QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 152**

Date: **2017 05 26**
Docket: QBG 1099 of 2017
Judicial Centre: Regina

BETWEEN:

AMALGAMATED TRANSIT UNION LOCAL 1374
APPLICANT

- and -

MINISTER OF FINANCE OF THE PROVINCE OF SASKATCHEWAN, MINISTER OF CROWN INVESTMENTS OF THE PROVINCE OF SASKATCHEWAN, THE ATTORNEY GENERAL FOR SASKATCHEWAN AND THE SASKATCHEWAN TRANSPORTATION COMPANY
RESPONDENTS

Counsel:

James Fyshe	for the applicant
Robert W. Leurer, Q.C. and Joanne Colledge-Miller	for Crown Investments Corporation of Saskatchewan and Saskatchewan Transportation Company
Michael J. Morris and Kyle McCreary	for Ministers of Finance and Crown Investments and the Attorney General for Saskatchewan

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JUDGMENT
MAY 26, 2017

SCHWANN J.

INTRODUCTION

[1] The Minister of Finance for the Province of Saskatchewan delivered the Provincial budget for the 2017/18 fiscal year on March 22, 2017.

[2] A significant feature of the budget speech was the announced discontinuation of the Saskatchewan Transportation Corporation [STC], a provincial Crown corporation. The Minister announced that operating and capital subsidies for STC would end in 2017. Freight service would no longer be accepted for delivery after May 19, 2017 and passenger services would cease effective May 31, 2017.

[3] On May 3, 2017, Order in Council 197/2017 [OC 197] was granted by the Lieutenant Governor in Council pursuant to s. 13 of *The Crown Corporations Act, 1993*, SS 1993, c C-50.101 [*CCA*] authorizing the Crown Investments Corporation [CIC] to wind up and dissolve STC.

[4] The Minister's announcement was unexpected and has met with opposition from a number of quarters. The Amalgamated Transit Union Local 1374 [ATU], on behalf of several hundred STC in-scope employees, has placed that opposition before this Court in the form of an application for judicial review and related interim injunctive relief.

[5] Although ATU identified numerous specific forms of relief in its originating application, it substantively re-tooled the relief portion of its application such that it now seeks the following orders:

> With regard to *The Crown Corporations Public Ownership Act*, SS 2004, c C-50.102 [*CCPOA*]:
>
> 1. A declaration that the Order in Council dated May 3, 2017 winding up and dissolving STC is *ultra vires* the Lieutenant Governor in Council as a violation of *CCPOA;*

2. An order in the nature of *certiorari* against the Attorney General quashing the May 3, 2017 Order in Council;

3. An order in the nature of *mandamus* compelling the Lieutenant Governor in Council to continue funding CIC and STC to allow it to operate its business as usual;

With regard to the *CCA*:

4. A declaration that before STC can be dissolved, notice be published in accordance with ss. 13(3) and (4) of *CCA*;

5. An order in the nature of *certiorari* against the Attorney General quashing the May 3, 2017 Order in Council for failing to comply with ss. 13(3) and (4) of the *CCA*;

6. An order in the nature of *mandamus* requiring CIC to continue funding STC and for STC to continue operating in the normal course until such time as the Attorney General has properly issued an Order in Council dissolving STC;

With regard to the *Canada Labour Code*, RSC 1985, c L-2 [*CLC*]:

7. A declaration that STC has violated ss. 212 and 214 of the *CLC* by failing to notify the Minister of Labour of its intention to lay off 50 or more employees in a period not exceeding four weeks in accordance with s. 212 of the *CLC*, and failing to establish a Joint Planning Committee in accordance with s. 214 of the *CLC*;

8. An order in the nature of *mandamus* against STC requiring it to continue to employ members of the applicant's employee bargaining unit and the dependent contractors in its dependent contractor bargaining unit until such time as it complies with the *CLC*.

[6] ATU also applied for an interim order preserving the *status quo* pending final determination on the merits and an order enjoining the Minister and CIC from winding down STC or changing its present funding arrangements.

[7] Since argument proceeded on the merits of ATU's underlying application, and as discussed below is ultimately resolved on that basis, there is no need for this Court to consider and determine the interim injunctive relief sought by ATU.

[8] Two preliminary matters arose at the commencement of argument. Counsel for ATU applied to add the Attorney General for Saskatchewan as the appropriate representative for the Lieutenant Governor in Council in relation to OC 197 which it seeks to impugn.

[9] Legal counsel for the Government of Saskatchewan consents to adding the Attorney General as a named respondent in these proceedings and accepts that ATU's brief of law constitutes sufficient notice for purposes of ss. 14 and 15 of *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01.

BACKGROUND

[10] STC was established by Order in Council in 1946 pursuant to *The Crown Corporations Act, 1945*, SS 1945, c 17 (since rep). The original 1946 Order in Council was subsequently repealed and replaced by OC 5/93 which continued STC as a Crown corporation under the *CCA*.

[11] By way of OC 915/93, STC was designated as a "CIC Crown Corporation". A "CIC Crown Corporation" is a category of Crown corporations established pursuant to s. 11 of the *CCA* by Order in Council.

[12] CIC is the holding company for all CIC Crown corporations, including STC.

[13] It is common ground that STC has been delivering a rural bus service to the citizens of the Province of Saskatchewan since its inception. STC has evolved over the years. It has a very extensive route configuration which provides public transit options to smaller and remote communities within the province, although coverage throughout the province is not universal.

[14] STC's annual reports and financial statements demonstrate a positive net earnings position from 1946 until roughly 1975, with the exception of fiscal year 1953-54. Thereafter, apart from two fiscal years where STC had positive net earnings (1977-78 and 1978-79), its earnings have been consistently negative. By way of illustration, in 2005 STC had a net loss of $5,437,830.00 which represented a negative 26.84% of earnings as a percentage of total expenditures. This past fiscal year (2015/16), STC reported

a net loss of $13,025,306.00 with earnings as a percentage of its expenses in excess of a negative 46%.

[15] The parties staunchly disagree on whether STC was historically understood to be publically subsidized in order to fulfill its mandate and whether, conceptually speaking, it was akin to a necessary public service impervious to change.

DISSOLUTION OF STC

[16] As mentioned, on March 22, 2017 the Government of Saskatchewan announced that operating and capital subsidies for STC would end in 2017/2018, its operations would be wound up and its corporate existence dissolved.

[17] The terms of OC 197 are as follows:

> On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that:
>
> a. the affairs of the Saskatchewan Transportation Company (STC) be wound-up, and that STC cease operating vehicles for the purpose of transporting passengers and freight effective May 31, 2017;
>
> b. STC dispose of its assets by way of sale, transfer, exchange, or any other manner that STC considers appropriate to achieve best value and maximize the proceeds of such sale, transfer, exchange or other manner by March 31, 2018; and
>
> c. STC be dissolved and all residual assets, liabilities and obligations be transferred to

> Crown Investments Corporation of Saskatchewan [CIC] effective March 31, 2018.

[18] According to the affidavit of Shawn Grice, President of STC, the government's decision to invoke s. 13 was premised on its conclusion that the STC subsidy had reached unsustainable levels with discernable trend lines pointing to a deterioration of the company's financial stability. These include:

- Continued decline of Canadian inter-city bus travel;
- Steady decline of provincial ridership with popularity of inter-city bus travel peaking 35 years ago but subsequently declining by 77%;
- Only two out of the 27 routes in the STC network are profitable;
- Increased competition with private sector delivery companies;
- Efforts to limit the growth of STC's subsidies through route reduction and discontinuance have been exhausted;
- The combination of ridership decline and cost increases has reached the point where the STC subsidy on a per passenger basis is forecast to be $94.00 per passenger in 2017. Just 10 years ago the per passenger subsidy was $25.00;

- Over the next five years, over $85 million in subsidies is forecast in order for STC to continue its operations.

[19] It is common ground that no public or stakeholder consultation was undertaken prior to the budget speech on March 22, 2017 in relation to the government's intention to wind-up STC. No stakeholder was given advance notice, and like the general public, ATU was only informed of the government's decision on March 22, 2017.

[20] It is also common ground that in spite of the budget announcement, CIC has been authorized to provide operating grant funding to STC in an amount not exceeding $17 million for the 2017/18 fiscal year. This authorization is reflected in Order in Council 157/2017 [OC 157], issued on April 5, 2017.

IMPACT OF THE STC DECISION

[21] STC notified ATU that all of its members would be permanently laid off, with the vast majority laid off between May 19 and May 31, 2017. In his affidavit sworn May 26, 2017 [*sic*], Eric Carr, President of ATU deposed:

> 17. The closure of STC is set to begin on May 19th, 2017 and will have an immediate and dramatic harmful effect on the employees of the company and their families. These people will, on very short notice, be left without income. The disruption to the employees' own lives and those of their families will be devastating. No steps of any kind have been taken by STC to address this situation such as the offer of alternative employment within the CIC companies, job training or relocation counselling. The damage caused to the employees of STC will be irreparable should its operation be closed as has been announced.

[22] In addition to the immediate and profound impact on STC employees, ATU identified the following unfavourable ramifications of the Government's decision:

- The vast majority of communities served by STC will be left with no public transit option or parcel delivery service;
- The Government's decision will have a disproportionate effect on low income riders who make up 70% of STC customers;
- Outlying communities which rely on STC buses for delivery of health care items, such as transporting blood and chronically ill patients, will be severely impacted;
- There is no alternate plan in place to transport inmates released from correctional facilities;
- STC service is critical to rural and northern women.
- Closure of STC will negatively impact public transit to remote communities including Saskatchewan First Nation and Métis communities;
- Closure of STC will have an inequitable negative impact on women, particularly marginalized women. ATU believes that there is a credible link between the lack of public transportation and the disappearance and murder of over 1,000 indigenous women in Canada.

STEPS TAKEN BY STC SUBSEQUENT TO THE ANNOUNCEMENT

[23] STC has taken a number of concerted steps to implement the government's budgetary decision and OC 197.

[24] Outside of its bus depots in Regina, Saskatoon and Prince Albert, STC's business is largely conducted through a series of 174 independent contractors acting as STC agents across a network of 253 communities. These contractors provide a range of services for STC including allowing passengers or freight to be loaded on and off. The contractors are not employees of STC and the terms of their agreements require notice of intention to terminate. To that end, notice has been provided to terminate STC's agency agreements effective May 31, 2017.

[25] STC has advised all charge account customers that after May 19, 2017 it will no longer accept freight for delivery. STC issued notices to terminate contracts with seven pick-up and delivery operators effective that date.

[26] Notice has been given to charge account customers and some have already ceased utilizing STC services.

[27] Some STC employees have already resigned along with two motor coach operators.

[28] STC has given notice to the Highway Traffic Board [Board] of its intention to surrender its operating authority certificate which authorizes STC to carry passengers on Saskatchewan highways. Notice is effective May 31, 2017.

[29] STC has terminated two Greyhound Canada contracts with respect to services and coordination of passengers. Both agreements are set to terminate on September 29, 2017.

[30] Greyhound has arranged to partner with a courier company to ensure continued access to the Saskatchewan market for freight. The courier company will begin collecting Greyhound freight from Regina and Saskatoon terminals and distributing it across Saskatchewan once STC's shipping services cease.

[31] Finally, KPMG LLP has been retained to assist with the liquidation of STC's physical assets and is expected to develop a plan to maximize the liquidation value.

THE ATU COLLECTIVE AGREEMENT

[32] The Collective Bargaining Agreement between STC and ATU [Collective Agreement] contains provisions governing "technological change" defined to include closure or sale of STC. These provisions were initially negotiated in 2001 and continue to the present date.

[33] Pursuant to Article 1, Section 30, employees with a minimum of 12 months service displaced as a result of a technological change have three options open to them:

1. Resign immediately and accept compensation determined pursuant to s. 30, *i.e.* severance of one week per year of service to a maximum of 26 weeks;

2. Go on lay off. Under this option, employee benefits are covered with possible access to employment insurance; or

3. Exercise bumping rights which allows an employee with more seniority to displace another in-scope employee with less seniority.

[34] By way of further background, ATU filed a grievance with the Canada Industrial Relations Board [CIRB] alleging a violation of Part IX of the *CLC* which requires employers to give notice to the Minister of Labour where a lay-off of more than 50 employees within a four week period is scheduled to occur. Apart from a copy of the grievance form which initiated proceedings before the CIRB, no evidence was filed with respect to this alleged violation.

[35] In its ruling given on May 2, 2017, the CIRB denied ATU's request for interim relief holding:

> The Board has concluded that the applicant has not made a *prima facie* case for an interim order pursuant to 19.1 of the *Canada Labour Code* (Part 1 – Industrial Relations) (the Code) and dismisses the application. In particular, the Board is not convinced that, in the circumstances of this case, its intervention is necessary on an interim basis to fulfill the objectives of the Code. The Board will proceed with the determination of the unfair labour practice complaint in due course….

ISSUES

[36] There are four issues which I will address. They are as follows:

1. **What is the nature of the impugned funding decisions? Are they justiciable?**

2. Is OC 197 void and of no effect because CIC failed to comply with the notice provision set out in ss. 13(3) of the *CCA*?

3. Is OC 197 void and of no effect because of non-compliance with the *CCPOA*?

4. Should this Court make a ruling in relation to the labour dispute?

ANALYSIS

1) What is the nature of the impugned funding decisions? Are they justiciable?

[37] Before delving into the applicable law and facts of this case, a clear understanding of what "decision" is being impugned by the applicant and its relationship to each of the named respondents is a necessary starting point.

[38] As initially formulated, ATU sought a declaration that the decision of the Minister of Finance to terminate STC's funding and wind down its operations violated the *CCPOA* and was therefore illegal, *ultra vires* and outside the jurisdiction of the Minister under that Act. As against all named respondents, ATU sought an order in the nature of *certiorari* to quash and declare the Minister's decision void.

[39] ATU also applied for an order of *mandamus* i) requiring the Minister to comply with the requirements of the *CCPOA* and *CCA*, ii) directing CIC to continue funding STC and maintain its operations in the absence of compliance with the *CCPOA* and *CCA*, and iii) directing STC to continue its operations until the government complies with the *CCPOA*.

[40] Cast in this light, both the originating application and the amended originating application took square aim at the budget decision made in relation to the STC subsidy.

[41] As mentioned, ATU subsequently recalibrated its position and no longer seeks judicial review of the funding decision made by the Minister of Finance. The re-casted relief presented at the time of argument in relation to matters of funding seek the following orders:

- An order in the nature of *mandamus* to compel the Lieutenant Governor in Council to continue funding CIC and STC to allow it to operate its business as usual; and

- An order in the nature of *mandamus* requiring CIC to continue funding STC and for STC to continue operating in the normal course until such time as the Attorney General has properly issued an Order in Council dissolving STC.

a) Mandamus against the Lieutenant Governor in Council to continue funding

[42] The STC announcement was part of the larger budget speech delivered by the Minister of Finance where, on behalf of the Government of Saskatchewan, the broad policy outlines for the allocation of public funds for the fiscal year 2017/2018 were unveiled.

[43] While the Minister of Finance is the public face of policy decisions with budget overtones, government spending is ultimately authorized by Legislative Assembly through an appropriations bill. Whether

an appropriations bill for this fiscal year has been passed is not in evidence, however, the point to be made here is simply that decisions about government expenditures are not decisions entrusted solely to the Minister of Finance. The funding decision is a decision made by the Legislative Assembly which is both fiscal and legislative in nature.

[44] Procedurally speaking, the Minister of Finance delivers the budget speech each fiscal year and then moves a motion for its adoption. Budget debate in the Legislature follows. Thereafter, the budget bill proceeds through committee stages and "estimates", and is eventually referred to the Legislative Assembly in the form of an appropriations bill. After third reading and passage in the Legislative Assembly, the bill proceeds to the Lieutenant Governor in Council for Royal Assent. It is the appropriations bill which gives the government the authority to spend money and it is the Legislature which determines whether it should be passed.

[45] The second point I wish to make cannot be over-emphasized. Funding decisions concerning the allocation of public financial resources fall within the policy-making function of the government as a whole. These sorts of decisions are of a political nature and considered immune from judicial review. As a matter of law and constitutional principle, a decision respecting the disbursement of public funds is within the authority of the Legislature alone and is not justiciable. There is ample legal support for this proposition as reflected in the oft-quoted passage from *Hamilton-Wentworth (Regional Municipality) v Ontario (Minister of Transportation)* (1991), 78 DLR (4th) 289 (Ont Div Ct) at 303-04:

> The evidence leads to the conclusion that the decision was one announced by the Minister after approval of the Cabinet and in substance constitutes an expression of the intention of the government not to provide any further funding for construction of the project. The government has the right to order its priorities and direct its fiscal resources towards those initiatives or programs which are most compatible with the policy conclusions guiding that particular government's action. This was simply a statement of funding policy and priorities and not the exercise of a statutory power of decision attracting judicial review.
>
> While it would appear that in basing its decision on environmental concerns the government is ignoring the statutory framework established to deal with environmental matters, that does not affect its jurisdiction to make the decision in question. Such a decision is not subject to judicial review. It is in substance a decision for the disbursement of public funds. It has been a constitutional principle of our parliamentary system for at least 3 centuries that such disbursement is within the authority of the Legislature alone. The appropriation, allocation or disbursement of such funds by a court is offensive to principle.
>
> …
>
> The nature of the action under review here is, in my view, observably and significantly different from those situations where the court requires government, be they municipal or provincial, to carry out mandates according to law and which require the expenditure of money. The decision in issue represents an exercise of the government's right to allocate its funds as it sees proper. Such a conclusion is essential to the parliamentary system of democracy. That, however, does not foreclose the applicant or the intervenants from pursuing by way of action any claim for damages or other remedy they may be advised exists in these circumstances. (emphasis added)

(see also Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (2016-Rel 4) vol 3 (Toronto: Thomson Reuters, 2016) at 15-12 [*Judicial Review*]); *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525

> [*Re Reference Canada*]; *Friends of the Regina Public Library Inc. v Regina Public Library Board*, 2004 SKQB 54, 247 Sask R 1, affirmed 2004 SKCA 58, 254 Sask R 4; *Kuki v Ontario (Training, Colleges, and Universities)* 2013 ONSC 5574 at para 14; *Huron-Perth Children's Aid Society v Ontario (Ministry of Children and Youth Services)*, 2012 ONSC 5388 at paras 52-58)

[46] The third and last point to be made here relates to the availability of the prerogative writ of *mandamus* "to compel the Lieutenant Governor in Council to continue funding CIC and STC to allow it to operate its business as usual". Characterizing the relief sought in this fashion is little more than an indirect attack on the budget decision which, as explained above, is non-justiciable.

[47] Even if this Court could interfere with funding decisions, the absence of a clear legal duty on the part of the Lieutenant Governor in Council to fund CIC or STC makes *mandamus* unavailable.

[48] *Mandamus* is prerogative relief issued to compel the performance of a public legal duty. It is a discretionary remedy and courts have circumscribed the circumstances where it will issue. (*Judicial Review*, vol 1 at 1-36)

[49] The prerequisites for an order of *mandamus* as summarized in *Karavos v Toronto and Gillies*, [1948] 3 DLR 294 at 297 (Ont CA), remain good law today:

> Before the remedy can be given, the applicant for it must show (1) "a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be

> coerced": High *op. cit.*, p. 13, art. 9; p. 15, art 10. (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform"; *ibid., supra*, p. 44, art. 36. (3) That duty must be purely ministerial in nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers": ibid., supra, p. 92, art. 80. (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy: *ibid., supra*, p. 18, art. 13.

(See also *Apotex Inc. v Canada (Attorney General)* [1994] 1 FC 742, aff'd [1994] 3 SCR 1100; *Dolan v Moose Jaw (City),* 2008 SKCA 170, 314 Sask R 301)

[50] The decision to cease funding STC was both fiscal and legislative in nature, and in accordance with settled law it is not subject to judicial review. Moreover, ATU has been unable to identify any legal duty reposed in the Lieutenant Governor in Council to fund CIC or STC, therefore the prerequisite for the issuance of *mandamus* has not been made. The portion of ATU's application seeking an order compelling the Lieutenant Governor in Council to continue funding CIC and STC so as to allow it to operate as "business as usual" cannot be granted and is denied.

[51] Having reached this conclusion I wish to clarify that my decision has no effect on the legitimacy of OC 157 and the authority therein to fund STC in the 2017/18 fiscal year up to $17 million.

b) Mandamus against CIC and STC

[52] As discussed above, for *mandamus* to issue, ATU must demonstrate a public legal duty which obligates CIC to continue to fund STC and require STC to continue to operate.

[53] CIC is the holding company for STC and other Crown corporations. It has no power or authority independent from statute and derives its existence solely from legislation.

[54] CIC's powers in relation to funding enshrined in s. 6 of the *CCA* are permissive in nature. Pursuant to ss. 6(1)(c), CIC may receive moneys appropriated by the Legislature for a subsidiary Crown corporation, and pursuant to ss. 6(7), CIC may make grants to any subsidiary Crown corporation. Grant funding does not exist in a vacuum; its source is an appropriation from the Legislature. Neither is its dispersal to a subsidiary Crown mandatory. It, too, is permissive. Since both funding and disbursement to Crowns is not mandatory but permissive, it is self-evident that the threshold requirement for a *mandamus* order cannot be met. ATU has been unable to point to any legal duty imposed on CIC requiring it to fund STC.

[55] Moreover, the permissive nature of funding subsidiary Crown corporations is consistent with the balance of the *CCA*, notably CIC's power to amend, vary or revoke the terms of funding (ss. 6(5)(a)(b)) and the authority to wind-up a CIC Crown corporation (s.13). The suggestion that funding is mandatory is also inconsistent with the principle of law discussed above concerning the non-justiciability of decisions about the allocation of public funds.

[56] Similarly, there is no statutory provision or other legal instrument which mandates STC to continue to operate in perpetuity. To hold otherwise flies in the face of s. 13 of the *CCA* which expressly authorizes Executive Council to wind-up a CIC Crown corporation. And as discussed below, while Orders in Council are subject to judicial review to determine if they were lawfully issued, the court's reach does not extend to evaluating Cabinet's policy decisions or the motives which impelled the Order in Council. This point was made by Zarzeczny J. in *Saskatchewan Federation of Labour v Saskatchewan (Attorney General, Department of Advanced Education, Employment and Labour)*, 2009 SKQB 20, 323 Sask R 115 where he said at para. 29:

> 29 … Courts have held that examination of such governmental action requires the court to determine whether or not the Cabinet has the requisite statutory authority to make the decision that it did. It is not for the courts to adjudicate upon the wisdom of nor the policy reasons motivating any decision that has been taken from either a policy or political perspective. Social, economic or politically partisan considerations may be involved, however, if the Cabinet has the statutory authority to make the decision made by the Order-in-Council and the decision made is consistent with that authority neither the motives or reasons for the decision nor the wisdom or merits of it can or should be subjected to the court's review … (emphasis added)

[57] For the reasons given, there is no mandatory legal duty on CIC to continue to fund STC nor on STC to continue to operate. Furthermore, as discussed, government decisions with respect to the disbursement of public money and the policy motivations for passage of an Order in Council are non-justiciable.

[58] ATU's application for *mandamus* requiring CIC to continue to fund STC and for STC to continue to operate must therefore be denied.

2) Is OC 197 void and of no effect because CIC failed to comply with the notice provision set out in ss. 13(3) of the CCA?

[59] ATU seeks to impugn the validity of OC 197. This instrument was enacted by the Lieutenant Governor in Council on the advice and recommendation of Executive Council pursuant to the authority of ss. 13(1) of the *CCA*. OC 197 directs the wind-up of STC's affairs, permits STC to dispose of its assets and approves its dissolution effective March 31, 2018.

[60] Section 13 provides:

> **13**(1) The Lieutenant Governor in Council may wind up the affairs of a CIC Crown corporation and dissolve a CIC Crown corporation.
>
> (2) The Lieutenant Governor in Council may dispose of the assets of a CIC Crown corporation being dissolved pursuant to this section and deal with the CIC Crown corporation's liabilities and obligations in any manner that the Lieutenant Governor in Council considers appropriate.
>
> (3) At least three weeks before a CIC Crown corporation is dissolved pursuant to this section, the Clerk of the Executive Council shall cause a notice of the dissolution to be printed in the Gazette and at least one newspaper having general circulation in the area where the CIC Crown corporation's head office is located.
>
> (4) A notice required pursuant to subsection (3) must contain:
>
> (a) the name of the CIC Crown corporation; and
>
> (b) the proposed manner of dealing with the CIC Crown corporation's assets, liabilities and obligations. (emphasis added)

[61] An Order in Council is a form of subordinate legislation which flows out of a grant of legislative authority. Where a statutory power to make subordinate legislation is conferred on the Lieutenant Governor in Council, it is typically expressed through an Order in Council. Subordinate legislation must be constitutionally sound and not exercised beyond the statutory grant of power. As a general principle, subordinate legislation should be construed in a manner which renders it *intra vires*. (*Judicial Review* at 15-57).

[62] It necessarily follows that the exercise of a statutory power by the delegate (in this case the Lieutenant Governor in Council) must be taken within the ambit of the empowering statute.

[63] Generally speaking, subordinate legislation must be consistent with the objects and purposes of its parent statute. An Order in Council is an exception to this general principle save for “egregious” situations. This point is made in *Judicial Review*, vol 3 at 15-71:

> The exercise of powers conferred on the Governor or Lieutenant-Governor-in Council, including powers to enact subordinate legislation in the form of orders-in-council, may be viewed as an exception to the principle that a court will review delegated legislation to ensure that it was made for a statutorily-authorized purpose. In particular, it has been said that it is not the function of a court to investigate the "motives" of Cabinet in exercising a power; rather, review is limited to ensuring that any statutory conditions precedent to the exercise of the power have been satisfied. ...
>
> In any event, the law seems to be that subordinate legislation enacted by a Cabinet will be found to be ultra vires on the ground that it is inconsistent with the purposes of the enabling legislation only in an egregious case. ... (emphasis added)

[64] Courts are instructed to review Orders in Council with an attitude of considerable deference. (*Judicial Review*, vol 3 at 15-72) As mentioned, it would be inappropriate for courts to review or investigate the motives which impelled executive government (Cabinet) to pass an impugned Order in Council. (*Thorne's Hardware Ltd. v The Queen*, [1983] 1 SCR 106)

[65] Having regard to the wording of ss. 13(1) of the *CCA* and OC 197 in particular, I am fully satisfied that the Lieutenant Governor in Council, on the advice and recommendation of Cabinet, had the requisite statutory authority to enact OC 197. Subsection 13(1) of the *CCA* clearly authorizes the granting of an Order in Council to wind-up and dissolve the affairs of a CIC Crown, of which STC is one. Therefore, on its face, OC 197 is *intra vires*.

[66] ATU's challenge, rather, is somewhat more nuanced. The applicant submits that ss. 13(3) and (4) bear upon the *vires* of OC 197 insofar as they operate as a pre-condition to its passage. More specifically, ATU submits that an Order in Council may not issue pursuant to ss. 13(1) unless the notice requirements detailed in ss. 13(3) and (4) have been satisfied.

[67] Subsections 13(3) and (4) stipulate that notice of dissolution must be published in the Gazette and at least one newspaper not less than three weeks before the CIC Crown is dissolved. The wording of these provisions bears repeating:

> **13**(3) At least three weeks before a CIC Crown corporation is dissolved pursuant to this section, the Clerk of the Executive Council shall cause a notice of the dissolution to be printed in the Gazette and at least one newspaper having general circulation in the area where the CIC Crown corporation's head office is located.

> (4) A notice required pursuant to subsection (3) must contain:
>
> (a) the name of the CIC Crown corporation; and
>
> (b) the proposed manner of dealing with the CIC Crown corporation's assets, liabilities and obligations. (emphasis added)

[68] The principle of law invoked by ATU is this: a condition precedent to the exercise of administrative action, including the enactment of subordinate legislation, must be fulfilled if the action in question is to be upheld. (*Judicial Review*, vol 3, at 15-66-7) Judicial oversight of the exercise of a statutory power can give rise to a *vires* review of an Order in Council where there is a question concerning fulfilment of conditions precedent to the exercise of that power. This point was made by the Supreme Court of Canada in *Attorney General of Canada v Inuit Tapirisat of Canada*, [1980] 2 SCR 735 at 749:

> Let it be said at the outset that the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity. …

[69] This concept is easily stated, but what does it mean and how has it been interpreted? Is ss. 13(3) a true precondition?

[70] In *B.C. Liquor Licensees & Retailers Assn. v British Columbia (Workers' Compensation Board)*, 2000 BCSC 505 at para 16, [2000] 5 WWR 575 [*B.C. Liquor*] the court was asked to review the *vires* of a regulation made pursuant to a statutory power which contained these prefacing words "….before the adoption of a regulation a public hearing must be held and not less than 10 days before the hearing a notice of it must be published in at least

3 newspapers….". In relation to the specific wording before it, the court concluded:

> 16 The giving of notice and the conducting of a public hearing are absolutely fundamental to the establishment of the Board's jurisdiction to make regulations having regard to s. 71(1). There is a distinction between the ability of this Court to review substantive determinations and findings of fact and law made by an inferior tribunal, and the ability to consider a breach of a procedural condition precedent to the taking of jurisdiction by an inferior tribunal to enact subordinate legislation. Subordinate legislation will be declared invalid if the procedure in the enabling statute for making the regulation is not observed. This is procedural ultra vires, as distinct from substantive ultra vires: see *Boutilier et al. v. Cape Breton Development Corp.* (1972), 34 D.L.R. (3d) 374 (N.S.S.C.); and S.A. De Smith, *De Smith's Judicial Review of Administrative Action*, 4th ed. by J. M. Evans. (London: Stevens & Sons Limited, 1980) at pp. 154 and 155. The privative clause contained in s. 96 of the *Act* has no application and the case of *Vancouver (City) v. British Columbia (Workers' Compensation Board)* (1995), 2 B.C.L.R. (3d) 321 (B.C.C.A.) is readily distinguishable. (emphasis added)

[71] Similarly in *Alberta Teachers Assn. v Alberta*, 2002 ABQB 240, 310 AR 89 [*Alberta Teachers*], an Order in Council was declared *ultra vires* where the necessary statutory pre-condition was not met. As the court noted at para. 56:

> 56 … It is trite law that discretion cannot be exercised arbitrarily. The statutory wording was placed there for a reason and requires that the LGIC to be of the opinion that unreasonable hardship is being caused or likely to be caused in respect of each dispute. The requirement recognizes the fact that before the right to strike can be eradicated by an order in counsel there must exist emergent circumstances sufficient to justify that eradication. Where a statute sets out a requirement for the exercise of a statutory power, the LGIC cannot act on whim or, for example, for a political purpose, as in the case of Thorne's Hardware (supra) where there were no statutory criteria and the Supreme Court held that it would not question the motives, political or otherwise, behind making

> the order in council. Here, the LGIC must be of the opinion there are emergent circumstances in respect of unreasonable hardship. In my view that means the LGIC's opinion should be informed and reasonable, not whimsical, speculative or political. (emphasis added)

[72] In *Alberta Teachers*, the Lieutenant Governor was authorized to exercise a statutory power premised on the existence of specific statutory criteria *i.e.* "…If in the opinion of the Lieutenant Governor in Council an emergency arising out of a dispute exists or may occur….. the Lieutenant Governor in Council may, by order, declare…" (para. 24)

[73] A careful reading of s. 13 as a whole leads me to conclude that the Lieutenant Governor's discretion to issue a wind-up and dissolution Order in Council under the *CCA* is not contingent on the notice requirement embedded in ss. 13(3). Had the Legislature intended to provide an avenue for members of the public to have their voices heard prior to the passage of an Order in Council under s. 13(1), the section would have contained explicit wording to that effect. For instance, ss. 13(1) could have used precatory words and phrases such as "subject to (3)", or "before an Order in Council may be passed for the wind-up or dissolution of a CIC Crown corporation, notice must be provided in the manner set out in ss. (3) and (4)".

[74] This is not a complicated drafting technique. Significantly, though, no such language is found in s. 13.

[75] Moreover, an examination of the specific language employed in ss. 13(3) does not assist ATU since the "notice" contemplated by this subsection is tied to dissolution, not wind-up. The meaning of these words can

be gleaned from conventional sources. *Black's Law Dictionary* offers these definitions:

> "winding up": the process of settling accounts and liquidating assets in anticipation of a partnership's or corporation's dissolution.
>
> "dissolution": The termination of a corporation's legal existence by expiration of its charter, by legislative act, by bankruptcy, or by other means

[76] Similarly, the Federal Court of Appeal in *Piccinin v R*, [1982] 1 FC 119, highlighted the legal distinction between liquidation and dissolution. At pages 121-122, the court observed:

> I do not agree with these submissions. In my view it is necessary to read the provisions of subsection (3) of section 204 in the context of the various other provisions of section 204. When viewed from that perspective, it is my opinion that the words "liquidation" and "dissolution" as used in subsection (3) are not synonymous and should not be so interpreted. Section 204 sets out the procedure for voluntary liquidation and dissolution of a corporation. The section is contained in Part XVII of the Act which is entitled "Liquidation and Dissolution". [Emphasis added.] Subsection (4) of section 204 provides for the filing of a statement of intent to dissolve with the Director. This step was not taken, at all relevant times, in the case at bar. Subsection (5) provides that the Director shall issue a certificate of intent to dissolve upon receipt of the statement of intention to dissolve as contemplated in subsection (4).
>
> …
>
> I thus conclude that section 204 treats liquidation as a preliminary step which may but does not necessarily lead to the dissolution of the corporation. Accordingly a Court would not be justified in reading into article 21 of the contract a word such as "dissolve" which, in the context of the applicable statutory provision, has a quite distinct, separate and different meaning from the word "liquidate" which is used in the clause under review. (emphasis added)

[77] Further support for this interpretation can be drawn from ss. 20(2) of the prior Act – *The Crown Corporations Act, 1978*, RSS 1978, (Supp) c C-50.1 (since rep) – which was the precursor to s. 13. Notably, concepts of wind-up and dissolution were previously intertwined in relation to the notice requirement. The section provided:

> 20(2) The Clerk of the Executive Council shall, **at least three weeks before winding up proceedings are commenced**, publish in the *Gazette* and in one issue of a newspaper circulating in the place in which the head office of the corporation is located a notice of the intended winding-up, which notice shall set forth the proposed disposition of assets and the proposed dealings with respect to the obligations of the corporation. (emphasis added)

[78] Taken together, the inescapable conclusion is that the Legislature intended to draw a distinction between wind-up and dissolution, and that as a matter of law there is a difference between these two concepts. A plain reading of s. 13 reveals an intention to attach the public notice requirement to dissolution, and not to winding-up.

[79] I have considered ATU's submission that s. 13 must be read in a manner consistent with the public transparency and accountability expected in this province in relation to Crown corporations. I find the suggested approach at odds with the modern rule of interpretation which mandates that the words of an Act are to be read in their entire context, and in the grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. (*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27)

[80] Read as a harmonious whole, the *CCA* is an organizational statute which establishes a legal framework for how CIC as a holding company

controls and manages certain Crown corporations. There is nothing in this legislation to support the interpretation advanced by ATU, nor is there a legislative link between the objects and purposes of the *CCPOA*, which entrench notions of transparency and public scrutiny, and the *CCA*.

[81] Before leaving this issue I wish to highlight some anomalies in the practical application of ss. 13(3). CIC says that notice of dissolution is premature since corporate dissolution has not yet occurred; in fact it is many months away. Since the effect of dissolution is to terminate STC's legal existence, CIC contends it would be incongruous to suggest dissolution has already occurred because the buses continue to run at the present time.

[82] ATU on the other hand submits the obligation to provide notice of dissolution takes its meaning from ss. 13(4), *i.e.* a notice under ss. 13(3) must contain "the **proposed** manner of dealing with the CIC Crown corporation's assets, liabilities and obligations".

[83] *Webster's Third New International Dictionary*, at 1819, defines the word "proposed" to mean "to form or declare a plan or intention".

[84] Thus, while it seems clear that notice must be given before STC's corporate existence is dissolved, a compliant notice must nonetheless contain information about how STC plans to deal with its assets, liabilities and obligations.

[85] The take away point from the language of this section is simply that a notice posted three weeks before STC is dissolved may not satisfy the content requirements of ss. 13(4). It is to be assumed the word "proposed" was

purposefully included consequently it must be given meaning and effect. A plain reading of ss. 13(4) suggests that notice must be given before STC's assets have been dissipated and its liabilities settled.

[86] Placed in the context of the present application, though, there is no evidence that STC's assets and liabilities (whatever they may be) have been dealt with nor is there any evidence of a defined plan for how they will be addressed beyond engaging KPMG LLP to spearhead this task.

[87] The bottom line conclusion is the same. Subsection 13(3) is not a statutory pre-condition to the exercise of power under ss. 13(1) of the *CCA*, and an examination of the motives underlying this Order in Council or the policy and economic reasons for it is beyond the realm of judicial review. For this reason, ATU's challenge to impugn and set aside OC 197 based on a violation of ss. 13(3) of the *CCA* cannot succeed.

3) Is OC 197 void and of no effect because of non-compliance with the CCPOA?

[88] ATU contends that closure of STC amounts to privatization by a different name and as such the sale and dismantling of STC is contrary to the *CCPOA*. Further, to the extent STC's situation is governed by the definition of "privatize" in *The Interpretation Act, 1995*, SS 1995, c I-11.2, ATU submits the procedural formalities of s. 5 of the *CCPOA* were not satisfied consequently OC 197 is invalid, *ultra vires* and should be set aside.

[89] The *CCPOA* was enacted in 2004. Since STC is defined as a Crown corporation for purposes of this legislation, actions in relation to the "privatization" of STC are governed by this statute.

[90] Section 3 lies at the heart of this Act. It provides:

> **3** No Crown corporation shall be privatized unless that privatization is authorized by an Act enacted after the coming into force of this Act. (emphasis added)

[91] The rule expressed in s. 3 is quite clear. Absent legislation specifically authorizing the privatization of a Crown corporation, no Crown corporation may be privatized.

[92] The debate, and quite frankly the outcome of ATU's application, turns on what constitutes "privatization".

[93] The starting point in this discussion is the obvious observation that neither the verb "privatize" or the noun "privatization" are defined by the *CCPOA*. Since the gravamen of this legislation turns on what it means to "privatize", its omission is both glaring and surprising given the significance of this legislation.

[94] The meaning of "privatize" could have been left to judicial interpretation, or it could be addressed proactively through legislation. With regard to the latter, two options were open to the government.

[95] The first was to amend the *CCPOA* by defining "privatize" or to establish a set of legislative parameters for what constitutes "privatization" of a Crown corporation. Of course, a legislative response to the *CCPOA* would have engaged s. 5 which provides:

> **Restrictions on Bill to amend, repeal, override or suspend this Act**
>
> 5(1) A Bill to amend, repeal, override or suspend the operation of all or any provision of this Act must be referred

> to a Policy Field Committee established by the Legislative Assembly:
>
> (a) after it has been read the first time and printed and distributed to members; and
>
> (b) before it is read the second time.
>
> (2) The Policy Field Committee mentioned in subsection (1):
>
> (a) must provide the opportunity for representations by members of the public; and
>
> (b) shall not meet to review the Bill until 14 days after the day on which the public is given notice of the date, time and place of the Policy Field Committee's meeting. (emphasis added)

[96] The effect of s. 5 is obvious. Where the government wishes "to amend, repeal, override or suspend the operation of all or any provision of this Act", the bill must be referred to the Policy Field Committee which must in turn provide an opportunity for public input. Unquestionably, adding a definition to the body of the *CCPOA* would have constituted an amendment engaging the enhanced legislative process outlined in s. 5. ATU contends, and I agree, that the requirements of s. 5 are in keeping with the public transparency and accountability purposes outlined in the preamble to this statute.

[97] This brings me to the second legislative option which was open to the government. As illustrated by Bill 40, *The Interpretation Act, 1995* could be amended to define "privatize". As it turned out, this was the course of action pursued by the government.

[98] Section 3 of Bill 40 proposed the following amendment to s. 27 of *The Interpretation Act, 1995*:

> Section 27 amended
> **3**(1) **Subsection 27(1) is amended by adding the following definition in alphabetical order**:
> "**privatize**" means, with respect to a Crown corporation, the transfer to the private sector of all or substantially all of the assets of the Crown corporation, the controlling interest of the Crown corporation or the operational control of the Crown corporation through one or more transactions that use one or more of the following methods:
> (a) a public share offering;
> (b) a sale of shares through a negotiated or competitive bid;
> (c) a sale of the assets and business of the Crown corporation as a going concern;
> (d) a management or employee buyout of the Crown corporation;
> (e) a lease or management contract;
> (f) any other method prescribed in the regulations;
> but does not include a winding-up and dissolution of the Crown corporation or other restructuring of the Crown corporation; ("*privatizer*")

[99] It is common ground that the statutory definition of "privatize" introduced by Bill 40 as an amendment to *The Interpretation Act, 1995*, was in effect when OC 197 was passed.

[100] Every Canadian jurisdiction has an Interpretation Act the purpose of which is to set out rules and definitions applicable to all legislation enacted in that jurisdiction subject to evidence of a contrary intention. (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 55 [*Sullivan on Statutes*]) It is not uncommon for this type of legislation to stipulate meanings for recurring words. Ubiquitous words like "person", "month", "year" are but a few examples found in the Saskatchewan Act. And as Ruth Sullivan observes: "The meanings set out in the section are presumed to apply each time the word is used in statutes and regulations". (p. 56)

[101] The final, but important point, is that the definitions incorporated into Interpretation Acts are meant to apply to all legislation enacted in the jurisdiction, and is presumed to carry the same stipulated meaning unless a contrary intent is expressed in other legislation. This principle is reflected in ss. 3(1) of *The Interpretation Act, 1995*:

> This Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or the enactment. (emphasis added)

[102] Finally, I turn to the legal concept of declaratory legislation. In a relatively recent decision from our Supreme Court, *Régie des rentes du Québec v Canada Bread Company Ltd.*, 2013 SCC 46, [2013] 3 SCR 125, Wagner J. had occasion to expound upon the meaning and effect of declaratory legislation. His observations at paras. 26-28 are particularly germane to the matter presently before this Court:

> [26] It is settled law in Canada that it is within the prerogative of the legislature to enter the domain of the courts and offer a binding interpretation of its own law by enacting declaratory legislation: L.-P. Pigeon, *Drafting and Interpreting Legislation* (1988), at pp. 81-82. As this Court acknowledged in *Western Minerals Ltd. v. Gaumont*, 1953 CanLII 70 (SCC), [1953] 1 S.C.R. 345, such forays are usually made where the legislature wishes to correct judicial interpretations that it perceives to be erroneous.
>
> [27] In enacting declaratory legislation, the legislature assumes the role of a court and dictates the interpretation of its own law: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 562. As a result, declaratory provisions operate less as legislation and more as jurisprudence. They are akin to binding precedents, such as the decision of a court: P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1993), at p. 248. Such legislation may overrule a court decision in the same way that a decision of this Court would take precedence over a previous line of lower court judgments on a given question of law.

(see also *Merck Frosst Canada & Co. v Apotex Inc.*, 2011 FCA 329, 107 CPR (4th) 155)

[103] The word "privatize" is statutorily defined by s. 27 of *The Interpretation Act, 1995*. In accordance with the aforesaid principles and the declaratory nature of this legislation, this definition is binding and applies to all Saskatchewan legislation absent a contrary intent is expressed in an Act. It is of no legal consequence that this word only appears in the *CCPOA* and *The Interpretation Act, 1995*.

[104] The definition of "privatize" is exhaustive in the sense it purports to declare the complete meaning of the term, yet at the same time narrows its scope by displacing certain concepts. As defined, "privatize" means, with respect to a Crown corporation, the transfer to the private sector of all or substantially all of the Crown's assets, controlling interest or operational control through a transaction. Significantly, the definition expressly excludes the winding-up and dissolution of a Crown corporation. This exclusion is both clear and unambiguous.

[105] In spite of its plain meaning, ATU submits the definition has no effect on STC's situation because 1) *The Interpretation Act, 1995* does not apply to the *CCPOA* because a contrary intention is expressed therein; 2) Bill 40, in substance, is an amendment to the *CCPOA* thus the procedural protections of s. 5 of the *CCPOA* should have been followed; and 3) as a matter of fact, STC's actions taken thus far have manifested an intention to privatize within the meaning of the definition.

a) Contrary intent

[106] As Ruth Sullivan observed, judges are bound to apply the stipulated meaning in declaratory legislation. The definition is binding unless a contrary intent has been legislatively expressed.

[107] A careful examination of the substantive provisions of the *CCPOA* reveals no such contrary intent. Accordingly, the definition of "privatize" contained in s. 27 of *The Interpretation Act, 1995* applies to STC.

b) Bill 40 "amended" the *CCPOA*

[108] The second argument advanced by ATU is that in its purpose and effect, Bill 40 operates as an amendment to the *CCPOA*. ATU submits Bill 40 is legally flawed because it failed to comply with the procedural rigours of s. 5 of the *CCPOA, i.e.* "amendments" to the *CCPOA* must be submitted to the Policy Field Committee and be exposed to public scrutiny before the legislative process can proceed.

[109] An overly simplified answer to this argument lies in the wording of s. 5 of the *CCPOA* itself which provides that a bill to amend, repeal, override or suspend the operation of all or any provision of **this Act** must be referred to the Policy Field Committee. The highlighted words in s. 5 signify an intention to limit the application of this section to just the *CCPOA*. There is no suggestion it extends to any other legislation. Had the Legislature intended to achieve the objective of imposing the s. 5 procedural requirements to any other Saskatchewan statute which happens to reference privatization, clear language was required.

[110] As a matter of law, Legislatures may bind themselves to self-imposed rules as to the "manner and form" in which statutes are to be enacted, and may re-define the legislative process generally or for a particular purpose.

> While a legislative body is not bound by self-imposed restraints as to the content, substance or policy of its enactments, it is reasonably clear that a legislative body may be bound by self-imposed procedural (or manner and form) restraints on its enactments. (footnotes omitted)

(Peter W. Hogg, *Constitutional Law of Canada*, 5th ed, vol 1 (Toronto: Thomson Reuters, 2016) at 12-11) [*Constitutional Law*]

[111] In contrast, binding future Legislatures to substantive content offends the principle of parliamentary sovereignty and is unlawful.

> Thus, while the federal Parliament or a provincial Legislature cannot bind itself as to the substance of future legislation, it can bind itself as to the manner and form of future legislation." (*Constitutional Law*, vol 1, at 12-12)

(see also *Canada (Attorney General) v Friends of the Canadian Wheat Board*, 2012 FCA 183 at para 82, [2014] 1 FCR 518)

[112] Courts have narrowly construed manner and form legislation. In *Re Canada Assistance Plan*, the Supreme Court stated that it would require very clear indication in a statute, particularly a non-constitutional statute, before a court would find an intention on the part of the legislative body to bind itself in the future. At 562-564:

> I reject this argument. Neither intention is revealed in the Plan. Any "manner and form" requirement in an ordinary statute must overcome the clear words of s. 42(1) of the Interpretation Act, which I set out again for ease of reference:

> 42. (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

This provision requires that federal statutes ordinarily be interpreted to accord with the doctrine of parliamentary sovereignty.

In order for this argument to succeed, it would first have to be shown that Parliament intended, in the face of s. 42(1), to bind itself or to restrict the legislative powers of those of its members who are also members of the executive. The sections of the Plan which are supposed to reveal this intention are ss. 8(1) and 9(1). They say absolutely nothing about the amendment of the Plan, and so reveal no parliamentary intention of the sort argued for by N.C.C.

It is no coincidence that when this court has found "manner and form" restrictions, the instrument creating the restrictions has not been an ordinary statute. Regard may be had for *R. v. Drybones*, [1970] S.C.R. 282, 71 W.W.R. 161, 10 C.R.N.S. 334, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, in which a provision of the *Indian Act*, R.S.C. 1952, c. 149, was held to be inoperative pursuant to the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reprinted in R.S.C. 1985, App. III). The latter statute was described as "a quasi-constitutional instrument" by Laskin J. (as he then was) in *Hogan v. R.* (1974), [1975] 2 S.C.R. 574 at 597, 9 N.S.R. (2d) 145, 26 C.R.N.S. 207, 18 C.C.C. (2d) 65, 2 N.R. 343, 48 D.L.R. (3d) 427. Similarly, in *R. v. Mercure, supra*, s. 110 of the *North-West Territories Act*, R.S.C. 1886, c. 50, as re-enacted by S.C. 1891, c. 22, s. 18, was held to impose "manner and form" limitations on the legislature of Saskatchewan. But s. 110 was explicitly directed at the legislature, and the court observed that the section was continued in force by the constituent statute of the province. Both the *Canadian Bill of Rights* and s. 110 of the *North-West Territories Act* have a constitutional nature. It may be that where a statute is of a constitutional nature and governs legislation generally, rather than dealing with a specific statute, it can impose requirements as to manner and form. But where a statute has no constitutional nature, it will be very unlikely to evidence an intention of the legislative body to bind itself in the future.

> …
>
> There is a further problem with this argument. It is clear that parliamentary sovereignty prevents a legislative body from binding itself as to the substance of its future legislation. The claim that is made in a "manner and form" argument is that the body has restrained itself, not in respect of substance, but in respect of the procedure which must be followed to enact future legislation of some sort, or the form which such legislation must take. In *West Lakes Ltd. v. South Australia, supra*, a "manner and form" argument was rejected. King C.J. said (at pp. 397-98):
>
> > Even if I could construe the statute according to the plaintiff's argument, I could not regard the provision as prescribing the manner or form of future legislation. A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure ... does not, to my mind, prescribe a manner or form of lawmaking, but rather amounts to a renunciation pro tanto of the lawmaking power.
>
> Those words are fully applicable here.

[113] To hold that the manner and form restrictions enshrined in s. 5 of the *CCPOA* extend to legislative action beyond the *CCPOA (i.e.* to other statutes) disregards the narrow interpretation accorded such legislation generally, and the principle of parliamentary sovereignty as codified in s. 32 of *The Interpretation Act, 1995*:

> **32** Every Act shall be interpreted as reserving to the Legislature the power of repealing or amending it, and of revoking, restricting or modifying a power, privilege or advantage that it vests in or grants to any person.

[114] Moreover, in the face of s. 32, for “manner and form” restrictions to extend to other statutes, clear legislative language is required. It therefore follows that if it had been the intention of the Saskatchewan Legislature in 2004 to limit the manner and form by which future changes are made to <u>any</u>

other provincial legislation which deals with the privatization of Crown corporations (including *The Interpretation Act, 1995*), the *CCPOA* would have had to clearly express this legislative intent in the *CCPOA*. It did not.

[115] Applied to the present situation, the following conclusions can be drawn:

a) *CCPOA*, particularly as a non-constitutional statute, must be narrowly construed;

b) Section 32 of *The Interpretation Act, 1995*, reaffirms the principle of parliamentary sovereignty and reserves unto the Legislature the power to amend every Act;

c) In order to overcome the principle of parliamentary sovereignty enshrined in s. 32, the *CCPOA* would have had to employ clear and express language;

d) No such language exists in the substantive provisions of the *CCPOA*.

e) Although the preamble to the *CCPOA* manifests an intention to maintain public control of necessary public services and for the public to be informed of the costs and benefits of privatization before a decision to privatize is made, the preamble is not a substitute for express substantive language in the statute. While the preamble provides helpful context and may assist in resolving intent and ambiguity, it does not amount to substantive law.

[116] In summary, the manner and form restrictions set out in s. 5 of the *CCPOA* only apply to future legislative changes to that Act and has no effect

on the amendment to s. 27 of *The Interpretation Act, 1995* brought about by Bill 40.

[117] The statutory definition of "privatize" brought into law by Bill 40 expressly excludes wind-up and dissolution of Crown corporations consequently the provisions of the *CCPOA* relating to manner and form amendments or the need for a specific authorizing statute have no application to STC's circumstance.

c) Do STC's actions taken thus far manifest an intention to privatize?

[118] By definition, to "privatize" means to **transfer** to the private sector all or substantially all of the assets, controlling interest and operational control of a Crown corporation through a **transaction**.

[119] The uncontroverted evidence before this Court establishes that the pending closure, wind-up and eventual dissolution of STC does not meet this definition.

[120] There is no evidence before this Court of a plan to transfer STC's business operation or controlling interest to the private sector. There is no evidence of a transfer of all or substantially all of STC's assets. And there is no evidence of a "transaction" between CIC and/or STC and one or more private entities. To the contrary, the steps taken thus far manifest a dismantling of STC's operation but not a divestiture of its assets or transfer of operations. At best, STC has given notice of its intention to terminate some obligations, eg: its operating authority certificate and contractual relations with various business partners.

[121] With regard to its physical assets, STC has retained KPMG to develop a liquidation plan to maximize value. There is no evidence STC has thus far sold, conveyed or transferred any of its assets to private interests.

[122] ATU submits STC's operating authority, or "bus routes" is an asset of significant value which is actively being transferred and conveyed to private operators under the aegis of the Board pursuant to *The Traffic Safety Act*, SS 2004, c T-18.1 [*TSA*]. Since the Board is a government agency and creature of provincial statute, ATU submits it necessarily follows that the Board operates under the direction and control of Executive Government. ATU submits the combined surrender of STC's certificate and grant of new operating authority certificates to private entities who have stepped forward to fill the STC void amounts to privatization. In short, ATU contends decisions made by the Board in relation to the granting of operating authority certificates are surreptitiously being directed to third parties by Executive Government in the execution of its policy objective to dismantle STC.

[123] Assuming for the sake of argument that STC's operating authority certificate is an asset of significant value as alleged by ATU, and that transfer of the STC certificate to private hands constitutes a transfer of "substantially all" of its assets for purposes of the definition of "privatize", ATU's argument is legally unsustainable for several reasons.

[124] First, there is no evidence before this Court that a third party has actually acquired STC's operating authority or that STC or CIC has taken steps to transfer it to the private sector as that term is ordinarily used. More to

the point, there is no evidence the two key elements of the definition have been met, *i.e.* a “transfer” and a “transaction”, in relation to STC’s certificate.

[125] Second, the argument is inconsistent with the legislative scheme. Pursuant to s. 81 of the *TSA*, an operating authority certificate is not exclusive to the holder and the Board is not precluded from issuing certificates to other parties. More importantly, s. 86 expressly prohibits the holder of a certificate from capitalizing, selling, assigning, leasing or transferring it in whole or in part.

[126] Third, the proposition advanced assumes the Board is under the control and direction of Executive Government in its decision-making process in relation to Part VII of the *TSA*. Part VII is a regulatory scheme. It is trite law that a statutory decision-maker (in this case the Board) must exercise its discretionary powers on the merits of each case and in the absence of any rule or policy which dictates a pre-ordained result. (David P. Jones & Anne S. de Villars, *Principles of Administrative* Law, 6th ed (Toronto: Carswell, 2014) at 206.

4) Should this Court make a ruling in relation to the labour dispute?

[127] As mentioned earlier, within the confines of this judicial review application ATU seeks a declaration that STC violated ss. 212 and 214 of the *CLC*, and an order in the nature of *mandamus* requiring STC to continue to employ members of the applicant’s bargaining unit until such time as STC complies with the referenced provisions.

[128] There are a number of reasons this Court cannot or should not entertain this part of ATU's application.

[129] To begin with, the alleged violations and form of relief sought were not pled and are therefore not before this Court. These arguments appeared for the first time in ATU's brief of law filed on May 16, 2017 as augmented by oral argument. Procedurally speaking, ATU's approach is contrary to Rule 3-49(4)(b) of *The Queen's Bench Rules* which requires the nature of the claim and basis for it to be stated.

[130] Quite apart from the Rules, ATU's argument raises serious jurisdictional issues. Violation of ss. 212 and 214 of the *CLC* is the very issue presently before the CIRB. Although the CIRB declined to grant the interim relief sought by ATU, it remains seized with the matter and as noted in its May 2nd ruling "will proceed with the determination of the unfair labour practice complaint in due course…"

[131] By seeking to have this Court rule on the same matter which was before the CIRB amounts to a collateral attack on the *CIRB*'s interim decision. For obvious reasons, this should be avoided.

[132] Furthermore, the dispute between ATU and STC over an alleged violation of the group termination provisions in the *CLC* falls within the exclusive jurisdiction of a labour arbitrator by operation of ss. 57, 58 and 60 of the *CLC*. As between labour arbitrators and the courts, it has been consistently affirmed that labour arbitrators have the exclusive jurisdiction to decide all issues arising from the interpretation, application or violation of a collective agreement. (*Weber v Ontario Hydro*, [1995] 2 SCR 929)

[133] Finally, even if I was inclined to entertain ATU's argument on the labour issue, the absence of an evidentiary record renders this task near impossible and assuredly prejudicial to the other parties.

CONCLUSION

[134] The creation and sustainability of Crown corporations has been a divisive political issue in Saskatchewan since their inception. Even the prospect of change evokes intense and passionate response from both politicians and electorate alike.

[135] However, as explained above, I see no legal infirmity with OC 197. Subsection 13(1) entrusts the Lieutenant Governor in Council with the authority to pass subordinate legislation in the form of an Order in Council authorizing the wind-up and dissolution of a CIC Crown corporation. The exercise of that power by the Lieutenant Governor in Council in relation to STC was taken within the ambit of the empowering statute.

[136] Neither was the budget decision discontinuing STC's subsidy legally flawed. This was a decision made by the Government of Saskatchewan for economic, policy and political purposes and it is not reviewable by this Court.

[137] ATU's application is accordingly dismissed. Since neither party sought costs, no such order will be made.

J.
L.M. SCHWANN