PRACTICE AND PROCEDURE

Before

ADMINISTRATIVE TRIBUNALS

VOLUME 4
by
ROBERT W. MACAULAY, Q.C.
and
JAMES L.H. SPRAGUE, B.A., LL.B.
and
LORNE SOSSIN, B.A., M.A., Ph.D., LL.B., LL.M., J.S.D

CONTRIBUTORS

Judy Algar
Gay A. Brown
Irène Dicaire
Marvin J. Huberman
Leslie MacIntosh
Paul Pudge
Judith A. Snider
Patricia Auron
Peter Budd
Roger R. Elliott
David P. Jacobs
Charles Mathis
Lucia Shatat
David Wood
Laura Boujoff
Douglas Colbourne
Daria Farr
Irving Kleiner
Steve B. McCann
Sharon Silberstein

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Implied Powers of an Agency

29.1 THE NECESSITY FOR A GRANT OF AUTHORITY

As has been frequently stated, an administrative agency has no inherent powers. It possesses only the powers given to it by Parliament or a legislature.[1] These powers can be given to it expressly in its enabling statute, another statute which grants the agency some mandate or authority, a statute of general application (such as Ontario's Statutory Powers Procedure Act), or by regulation (if such regulations are authorized themselves by statute). Powers can also be given to an agency by implication.

> "38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: 1) express grants of jurisdiction under various statutes (explicit powers); and 2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15)."[1.1]

The powers conferred by legislation include not only such powers that are expressly granted, but also all of those powers which are reasonably necessary for the accomplishment of the mandate which that legislation imposes upon the agency. In other words, when Parliament or a legislature imposes a mandate upon

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1 *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 (S.C.C.); *Jarvis v. Associated Medical Services Ltd.*, [1964] S.C.R. 497, 64 C.L.L.C. 18,511, 44 D.L.R. (2d) 407; *Hughes Boat Works Inc. v. U.A.W., Loc. 1620* (1979), 26 O.R. (2d) 420, 102 D.L.R. (3d) 661, 79 C.L.L.C. 14,230 (Div. Ct.); *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 (Gen. Div.), affirmed (1994), 21 O.R. (3d) 104 (C.A.); *Diamond v. Ontario (Municipal Board)*, [1962] O.R. 328, 32 D.L.R. (2d) 103 (C.A.), *Canadian Broadcasting Corp. v. Cordeau*, [1979] 2 S.C.R. 618, 14 C.P.C. 60, 48 C.C.C. (2d) 289, 28 N.R. 541, 101 D.L.R. (3d) 24. *Persaud v. Society of Management Accountants of Ontario* (1997), 144 D.L.R. (4th) 375, 98 O.A.C. 216 (Div. Ct.)

See also the more fulsome discussion respecting the granting of authority found earlier in chapter 5 "Grant and Subdelegation of Authority".

1.1 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 CarswellAlta 139, 2006 SCC 4, 263 D.L.R. (4th) 193 (S.C.C.)

an agency, included implicitly in the imposition of the mandate, are all of the powers that the agency will need in order to accomplish that mandate.[2]

Thus, in determining the extent of an agency's powers one must look to its enabling legislation. It is a question of interpretation.[2.1] The existence of the grant is thus approached using the regular tools of statutory interpretation.[2.2]

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2 *Ref. Re National Energy Board Act*, (1986), 19 Admin. L.R. 301, 29 D.L.R. (4th) 35, 69 N.R. 174, [1986] 3 F.C. 275 (Fed. C.A.), leave to appeal to S.C.C. refused (1986), 23 Admin. L.R. xxi (note); *CTV Television Network Ltd. v. Canada (Copyright Board)*, [1993] 2 F.C. 115, 46 C.PR. (3d) 343, 99 D.L.R. (4th) 216 (Fed. C.A.), leave to appeal to S.C.C. refused (1993), 107 D.L.R. (4th) viii (note) (S.C.C.) (Board has implied authority to determine those matters necessary to establish its jurisdiction).

In *British Columbia (Securities Commission) v. Seifert*, 2007 CarswellBC 2398, 2007 BCCA 484 (B.C.C.A.), the British Columbia Court of Appeal held that, in the context of an investigation respecting a potential prosecution of a trader, the British Columbia Securities Commission had the implied power to settle a matter outside of a hearing. Although the Act did not expressly provide the Commission with the authority to resolve a matter through a settlement, the Court of Appeal agreed with the holding of the trial judge that this authority was implied in the statute. The trial judge had noted that the Supreme Court of Canada had ruled that an agency had, in addition to the powers granted to it by statute, also, by implication, those powers that were reasonably necessary to accomplish its mandate. The trial judge had then stated that:

> The power to enter into a settlement may not be "absolutely" necessary for the Com mission to realize the objects of its statute. If there were no power to settle, the Commission could hold a hearing in every case. The Executive Director, acting as administrative prosecutor, and the person under investigation could make joint submissions to the Commission and attempt to persuade the Commission that the resolution is in the public interest. The tentative settlement would then become an order or decision of the Commission, or if the Commission chose not to approve it, the hearing could go ahead.
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> But the power to settle, I find, is necessary if the Commission is going to carry out its purpose under s. 4(2) and its enforcement mandate under ss. 161 and 162 in an effective and efficient manner. Administrative tribunals do not and can not adjudicate on every matter that commences before them.
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> Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation. Enforcement is rarely a concern because the settlement is voluntary. A person who is the subject of an investigation retains the option of refusing to settle and proceeding to a hearing. Settlements are also efficient. Both parties can forego the time and expense of a hearing. Or, they can settle some matters, and direct their resources to the matters that are in dispute, and therefore to be resolved by way of a hearing.

2.1 Thus, in determining whether the Alberta Energy & Utilities Board had an implied jurisdiction in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 CarswellAlta 139, 2006 SCC 4, 263 D.L.R. (4th) 193 (S.C.C.), Mr. Justice Bastarache (for the majority of the Supreme Court of Canada) wrote:

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

In *Brink's Canada Ltd. v. Canada (Human Rights Commission)*, [1996] 2 F.C. 113 (T.D.) Justice

29.2 DETERMINING AN IMPLIED GRANT OF AUTHORITY

The doctrine of jurisdiction by "necessary implication" enables administrative agencies to extend their jurisdiction beyond the precise words contained in

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McKay stated that "The Tribunal Panel, its President and an appointed Tribunal derive their authority from the Act, not from comparisons with other bodies." By this is meant that the fact that Parliament may have given other bodies specific authorities is not, itself, an indication that it also gave, or did not give a particular agency an authority. However, where agencies perform similar mandates and are structured similarly, some guidance as to the grant of power may be gained from comparisons of other - perhaps clearer - statutory schemes. For example, in *Van couver (City) v. British Columbia (Assessment Board)* (1996), 135 D.L.R. (4th) 48 (B.C.C.A.), the British Columbia Court of Appeal saw some value in looking at other statutory schemes to determine the extent of the powers of the B.C. Assessment Appeal Board. The fact that other statutory schemes contained an express grant of authority to hold closed hearings was a factor in the Court's conclusion that the Legislature's failure to do so expressly for the Assessment Appeal Board indicated that the Board was not intended to have that power.

In *Distribution Canada Inc. v. Minister of National Revenue*, 10 Admin. L.R. (2d) 44, (sub nom. *Distribution Canada Inc. v. M.N.R.*) [1993] 2 F.C. 26, 99 D.L.R. (4th) 440 (Fed. C.A.), leave to appeal refused (1993), 12 Admin. L.R. (2d) 280n (S.C.C.) the Federal Court of Appeal held that the express statutory duty on persons to pay customs duties contained an implicit discretion in the authorities not to collect such duties where the mechanism required to do so would cost more than the revenue that would be generated by the exercise. That case involved a decision by the Minister of National Revenue not to collect customs duties of less than $1 and, in addition, to authorize his officials not to collect larger amounts where the circumstances warranted.

There was an express statutory duty on persons, in section 19(1) of the Customs Tariff Act, to pay customs duty.

> 19(1). Subject to this Act and the Customs Act and any regulation or order made thereunder, there shall be levied and collected on all goods enumerated or referred to in Schedule I, when such goods are imported, and paid in accordance with the Customs Act, customs duties at the rates set out in Schedule I or section 46 that are applicable to those goods.

The Federal Court of Appeal upheld the Minister's decision. Insofar as the purpose of the Customs Tariff Act was the collection of revenue for the Crown there was a discretion in the Minister to ensure that the enforcement undertaken would not result in a depletion of revenues.

This is not a case where the Minister has turned his back on his duties, or where negligence or bad faith has been demonstrated. It is a case where the Minister has established difficulties in implementation and where he enjoys a discretion with which the law will not interfere.

2.2 Thus, for example, the express grant of authority to the Saskatchewan Labour Relations Board to award damages in one specific circumstance led the Sask. Court of Queen's Bench to conclude that the Board did not have that authority in other circumstances (*Westfair Foods Ltd. v. R.W.D.S.U., Local 454* (1993), 15 Admin. L.R. (2d) 260, 110 Sask. R. 139 (Q.B.). As for an approach to statutory interpretation generally, see the pithy overview provided by the Supreme Court of Canada in the following two cases: *Novak v. Bond*, [1991] 1 S.C.R. 808 (S.C.C.):

> The cardinal principle of statutory interpretation is that a legislative provision should be construed in a way that best furthers its objectives: See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paras. 21-22, per Iacobucci J., and Interpretation Act, R.S.B.C., 1986, c. 238, s. 8. Subsidiary rules of statutory interpretation provide that each part of an enactment must be given meaning and that statutes must be construed in such a way that absurdities are avoided: see *Rizzo Shoes, supra*, at para. 27, per Iacobucci J.

their enabling legislation if the extended jurisdiction can be shown to be required for the effective exercise of their mandates. Thus, in *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (S.C.C.) the Supreme Court of Canada stated:

> It is well established that a statutory body enjoys not on ly the powers expressly conferred up it, but also by implication all powers that are reasonably necessary to accomplish its mandate. . . . In other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions . . ..
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> Consequently, the function of a statutory body is of principal importance in assessing whether it is vested with an implied power to grant the remedy sought. Such implied powers are found only where they are required as a matter practical necessity for the court or tribunal to accomplish its purpose. . .. While these powers need not be absolutely necessary for the court or tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose . . . . [2.2A]

Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City), [2000] 1 S.C.R. 665, 2000 S.C.C. 27:

The courts are increasingly recognizing that all statutes, whether or not they are constitutional in nature, must be interpreted contextually. P.-A. Côté, Interpretation des lois (3rd etc. 1999), stated at pp. 355 -56:

[Translation] Without going so far as to say that words have no intrinsic meaning, their dependence on context for real meaning must be recognized. A dictionary provides a limited assortment of potential meanings, but only within the context is the effective meaning revealed. . . . .

Thus, as this Court stated in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, at para. 21-23, it is appropriate to consider the legislative context. According to Côté, supra, at pp. 355-56, the context of a law includes the other provisions of the law, related statutes, the objective of both the law and the specific provision, as well as the circumstances which led to the drafting of the text.

The following books are recommended as guides to statutory interpretation. For a compre hensive, in-depth text see: Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd) (Les Editions Yvons Blais Inc. 1991); for a handy slim and easy to read paperback see Donald Gifford, *Statutory Interpretation*, (The Law Book Company, 1990). Gifford is Australian so the reader may have difficulty in laying hands on it. As an alternative try Ruth Sullivan, *Statutory Interpretation* (Irwin Law, 1997).

2.2A See also *CTV Television Ltd. v. Canada (Copyright Board)*, [1993] 2 F.C. 115, 46 C.P.R. (3d) 343, 99 D.L.R. (4th) 216 (Fed. C.A.), leave to appeal to S.C.C. refused (1993), 107 D.L.R. (4th) viii (note) (S.C.C.). (Board had implied power to determine questions of law necessary to establish its jurisdiction and ability to perform mandate.)

See also *Lakeview School Division No. 142 v. Saskatchewan (Municipal Employees' Pension Commission)*, 2008 CarswellSask 28, 2008 SKCA 10 (Sask. C.A.) where the Saskatch ewan Court of Appeal held that the authority of the Saskatchewan Municipal Employees' Pension Commission to determine who was an "employee" for the purposes of Saskatchewan's Municipal Employees' Pension Act existed by virtue of the mandate it was to perform. The Court of Appeal also, however, looked to a general direction in the Act respecting the authority of the Commission to resolve questions respecting the interpretation of its statute.

The mandate of the Commission encompasses the administration of the Act, including the Pension Fund, into which an "employer" is required to contribute on behalf of an "employee". These terms are defined in section 2 of the Act. "Employer" is defined in section 2(r) to include

It should, of course, go without saying that, as a matter of statutory interpretation, it should not appear that the legislature did not want the agency to have the jurisdiction in question. Thus, in *Nishnawbe Aski Nation v. Eden*, 2011 CarswellOnt 1474, 2011 ONCA 187 (Ont. C.A.) (in determining whether a coroner had the authority to question the validity of the jury rolls from which a coroner's jury is selected) the Ontario Court of Appeal listed a number of criteria which it stated were taken from *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 CarswellAlta 139, 2006 SCC 4, 263 D.L.R. (4th) 193 (S.C.C.). The listing of these criteria essentially amount to determining whether a power is necessary for a statutory body to fulfill its mandate and whether there was any indication (either expressly or by reference to other provisions) whether the legislature did not wish the body to have the authority in question.

> "34 In *ATCO*, the Supreme Court of Canada enumerated the circumstances in which the doctrine of jurisdiction by necessary implication may be applied:
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> i. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the statutory body fulfilling its mandate;
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> ii. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
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> iii. when the mandate of the statutory body is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
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> iv. when the jurisdiction sought is not one which the statutory body has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
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> v. when the legislature did not address its mind to the issue and decide against conferring the power to the statutory body."

The Court of Appeal went on to find the implicit power in coroners to determine the representiveness of a jury roll from two separate sources.

The implied grant was found first in the legal authority of a coroner to arrange for an inquest jury. A lawfully constituted inquest jury must be representative and impartial. As section 34(1) of the Coroner's Act gives the coroner the power to require the production of a list of potential jurors from the jury roll and section 33(2) gives the coroner the power to direct a constable to choose five

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a number of specifically identified entities, including boards of education. "Employee" is defined in section 2(m) to mean "an individual who provides services for an employer. . .". It is obvious from this that the Commission as the administrator of the Pension Fund, may be called upon on occasion to determine if a particular person is or is not an "employee" of one of these entities for the purpose of the Fund. In other words the Commission may be called upon to apply the provisions of the Act a particular situation. The Act recognizes and provides for this, as it does in section 64:

64. When a question arises as to the application, interpretation or intent of this Act or the regulations it shall be determined by the commission whose decision shall be final.

persons for the jury from that list Court of Appeal held that the coroner must have the authority to determine that the jury roll from which those persons are selected is itself representative and impartial.

> "37 The Coroners Act confers on a coroner the statutory mandate to preside over an inquest. This mandate includes the legal duty to arrange for an inquest jury. Sections 34(1) and 33(2) of the Act give the coroner the power to satisfy this part of the coroner's mandate. Section 34(1) gives the coroner the power, by warrant, to require the sheriff to produce a list of potential jurors taken from the jury roll prepared under the Juries Act. Section 33(2) gives the coroner the power to direct a constable to choose from that list five persons suitable to serve as jurors at an inquest.
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> 38 The coroner's mandate to arrange for an inquest jury must necessarily include the power to ensure that the jury is lawfully constituted. A lawfully constituted jury is one that is representative and impartial. To be representative and impartial the jurors must initially be chosen from a jury roll that complies with the Juries Act — in other words, from a jury roll that is representative. Thus, to fulfill the mandate conferred by the Act, a coroner has the necessarily implied jurisdiction to inquire into the representativeness of a jury roll from which an inquest jury is chosen."

The Court of Appeal also held that the authority could be found in the coroner's statutory power in section 50(1) of the Coroner's Act to prevent abuse of the inquest process. The Court held that holding an inquest with a jury which was not representative or impartial would result in an unfair or unjust process which would undermine the public confidence in it.

> "40 A coroner's jurisdiction to control an inquest to prevent an abuse of process is not open ended. It must be exercised within the limits and objects of the Coroners Act. Still, it is a broad and flexible jurisdiction. It can be exercised to prevent an inquest that is unfair or unjust, or an inquest in which the public would lose confidence: see, for example, *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at para. 37; and *Booth v. Huxter* (1994), 16 O.R. (3d) 528 (Div. Ct.) per Moldaver J. stating at p. 542 that, in circumstances which could "undermine the public confidence in the administration of justice and the integrity of the process, the coroner should be able to act under s. 50(1) [of the Coroners Act] to cure the defect."
>
> 41 An inquest into the death of a First Nations person that is adjudicated by a jury chosen from a jury roll that excludes First Nations persons on reserves would not, in my view, be seen as a fair and just inquest or an inquest in which the public would have confidence. It would amount to an abuse of process within s. 50(1) of the Act."[2.2B]

2.2B Notwithstanding the Court of Appeal's statement that the concept of abuse of process is not open ended and is restricted to the limits and objects of an agency's enabling statute its assertion that abuse of process supports a implicit grant of authority necessary in order to prevent the public from losing confidence in an agency's decisions is a significant expansion of the concept. (It is not unusual for abuse of process to serve as the foundation for powers necessary to prevent

The Court of Appeal further held that if the coroner found that a jury list was not representative or impartial because of defects in the initial roll the coroner could order the creation of a proper roll from which to prepare the list of potential jurors.

> "47 Yet, it seems to me that a coroner does have remedial authority to address concerns about an unrepresentative jury roll. For example, suppose the list of jurors the sheriff is required to produce under s. 34(1) of the Coroners Act reflects a jury roll that does not comply with s. 6(8) of the Juries Act. In that case, the coroner could say that the list has not been taken from a jury roll that complies with s. 6(8) and could order the sheriff to produce a list of jurors from a proper jury roll. At least to that extent, a remedy is available to rectify an unrepresentative jury roll."

In reaching this conclusion the Court of Appeal rejected the argument that the express statutory direction in the Coroner's Act and the Juries Act that purported to cure deficiencies in the selection of jurors were intended only to go to minor or technical defects or procedural irregularities and not defects of a fundamental nature. And the representativeness or impartiality of a jury was a fundamental matter and not a mere procedural defect.

> "48 That takes me to the curative provisions of the statutes, s. 36 of the *Coroners Act* and s. 44 of the *Juries Act*on which the Attorney General relies:
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> > 36. The omission to observe any of the provisions of this Act or the regulations respecting the eligibility and selection of jurors is not a ground for impeaching or quashing a verdict.
> >
> > 44.(1) The omission to observe any of the provisions of this Act respecting the eligibility, selection, balloting and distribution of jurors, the preparation of the jury roll or the drafting of panels from the jury roll is not a ground for impeaching or quashing a verdict or judgment in any action.
> >
> > 44.(2) Subject to sections 32 and 34, a jury panel returned by the sheriff for the purposes of this Act shall be deemed to be properly selected for the purposes of the service of the jurors in any matter or proceeding.
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> . . .
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> 50 I do not accept this submission. These curative provisions are designed to relieve against minor or technical deficiencies, or procedural irregularities in the selection of jurors. They are not intended to relieve against something as fundamental as an unrepresentative jury roll.
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> 51 Representativeness is a key characteristic of a jury, a characteristic that enhances the likelihood of the other key characteristic of a jury, its impartiality. It is a

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a process from being unfair.) It would take little ingenuity to conceive significant expansions of an agency's power in order to maintain public confidence in its processes. In this limited respect *Nishnawbe Aski Nation* may be a "one-off" decision on which reliance in the future may be extremely risky.

> substantive and not merely a technical requirement for the proper functioning of a jury. Thus, neither s. 44 of the Juries Act nor s. 36 of the Coroners Act can "cure" an unrepresentative jury roll. And they certainly cannot be used to cure a roll that reflects the systemic discrimination or exclusion of First Nations persons."

The purpose of the legislation in question also played a significant role in determining the existence of jurisdiction in *Campbell v. Canada (Chief Electoral Officer)*, 2011 CarswellNat 408, 2011 FCA 74 (Fed. C.A.). The case considered whether the Chief Electoral Officer, in approving reimbursement of a party's election expenses, had the authority to look behind submitted invoices to question whether the expense claimed was a valid election expense.

The election expense reimbursement scheme set out in the Canada Elections Act provides for the public reimbursement of a percentage of the election expenses (a defined term) incurred by a candidate. As part of this scheme the Act requires (among other things) that a candidate file and document his or her election expenses with the Chief Electoral Officer. The Act then provides that the Chief Electoral Officer is to provide the Receiver General with a certificate that states "that the Chief Electoral Officer is satisfied that the candidate and his or her official agent have complied with the requirements of subsection 447(2) and sections 451 to 462 of the Act" (the various financial reporting filing requirements – including the requirement to detail and support the candidate's election expenses.) and sets out the amount of the reimbursement from public funds to be paid to the candidate.

The Federal Court of Appeal held that it was evident from the terms of the statute that the Chief Electoral Officer had the power and the responsibility to verify that a claimed expense was legal – including verification of the supporting documentation to verify whether a claimed expense fell within the legal meaning of the term – under the statute before public funds should be paid to reimburse it. The Court rejected that the Chief Electoral Officer was not obliged to simply accept the documents provided by a candidate and face value.

While the Court felt that a literal reading of the Chief Electoral Officer's duty could support the argument that the Chief Electoral Officer only played a minor clerical reporting role the Court of Appeal held that the text of a statutory provision is only the starting point of its interpretation. Looking at the context and the objectives of the statute led the Court of Appeal to conclude: "that Parliament did not intend to circumscribe the CEOC's role by confining him to the largely clerical function of ensuring that candidates have submitted the documents specified in the Act and, when satisfied that they have, to providing a certificate to enable the Receiver General to reimburse the claimed election expenses. The Court of Appeal cited a number of factors which led it to this conclusion.

First, the Court of Appeal noted that the statutorily defined role of the Chief Electoral Officer as having the general direction and supervision over the conduct of elections and as having the authority to exercise the powers and perform the

duties and functions that are necessary for the administration of the Act indicated "a broader role under section 465 than a more or less mechanical "review" of the documents submitted against a check list, without regard to their accuracy or whether expenses claimed are in accordance with the Act."

Second, an earlier section of the Act provided for the payment of a first instalment of reimbursement (that was based not on the candidate's claimed expenses but on a percentage of the candidate's election expense spending limit under the Act) which also required the Chief Electoral Officer to provide the Receiver General with a certificate which did not require that the Chief Electoral Officer to state that he was "satisfied" of anything but only to provide simple information setting out the name of the candidate, that the candidate had secured the necessary number of votes to be eligible for reimbursement and a reimbursement figure that amounted to 15% of the candidate's spending limit (i.e. no reference to actual expenses incurred by the candidate).

Third, the statute required the candidate to provide documents evidencing the election expenses claimed and provided that if the Chief Electoral Officer was of the opinion that the documents provided were not sufficient the Chief Electoral Officer could require the provision of further documents. The Court of Appeal held that: "If the CEOC's function under subsection 465(1) were as limited as the Respondents allege, the CEOC would never, or hardly ever, need to request candidates to provide the supporting evidence stipulated in subsection 451(2.1), or to require the production of additional documents under subsection 451(2.2)." The Court of Appeal stated that:

> "The existence of these powers suggests that candidates' duty to provide the documents described in the sections of the Act listed in subsection 465(1) implicitly requires that the information contained in them is correct. Similar indications are found in section 457, which authorizes the CEOC to "correct a document referred to in subsection 451(1) or 455(1), if the correction does not materially affect its substance", and in section 458, under which, at the request of a candidate, the CEOC may authorize corrections. Thus, in order to comply with the duty to submit the listed documents, candidates must submit documents that accurately reflect the costs that they actually incurred, and claimed as election expenses in accordance with the Act."

Fourth, the Court of Appeal felt that the express authorization for the Commissioner of Canada Elections (who was responsible for prosecutions under the Act) to make inquiries into possible offences the Court of Appeal did not mean that the Chief Electoral Officer did not also have the authority to inquire into the propriety of expenses claimed in candidates' electoral campaign returns. This was because the Chief Electoral Officer's residual authority to carry out the functions "necessary for the administration of the Act served as such authority. The Court of Appeal concluded that the monitoring of the accuracy of expenses were functions necessary for the administration of the Act and within the Chief Electoral Officer's responsibilities.

> "66 It would surely be surprising if Parliament intended to oblige the CEOC to provide a certificate entitling a candidate to obtain a reimbursement of election expenses from public funds when the CEOC was not satisfied that an expense claimed was statutorily permitted. To limit the CEOC's function in the manner urged by the Respondents is not congruent with the broad powers and responsibilities of the office set out in section 16.
>
> 67 Nor can it be said that by specifically empowering the Commissioner to inquire into suspected offences under the Act, Parliament implicitly withdrew from the CEOC's general functions the task of verifying the propriety of candidates' claimed election expenses. The CEOC and the Commissioner have different roles in the administration of the Act. Making inquiries with a view to possibly turning over a file to the DPP to decide whether to lay charges is one thing; it is another, however, to audit returns in order to be satisfied that candidates are entitled to be reimbursed from public funds for costs incurred during an election, and have included in their electoral campaign returns a complete and accurate statement of their election expenses, as well as the commercial value of any non-monetary benefits that they had received."

The Court rejected the argument that the authority of a court presiding over a criminal prosecution of a breach of the Elections Act to order the reimbursement of public funds paid to reimburse expenses found to be ineligible was only a partial safeguard of public funds. "The standard of proof in penal proceedings is high, and conviction may require proof of a guilty intent. Accordingly, paragraph 501(1)(a.7) is unlikely to include all candidates whose expenses should not have been reimbursed. Without the administrative check by the CEOC on the propriety of claimed election expenses, many irregularities could well slip through unnoticed."

The Court of Appeal distinguished an earlier decision of the Federal Court of Appeal in *Stevens v. Conservative Party of Canada,* 2005 CarswellNat 3774, 2005 FCA 383 (Fed. C.A.) that dealt with the merger of political parties and the registration thereof by the Chief Electoral Officer where the Federal Court of Appeal had held that the duty of the Chief Electoral Officer to amend a party register on his being satisfied that the conditions of the Act had been met did not authorize the Chief Electoral Officer to go to questioning the validity of the documents he had been given by the applicants seeking registration. The Court of Appeal noted that the two responsibilities were significantly different in nature. Calling upon the Chief Electoral Officer to question the propriety of political arrangements entered into to merge a political party would call into question the neutrality of the office and possibly compromise democracy. However, verifying the accuracy of documentary evidence submitted to establish claimed election expenses could not plausibility be said to compromise democracy. "Questioning the propriety of an election expense is a routine matter, and is very different from probing the often highly politically charged circumstances of the merger of political parties." Furthermore, the Court noted that there was nothing in the provisions respecting the merger of parties mirroring the requirement for the provi-

sion of documentary evidence to support the statement of election expenses contained in an electoral campaign return and the power of the Chief Electoral Officer to require further documentation.[2.2C]

In *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board* (2008), 2008 CarswellOnt 5372, 298 D.L.R. (4th) 231 (Ont. Div. Ct.) a majority decision of the Ontario Divisional Court held that the Ontario Energy Board's power to set energy rates did not expressly or implicitly extend to imposing conditions on the ability of the energy company to spend its revenue by declaring dividends (thus indirectly controlling revenue requirements through controls on expenditures). Having found that the terms of the statute did not expressly provide the required authority, the majority decision went on to consider whether that authority could be seen as being implicit. The majority held that the legal test was:

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

However, the majority of the Court was not "persuaded that the jurisdiction to impose restrictions on the process for the declaration of dividends by directors is necessary or essential to the core function of the OEB, namely rate-setting." Referring to earlier decisions of the Board, in which it had held that it had no authority to regulate the conditions under which energy companies amalgamated or the rate of return granted to shareholders by board of directors, the majority of the Court held that it was similarly not a necessary part of the Board's objectives or role in rate regulation to control the declaration of dividends. The majority also held that there were other statutory safeguards in the Ontario *Business*

2.2C The two preceding cases of *Nishnawbe Aski Nation* and *Campbell v. Chief Electoral Officer* are illustrative of the importance of context and mandate in determining the ability of an agency to question the validity of documents or assertions filed with it as triggering preconditions to the exercise of authority. Both cases involved the exercise of authority by an agency which would be based on documents filed by entities outside of the agency. In such cases the question exists as to how far an agency can or must go behind a document to determine the validity of an assertion contained therein. This situation is very common in agency practice and arises in many different ways for example, the filing of a written agency authorization by a non-lawyer asserting the right of the agent to represent a party. As illustrated by the *Stevens* case (cited in *Campbell v. Chief Electoral Officer)* sometimes the agency is required to accept the document on its face. But, as illustrated by *Nishnawbe Aski Nation* and *Campbell,* even in the absence of express statutory direction, the statutory language, context and role of the agency may indicate that the agency in either entitled or required to determine the validity of the tendered instruments (which will likely always be on the civil balance of proof).

Corporations Act (under which the energy company operated) to control the concerns of the Board respecting the declaration of dividends including:

> . . . the duty of a director to act honestly and in good faith (s. 134), the requirement that the solvency test is met before declaring a dividend (s. 38(3)), the liability on the director to restore amounts paid (s. 130), and the well-established fiduciary duty of directors to act in the best interests of the corporation at all times.

The use of the doctrine to extend an agency's jurisdiction must be carefully connected to the purpose of the statute.[2.2D] In order for an agency to claim authority by implicit grant that authority must be actually necessary for the administration of the terms of the legislation. "[C]oherence, logicality, or desirability are not sufficient."[2.3] Nor is it sufficient that it would be practical or efficient for the agency to have the authority in question.[2.4]

2.2D See the earlier noted decisions by the Ontario Court of Appeal in *Nishnawbe Aski Nation v. Eden*, 2011 CarswellOnt 1474, 2011 ONCA 187 (Ont. C.A.) and the Federal Court of Appeal in *Campbell v. Canada (Chief Electoral Officer)*, 2011 CarswellNat408, 2011 FCA 74 (Fed. C.A.) where the purpose to be served by the agency was a significant factor in finding implied jurisdiction.

2.3 *Canada (Canadian Human Rights Commission) v. Canadian Liberty Net*, [1988] 1 S.C.R. 626, 157 D.L.R. (4th) 385, 6 Admin. L.R. (3d) 1, 224 N.R. 241 (S.C.C.). In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 CarswellQue 1268, 2001 SCC 40 (S.C.C.), the Supreme Court of Canada repeated the direction that statutory bodies, in this case a municipality, possess only those powers expressly conferred by statute, necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the accomplishment of the body's mandate.
The difficulty in determining at which point of the spectrum between convenient and indispensable a claimed authority may fall can be seen in the Manitoba Court of Appeal in *Hudson Bay Mining & Smelting Co. v. Cummings*, 2004 CarswellMan 480, 2004 MBCA 182 (Man. C.A.) in which the Court of Appeal, relying on the earlier SCC decision in *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (S.C.C.) held that a provincial judge presiding over an inquiry under the Fatality Inquiries Act has the implicit authority to order the disclosure of documents by a party. The Act provided no express authority for such an disclosure order but the Court of Appeal held that:

> . . . the making of such an order is truly necessarily incidental to his jurisdiction as an inquest judge. It is required as a matter of practical necessity for the inquest judge so that he may accomplish the very wise purposes set out in s. 33(1) of the FIA. The power to order disclosure would in my opinion increase and possibly by a substantial measure, the likelihood that an inquest judge could make truly meaningful recommendations under the FIA. The power would help the inquest judge fulfill the role he plays under that section. Since the ultimate goal of the inquest judge includes the making of recommendations in a number of areas, providing the judge with all the tools that might be reasonably necessary to do the job accords well with a functional and structural approach to assessing jurisdiction.

2.4 *Northrop Grumman Overseas Services Corp. v.Canada (Attorney General)*, 2009 SCC 50 (S.C.C.). The issue in this case was whether the Canadian International Trade Tribunal could receive complaints from non-Canadian suppliers. In holding that under the statute only Canadian suppliers could make complaints the Supreme Court of Canada also rejected the idea that the practicality of the CITT assuming jurisdiction could support the claim of authority. The authority of the agency had to be found in its statute.

> It is suggested that the CITT provides an efficient dispute resolution mechanism to which there should be ready access. While the CITT may be an efficient dispute resolution vehicle, it is a statutory tribunal and access to it must be found in the relevant statutory

In *Balancing Pool v. TransAlta Corp.*, 2013 CarswellAlta 2331, 2013 ABCA 409 (Alta. C.A.) the Alberta Court of Appeal held that it in order to establish an authority by necessary implication it was not sufficient merely to establish that the authority would be helpful to the agency. In that case an agency was found not to have the power to physically enter an inspect the premises of an energy generator by necessary implication when the legislation expressly provided adequate alternative means for the agency to establish the facts which it required in order to perform its mandate.

In the case in point the agency had to be able to establish that an energy generator had suffered damages due to a *force majeure* which triggered an obligation on the agency to provide certain financial services. The agency claimed that it had to have the power to physically inspect the plant in order to verify that the occurrence had taken place and that repairs were being made appropriately in order to mitigate the resulting loss which fact went to the agency s obligation to make certain compensatory payments to third parties under the legislation. The Alberta Court of Appeal disagreed. After determining that legislation did not provide an express power to inspect the Court of Appeal went on to determine that the power to physically inspect was not necessary for the agency to be able to carry out its mandate because the legislation had provided an alternative method to achieve the same result. Under the legislation the claimant was obliged to satisfy the agency that a *force majeure* incident had taken place and was required to send reports and other documentation to the agency. If, after receiving all of the documentation the agency disagrees with the claimant the legislation provided for a dispute resolution process. The burden of proof always remains on the claimant to establish both the incident and that it mitigated the loss.

The Court of Appeal noted that in order to established jurisdiction by necessity the Supreme Court of Canada had stated in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 CarswellAlta 140, 2006 SCC 4, 263 D.L.R. (4th) 193 (S.C.C.) that enabling statutes are to be construed to included not only those expressly granted powers but also those powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime. The Court also noted that section 25(2) of Alberta's *Interpretation Act* similarly provided that:

> 25(2) If in an enactment power is given to a person to do or enforce the doing of any act or thing, all other powers that are necessary to enable the person to do or enforce the doing of the act or thing are deemed to be given also.

However, in light of the burden on the claimant to establish the facts necessary for the agency to perform its duty and the existence of the legislatively

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instrument. The statutory provisions provide that access to the CITT is pursuant to specific trade agreements negotiated by governments. If the government of a supplier did not negotiate access to the CITT for its suppliers, there is no access for them.

mandated dispute resolution process to resolve any disagreement the Court of Appeal stated that "[w]hile a power to inspect at this stage, might be helpful, it cannot be implied as necessary to the process."

The doctrine of jurisdiction by necessary implication was considered in *Ref. Re National Energy Board Act.*[3] Two qualifications were placed on the doctrine in that case by the Federal Court of Appeal. Essentially, the doctrine can only be applied if the following two conditions are met:

(1) The implied jurisdiction must be required as a matter of practical necessity for the agency to accomplish its mandate. This will not be met in cases where the tribunal can accomplish its purpose without the jurisdiction; and

(2) The question of the implied jurisdiction to perform an act must not be one to which Parliament clearly addressed its mind as evidenced by explicit provisions in other statutes or contrary provisions in the piece of legislation in question.

In *Interprov. Pipe Line Ltd. v. Nat. Energy Bd.*[4] the Federal Court of Appeal found that an NEB order compelling the production of documents, although not explicitly authorized by the legislation, was required as a matter of "practical necessity" to enable the NEB to accomplish its purpose. It is clear that the Court's definition of the phrase "practical necessity" did not mean that the power exercised by the Board was absolutely necessary for the NEB to achieve the objects of the statute. Rather, the power was necessary for the Board to *effectively* and *efficiently* carry out its purpose. More important, the Court looked beyond the express provisions of the statute to its purpose and concluded that to deny the power would defeat the purposes of the statute.[4.1]

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3 *Ref. Re National Energy Board Act*, 19 Admin. L.R. 301, 29 D.L.R. (4th) 35, 69 N.R. 174, [1986] 3 F.C. 275 (Fed. C.A.), leave to appeal to S.C.C. refused (1986), 23 Admin. L.R. xxi (note).

4 *Interprov. Pipe Line Ltd. v. Nat. Energy Bd.*, 78 D.L.R. (3d) 401, [1978] 1 F.C. 601, 17 N.R. 56 (Fed. C.A.).

4.1 See also *C. (C.) (Litigation Guardian of) v. Ontario Health Insurance Plan* (2009), 2009 CarswellOnt 127 (Ont. Div. Ct.) where the alleged authority was found as a matter of necessary implication in light of the practical realities of the operation of the statute in order for it to accomplish its purpose. Although there was no express statutory authority for the General Manager of the Ontario Health Insurance Plan to give retroactive consent to the incursion outside of Ontario of a health expense, the Ontario Divisional Court held that that authority existing by "necessary implication" in order to give overall effect to the purpose of the legislation as it would not be practically possible in all cases to secure advance consent particularly in the cases of emergencies.

> To require prior approval even in circumstances where the Ministry can not provide approval in a timely manner would undermine the purpose of s. 28.4 of the regulation, which aims to compensate those whose health will be at serious risk because of a delay in obtaining needed medical treatment. In my view, there is a practical necessity that the Ministry be able to provide retroactive approval in urgent cases where prior approval can not be obtained. This may be due to the fact that the Ministry offices are not open. In some cases, it may be because the circumstances are so urgent that the patient must be sent for treatment before approval has come through or can be sought. The doctrine of necessary implication is appropriately applied in this context to confer the power on the General Manager to grant retroactive prior approval.

Practical reality also served as the basis for the finding of an implicit authority in *Carter v. Travelex Canada Ltd.*, 2009 CarswellBC 1064, 2009 BCCA 180 (B.C.C.A.). That case

A third decision involving the Federal Court found that even in the absence of specific statutory criteria or directions, the Canadian Radio-television and Telecommunications Commission ("CRTC") had the jurisdiction to impose maximum fees that a licensee cable company could charge its subscribers. The Court reviewed the main purposes of the Broadcasting Act, considered the doc trine as cited from Halsbury's Laws of England and found that the CRTC did have jurisdiction to fix the maximum fee.[5]

Broad powers were found to be vested in the CRTC by the Supreme Court of Canada in the *Capital Cities*[6] case upon which I have commented in other chapters: see also *Toronto (City) v. Solway.*[7]

In the early cases, the courts felt some duty to supply powers that they believed had been unintentionally omitted by Parliament: see Dreidger, *Construction of Statutes.*[8] In *Minister of Transport for Ont. v. Great American Ins. Co.,*[9] the Court of Appeal filled in a gap in legislation dealing with notice. In that case the Court stated:

> It is plain to my mind that this is a case in which the true and perfect intention of the legislative body has received imperfect expression. If the intention of the leg islature is deemed to be defective on ethical grounds the court would not be war ranted in attempting to correct it on such grounds for to do so would be to arrogate to itself legislative powers. But here what may be called the dormant or latent intention of the legislature plainly appears, and the logically defective letter of the enacted law may and should be made logically perfect so as to give effect to the legislative intention which is clearly evident despite the imperfection or incomplete ness of the language in which the enactment is couched.

An appeal to the Supreme Court of Canada was dismissed without reasons: see also *R. v. Krentz* and *Pitts v. Steen.*[10]

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considered s. 27(1)(d)(ii) of the B.C. Human Rights Code which authorized the Human Rights Tribunal to dismiss a complaint with or without a hearing where a proceeding would not further the purposes of the Code. The B.C. Court of Appeal found it implicit in this authority that the Tribunal could dismiss a complaint without a hearing where a settlement offer has been made which the Tribunal felt was reasonable and similar to the award likely to be made if the complaint proceeded.

> In my opinion, common sense dictates that the Tribunal is within its jurisdiction to dismiss a claim if, to proceed with it, would result in the same or nearly same award but with the inevitable attendant costs to the Tribunal and the parties. This interpretation is also supported by my reading of s. 27(1)(d)(ii) in relation to the scheme and object of the *Code* and the intent reflected therein. To find otherwise would burden the Tribunal and parties willing to settle with unnecessary expenditures of time and money. That cannot have been the legislator's intent.

5 *Can. Broadcasting League v. C.R.T.C.*, [1983] 1 F.C. 182, 67 C.P.R. (2d) 49, 138 D.L.R. 512, 43 N.R. 77 (Fed. C.A.), affirmed [1985] 1 S.C.R. 174, 57 N.R. 76.

6 *Capital Cities Communications Inc. v. Can. Radio-television and Telecommunications Comm.*, [1978] 2 S.C.R. 141, 36 C.P.R. (2d) 1, 18 N.R. 181, 81 D.L.R. (3d) 609.

7 *Toronto (City) v. Solway* (1919), 46 O.L.R. 24, 16 O.W.N. 306 (C.A.).

8 Dreidger, E.A. *Construction of Statutes,* (Toronto: Butterworths, 1983) at p. 96.

9 *Ontario (Minister of Transport) v. Great American Ins. Co.* (1966), 57 D.L.R. (2d) 27 (C.A.).

10 *R. v. Krentz,* [1976] 6 W.W.R. 527, 31 C.C.C. (2d) 450 (B.C.S.C.); *Pitts v. Steen; Northern*

The powers of a board can be broadly interpreted where a court feels that to do so is within the general scheme of mandating legislation. The decision of Mr. Justice Keith in *Union Gas Ltd. v. Dawn*[11] supports this view.

> [I]t is clear that the legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and hence must be classified as special legislation.

Also at page 622, the Justice stated:

> In my view this statute makes it clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board . . .
>
> These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in s. 40(8) [now s. 48(8)], s. 41(3) [now s. 49(3)] and s. 43(3) [now s. 51(3)], which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served . . .
>
> In the final analysis, however, it is the Energy Board that is charged with the responsibility of making a decision and issuing an order "in the public interest".
>
> The jurisdiction of the Ontario Energy Board is very broad. It is charged with the regulatory and quasi-judicial functions covering the entire field of energy within the Province of Ontario.

On the other hand, in *Re Ontario Energy Board*[12] the court found that although the Board had very broad powers, including the power to award costs and although costs were in the discretion of the Board by virtue of section 28 of the OEB Act, the definition of the word "costs" could not be left to the Board's competence to interpret. This decision has been examined in more detail in Chapter 27 dealing with costs.[12.1]

The Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-Television & Telecommunication Comm.)*[12.2] acknowledged that the powers of any administrative tribunal must be stated in its enabling statute but also held that

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Plumbing & Mechanical Ltd. v. Pitts, [1981] 3 W.W.R. 289, 18 A.P.R. 279, 119 D.L.R. (3d) 398 (N.W.T.S.C.).

11 *Union Gas Ltd. v. Dawn; Tecumseh Gas Storage Ltd. v. Dawn* (1977), 2 M.P.L.R. 23, 15 O.R. (2d) 722, 76 D.L.R. (3d) 613 (Div. Ct.) at D.L.R. p. 625.

12 *Re Ontario Energy Board* (1985), 51 O.R. (2d) 333 (Div. Ct.).

12.1 See also *Westfair Foods Ltd. v. R.W.D.S.U., Local 454* (1993), 15 Admin. L.R. (2d) 260, 110 Sas.k R. 139 (Q.B.) which considered the extent of the authority of the Saskatchewan Labour Relations Board to award damages. The Board was expressly given the authority to award damages in respect of a discharge of an employee. Insofar as this express power was exerciseable only in the specific circumstances the Board was found not to have the authority to do so in other circumstances. Nor could it rely on its general power to exercise such powers and perform such duties as are conferred or imposed on it by the Act or as may be incidental to the attainment of the objects of the Act.

12.2 [1989] 1 S.C.R. 1722, 38 Admin. L.R. 1.

authority may also exist by necessary implication and that the courts must refrain from overly technical interpretations of statutes which would sterilize the powers of an agency. Thus, the nature of the mandate of the agency is important in determining whether an agency has an implicit authority. In *Bell* the Supreme Court found that within the scheme of the Railway Act and the National Trans portation Act the express authority given to the CRTC to make interim orders necessarily implied the power to revisit the periods during which the interim orders were in force. The Court stated that "The fact that this power is provided explicitly in other statues cannot modify this conclusion based as it is on the interpretation of these two statutes as a whole."[12.3]

A reading of many cases dealing with implied powers reveals that there are no clear rules or criteria under which a court will imply a power. Ian Rogers in his excellent text on the "Law of Canadian Municipal Corporations"[13] comments:

> The proposition that local authorities are confined within the limits of their express powers does not mean that they are limited to the precise terms of the grant and that the power to do each particular act must be specifically delegated. They may also exercise powers which are necessarily or fairly implied or incidental to their express powers. Implied powers are not limited to those which are indispensably necessary to carry into execution those expressly granted but they are implied from the necessity that the latter may be more completely executed. They may arise from a grant of an express power or by logical inference from the purposes and functions of the corporation with which they must be in consonance. While any fair and reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, they will give effect to an implication so strong as to amount to an actual expression.[13.1]

12.3 See also *Canada (Attorney General) v. Grover* (1994), 80 F.T.R. 256 (T.D.) where the remedial nature of the Canada Human Rights Act, and the inherent difficulties in implementing remedial orders issued led the Federal Court Trial Division to conclude that a Canadian Human Rights Tribunal had the implied authority to reserve jurisdiction on issuing an order as might be necessary for the successful implementation of the order. In *CTV Television Network Ltd. v. Canada (Copyright Board)*, [1993] 2 F.C. 115, 46 C.P.R. (3d) 343, 99 D.L.R. (4th) 216 (C.A.), leave to appeal to S.C.C. refused (1993) 107 D.L.R. (4th) viii (note) S.C.C. the Federal Court of Appeal found that the Copyright Board had the implied authority to determine at least some questions of law. The Board was not explicitly granted the authority to determine questions of law. However, the Court found that the Board had to have that authority to the extent that it was necessary for the Board to exercise its rate fixing function. The Court gave as an example the ability of the Board, in the exericise of that function, being able to determine those matters establishing its jurisdiction. This included such things as whether or not the party filing a proposed statement of royalites is entitled to do so, whether or not the statement is in relation to a musical work, and whether or not it is for the grant of licences for the performance of protected works in Canada. "[T]he Board possess the incidental powers which are necessary and inexorably linked to the exercise of its function.... This may entail deciding preliminary or collateral issues and questions of law." To the same effect see *Dynamex Canada Inc. v. Mamona*, 2002 CarswellNat 808, 2002 CarswellNat 2364, 2002 FCT 393, 2002 CFPI 393 (Fed. T.D.) (referee under the Canada Labour Code has implicit authority to determine preliminary jurisdictional question whether person is an employee who can make a claim under Code).

13 Rogers "Law of Canadian Municipal Corporations," 2d Ed. (Toronto: Carswell, 1971) at Vol. 1, para. 63.32.

13.1 Thus, the Ontario Court of Appeal found that a legislative grant to the Minister of Transportation of the statutory power to operate ferries and to acquire land and equipment and machinery for that purpose, included, as incidental thereto, the authority to impose and collect ferry tolls or fares. In

Therefore, the powers do not need to be absolutely indispensable. It will be sufficient if the powers in question can be seen as being sufficiently necessary to the effective and efficient performance of the agency's mandate that it would be reasonable to assume that in giving the agency that mandate to perform Parliament or a legislature implicitly gave the agency the authority in question in order to perform that mandate.[14] In carrying out this analysis, consideration must be given to the other powers possessed by the agency. If the legislature has already expressly directed its mind to the authority which an agency is to have respecting a particular remedy or issue it may be difficult to argue the existence of an implicit grant of authority in addition to that expressly which has been provided.[15] The existence of an implicit authority based on mandate is essentially

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the opinion of the Court, that authority should be implied pursuant to the direction in section 10 of the Interpretation Act, R.S.O. 1990, c. I.11 as being such fair, large and liberal construction and interpretation as will ensure the attainment of the object of the Act according to its true intent, meaning and spirit *(Wolfe Island (Township) v. Ontario (Ministry of Environ ment)* (1995), 23 O.R. (3d) 737 (C.A.)).

14 See for example, *Hudson Bay Mining & Smelting Co. v. Cummings*, 2004 CarswellMan 480, 2004 MBCA 182 (Man. C.A.).

15 See, for example, the earlier noted decision of the Ontario Court of Appeal in *Nishnawbe Aski Nation v. Eden*, 2011 CarswellOnt 1474, 2011 ONCA 187 (Ont. C.A.) (in determining whether a coroner had the authority to question the validity of the jury rolls from which a coroner's jury is selected) the Ontario Court of Appeal listed a number of criteria which it stated were taken from *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 CarswellAlta 139, 2006 SCC 4, 263 D.L.R. (4th) 193 (S.C.C.). The listing of these criteria essentially amount to determining whether a power is necessary for a statutory body to fulfill its mandate and whether there was any indication (either expressly or by reference to other provisions) whether the legislature did not wish the body to have the authority in question.

> "34 In *ATCO*, the Supreme Court of Canada enumerated the circumstances in which the doctrine of jurisdiction by necessary implication may be applied:
>
> i. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the statutory body fulfilling its mandate;
> ii. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
> iii. when the mandate of the statutory body is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
> iv. when the jurisdiction sought is not one which the statutory body has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
> v. when the legislature did not address its mind to the issue and decide against conferring the power to the statutory body."

These criteria were also followed by the majority in the Ontario Divisional Court decision in *Toronto-Hydro-Electric System Ltd. v. Ontario Energy Board*, 2008 CarswellOnt 5372, 298 D.L.R. (4th) 231 (Ont. Div. Ct.).

See for example, *Westfair Foods Ltd. v. R.W.D.S.U., Local 454* (1993), 15 Admin. L.R. (2d) 260, 110 Sask. R. 139 (Sask. Q.B.). (As the Saskatchewan Labour Relations Board was expressly given the authority to award damages in respect of a discharge of an employee by the Sask. Trade Union Act, the Board was found not to have the authority to do so in other circumstances. Nor could it do so pursuant to its general power to exercise such powers and perform such duties as are conferred or imposed on it by the Act or as may be incidental to the attainment of the objects of the Act.)

See also *Ref. Re National Energy Board Act*, 19 Admin. L.R. 301, 29 D.L.R. (4th) 35, 69 N.R. 174, [1986] 3 F.C. 275, 1986 CarswellNat 225, 1986 CarswellNat 690 (Fed. C.A.), leave to appeal to S.C.C. refused (1986), 23 Admin. L.R. xxi (note) (S.C.C.), where the Federal Court, after noting that the claimed authority must be required as a matter of practical necessity, went on to say that:

that in granting the mandate Parliament must have implicitly also granted such authority as necessary to perform that mandate. Where Parliament appears to have provided an express authority for that purpose it may be difficult to argue that it also implicitly provided another on the grounds that the implicit authority may operate better. Notwithstanding, the existence of an express authority is not determinative of the issue particularly where the implicit power can be seen to address a different circumstance than the express.[16] The essential issue remains as to whether the implicit authority is necessary for the efficient and effective performance of the agency's mandate.

Some powers cannot be established by implication but must be evident by express or clear wording from the legislature. These are authorities or authorities which are generally considered by the courts to be so significant that a legislature wishing to grant an agency that power would do so clearly rather than leave the matter to implication. The authority to deviate from the principles of natural justice and fairness is an historic example of such a case.[17] Similarly, the power to award costs requires a grant by clear words.[18] Another example is the authority to dispense with solicitor-client privilege.[19] Thus, in *Newfoundland & Labrador (Attorney General) v. Newfoundland & Labrador (Information & Privacy Commissioner)*, 2011 CarswellNfld 353, 2011 NLCA 69 (N.L.C.A.) the Newfoundland and Labrador Court of Appeal, following the Supreme Court of Canada in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (S.C.C.) held that the authority to impinge upon solicitor-client privilege cannot be established by reasonable implication. Language authorizing the incursions upon the privilege must be explicit. This was in the context of

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> The question of the implied jurisdiction to perform an act must not be one to which Parliament clearly addressed its mind as evidenced by explicit provisions in other statutes or contrary provisions in the piece of legislation in question.

16 See for example, *Hudson Bay Mining & Smelting Co. v. Cummings*, 2004 CarswellMan 480, 2004 MBCA 182 (Man. C.A.). The issue in that case was whether a judge presiding over an inquiry under the provincial Fatalities Inquiries Act had the authority to order disclosure of statements secured by the Crown from potential witnesses. It was argued before the Court that as the inquest judge was expressly given the authority to require disclosure by subpoena it would be improper to imply a similar power to require disclosure simply by order. The Court of Appeal rejected this argument on that grounds that the subpoena power granted to the judge was worded such subpoenas were authorized "requiring the attendance of witnesses". The Court held that the implicit disclosure power argued for was a different power altogether as it did not require the compulsory attendance of witnesses such that the express power to issue subpoenas could not logically be seen as relevant to the issue of the implicit grant.

> . . . [A]n order for production or disclosure has no necessary connection to a particular individual who will be called as a witness. It is, therefore, no answer to the jurisdictional argument to say, as was argued here, that another power exists in the statute and should be exercised; the subpoena power is fundamentally different from a power to order production.

17 See *Innisfil (Township) v. Vespra (Township)*, 1981 CarswellOnt 466, [1981], 2 S.C.R. 145. See also the discussion earlier in chapter 12.2(c) "Hearings Must Be Fair" and particularly the cases listed in footnote 17.

18 See the discussion earlier in chapter 27 "Costs", notably under heading 27.3 "Costs Generally".

19 *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 CarswellNat 2244, 2008 SCC 44.

whether the provincial Access to Information and Protection of Privacy Act gave the Information and Privacy Commissioner the authority to require the production of documents for which solicitor-client privilege was claimed in order to determine if the exemption from disclosure under that Act for such documents applied.

> 29 As both parties correctly acknowledged, the interpretive principle set out in the Desçteaux line of cases applies to the interpretation of section 52 of ATIPPA. This principle of interpretation was restated by Binnie J. in Blood Tribe at para. 11:
>
> ... [L]egislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client documents:Lavallee, at para. 18; Pritchard, at para 33 ...

Consequently, the Information and Privacy Commissioner could not argue that insofar as he could not make a determination as to whether the statutory exemption from disclosure applied without examining the documents the Commissioner's statutory right to examine documents had to extend to documents protected by solicitor-client privilege by reasonable implication.

29.3 DETERMINING THE PRACTICAL NECESSITY

As noted earlier under chapter heading 29.1, the existence of an implicit power is a question of statutory interpretation. Notwithstanding, where one is attempting to demonstrate that an agency must have a particular authority in order to be practically able to carry out its mandate does one have to prove by evidence actual cases of such need? One does not. A practical necessity does not always have to be established by factual demonstration, but can, in some cases, be identified by logical inference from the nature of the mandate of an agency. One does not have to wait for an actual history of failures or difficulties to prove the necessity.

This was the conclusion of the British Columbia Court of Appeal in *Pugliese v. British Columbia (Registrar of Mortgage Brokers),* 2008 CarswellBC 609, 2008 BCCA 130 (B.C. C.A.) where the Court held that while it was open to a party to call evidence to prove the practical necessity, in other cases the necessity would follow from an application of the usual rules of statutory interpretation. The case in point was illustrative of such an instance. It turned on the authority of the British Columbia Registrar of Mortgage Brokers, in refusing an application for registration as a mortgage broker, to order that the applicant not be able to reapply for a set period of time.

While section 4(c) of British Columbia's Mortgage Brokers Act, R.S.B.C. 1996, c. 313 expressly authorized the Registrar of Mortgage Brokers to attach terms, conditions and restrictions to a mortgage broker's registration of renewal of registration, the Act was silent on whether the Registrar could attach such conditions to a *refusal* of registration. In the case in point the Registrar had refused to register an applicant as a broker as the Register held that the applicant

was unsuitable and his registration was objectionable. This decision was based on the fact that four years earlier the applicant had been convicted of conspiracy to traffic in cocaine and possession of cocaine for trafficking. In refusing the registration the Registrar stated that he would not consider an application until five years after the completion of the applicant's sentence (2014) and even then would not do so unless the applicant could demonstrate that he had rehabilitated himself and reestablished his suitability.

As there was no express authority for such actions the question before the Court was whether an implicit authority existed as a matter of practical necessity. The over-all purpose of the Act was to protect the public interest by ensuring that those who were registered as brokers were suitable and unobjectionable. The Court stated that, in light of the nature of the concerns of the Act, it was evident that the Registrar had to have the authority to control the number of repeat applications where the very ground of rejection was immutable for a period of time. This was so even in the absence of any actual history of such abusive practices by parties.

> In my view, the question of whether there is a practical necessity for the Registrar to be able to effectively control the licensing process by precluding repeat applications for registration is not one requiring evidence of repeated abuses in order to succeed. It cannot be doubted that repeated applications for registration by the same applicant where the condition of unsuitability or objectionability (assuming it to be valid) is one which, by its very nature, is immutable for a period of time, would be abusive of the system of registration laid out under the Act. Under s. 4(b) of the Act, the Registrar cannot refuse to grant registration without giving the applicant an opportunity to be heard. If the Registrar had no power to prescribe a time during which he would not reconsider an application, he would be bound to provide a form of hearing even in circumstances where the very ground of unsuitability or objectionability had been determined by him in a prior hearing, and in other circumstances which are clearly abusive of the process. In my view, this would be contrary to the public interest in an efficient and orderly determination of suitability to practise as a broker. In fact, I am inclined to the view expressed by counsel for the FST (Financial Services Tribunal) that the impugned power exists to protect against any abuse of the licensing process and is not dependent upon the existence, or proof of, systemic abuse of the system.

Because the determination of authority by implication is essentially a matter of the agency's home legislation or legislation closely related to the agency's functions the determination of authority by implication is affected by the *Dunsmuir* standard of review analysis. As *Dunsmuir* directs that a court grant deference to an agency's interpretation of its home legislation (subject to a limit number of exceptions which are discussed in detail later in chapter 28) it appears that a court must also generally approach the agency's determination of its implied authority with deference. Thus, it appears that a court should not interfere with an agency's determination that an implied authority is necessary for the agency's effective and efficient performance of its mandate.

See, in illustration, *Bell Canada v. Amtelecom Limited Partnership*, 2015 CarswellNat 1731, 2015 FCA 126 (Fed. C.A.) the Federal Court of Appeal held that insofar as the relevant statute did not expressly give the CRTC the authority to make to make retrospective rulings or rulings which interfered with vested rights the CRTC could do so only if that power arose by necessary implication because without that power it could not fulfill its statutory mandate.

However, the agency's conclusion on that issue was subject to the reasonableness standard of review as an interpretation of the agency's home statute.

In the case of the retrospective application of a ruling lifting the payment of early termination cancellation fees for existing wireless contracts the Court of Appeal held that the Commission's view of the necessity for the retrospective authority was reasonable.

> 56. At paragraph 365 of the Code, the CRTC noted that if the Code only applies to new contracts, "many Canadians with pre-existing wireless contracts will not fully benefit from the Wireless Code until these pre-existing contracts expire or are amended." Given the CRTC's intention to put more information into the hands of consumers so as to increase the dynamism of the market, it is reasonable to have all consumers on the same footing as soon as possible. It is perhaps this limited non-technical view of "undue discrimination" which the CRTC had in mind. From the point of view of the regulation of the retail market in voice and data wireless services, the CRTC could reasonably consider that section 24, by necessary implication, gives it the power to impose the Code retrospectively.

In *Amtelecom Limited Partnership* the CRTC had the clear authority to make the type of rulings in question — the issue was whether that power could be exercised retrospectively. This would be seen as determining the parameters or extent of a power granted by legislation and not a true question of jurisdiction as conceived by *Dunsmuir*. In the event that whether an implied power does meet the criteria of a true question of jurisdiction in the *Dunsmuir* sense the traditional correctness standard of review would apply.