated with the specialized statutes enabling the CRTC. The meaning of "the supporting structure of a transmission line" is a technical question best answered by the specialized agency in whose enabling legislation it arises. When its enabling legislation is in issue, a specialized agency will be better equipped than a court to interpret words in their entire context in harmony with the Act, the object of the Act, and the intention of Parliament. On even a purely legal question within its expertise, the CRTC is owed deference. The CRTC would have been significantly better positioned than the court to assess the alternatives and the consequences for the broader scheme of each possible interpretation of s. 43(5) . If knowledge of all the technical meanings of terms such as "transmission" and the factual situation of poles are relevant, the issue appears no longer to be a pure question of statutory interpretation. Instead, it is one deeply enmeshed in the context and the domain of the CRTC's expertise. Therefore, determining the definition of "the supporting structure of a transmission line" falls squarely within the CRTC's expertise. The purpose of the Act as a whole and the provision in particular also suggest substantial deference. The purpose of s. 43(5), as evident from its inclusion with the other subsections of s. 43, is clearly to provide an alternative to the construction of new structures on public land. This suggests deference to the extent that the question is one best answered by the expert tribunal in appreciation of the real-life consequences for other provisions in the statute. The nature of the problem suggests, at first blush, less deference. It is established, however, that even pure questions of law may be granted deference where other factors of the pragmatic and functional approach suggest that the legislature intends such deference.

Construing s. 43(5) so as to allow the CRTC to permit access to the poles of provincially regulated utilities would not render the provision *ultra vires* Parliament. The CRTC therefore decided correctly that this construction of s. 43(5) is constitutionally valid.

The CRTC's interpretation of s. 43(5) stands up to scrutiny and is therefore reasonable. It is unnecessary to determine whether the CRTC's contextual approach to "public place" is correct, but it is at least reasonable. Furthermore, the CRTC's decision was supported by reasons that could stand up to a somewhat probing examination. Since the CRTC's order was reasonable, the Federal Court of Appeal erred in allowing the appeal.

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By Gonthier J.

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By Bastarache J. (dissenting)

Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *U.F.C.W.,*

Local 1518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739; *Federation of Canadian Municipalities v. AT&T Canada Corp.*, [2002] F.C.J. No. 1777 (QL), 2002 FCA 500; *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Société Radio-Canada v. Métromédia CMR Montréal Inc.* (1999), 254 N.R. 266; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47; *Sept-Îles (City) v. Quebec (Labour Court)*, [2001] 2 S.C.R. 670, 2001 SCC 48; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Toronto Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737, leave to appeal refused, [2002] 2 S.C.R. ix; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Baker v. Canada (Minister of*

Citizenship and Immigration), [1999] 2 S.C.R. 817; *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569, 2002 SCC 17; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117; *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1906] A.C. 204; *City of Toronto v. Grand Trunk Railway Co. of Canada* (1906), 37 S.C.R. 232; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31.

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Constitution Act, 1867, s. 92(10), (13).

Interpretation Act, R.S.C. 1985, c. I-21, s. 12.

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APPEAL from a judgment of the Federal Court of Appeal, [2001] 4 F.C. 237, 202 D.L.R. (4th) 272, 273 N.R. 291, [2001] F.C.J. No. 1150 (QL), 2001 FCA 236, setting aside the Telecom Decision CRTC 99-13. Appeal dismissed, Bastarache J. dissenting.

Neil Finkelstein and *Catherine Beagan Flood*, for the appellant.

Alan Mark and *Peter Ruby*, for the respondents.

Brian J. Saunders and *Peter Southey*, for the intervener the Attorney General of Canada.

Michel Y. Hélie, for the intervener the Attorney General of Ontario.

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Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Cynthia Devine, for the intervener the Attorney General of Manitoba.

Nancy E. Brown, for the intervener the Attorney General of British Columbia.

Robert G. Richards, *Q.C.*, for the intervener the Attorney General for Saskatchewan.

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Written submissions only by *Christian S. Tacit*, for the intervener the Federation of Canadian Municipalities.

Written submissions only by *Seumas Woods* and *Charlotte Kanya-Forstner*, for the intervener GT Group Telecom Services Corp.

Written submissions only by *Thomas G. Heintzman*, *Q.C.*, *Susan L. Gratton* and *Genevieve Currie*, for the interveners Aliant Telecom Inc., AT & T Canada, Bell Canada, Bell West Inc., MTS Communications Inc. and TELUS Communications Inc.

The judgment of McLachlin C.J. and Gonthier, Major, Arbour, LeBel and Deschamps JJ. was delivered by

1 GONTHIER J. — The appellant, Canadian Cable Television Association ("CCTA"), seeks access to the power poles of the respondent power utilities ("Utilities") for the purpose of supporting cable television transmission lines. In the past, the CCTA's members have rented space from the Utilities under private contract. Since 1996, however, the parties have been unable to reach agreement. The CCTA sought and obtained an order from the Canadian Radio-television and Telecommunications Commission ("CRTC") requiring the Utilities to grant it access to their power poles on terms stipulated by the CRTC. The Utilities successfully appealed this order before the Federal Court of Appeal. The CCTA now appeals that decision.

2 The CRTC purported to make its order against the Utilities pursuant to s. 43(5) of the *Telecommunications Act*, S.C. 1993, c. 38 ("Act"). The Federal Court of Appeal held that s. 43 (5), properly interpreted, does not give the CRTC jurisdiction over the power poles of provincially regulated electric power companies such as the Utilities. I agree with this finding and would dismiss the appeal.

I. Facts

3 The members of the CCTA provide cable television services throughout Canada by means of cable transmission lines. In Ontario, these transmission lines are commonly carried on telephone and power poles. The CCTA claims to use over 300 000 power poles for this purpose in Ontario alone. By renting space on the poles of other providers, the CCTA avoids the expense, inconvenience and duplication of erecting its own poles.

4 The Utilities are provincially regulated electric power providers. The power poles by which they and other power utilities distribute electricity are a familiar sight throughout the country. In Ontario, the Utilities' poles are erected on both public and private property. It is not disputed that the Utilities are subject to the legislative jurisdiction of the Province of Ontario.

5 In 1996 the parties began negotiating a new rental agreement to replace the one that would soon expire. The Utilities demanded an increase in the rental rate from $10.42 to $40.92 per pole. The CCTA refused and the existing rental agreement expired. On February 13, 1997, the CCTA applied to the CRTC for final and interim relief.

II. Procedural History

6 The CRTC issued Telecom Decision CRTC 99-13 on September 28, 1999. It found that s. 43(5) of the Act granted it authority over the Utilities' power poles. In particular, the CRTC found that the phrase "the supporting structure of a transmission line", read in context and in the light of telecommunications and broadcasting policy objectives, was broad enough to include the Utilities' power poles. It ordered the Utilities to grant the CCTA access to their power poles at the annual rate of $15.89 per pole.

7 The Federal Court of Appeal granted leave to appeal the CRTC's decision under s. 64 (1) of the Act. Rothstein J.A. for the court allowed the appeal. He found that the CRTC's decision was reviewable on a correctness standard. He agreed with the CCTA that "the supporting structure of a transmission line", read literally and in isolation, was capable of bearing a broad enough meaning to include power poles. Read in the context of the section as a whole, however, such an

interpretation was inconsistent and unworkable. Rothstein J.A. rejected the CRTC's reliance on policy objectives to inform its interpretation of s. 43(5), observing that the policies themselves do not confer jurisdiction on the CRTC and cannot be used as a basis for exercising a power the Act does not grant it.

III. Relevant Statutory Provisions

8 *Telecommunications Act*, S.C. 1993, c. 38

2. (1) In this Act,

. . .

"Canadian carrier" means a telecommunications common carrier that is subject to the legislative authority of Parliament;

. . .

"transmission facility" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus.

43. (1) In this section and section 44, "distribution undertaking" has the same meaning as in subsection 2(1) of the *Broadcasting Act*.

(2) Subject to subsections (3) and (4) and section 44, a Canadian carrier or distribution undertaking may enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.

(3) No Canadian carrier or distribution undertaking shall construct a transmission line on, over, under or along a highway or other public place without the consent of the municipality or other public authority having jurisdiction over the highway or other public place.

(4) Where a Canadian carrier or distribution undertaking cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct a transmission line, the carrier or distribution undertaking may apply to the Commission for permission to construct it and the Commission may, having due regard to the use and enjoyment of the highway or other public place by others, grant the permission subject to any conditions that the Commission determines.

(5) Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.

45. On application by a municipality or other public authority, or by an owner of land, the Commission may authorize the construction of drainage works or the laying of utility pipes on, over, under or along a transmission line of a Canadian carrier or any lands used for the purposes of a transmission line, subject to any conditions that the Commission determines.

64. (1) An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.

Broadcasting Act, S.C. 1991, c. 11

2. (1) In this Act,

. . .

"distribution undertaking" means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;

IV. Analysis

A. *Standard of Review*

9 I agree with the Federal Court of Appeal that correctness is the appropriate standard of review in this case.

10 As is well known, Canadian courts take a pragmatic and functional approach to the review of administrative decisions. The leading statement on determining the applicable standard of review within the pragmatic and functional approach is found in the reasons of Bastarache J. in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; see also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19. Bastarache J. identified four factors to be taken into account: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing judge on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the problem.

(1) Privative Clauses and Statutory Rights of Appeal

11 Section 64(1) of the Act grants a right of appeal in the following terms:

> An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.

While the presence of a statutory right of appeal is not decisive of a correctness standard (*Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27), it is a factor suggesting a more searching standard of review (*Pushpanathan*, *supra*, at para. 30).

(2) Relative Expertise

12 The proper concern of the reviewing court is not the expertise of the decision maker in general, but its expertise relative to that of the court itself *vis-à-vis* the particular issue (*Pushpanathan*, at para. 33). The reviewing court must also bear in mind that in determining the standard of review, the focus of the inquiry is on the particular provision being invoked and interpreted by the tribunal; some provisions within the same Act may require greater curial deference than others (*Pushpanathan*, at para. 28).

13 These points are illustrated by L'Heureux-Dubé J.'s discussion of the standard of review in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739. There, L'Heureux-Dubé J. aptly described the CRTC as "a specialized administrative tribunal . . . which possesses considerable expertise over the subject matter of its jurisdiction" yet found that it was reviewable on a correctness standard "as regards jurisdictional questions and questions of law outside the CRTC's area of expertise" (paras. 30-31). To ascertain the CRTC's relative expertise for the purpose of this appeal, I must consider the particular provision at issue and the nature of the CRTC's expertise.

14 The provision at issue is s. 43(5). More particularly, the question before the Court in this appeal is whether the phrase "the supporting structure of a transmission line" in s. 43(5) includes the Utilities' power poles. This phrase has no technical meaning beyond the ken of a reviewing court. Indeed, it appears to have no stand-alone meaning at all, but only the meaning given to it by the Act itself. In short, we are faced with a question of statutory interpretation.

15 The CRTC's expertise lies in the regulation and supervision of Canadian broadcasting and telecommunications. In particular, the CRTC is charged with the implementation of Canada's telecommunications policy as enunciated in s. 7 of the Act.

16 Deference to the decision maker is called for only when it is in some way more expert than the court and the question under consideration is one that falls within the scope of its greater expertise (*Dr. Q*, at para. 28). In my view, this is not such a case. The proper interpretation of the phrase "the supporting structure of a transmission line" in s. 43(5) is not a question that engages the CRTC's special expertise in the regulation and supervision of Canadian broadcasting and telecommunications. This is not a question of telecommunications policy, or one which requires an understanding of technical language. Rather, it is a purely legal question and is therefore, in the words of La Forest J., "ultimately within the province of the judiciary" (*Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 28). This Court's expertise in matters of pure statutory interpretation is superior to that of the CRTC. This factor suggests a less deferential approach.

(3) Purposes of the Legislation and Provision

17 Much of the CRTC's work involves the elaboration and implementation of telecommunications policy. I consider the policy objectives of the Act below. I note, however, that this policy function is much less in evidence in s. 43(5) than elsewhere in the Act. Rather, s. 43(5) accords the CRTC the essentially adjudicative role of considering applications from, and providing redress to, public service providers who cannot gain access to the supporting structure of a transmission line on terms acceptable to them. The proper interpretation of s. 43(5) at issue in this case is not a "polycentric" question. It is a question of whether s. 43(5), properly construed, gives

the CRTC jurisdiction to hear the parties' dispute. Again, this factor points to a less deferential standard of review.

(4) Nature of the Problem

18 As I noted in my consideration of relative expertise, above, the problem before us is a purely legal one: what did Parliament intend by the phrase "the supporting structure of a transmission line"? This is a question of general importance to the telecommunications and electricity industries. I note Bastarache J.'s observation in *Pushpanathan* (at para. 37) that even pure questions of law may be granted a wide degree of deference where other factors suggest the legislature so intended. That is not the case here.

19 Applying the pragmatic and functional approach to the circumstances of this appeal, I conclude that all four factors point to a correctness standard of review. This is therefore not a case calling for deference to the decision of the CRTC on this issue.

B. *The Meaning of Section 43(5)*

(1) The Modern Approach

20 The starting point for statutory interpretation in Canada is E. A. Driedger's definitive formulation in his *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.

In the case of federal legislation such as the Act in question, this modern approach to statutory interpretation is confirmed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" (see *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, *per* Iacobucci J.).

(2) The Grammatical and Ordinary Meaning of Section 43(5)

21 The disputed subsection reads as follows:

> Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.

> Lorsqu'il ne peut, à des conditions qui lui sont acceptables, avoir accès à la structure de soutien d'une ligne de transmission construite sur une voie publique ou un autre lieu public, le fournisseur de services au public peut demander au Conseil le droit d'y accéder en vue de la fourniture de ces services; le Conseil peut assortir l'autorisation des conditions qu'il juge indiquées.

In my view, there is no important difference between the English and French versions. Nor have the parties suggested otherwise.

22 Looking for the moment at the subsection alone, in its grammatical and ordinary meaning, three points arise.

23 First, it is clear that the phrase “a person who provides services to the public” in s. 43(5) includes, but is broader than, the phrase “Canadian carrier or distribution undertaking” found elsewhere in the section. Any provider of services to the public, it seems, may apply to the CRTC to gain access to the supporting structure of a transmission line constructed on a highway or other public place.

24 Second, the phrase “constructed on a highway or other public place” qualifies the phrase “transmission line”. Therefore, on the grammatical and ordinary meaning of the provision, the CRTC may not grant access to transmission lines situated on private land. In its decision, the CRTC found otherwise, saying that the contextual approach to statutory interpretation requires the interpreter to presume that Parliament knew that some support structures — not those constructed pursuant to s. 43, but others such as those owned by the Utilities — are located on public utility rights-of-way. This conclusion begs the question, for it assumes that “transmission line” includes the Utilities’ power poles. If we refrain from that assumption, the grammatical and ordinary meaning of s. 43(5) is that the CRTC may not grant access to supporting structures located on private land.

25 Third, the phrase used in s. 43(5) and throughout s. 43 is “transmission line”. The Utilities submit that a transmission line is to be distinguished from a distribution line. A transmission line carries electricity over large distances with minimum losses. A distribution line carries less than 50kV of electricity over short distances. The power poles to which the CCTA seeks access are not

transmission lines but distribution lines. Parliament, say the Utilities, must be taken to have known of this distinction. Had Parliament intended to submit the Utilities' power poles to the jurisdiction of the CRTC by means of s. 43(5), it would have employed the phrase "distribution line".

26 In the Court of Appeal, Rothstein J.A. was of the view that the phrase "transmission line", read literally and in isolation, was capable of including distribution lines, but that analysis of the statutory context proved otherwise. I would go further. I am inclined to agree with the Utilities' submission that Parliament should be taken to know the distinction between transmission and distribution lines. I also agree that Parliament should be taken to know that some power poles are situated on private land and therefore cannot be captured by a provision referring to supporting structures "constructed on a highway or other public place". Even a literal and isolated reading of s. 43(5) raises some doubt about the correctness of the CRTC's decision.

(3) <u>The Context: Section 43</u>

27 The disputed subsection is one of five provisions that make up s. 43. The entire section must be considered. The section is mainly concerned with the construction, maintenance and operation of transmission lines.

28 Section 43(1) adopts for the purposes of ss. 43 and 44 the definition of "distribution undertaking" set out in the *Broadcasting Act*, S.C. 1991, c. 11, namely "an undertaking for the reception of broadcasting and the retransmission thereof . . .". The other defined term of note when reading s. 43 is "Canadian carrier", defined in s. 2(1) of the Act as "a telecommunications common carrier that is subject to the legislative authority of Parliament". Section 43(2) grants "a

Canadian carrier or distribution undertaking" the power to "enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines". Section 43(3) requires the consent of "the municipality or other public authority" in such cases. Section 43(4) provides that where a Canadian carrier or distribution undertaking cannot gain such consent on terms acceptable to it, it may apply to the CRTC for permission.

29 It is at this point in the section that s. 43(5) appears. The terminology and subject matter of this subsection are a notable break from the rest of s. 43. Rather than addressing the construction, maintenance and operation of transmission lines, s. 43(5) is concerned with gaining access to the supporting structures of pre-existing transmission lines. Rather than referring to "a Canadian carrier or distribution undertaking", the subsection empowers "a person who provides services to the public" to apply to the CRTC for "a right of access".

30 The CCTA submits that the differences between s. 43(5) and the other subsections reveal Parliament's intent to empower the CRTC to grant cable service providers access to the Utilities' power poles. Elsewhere in s. 43, the phrase "transmission line" clearly means the transmission line of a Canadian carrier or distribution undertaking. But the phrase "Canadian carrier or distribution undertaking" is absent from s. 43(5). The CCTA says this means that the transmission lines referred to in s. 43(5) are not only the telecommunications and cable transmission lines of Canadian carriers and distribution undertakings, but also the electric power transmission lines of power providers such as the Utilities. The Court of Appeal erred in the CCTA's submission by reading the phrase "Canadian carrier or distribution undertaking" back in to s. 43(5) when Parliament clearly left it out.

31 The Utilities deny that the omission of "Canadian carrier or distribution undertaking" in s. 43(5) has such significance. That phrase, as it is used in s. 43(2) to (4), identifies who may construct transmission lines and under what terms; it does not, in the Utilities' submission, identify the owner of existing transmission lines. Therefore, the absence of the phrase "Canadian carrier or distribution undertaking" and the presence of the broader phrase "a person who provides services to the public" in s. 43(5) reveal nothing about the meaning of "the supporting structure of a transmission line". The broader wording indicates only that the applicant for access to the supporting structure of a transmission line under s. 43(5) need not be a "Canadian carrier or distribution undertaking" but may be any person providing services to the public. By contrast, it is not any service provider who may construct, maintain or operate transmission lines by virtue of s. 43(2), (3) and (4); only Canadian carriers and distribution undertakings may do so. In short, the subject of s. 43(5), i.e., the applicant for access, is different but the object, i.e., transmission lines constructed pursuant to this section, remains the same.

32 I agree with this construction of the section. I would also observe that ss. 43(1) to 43(4) are entirely concerned with telecommunications matters and not at all concerned with other supporting structures such as the Utilities' power poles. For s. 43(5) to encompass power poles would be a surprising departure from the otherwise harmonious meaning of the section as a whole. This analysis of s. 43 as a whole raises further doubts as to the correctness of the CRTC's decision.

(4) The Context: Other Provisions

33 Other provisions of the Act may shed light on the meaning of s. 43(5). The phrase "transmission facility" is defined in s. 2(1) of the Act as follows:

> “transmission facility” means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus.

A transmission facility is therefore a facility for the transmission of “intelligence”. The phrase “transmission facility” does not, of course, occur in s. 43(5). Yet, the Utilities submit that the term “transmission” in s. 43(5) must be read harmoniously with the definition of “transmission facility” so that in both provisions the thing being transmitted is “intelligence”. The Utilities’ power poles do not serve to transmit intelligence. They serve to transmit electricity.

34 I agree with the Utilities that a harmonious interpretation of these two provisions is to be preferred. While I do not consider this point to be conclusive, it is another factor suggesting that s. 43(5) does not encompass the Utilities’ power poles.

35 In support of its approach, the CCTA relies on s. 45:

> On application by a municipality or other public authority, or by an owner of land, the Commission may authorize the construction of drainage works or the laying of utility pipes on, over, under or along a transmission line of a Canadian carrier or any lands used for the purposes of a transmission line, subject to any conditions that the Commission determines.

The CCTA points to this provision as an example of Parliament specifying that the transmission line in question must be that of a Canadian carrier. The CCTA says that had Parliament intended to impose a similarly narrow interpretation on the phrase “transmission line” in s. 43(5), it could easily have done so.

36 I read s. 45 rather differently. While most of s. 43 qualifies the phrase "transmission line" with the defined terms "Canadian carrier" and "distribution undertaking", s. 45 leaves "distribution undertaking" out. (Indeed, s. 43(1) defines "distribution undertaking" for the purposes of ss. 43 and 44 only.) The effect is that a municipality or other public authority, or an owner of land, may apply to the Commission as specified in s. 45 only in respect of a Canadian carrier's transmission line — not in respect of a distribution undertaking's transmission line. The meaning of s. 45 has not yet been judicially considered, and this is not the case to consider it. I am satisfied, however, that s. 45 does not assist the CCTA in this case.

(5) Policy Objectives

37 In its decision, the CRTC relied heavily on the policy objectives enunciated by Parliament in s. 7 of the Act and s. 3 of the *Broadcasting Act*. These objectives help elucidate the purpose of the statutory regime as a whole and will often be relevant to the CRTC's decision making.

38 Section 7 of the Act sets out the objectives of Canadian telecommunications policy. The relevant objectives, in my view, are "the orderly development throughout Canada of a telecommunications system" (s. 7(*a*)), "reliable and affordable telecommunications services" (s. 7(*b*)), "efficiency and competitiveness . . . of Canadian telecommunications" (s. 7(*c*)), "efficient and effective" regulation where required (s. 7(*f*)), and responsiveness to "the economic and social requirements of users of telecommunications services" (s. 7(*h*)). In short, the purpose of the *Telecommunications Act* is to encourage and regulate the development of an orderly, reliable, affordable and efficient telecommunications infrastructure for Canada.

39 Section 3(1)(*t*)(ii) of the *Broadcasting Act* provides another relevant policy objective: "distribution undertakings . . . should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost". (The *Broadcasting Act* is not directly applicable to this appeal but is nevertheless relevant because it is the main statutory authority for the CRTC's regulatory powers over cable television.)

40 Considerations of efficiency and affordability played a significant part in the CRTC's decision. The CRTC was anxious to avoid an interpretation of s. 43(5) that would require the CCTA or others to construct their own supporting structures because they could not gain access to the Utilities' power poles. Such a result was described by the CRTC (at para. 126) as inconsistent with the orderly development of the Canadian telecommunications system, ultimately costly to end-users, a potential disincentive to new entrants into the telecommunications marketplace and inconvenient to the public. The CRTC concluded (at para. 131) that "an approach that forces each operator to construct its own duplicate infrastructure is not in the public interest".

41 I need not disagree with that conclusion. I do disagree, however, with the assumption that founds it. It is not at all clear to me that the erection of a province-wide duplicate infrastructure of cable television poles is the necessary or even the likely result of finding that the CRTC lacks jurisdiction over power poles. The CCTA originally sought access to the Utilities' power poles by contract. When it could not reach terms agreeable to it by those means, it opted for the untested avenue of a CRTC regulatory solution. If that avenue proves unavailable, there may yet be other avenues, be they contractual or regulatory.

42 The consideration of legislative objectives is one aspect of the modern approach to statutory interpretation. Yet, courts and tribunals must invoke statements of legislative purpose to elucidate, not to frustrate, legislative intent. In my view, the CRTC relied on policy objectives to set aside Parliament's discernable intent as revealed by the plain meaning of s. 43(5), s. 43 generally and the Act as a whole. In effect, the CRTC treated these objectives as power-conferring provisions. This was a mistake.

(6) Conclusion

43 Section 43(5) cannot bear the broad meaning given to it by the CRTC. The subsection, taken alone, does not on its face include the Utilities' power distribution lines. Seen in the light of the rest of s. 43, the CRTC's broad interpretation is at odds with the scheme of the section. Likewise, such an interpretation is inexplicably inconsistent with the definition of "transmission facility" in s. 2(1). Nothing in s. 7 of the Act, or in the policy objectives of the *Broadcasting Act*, meets these objections.

44 As this appeal turns on a straightforward statutory interpretation of s. 43, I decline to address the constitutionality of any similar law purporting to grant the CRTC the authority to grant access rights to, or otherwise regulate, property within provincial jurisdiction, such as electrical poles.

V. Disposition

45 I would dismiss the appeal with costs.

The following are the reasons delivered by

46 BASTARACHE J. (dissenting) — I have read the reasons of my colleague Justice Gonthier. I am, however, unable to agree with his analysis and his conclusion. I am also concerned that his reasons fail to address and correct errors made by the Federal Court of Appeal. I have two main concerns with the proposed disposition of this appeal.

47 First, the Court of Appeal erred by failing to separate the constitutional question from the statutory interpretation question. As I shall explain below, the constitutional question haunted Rothstein J.A.'s reasons and affected their outcome. More specifically, in my view, the constitutional question inappropriately influenced the Court of Appeal's determination of the standard of review and of the interpretation of s. 43(5) of the *Telecommunications Act*, S.C. 1993, c. 38 ("Act").

48 Second, treatment of the constitutional question aside, I believe that both the Court of Appeal and my colleague Gonthier J. erred in their determination of the standard of review. An expert tribunal interpreting a technical provision of its enabling legislation is entitled to some deference.

49 I am concerned that the reasoning in this appeal, in both respects I have mentioned, will influence judges in future cases. In what follows, I set out my understanding of the correct approach to determining the standard of review in this appeal. Then I apply what I find to be the appropriate standards of review to the questions. Finally, I discuss what I fear will be the effects of Gonthier J.'s

reasoning. Since he does not criticize or reject the reasoning of the Court of Appeal, Rothstein J.A.'s approach is implicitly affirmed as correct, at least in cases where one party raises a constitutional concern.

50 In my view, the critical issues in this appeal come into focus only on reading Rothstein J.A.'s decision in the Court of Appeal. I thus begin there.

I. The Court of Appeal's Approach, [2001] 4 F.C. 237, 2001 FCA 236

51 Concerns about the jurisdiction of the Canadian Radio-television and Telecommunications Commission ("CRTC") and the legislative competence of Parliament appear throughout Rothstein J.A.'s reasons.

A. *Standard of Review*

52 In his discussion of the standard of review, Rothstein J.A. writes that the interpretation of s. 43(5) "involves the scope of the CRTC's regulatory authority" (para. 13). If "transmission line" includes all transmission lines, irrespective of ownership, he went on to say, s. 43(5) would "extend to transmission lines of power utilities and others not otherwise subject to the jurisdiction of the CRTC" (para. 13).

53 This is a peculiar concern. Sections 43(2) and 43(4), immediately preceding the provision at issue in this appeal, empower the CRTC to grant a Canadian carrier or distribution

undertaking permission to "enter on and break up any highway or other public place" for construction, maintenance, and operation purposes. That power is granted irrespective of the ownership of the particular highway or public place. Indeed, the Act merely contemplates, broadly, that the land in question will be under the jurisdiction of some municipality or other public authority. There is thus no sense in which there is an identifiable set of parties who may be "subject to the jurisdiction of the CRTC" as it exercises its powers under s. 43.

54 Rothstein J.A. writes that the interpretation of s. 43(5) will have precedential importance. On the basis of the precedential importance of a decision potentially "extending" the CRTC's jurisdiction, he concluded that Parliament did not intend to leave determination of such a question to the exclusive decision of the CRTC (para. 13).

55 Rothstein J.A. then turned more specifically to the factors in the pragmatic and functional approach. He noted the statutory right of appeal with leave in s. 64(1) of the Act. On expertise, the most important of the factors, he said this, at para. 15:

> I accept that the CRTC has expertise with respect to telecommunications and broadcasting and that with respect to technical matters within that expertise, the CRTC may be better suited than the Court to interpret technical laws. However, there is no indication that the expertise of the CRTC is involved in the determination of the question at issue in this case.

I will return below to the question of the CRTC's expertise on the question at issue.

B. *Statutory Interpretation*

56 On the basis of his finding of a correctness standard of review, Rothstein J.A. approached the review of statutory interpretation from the question of what was the correct interpretation. It is unnecessary to undergo a thorough analysis of Rothstein J.A.'s approach to the statutory interpretation question. I wish here to focus on the extent to which constitutional concerns tainted his conclusions.

57 The possibility that s. 43(5), depending on its construction, might exceed Parliament's constitutional boundaries clearly troubled Rothstein J.A. He wrote at para. 21:

> Read literally, subsection 43(5) might be interpreted as conferring on the CRTC, the jurisdiction to grant to all persons who provide services to the public, access to support structures of all transmission lines, whether they are part of an undertaking that falls under federal jurisdiction or provincial jurisdiction. Such an interpretation would imply that Parliament was purporting to confer jurisdiction on the CRTC, not only outside Parliament's legislative jurisdiction under the *Constitution Act, 1867* . . . but also, well beyond the mandate of the CRTC to regulate telecommunications and broadcasting under the *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22.

He also noted that the CRTC rejected one possible reading of s. 43(5) so as to limit its effects to circumstances within federal and CRTC jurisdiction (paras. 22 and 24). Much later in his reasons, Rothstein J.A. returned to the question of provincial jurisdiction and constitutional limits. In the context of his discussion of the legislative history, he wrote, at para. 65:

> I find it hard to believe that if it had been the Government's intention that subsection 43(5) should confer jurisdiction on the CRTC over access by Canadian carriers or distribution undertakings to the support structures of the transmission lines of utilities subject to provincial jurisdiction, that such intent would not have been expressly made known and submissions invited. I do not say that Parliament could not enact such a provision; nor need I make any determination as to whether such a provision would be within the constitutional jurisdiction of Parliament. However, I would not attribute to the federal government or to Parliament an intention to confer such jurisdiction on a federal regulatory tribunal through the guise of an ambiguous provision that was enacted without express notice to the provinces or their utilities of such an intention.

58 Having set out this brief overview of Rothstein J.A.'s approach, I turn to what would have been the correct approach.

II. Determination of the Standard of Review

59 Judicial review of the CRTC's order requires a separation of that decision into two main questions. One is the constitutional question. The constitutional question is whether any interpretation argued for s. 43(5) of the Act would make that provision *ultra vires* the Parliament of Canada. The other is the more general question of the CRTC's interpretation of s. 43(5) and exercise of its power in issuing Telecom Decision CRTC 99-13.

60 Separating the two main questions is crucial. Failure to distinguish and resolve separately the two questions frustrates the appropriate process of judicial review in at least two ways. It may also, consequently, frustrate Parliament's intent.

61 First, combining a constitutional question and a statutory interpretation question may skew the standard of review for an agency's decision. As I shall develop below, a question with

constitutional overtones will inevitably drive towards the correctness standard. Yet, where the constitutional argument is without merit, the agency's decision should not be viewed globally as a constitutional matter.

62 Second, where a constitutional question is raised, reviewing the agency's ordinary statutory interpretation without isolating the constitutional question can limit the agency's ability to give the legislation at issue the full import intended by the legislature. The mere unproven argument that one reading of a statute is unconstitutional may impel the decision maker erroneously to eliminate that reading by applying the interpretive doctrine of the presumption of constitutionality.

63 I turn now to the question of the standards of review for the two principal questions in this appeal.

A. *Constitutional Question*

64 On October 29, 2002, the Chief Justice stated the following constitutional question: "Is s. 43(5) of the *Telecommunications Act*, S.C. 1993, c. 38, *intra vires* Parliament pursuant to the *Constitution Act, 1867*?"

65 For present purposes, the constitutional question is better phrased as whether any interpretation argued for s. 43(5) of the Act would be *ultra vires* Parliament. In other words, is there a plausible construction of s. 43(5) that, instead of being valid federal legislation, would

amount to legislation in relation to property and civil rights within a province under s. 92(13) of the *Constitution Act, 1867*?

66 The pragmatic and functional approach applies to this question, as it does to all matters of judicial review and all appeals from administrative tribunals: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. It is settled law, however, that application of the pragmatic and functional approach to a question of constitutional law will yield a correctness standard. As Iacobucci and Major JJ. wrote in *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at para. 40, "[i]t seems reasonable to accept the proposition that courts are in a better position than administrative tribunals to adjudicate constitutional questions". That appeal addressed the degree of deference due a decision by a specialized agency, the National Energy Board. That agency had determined that certain gathering pipeline and processing plant facilities were not federal works or undertakings under s. 92(10)(*a*) of the *Constitution Act, 1867*. As a division of powers question, the issue in *Westcoast* thus resembles that in the present appeal. The same point is also made frequently when a tribunal answers a question relating to the *Canadian Charter of Rights and Freedoms*: *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. The CRTC's constitutional determination is therefore reviewable by a correctness standard.

67 I turn now to the second question, the standard of review of the CRTC's decision, constitutional matters aside.

B. *The CRTC's Decision*

68 In determining the standard of review for the order, I note that it is important to distinguish the present case from one where an administrative agency simply applies the Constitution. Sometimes the sole question before an agency will be constitutional. For example, in *KMart Canada*, *supra*, the entire question was whether the statutory definition of "picketing" in a provincial labour code was unconstitutional as contrary to the *Charter*. Cory J. wrote for the Court, at para. 69:

> It has been recognized that where a Labour Board is acting within its jurisdiction its decision can only be overturned if it is patently unreasonable. However where the Board interpreted or applied the *Charter* the standard of review must be that of correctness.

Likewise, in *Cooper*, *supra*, the question before the Canadian Human Rights Commission was whether a provision in human rights legislation contravened s. 15(1) of the *Charter*. Those cases were very different from the present appeal. In the present appeal, the main question was the appropriateness of the CRTC's access order issued under s. 43(5). The constitutional question was raised only as an attack on the CRTC's order. If the constitutional question is meritless, it should not serve nevertheless to dictate the level of scrutiny by the court reviewing the administrative decision.

69 This question is more complicated than the standard of review for the constitutional question. It is appropriate to view the CRTC and s. 43(5) through the four factors set out in *Pushpanathan*, *supra*. Moreover, it is necessary to recognize that review of the administrative

decision itself consists properly of two questions: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at para. 41, *per* Arbour J. The first is the CRTC's interpretation of s. 43(5). This is a question of law. As noted by the parties, it will have some precedential value in the CRTC's future cases: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 36, *per* Iacobucci J. The second is the appropriateness of the specific terms in Telecom Decision CRTC 99-13. It is a question of mixed law and fact.

70 On the basis that the CRTC's interpretation of the enabling provision was incorrect and vitiated the order, Gonthier J. does not review the specific terms or determine their appropriate standard of review. In my view, it is uncontroversial that the reviewing court owes the CRTC deference on the specific terms of an order. Dictation of such terms falls "squarely within its area of expertise", to use the words of Gonthier J. in reference to other CRTC decisions in *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1746. See also *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739; *Federation of Canadian Municipalities v. AT&T Canada Corp.*, [2002] F.C.J. No. 1777 (QL), 2002 FCA 500 ("*Ledcor*"), at para. 30, *per* Létourneau J.A. The standard for review of the specific terms of Telecom Decision CRTC 99-13 is therefore reasonableness *simpliciter*.

71 It is the standard of review for the CRTC's interpretation of s. 43(5) that is controversial in this appeal, and for which it is important to apply the four factors from *Pushpanathan* with some care.

(1) Privative Clauses and Statutory Rights of Appeal

72 No privative clause protects the CRTC's decision in this case. Indeed, s. 64(1) provides that an appeal from a decision by the CRTC on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with leave. A clause permitting appeals is a factor suggesting a more searching standard of review: *Pushpanathan*, *supra*, at para. 30. While this factor militates against deference, it is necessary to consider the other factors before making the final determination of the degree of deference.

(2) Relative Expertise

73 The second factor is the expertise of the tribunal. Expertise on the part of the tribunal warrants greater deference:

> If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded.
>
> (*Pushpanathan*, *supra*, at para. 32)

L'Heureux-Dubé J. explained the rationale for deference to expertise, writing for the Court in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, at para. 17:

> These bodies play a very important and special role in regulating social, economic, and political activities and relationships within an increasingly complex society. The administrative tribunal, with its specialized expertise, accumulated experience, and sensitivity as regards problems which arise in a particular field, is essential to the effective and fair implementation of state policy aimed at addressing these concerns.

Cory J. has written, similarly, that the basis for deference is that "administrative tribunals are set up to replace courts in areas where specific expertise and experience are required" (*Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, at para. 53; see also *Bell Canada*, *supra*, at p. 1746, *per* Gonthier J.).

74 It was largely on this justification that Iacobucci J. described expertise as "the most important of the factors that a court must consider in settling on a standard of review" (*Southam*, *supra*, at para. 50, cited in *Pushpanathan*, *supra*, at para. 32). This justification can apply even where there is a statutory right of appeal: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591.

75 Recall that expertise is to be understood as a relative, not an absolute, concept. In other words, is the tribunal expert *vis-à-vis* the reviewing court concerning the particular issue before it? *Pushpanathan*, *supra*, at para. 33.

76 I plan to assess the CRTC's expertise in three steps, using the approach suggested in *Pushpanathan*, at para. 33:

> Making an evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise.

77 First, what is the CRTC's expertise? This Court has recognized the CRTC as an expert body. In *Shaw*, *supra*, at para. 30, L'Heureux-Dubé J. characterized the CRTC as "a specialized administrative tribunal . . . which possesses considerable expertise over the subject matter of its jurisdiction". She also noticed "the broad and important policy mandate of the CRTC" (para. 43). As Major J. noted for the Court in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 28, a tribunal's role in policy development is a significant factor in considering its expertise and the deference appropriate. See also Wilson J.'s reference to the "specialized understanding" of administrative tribunals in the fields of labour relations, telecommunications, financial markets, and international economic relations: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336, cited by Iacobucci J. in *Pezim*, *supra*, at p. 593. For the telecommunications field, Wilson J. was clearly referring to the CRTC. The Federal Court of Appeal has also noted that the "CRTC is a specialized, independent agency to which, precisely because of its expertise, Parliament has granted extensive powers for the supervision and regulation of the Canadian broadcasting system" (*Société Radio-Canada v. Métromédia CMR Montréal Inc.* (1999), 254 N.R. 266, at para. 2, *per* Létourneau J.A.).

78 I agree with Gonthier J. that the "CRTC's expertise lies in the regulation and supervision of Canadian broadcasting and telecommunications" (para. 15). We seem to differ, however, as to the extent to which this expertise extends generally to the CRTC's interpretation of its enabling legislation. (While it is the *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22, that established the CRTC, in the present context the *Telecommunications Act* is appropriately viewed as the enabling legislation, since the CRTC purported to act under s. 43(5) of that statute.) Gonthier J. suggests that the CRTC's special expertise in the regulation and supervision of Canadian broadcasting and telecommunications does not apply to statutory interpretation of the Act. In contrast, I am more inclined to think that interpretation of enabling legislation by a specialized tribunal is more akin to administration of that statute, a core part

of the tribunal's mandate. As Dickson J., as he then was, wrote in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at pp. 235-36:

> The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

See also the discussion of how specialized agencies develop their own body of law and policy, arguably equivalent to a court's development of the common law, in R. A. Macdonald, "On the Administration of Statutes" (1987), 12 *Queen's L.J.* 488.

79 The CRTC is obviously not a labour board, and telecommunications policy is not labour relations. Nevertheless, the general rationale applies. Indeed, where the particular facts of an administrative scheme and its tribunal warrant, this Court has explicitly distinguished its general deferential approach, developed initially in the context of labour boards: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 583-85, *per* La Forest J. But in the present appeal Gonthier J. distinguishes neither labour boards nor the general rule of deference to a specialized tribunal.

80 The CRTC may, in exercising its powers and performing its duties, determine any question of law or fact: s. 52(1) of the Act. CRTC members exercise their understanding of the body of decisions that has developed in the telecommunications field. Members will inevitably acquire a familiarity with technical terms and concepts prevalent in the telecommunications field.

Moreover, the renewable five-year terms of CRTC members (*Canadian Radio-television and Telecommunications Commission Act*, ss. 3(2) and 3(3)) make clear that it is not only institutional, but also personal experience on the part of individual members that accumulates during the CRTC's work. CRTC members are thus sharply distinguishable from members of *ad hoc* tribunals in other domains.

81 I agree with Rothstein J.A. and Gonthier J. that the policy objectives of the relevant legislation are not *per se* power-conferring provisions. That said, I believe that the CRTC has expertise in advancing those policies and in administering the enabling statutes in furtherance of those policies. CRTC members, working full time with those policies and statutes, will acquire an expertise superior to that of generalist judges who from time to time sit in judicial review of telecommunications matters.

82 Second, what is the expertise of the court relative to that of the CRTC? The court has general expertise at statutory interpretation. The court is perhaps better positioned than the CRTC to interpret general legal terms of wide usage. See *Mattel*, *supra*, at para. 33, *per* Major J., where a critical factor in reaching the standard of correctness was that the question related to concepts intrinsic to basic commercial law. See also *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1097, *per* Beetz J., where a labour board had no relative expertise respecting alienation and operation by another, which are general concepts of the civil law. (But for the suggestion that once a board has developed sufficient expertise, it is due deference on precisely the same general legal concepts, see *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47; *Sept-Îles (City) v. Quebec (Labour Court)*, [2001] 2 S.C.R. 670, 2001 SCC 48.) A court may also have relative expertise where interpretation of an external statute, one that the specialized agency does not routinely administer, is

at issue: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157. Even this point is nuanced, however, and Iacobucci J. contemplates that an agency may develop expertise respecting the legal interpretation of an external statute linked to the tribunal's mandate and frequently encountered by it (*Canadian Broadcasting Corp.*, at para. 48). See *Toronto Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737 (C.A.), leave to appeal refused, [2002] 2 S.C.R. ix. The point, however, is that the CRTC will have greater expertise *vis-à-vis* the reviewing court for technical and policy-related matters, including determination of legal questions, associated with the specialized statutes enabling the CRTC.

83 For judicial determinations that the CRTC is due deference on legal questions within its expertise, see *Shaw*, *supra*; *Ledcor*, *supra*; *Métromédia*, *supra*. These authorities are relevant only insofar as the question at issue turns out to be one within the CRTC's expertise. They stand, however, as a corrective against the reliance Gonthier J. places on the statutory interpretation character of the question and the courts' general expertise at that exercise.

84 The third inquiry here is this: What is the nature of the specific issue before the administrative decision maker relative to its expertise? To Gonthier J., the bare question "[W]hat did Parliament intend by the phrase 'the supporting structure of a transmission line'?" is a pure legal question best suited to final resolution by the courts, one that does not draw on the CRTC's core expertise. I cannot agree. In my view, the specific issue draws heavily on the CRTC's specialized expertise, indicating that deference is required.

85 The phrase "the supporting structure of a transmission line" in s. 43(5) is not one familiar to lawyers or judges. It has no standard legal meaning independent of the Act. Unlike concepts intrinsic to commercial law ("sale of goods for export to Canada", "condition of the sale of the goods": *Mattel*, *supra*) or to the civil law ("alienation", "operation by another": *Bibeault*, *supra*), the meaning of "the supporting structure of a transmission line" is not one that lawyers or judges would ever have thought about or on which they would have any opinions. Nor does it derive from an area of law where the tribunal has been held to have no greater expertise than the court, as for example human rights: *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at para. 46, *per* La Forest J., and at para. 3, *per* Iacobucci J.; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Mossop*, *supra*; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321. Commentators have criticized the determination that tribunals do not have greater expertise than courts on matters of human rights law: D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 279; B. Ryder, "Family Status, Sexuality and 'The Province of the Judiciary': The Implications of *Mossop* v. *A.-G. Canada*" (1993), 13 *Windsor Y.B. Access Just.* 3; A. Harvison Young, "Human Rights Tribunals and the Supreme Court of Canada: Reformulating Deference" (1993), 13 Admin. L.R. (2d) 206. I need not address those criticisms here. I simply note that it strikes me as inadvisable to develop, in this appeal, the notion that courts have general expertise respecting telecommunications support structures and Parliament's policy intentions for the telecommunications domain.

86 In contrast with these examples of general questions or questions within the courts' expertise, the meaning of "the supporting structure of a transmission line" is a technical question best answered by the specialized agency in whose enabling legislation it arises. The question is not simply one "of statutory interpretation" (as *per* Gonthier J., at para. 14). Indeed, to characterize it so, and therefore to conclude that the court's expertise in matters of pure statutory interpretation exceeds

the CRTC's, undermines the basis for deference to agencies in administration of their enabling legislation. Wilson J. made the point nicely in *National Corn Growers*, *supra*, at p. 1336:

> Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work.

This comment relates well to the definitive formulation of the modern approach to statutory interpretation:

> 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.
>
> (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, cited in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21)

In other words, the broad policy context of a specialized agency infuses the exercise of statutory interpretation such that application of the enabling statute is no longer a matter of "pure statutory interpretation". When its enabling legislation is in issue, a specialized agency will be better equipped than a court to interpret words in "their entire context" in harmony with the Act, "the object of the Act, and the intention of Parliament".

87 I note several difficulties with Gonthier J.'s approach to the assessment of the specific issue *vis-à-vis* expertise. First, it prematurely introduces subsequent conclusions into the determination of the standard of review. Gonthier J. holds, at para. 16, that the CRTC's expertise is not engaged because the "proper interpretation of the phrase" does not require "an understanding of technical language". As he puts it, at para. 14, "[t]his phrase has no technical meaning beyond the

ken of a reviewing court". Yet, Gonthier J. rejected the finding by Rothstein J.A. that an ordinary construction of the phrase would include the respondents' poles (para. 26). Moreover, the statement that the phrase has no technical meaning is only a conclusion that can be reached after canvassing all possible interpretations of the phrase, presumably some technical, some not. Identifying all the possible interpretations of the phrase "the supporting structure of a transmission line" and then discriminating amongst them requires expertise. The standard of review cannot be contingent on what the reviewing court determines to be the correct interpretation.

88 Second, the degree of deference must be discerned from the question to be resolved, not the tools that the reviewing court has already used to reach the answer. In particular, this Court has already determined "that the CRTC is entitled to curial deference with respect to questions of law within its area of jurisdiction and expertise" (*Shaw*, *supra*, at para. 31, *per* L'Heureux-Dubé J.). Given *Pushpanathan*, the focus on reading that statement should shift towards the question of expertise. Indeed, Létourneau J.A. takes precisely this approach in citing the *Shaw* case in *Ledcor*, *supra*, at para. 30: "Consequently, this means the applicable standard of review of the CRTC's legal conclusions on matters within its expertise is that of reasonableness". The reasonableness standard on questions of law means that the CRTC is entitled to err in law in the exercise of its jurisdiction (*Ledcor*, at para. 30). Given the general rule that an expert tribunal will be due deference on its determinations of questions of law relating to its enabling statute (see *Tétreault-Gadoury*, *supra*, at p. 33, *per* La Forest J.) and this Court's specific conclusion that the CRTC is entitled to deference on its answers to legal questions within its expertise, it is insufficient and, indeed, unhelpful to note that the interpretation of s. 43(5) is "a purely legal question" (as *per* Gonthier J., at para. 16). For tribunals expert at making legal determinations, such an observation adds little and need not, without more, drive towards correctness review. For example, in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 24, it was the fact of the decision maker's lack of expertise as to the substantive issue that indicated correctness review, not a lack of expertise

regarding legal questions as such. In the case of tribunals or administrative decision makers not empowered to make determinations of law, for example, or lacking expertise, the fact that a question is purely legal will of course be more significant. Yet, on purely legal questions within its expertise, the CRTC is owed deference. The analytical work in this appeal arises when determining whether the particular legal question is within the agency's expertise.

89 Third, by effectively holding that no deference is due where an ordinary, rather than technical, meaning prevails, Gonthier J. substantially reduces the likelihood that the pragmatic and functional approach will indicate deference to expert decision makers. As noted above, the correct approach to statutory interpretation requires that words be read "in their grammatical and ordinary sense". Gonthier J.'s approach suggests that a court will generally be as well equipped as a specialized agency to read words in their ordinary sense, in effect, most of the time.

90 Fourth, in his own analysis, Gonthier J. engages in technical reasoning of the kind he says is unwarranted by the question. While noting that consideration of legislative objectives is one aspect of the modern approach to statutory interpretation, Gonthier J. makes a policy assessment that there may be other avenues available to the appellant for access to the respondents' poles, "contractual or regulatory" (para. 41). This indicates that the exercise is not a "pure" one best suited to judges. The CRTC would have been significantly better positioned than the court to assess the alternatives and the consequences of each possible interpretation of s. 43(5). Moreover, he determines that the interpretive exercise is aided by assuming that Parliament knew — and thus that the reviewing court knows — the technical distinctions between transmission and distribution lines, and that some power poles are situated on private land (para. 26). The distinction, as Gonthier J. notes (at para. 25), is that a transmission line carries electricity over large distances with minimum losses. In contrast, a distribution line carries less than 50kV of electricity over short distances. It

strikes me that the distinction between transmission lines and distribution lines is not one to which any lawyer or judge, not having previously litigated or adjudicated in the telecommunications or energy sectors, would ever have turned his or her mind. It is a distinction with which the CRTC, as a specialized body regularly issuing orders respecting transmission facilities and transmission lines, is much more familiar than any judge. The CRTC, better than any judge, would know the extent to which Parliament regularly demonstrates its knowledge of technical distinctions in its legislation respecting the telecommunications sector. Reliance on these technical distinctions and facts further indicates how far the question is from a general question of law. If knowledge of all the technical meanings of terms such as "transmission" and the factual situation of poles is relevant, the issue appears no longer to be a pure question of statutory interpretation. Instead, it is one deeply enmeshed in the context and the domain of the CRTC's expertise.

91 In conclusion, this second factor militates for deference. Determining the definition of "the supporting structure of a transmission line" falls squarely within the CRTC's expertise.

(3) Purpose of the Act as a Whole, and the Provision in Particular

92 The purpose of the Act as a whole is to advance the "essential role in the maintenance of Canada's identity and sovereignty" of telecommunications and to advance certain specified objectives: s. 7. The CRTC, as a specialized agency, plays a crucial role in this scheme. Nevertheless, as noted above, the provision for an appeal on questions of law or jurisdiction with leave indicates that, under the Act, the CRTC is less clearly the final and exclusive decision maker than expert agencies fully shielded by privative clauses under other regimes, such as labour boards. I have several comments as to the provision in particular.

93 First, Gonthier J. suggests, at para. 17, that interpretation of s. 43(5) is a jurisdictional question: "It is a question of whether s. 43(5), properly construed, gives the CRTC jurisdiction to hear the parties' dispute." Such an observation hints at the defunct notion of the jurisdictional question as such. Yet, according to this Court's recent jurisprudence, the fact that a provision seems to limit a tribunal's powers does not lead to a less deferential standard of review. Rather, "the functional and pragmatic approach for determining the legislator's intent should be applied equally to questions which, at first blush, appear to limit a tribunal's jurisdiction" (*Canadian Union of Public Employees v. Montreal*, *supra*, at para. 19, *per* L'Heureux-Dubé J.). See also *Pushpanathan*, *supra*, at para. 28: "But it should be understood that a question which 'goes to jurisdiction' is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis." See also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at paras. 18-19, *per* Sopinka J., which also makes clear that a "jurisdictional question" is one that the legislator did not intend to leave to the board, not one that on its face defines the board's powers.

94 Second, Gonthier J. finds that the CRTC's telecommunications policy function is much less in evidence in s. 43(5) than elsewhere in the Act. He notes that s. 43(5) accords the CRTC "the essentially adjudicative role of considering applications from, and providing redress to, public service providers who cannot gain access to the supporting structure of a transmission line on terms acceptable to them" (para. 17). This subsection is not unique in this respect. Indeed, s. 43(4), in a strikingly similar way, empowers the CRTC to grant a Canadian carrier or distribution undertaking permission to enter on and break up any highway or other public place for the purpose of constructing a transmission line. Section 43(4) is triggered only where the Canadian carrier or

distribution undertaking has failed to obtain the consent of the municipality or other public authority, according to s. 43(3). Thus, s. 43(4) has an equivalent "adjudicative" role.

95 More important, however, is the point that it is impossible to extricate this question of whether the CRTC was statutorily authorized to hear the parties' dispute from matters of policy. The reach of the CRTC's power to grant permission under s. 43(5) connects directly with the CRTC's ability to implement its policy objectives. I disagree with Gonthier J. that the proper interpretation of s. 43(5) is not a "polycentric" question (para. 17). Obviously the question affects, bilaterally, the parties in this appeal. But the question reaches much further. In interpreting and applying s. 43(5), the CRTC is required to advance the complex policy objectives set out in s. 7 of the Act. The Federal Court of Appeal has observed the polycentric character of the CRTC's role in implementing similarly complex legislative objectives set out in s. 3 of the *Broadcasting Act*, S.C. 1991, c. 11: *Métromédia*, *supra*, at paras. 3-5, *per* Létourneau J.A. Moreover, Canadian telecommunications policy in s. 7 of the Act indicates that Canadians generally — by virtue of the role of telecommunications respecting Canada's identity and sovereignty — have a stake in the effectiveness of the tools given the CRTC. Parliament has made a determination that ordinary citizens are stakeholders in Canada's telecommunications policy. This indirect involvement by citizens thus distinguishes the present situation from a case in which, say, a public corporation and thus its shareholders are involved. Furthermore, the proper interpretation of s. 43(5) affects the municipalities and other public authorities, whose land may be broken up for the construction of duplicative transmission structures under s. 43(4). This is because, in practical terms, an order under s. 43(5) is an alternative to an order under s. 43(4). Therefore, in interpreting s. 43(5), as in exercising its discretion under s. 43(4), "the CRTC has to strike a delicate balance between public, private and municipal interests" (*Ledcor*, *supra*, at para. 28, *per* Létourneau J.A.). The environmental repercussions flowing from construction of such duplicative structures may have an impact upon those municipalities and their residents more generally. Indeed, the legislative history of

s. 43 indicates the multiple complex concerns implicated. Interpretation of the CRTC's scope to issue orders under s. 43(5) implicates much more than the private rights of the two parties. Compare cases where instead of a polycentric balancing of competing interests, the decision maker was required to resolve an issue in which an individual's rights were at stake *vis-à-vis* the state: *Chieu*, *supra*, at para. 26, *per* Iacobucci J.; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 60, *per* L'Heureux-Dubé J.

96 The purpose of s. 43(5), as evident from its inclusion with the other subsections of s. 43, is clearly to provide an alternative to the construction of new structures on public land. At this stage, in determining the standard of review, this does not on its own dictate a substantive outcome. It suggests, nonetheless, deference to the extent that the question is one best answered by the expert tribunal in appreciation of the real-life consequences for other provisions in the statute.

(4) The "Nature of the Problem": A Question of Law or Fact?

97 I agree with Gonthier J. that the interpretation of s. 43(5) is a question of law. The nature of the problem thus suggests, at first blush, less deference. It is established, however, that even pure questions of law may be granted deference where other factors of the pragmatic and functional approach suggest that the legislature intends such deference (*Pushpanathan*, *supra*, at para. 37).

98 To sum up, two factors suggest a low degree of deference, the statutory appeal and the legal nature of the problem. Two factors suggest substantial deference, the CRTC's relative expertise on an issue drawing on its technical knowledge and role in policy development and the purpose of the provision and the Act as a whole. I have already noted this Court's determination that expertise is

the most compelling of the factors in arriving at the appropriate standard of review (*Southam*, *supra*). I conclude that the appropriate standard is reasonableness *simpliciter*.

III. Application of Standards of Review

A. *Constitutional Question*

99 If the provision at issue has only one plausible construction, the constitutional question is simple: is the provision *ultra vires* its legislator? If the provision is genuinely ambiguous, however, greater care is required. The presumption of compliance with constitutional norms is a well-established principle of statutory interpretation, but it does not apply unless one possible interpretation would render the legislation invalid: R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 322. Iacobucci J. makes a similar point about the use of *Charter* values in *Bell ExpressVu*, *supra*. In other words, where an interpreter is choosing between versions, neither one of which is constitutionally invalid, there is no reason to prefer one over the other.

100 Rothstein J.A. read s. 43(5) restrictively so as to avoid possible unconstitutionality. He did not, however, make a prior determination that the possible interpretation he was excluding would, in fact, have rendered the legislation unconstitutional.

101 The interpretation Rothstein J.A. eliminated was the one that had been selected by the CRTC in its decision below, and is the one sought by the appellant before this Court. This is the construction of s. 43(5) that permits the CRTC to order access, for a federal undertaking, to poles owned by provincially regulated electric companies. The best approach is to determine whether that

interpretation would render s. 43(5) *ultra vires* Parliament. As nobody argued for it, it is unnecessary to access a construal by which a "person who provides [a] servic[e] to the public" could mean poles of a competing provincial hydro company. Without reference to constitutional precepts, the basic contextual approach to statutory interpretation would appear to rule out such a construction of the federal *Telecommunications Act*.

102 Gonthier J. declines to address the constitutional question. Nevertheless, I propose to answer the question briefly. The CRTC undertook a thorough constitutional analysis, spreading over some 70 paragraphs in its decision, and for future cases it may assist the CRTC to have comments from this Court on its reasoning. Moreover, my analysis may be helpful to Parliament should it decide, in light of the majority's decision, to amend s. 43(5).

103 In my view, the CRTC decided correctly that this construction of s. 43(5) is constitutionally valid (Telecom Decision CRTC 99-13, at paras. 89-106).

104 There are two stages to the division of powers analysis. The first step asks: What is the essential character of the law? The second step asks whether that character relates to an enumerated head of power granted to the enacting legislature by the *Constitution Act, 1867*. If it does, the law is valid: *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569, 2002 SCC 17; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.

105 First, what is the pith and substance, or essential character, of the impugned law? Here we are seeking the "true meaning or dominant feature" of s. 43(5): *Ward*, *supra*, at para. 17, *per* McLachlin C.J. "The effects of the legislation may also be relevant to the validity of the legislation in so far as they reveal its pith and substance": *Global Securities*, *supra*, at para. 23; see also *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299. Indeed, in some cases, the effects of the law suggest a purpose other than that stated in the law: *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.). In other words, a law may say that it intends to do one thing and actually do something else: *Firearms Reference*, *supra*, at para. 18. Here, for example, the respondents argue that the pith and substance of s. 43(5) is actually the minimization of disruption of roadways.

106 In my view, the dominant characteristic is that s. 43(5), construed for argument's sake as suggested by the appellant and as found by the CRTC, empowers the CRTC to aid federal undertakings by granting them access to the infrastructure of provincially regulated utilities when they have otherwise failed to obtain access on acceptable terms. I cannot accept the argument by the respondents and a number of the interveners that the dominant characteristic is that the provision would permit the CRTC to minimize disruption of roadways or to regulate hydro-electricity within a province. Any impact the CRTC can have on a provincially regulated hydro utility arises only through the fact of granting a federal undertaking access to transmission lines in resolution of a particular dispute. This is not a plenary regulatory power. See the relevant discussion of the constitutional validity of s. 43(4) of the Act, which, despite its incidental effects, is not in pith and substance legislation in respect of "control and management of traffic on municipal roadways" (*Ledcor*, *supra*, at para. 24).

107 Turning to the second step, it should be obvious that, in my view, the essential character of s. 43(5) relates to an enumerated head of power granted to Parliament by the *Constitution Act, 1867*. The pith and substance of the law is properly assigned to s. 92(10)(*a*) of the *Constitution Act, 1867*. The impugned provision cannot credibly be described as a law in respect of a provincial matter such as property and civil rights under s. 92(13). According to the authorities of this Court, the analysis stops here: *Firearms Reference*, *supra*; *GM Canada*, *supra*. There is no need to consider whether the impugned provision is part of a valid legislative scheme, nor if so, whether it is sufficiently integrated into that legislative scheme. Since the impugned law is valid federal law, incidental effects upon matters of provincial jurisdiction are constitutionally irrelevant.

108 My conclusion is unsurprising, since the validity of federal laws granting access to or rights upon property otherwise regulated under the head of s. 92(13) for the purposes of federal undertakings is long established. See *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52 (P.C.); *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1906] A.C. 204 (P.C.); *City of Toronto v. Grand Trunk Railway Co. of Canada* (1906), 37 S.C.R. 232. Indeed, the Federal Court of Appeal recently affirmed the constitutionality of s. 43(4) of the Act, including the power of the CRTC to authorize federal undertakings to enter on and break up municipal highways for their purposes: *Ledcor*, *supra*.

109 While my colleague Gonthier J. does not explicitly raise the constitutional issue, he refers indirectly to a misconception of the division of powers raised by several interveners.

110 The Attorney General of Ontario, the Federation of Canadian Municipalities, and the Attorney General of Alberta appear to believe that, by granting the provinces the exclusive power to

make laws in relation to matters within the enumerated classes of subjects, s. 92 of the *Constitution Act, 1867* precludes the federal Parliament from passing legislation imposing any ancillary effects on matters under s. 92 (Attorney General of Ontario, at para. 7; Federation of Canadian Municipalities, at para. 25; Attorney General of Alberta, at para. 28). This is the only sense to be given to arguments that "jurisdiction over access . . . must also fall within exclusive provincial jurisdiction" (Attorney General of Ontario, at para. 7). Such an argument confuses the doctrine of interjurisdictional immunity protecting federally regulated undertakings with an equivalent doctrine protecting provincially regulated undertakings. The weight of authority is against any such equivalent doctrine protecting provincially regulated undertakings from intrusion (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 68-69, *per* La Forest J.; *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, at p. 275, *per* Dickson C.J. See also P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at p. 15-34).

111 In his account of the facts, Gonthier J. states that "[i]t is not disputed that the Utilities are subject to the legislative jurisdiction of the Province of Ontario" (para. 4). If no constitutional question lurks, somewhere, it is difficult to understand the significance of this fact. Moreover, even under a constitutional analysis, the fact of provincial legislative jurisdiction is irrelevant. The highways or other public places targeted by ss. 43(2) to 43(4) are, similarly, subject to provincial regulation. To be complete and accurate, Gonthier J.'s factual statement should specify that the Utilities are subject to the legislative jurisdiction of the Province of Ontario for valid provincial purposes and to the legislative jurisdiction of Parliament for valid federal purposes.

112 In conclusion, construing s. 43(5) so as to allow the CRTC to permit access to the poles of provincially regulated utilities would not render the provision *ultra vires* Parliament.

B. *Review of Statutory Interpretation and the Terms of the Order*

113 The first question here is whether the CRTC's interpretation of s. 43(5) was reasonable. As Iacobucci J. wrote in *Southam*, *supra*, at para. 56, "[a]n unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it." Where the appropriate standard is reasonableness *simpliciter*, "a court must not interfere unless the party seeking review has positively shown that the decision was unreasonable" (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 48, *per* Iacobucci J.).

114 Further, as Iacobucci J. noted in *Southam*, *supra*, a reviewing court operating on a reasonableness *simpliciter* standard must not intervene on the sole basis that it would have come to a conclusion opposite to or different from the tribunal's (para. 80). The question is not whether I would have reached the same decision, or done so by the same reasoning, but whether the CRTC's decision is reasonable.

115 In my view, it was. The CRTC, in its approximately 250 paragraphs, justified its interpretation of s. 43(5) with reasons that stand up to scrutiny. The CRTC identified the proper approach to statutory interpretation (paras. 107-8). It noted further that s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, mandates the fair, large and liberal construction and interpretation that best attains the remedial character of s. 43(5) (para. 109). The CRTC considered the provision's legislative history, including a government report recognizing the "good economic, environmental and aesthetic reasons for sharing support structures between the telephone and cable industries, as

well as others, notably electrical power utilities" (para. 113). It noted reference to the need for regulators to intervene to ensure the development of co-operative mechanisms (para. 114). The CRTC interpreted s. 43(5) in light of Canadian telecommunications policy and other public interest concerns (paras. 125 *et seq.*). The CRTC concluded that the construction of duplicative distribution infrastructures was not in the public interest (para. 131). The CRTC then conducted a more detailed interpretive analysis of elements of s. 43(5).

116 In keeping with the deferential approach to reasonableness review, I will not assess each of the CRTC's reasons in detail. I will instead focus on the most convincing suggestion in Gonthier J.'s analysis that a defect vitiates the reasons supporting the CRTC's decision. I refer to his analysis of the phrase "highway or other public place".

117 The CRTC concluded that it had power to grant access to poles located on a public utility easement or right-of-way running across privately owned land (para. 153). It noted that the meaning of "public place" depends on the specific purpose and legislative context (para. 150). The CRTC noted that the majority of utility poles are located on a "highway" or other publicly owned land, interspersed with a minority of poles located on public utility rights-of-way or easements on private land (para. 151). If "highway or other public place" did not reach the poles located on privately owned land, the result would be what it called a "jurisdictional hopscotch" with s. 43(5) applying to the majority of support structures, but not to the exceptional few (para. 151). The CRTC presumed that Parliament would have known that some support structures were located on public utility rights-of-way or easements (para. 151), but would not have wanted its objective to be frustrated. A purposive interpretation of the words "public place" would, arguably, suggest that land over which a public utility has a right-of-way and has built its infrastructure has become a public

place for the pursuit of public goals. The CRTC therefore concluded that s. 43(5) extended to poles located on private land.

118 The CRTC's interpretation of the phrase "highway or other public place" was not a justification supporting its conclusion that "transmission line" included the poles of provincially regulated utility companies. That conclusion stands independently of the meaning of "highway or other public place". There are therefore two possibilities: (1) the CRTC's interpretation of "highway or other public place" may be reasonable; (2) the CRTC's interpretation may be unreasonable, such that its decision must be narrowed so as to eliminate the possibility of access to poles on privately owned land. Even an unreasonable interpretation of "highway" cannot spoil the entire decision.

119 Gonthier J. notes that on the grammatical and ordinary meaning of "constructed on a highway or other public place", the CRTC may not grant access to transmission lines situated on private land (para. 24). He writes that the CRTC's presumption that Parliament knew that some support structures owned by utilities are located on public utility rights-of-way begs the question. In other words, that presumption took for granted that "transmission line" includes utilities' power poles. He writes, at para. 24: "If we refrain from that assumption, the grammatical and ordinary meaning of s. 43(5) is that the CRTC may not grant access to supporting structures located on private land."

120 Gonthier J. is correct in this limited respect, but he too begs the question. He understands that "transmission line" excludes utilities' power poles. He takes "transmission line" to mean the transmission line of a Canadian carrier or distribution undertaking (paras. 31-32). Assuming that Gonthier J. is correct that the grammatical and ordinary meaning applies to "highway

or other public place", this simply excludes from the CRTC's scope all transmission lines located on private property. It says nothing about whether those transmission lines are themselves owned by federally regulated undertakings or by provincially regulated utilities. If the CRTC is reasonable and "transmission line" includes poles of provincially regulated utilities, utility poles located on private property are excluded. If Gonthier J. is correct and "transmission line" means only structures of federal undertakings, support structures on private property are still excluded. The CRTC could then only order access to transmission lines of federal undertakings located on public property. In effect, there might still be a hopscotch pattern of structures to which access could be granted and structures to which access could not be granted. This time, however, the hopscotch would not be jurisdictional. Rather, it would be one of alternating public and private property. The qualifier "highway or other public place" therefore adds nothing to the debate as to whether "transmission line" includes both federally and provincially regulated support structures or only federally regulated structures. In other words, irrespective of the content given to "transmission line", there are purposive arguments to be made concerning the purposive definition of "public place".

121 It remains necessary to consider the reasonableness of the CRTC's interpretation of "highway or other public place" as including support structures built on private land by virtue of rights-of-way or easements. I have observed that Gonthier J.'s interpretations of "transmission line" and "highway or other public place" still leave open the possibility of only partial, patchwork access to networks of support structures. It is unnecessary to determine whether the CRTC's contextual approach to "public place" is correct, but on the basis of the pragmatic reasons given, I conclude that it is at least reasonable.

122 The second question is whether the details of the order made, notably the rate, were reasonable. The CRTC ordered access to the respondents' poles at the rate of $15.89 per year. The

previous negotiated rate was $10.42 per pole. The rental rate paid by cable companies for access to telephone company poles, set by the CRTC in Telecom Decision CRTC 99-13, was $9.60 per pole in 1997. On the basis of the evidence and arguments submitted in this appeal, I am unable to conclude that the CRTC's decision was not supported by reasons that could stand up to a somewhat probing examination: *Southam*, *supra*, at para. 56.

123 I would therefore conclude that the CRTC's order was reasonable, and that the Federal Court of Appeal erred in allowing the appeal.

IV. Effects of the Majority's and Court of Appeal's Approaches

124 In conducting my analysis, I have already to some extent indicated my general concerns with the approaches taken by Gonthier J. and Rothstein J.A. In light of the importance of these concerns, I will elaborate briefly.

125 By failing to separate out the constitutional issue from the ordinary judicial review process, Rothstein J.A. introduced constitutional concerns into the standard of review. He held that the question could not have been intended to be left to the exclusive determination of the CRTC because it might extend the CRTC's power to entities not otherwise subject to its jurisdiction. This is a veiled constitutional concern. The result was a determination of a correctness standard for an expert agency's interpretation of its enabling legislation. Neither Rothstein J.A. nor Gonthier J. conducted a full constitutional analysis. Had they done so, they would have concluded that the CRTC's interpretation of s. 43(5) was not *ultra vires* Parliament. In effect, Rothstein J.A.'s decision

demonstrates to parties dissatisfied with an administrative decision that they need only frame a constitutional argument — it need not be a sound one — in order to have the decision reviewed by a court on a correctness basis. The mere suggestion of unconstitutionality is enough.

126 Worried by the possibility that s. 43(5) might exceed Parliament's legislative competence, Rothstein J.A. eliminated the CRTC's reading of "transmission line" (para. 65). I cited earlier his conclusion that Parliament would not have conferred jurisdiction on the CRTC over the support structures of utilities subject to provincial jurisdiction in an ambiguous provision. I have already noted that the fact that the utilities are subject to provincial jurisdiction for valid provincial purposes is constitutionally irrelevant when they are, incidentally, subject to the effects of valid federal legislation. I note further that ss. 43(2) to (4), the adjacent provisions, give federal undertakings and the CRTC limited power over the structures of provincially regulated highways. What matters here, however, is that if Rothstein J.A. had done a full constitutional analysis and determined that Parliament may authorize the CRTC to grant access to provincially regulated utilities, the alleged ambiguity of the provision would have been irrelevant. Instead, Rothstein J.A. would simply have attempted to find the legislative intent and read the provision as best he could in its context and in light of the *Interpretation Act*. Indeed, had he found a reasonableness standard of review, he would only have examined the CRTC's decision to see if its interpretation was reasonable, rather than attempting to reach his own correct interpretation.

127 It is a serious mistake to eliminate a possible interpretation of a provision, under the preference for a valid interpretation, where both or all options are constitutionally valid. There are not degrees of constitutional validity, such that a judge in constructing a statute is authorized to choose the interpretation that, while in pith and substance valid legislation *intra vires* its legislator, intrudes incidentally the least in the other legislative domain. Valid legislation is entitled to impose

its ancillary effects. Courts do not limit an enacting legislature's jurisdiction by "reading down" to avoid intruding upon areas of jurisdiction of the other legislature. As I noted earlier, favouring one construction as constitutional when the alternative is also constitutional misapplies this Court's recent decision in *Bell ExpressVu*, *supra*. It also denies the legislator the full effect of the legislation it passes. Moreover, if even valid legislation is to be read down, in a misguided effort to render it yet more constitutional, there will be considerable uncertainty on the part of legislators, judges, administrative decision makers, and parties attempting to order their conduct by that legislation.

128 Finally, the constitutional question aside, in my view the determination that the CRTC's interpretation of its own statute is reviewable on correctness is a regressive step by this Court. It is worth recalling the general rationale for deference to specialized administrative decision makers. L'Heureux-Dubé J. stated this justification helpfully, for a unanimous Court, in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 774-75. She is referring to the patently unreasonable test in respect of a specialized agency protected by a privative clause, but this Court's decisions in *Pezim* and *Southam* indicate that her comments apply in the present case, where there is a limited right of appeal.

> As it relates to matters within the specialized jurisdiction of an administrative body protected by a privative clause, this standard of review has a specific purpose: ensuring that review of the correctness of an administrative interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision. The process by which this standard of review has progressively been accepted by courts of law cannot be separated from the contemporary principle of curial deference, which is, in turn, closely linked with the development of extensive administrative justice (see Cory J.'s reasons in *PSAC No. 1* and *PSAC No. 2*, *supra*, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 (*per* Wilson J.)). Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. For the purposes of judicial review, statutory interpretation has ceased to be a necessarily "exact" science and this Court has, again recently, confirmed the rule of curial deference set forth

> for the first time in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp. . . .*

Gonthier J.'s conclusion, at para. 16, that the interpretation of s. 43(5) is a matter of "pure statutory interpretation" unconnected with the general policy informing the entire Act and developed by the CRTC is a setback for this Court's jurisprudence on deference to administrative decision makers. The conclusion that a court's residual expertise at statutory interpretation trumps a specialized agency's interpretation of a provision that on its face has no general legal meaning but is entirely technical and context-specific squares badly with "the reluctance courts should feel in interfering in decisions of administrative tribunals" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 961, *per* Cory J.) or the "restrained approach to disturbing the decisions of specialized administrative tribunals" (*Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at p. 464, *per* Dickson C.J.).

129 This Court has recently affirmed that *Pushpanathan* did not modify the decisions of this Court in *Pezim* and *Southam* (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 48, *per* Iacobucci J.; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 17, *per* Iacobucci and Bastarache JJ.). It is, of course, necessary to read the discussions in those cases about jurisdiction and jurisdictional questions through the lens of *Pushpanathan*. As the context of those remarks makes clear, their thrust was that *Pushpanathan* did not diminish this Court's commitment to the notion of deference to an expert decision maker, even absent a privative clause. This is most obvious in the *Asbestos* case, since, like *Pezim*, that appeal dealt with a provincial securities commission. I am concerned that the reasoning of Gonthier J. in the present appeal does, in fact, indicate a shift in this Court's approach towards lesser deference.

130 In *New Brunswick Liquor Corp.*, *supra*, Dickson J. stated that courts, in his view, "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Reformulated in light of *Pushpanathan*, the caution would run against branding as reviewable on correctness questions that are doubtfully so. In my view, the majority's approach in this appeal warrants such a caution.

V. Disposition

131 For the reasons given, I would allow this appeal. I would answer the constitutional question as it was stated by the Chief Justice in the affirmative.

Appeal dismissed with costs, BASTARACHE J. *dissenting.*

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