EB-2008-0222
EB-2008-0223
EB-2008-0224

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF applications by Canadian Niagara Power Inc. – Eastern Ontario Power, Canadian Niagara Power Inc. – Fort Erie and Canadian Niagara Power Inc. – Port Colborne for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2009.

MOTION RECORD OF CANADIAN NIAGARA POWER INC.

Ogilvy Renault LLP
Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800
Toronto, ON M5J 2Z4

Andrew Taylor
Tel: (416) 216-4771
Fax: (416) 216-3930
Email: ataylor@ogilvyrenault.com

Lawyers for the Applicants,
Canadian Niagara Power Inc.

TO: Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
26th Floor
P.O. Box 2319
Toronto, ON M4P 1E4

Tel.: (416) 481-1967
Fax: (416) 440-7656

AND TO: **SHIBLEY RIGHTON LLP**
250 University Avenue, Suite 700
Toronto, ON M5H 3E5

John De Vellis
Rosa Kang, Student-at-Law

Tel.: (416) 214-5232
Fax: (416) 214-5432
john.devellis@shibleyrighton.com

Lawyers for the Intervenor,
School Energy Coalition

AND TO: **ALL INTERVENORS**

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OGILVY RENAULT

Direct Dial: (416) 216-4771
Direct Fax: (416) 216-3930
ataylor@ogilvyrenault.com

Toronto, March 10, 2009

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2700, PO Box 2319
Toronto, ON, M4P 1E4

Dear Ms. Walli:

RE: Canadian Niagara Power Inc. ("CNPI")
EB-2008-0222, EB-2008-0223, EB-2008-0224

In accordance with the Board's Rules of Practice and Procedure, we hereby file CNPI's materials in response to the February 25, 2009 Notice of Motion filed by the School Energy Coalition.

Yours very truly,

Ogilvy Renault LLP

Andrew Taylor

Encls.
cc. All Parties Listed on Intervenor List

Tab 2

Canadian Niagara Power Inc.
("CNPI", or the "Applicant")
EB-2008-0222
EB-2008-0223
EB-2008-0224

CNPI's Responses to the SEC Motion Identified Interrogatories

1. **The lease arrangement among Port Colborne Hydro Inc. (the Lessor), the Corporation of the City of Port Colborne (the City), Canadian Niagara Power Inc. (the lessee) and Canadian Niagara Power Company Limited (the Lessee Guarantor)**

Initial SEC Interrogatory #24

Ref: (Ex.1/Tab 1/Sched.1/App.A)

Please file copies of the Master Implementation Agreement and Lease Agreement dated July 19, 2001, and any amendments thereto. Please confirm that the documents filed constitute all of the agreements between Port Colborne Hydro Inc. and Canadian Niagara Power Inc. If that is not the case, please file all other agreements between the parties including, without limiting the generality of the foregoing, any documents granting or amending any option to Canadian Niagara Power Inc. to purchase or acquire any asset or asset from Port Colborne Hydro Inc.

Response:

In response to this interrogatory, on December 12, 2008 CNPI provided the Master Implementation Agreement dated July 19, 2001 (the "MIA"). Exhibits to the Master Implementation Agreement that were also provided were: a Confidentiality Agreement (Exhibit 1 to the MIA); the City Guarantee (Exhibit 2 to the MIA), the Lease Agreement (Exhibit 3 to the MIA) and the Lessee Guarantee (Exhibit 4 to the MIA). With the exception of the Ancillary Agreements addressed in the response to SEC's Interrogatory #12 below, these are all of the agreements between Port Colborne Hydro Inc. and CNPI.

Supplementary SEC Interrogatory #12

1. (SEC #24, Attach A) With respect to the Master Implementation Agreement:
   a. p. 2 Please provide copies of the Ancillary Agreements. Please identify which costs associated with performance under those agreements are included in the costs of CNPI, how much those costs are, and where they are reflected in the Application.

   b. p. 3 Please provide copies of the appraisal reports referred to.

   c. p. 12 Please provide a copy of the Advance Tax Ruling, including the letter requesting that ruling, and any additional facts provided to the tax department in the course of obtaining the ruling.

   d. p. 13 Please provide a copy of the notification to the Minister of Finance.

   e. p. 22 Please provide a copy of the Closing Agenda for the transaction.

   f. App. A, p. 4 Please advise how, if at all, the lease payments are apportioned between the components of the Business, as defined, that are regulated activities and those that are not. If there is no allocation or apportionment, please explain.

   g. Exh. 1 Please provide a copy of the RFP referred to in the Confidentiality Agreement, and all proposals made by the Applicant or its affiliates in response to the RFP.

   h. Exh. 3 Please provide all documents in the possession of the Applicant setting out the calculation of the proposed rent amounts, including any net present value, cash on cash, equivalent purchase price, and similar calculations. In particular, and without limiting the generality of the foregoing,
      i. please provide details of the basis of the 6.99% discount rate referred to on page 3 of the Lease, and advise where and how that discount rate, or any similar rate, was used in the calculation of the appropriate rental amount, and
      ii. please provide details of any calculation that identified the relationship between the amount of the lease payments and the amount of the Option Price.

   i. Exh. 3, p. 10 Please identify any Modifications as set forth in section 9.2 that have vested in the Lessor.

   j. Exh. 3, p. 12 Please explain why insurance policies do not include the Lessor as a loss payee consistent with normal commercial practice.

k. Exh. 3, p. 17 Please provide a description of the mechanism that is expected to work if the Purchase Option is not exercised. Please include details of the obligations of the Lessor, the assets that must be purchased by the Lessor, and the pricing and terms of that transaction.

l. At page 15 of the Fortis Inc. 2002 Annual Report, the parent company of the Applicant says:

"FortisOntario is seeking to further expand its distribution business in Ontario by acquiring municipal electric utilities. The lease between Canadian Niagara Power and the City of Port Colborne, the first of its kind in Ontario, is an innovative approach to meeting that objective." (emphasis added)

Please explain how the Lease furthers the stated acquisition strategy.

Responses:

(a) The Ancillary Agreements referred to at page 2 of the MIA are: a Streetlight Installation and Maintenance Agreement; a Municipal Access Agreement; and a Pole Access and Attachment Agreement. There are no costs associated with these agreements included in the rate Application, so these contracts are not relevant for the purpose of this proceeding.

(b), (c), (d), (e) Please refer to the Comprehensive Response at Tab 3.

(f) The Lease payments pertain to the operation of Port Colborne Hydro Inc.'s distribution facilities. As such, the Lease payments are only allocated to CNPI–Port Colborne.

(g), (h) Please refer to the Comprehensive Response at Tab 3.

(i) CNPI-Port Colborne's rate base amounts reflect the modifications/additions to Port Colborne Hydro Inc.'s facilities.

(j) CNPI has an obligation to maintain and protect the Leased Assets and to keep them in good operating order and repair (section 8.1(a) of the Lease). Further, CNPI at its sole cost and expense, will promptly replace all parts and equipment incorporated or installed in or attached to any Lease Asset which become worn out, stolen, destroyed, seized, confiscated, damaged beyond repair or permanently rendered unfit for use by damage or obsolescence (section 8.4 of the Lease). Also, any proceeds from the sale or disposal in the ordinary course of business of any equipment that is surplus, obsolete or

damaged, shall be held by CNPI for the benefit of PCHI and shall be applied by CNPI for the purchase of equipment for use in the business. Title to any equipment purchased by CNPI with such proceeds shall vest in PCHI.

In addition to CNPI's obligations noted above, the Lease requires CNPI at all times and at its expense to maintain and carry insurance in respect of the Leased Assets and additional assets (section 11.1 of the Lease). Given these obligations to maintain the assets and insure them at its expense, it is commercially reasonable for CNPI to be paid the insurance proceeds with respect to any loss (section 11.3).

(k) Please refer to section 16.2 of the Lease.

(l) In 2002, it was FortisOntario's objective to acquire municipal electric utilities, subject to favourable tax treatment. At the time, further transfer tax holidays were unknown. In the absence of favourable tax treatment, FortisOntario obtained a leasehold interest in Port Colborne Hydro Inc.'s distribution facilities in accordance with section 3(14) of Ontario Regulation 124/99.

Initial SEC Interrogatory #25

Ref: (1/1/1A)

Please provide the following financial information with respect to Port Colborne Hydro Inc. for the Historical Years 2004 through 2007, the Bridge Year 2008 and the Test Year 2009:

(a) Audited (or unaudited, if the statements were not audited) financial statements for historical years;
(b) Budget and/or forecast income statements and year end balance sheet for the Bridge Year and the Test Year.
(c) Rate Base continuity chart (in the form set out in Exhibit 2, Tab 2, Schedule 1, page 1-4, but commencing with 2008 and continuing until 2009.
(d) Calculation of cost of capital (in the form set out in Exhibit 7, Tab 1, Schedule 1, page 2).
(e) Calculation of deficiency or sufficiency (in the form set out in Exhibit 7, Tab 1, Schedule 1, page 2).

Response:

Port Colborne Hydro Inc. has not applied for distribution rates. Therefore, its financial statements have no relevance to the Applications, as only the costs of CNPI are included in the Applications. Please refer to the Comprehensive Response at Tab 3.

Supplementary SEC Interrogatory #13

(SEC #25) Please provide the requested information with respect to the Applicant Port Colborne Hydro Inc. It is irrelevant whether the Board has included the lease payments in past, non-cost of service proceedings. The Board has determined that Port Colborne Hydro Inc. is an applicant in this proceeding, and therefore as an applicant Port Colborne Hydro Inc. must provide normal regulatory financial information.

Response:

Please refer to the Comprehensive Response at Tab 3.

Initial SEC Interrogatory #26

Ref: (1/1/1/A)

Please confirm that the attached document entitled "Financial Report, City of Port Colborne" is the most recent audited financial statements of the City of Port Colborne, and that the City of Port Colborne is the sole owner of Port Colborne Hydro Inc.

Response:

Please refer to the Comprehensive Response at Tab 3.

Supplementary SEC Interrogatory #14

(SEC #26) Please confirm that the attached document is the latest audited financial information of the City of Port Colborne. If the City of Port Colborne currently holds its interest in Port Colborne Hydro Inc. through Port Colborne Energy Inc., please provide the latest audited financial statements of Port Co/borne Energy Inc.

Response:

Please refer to the Comprehensive Response at Tab 3.

Initial SEC Interrogatory #27

Ref: (1/1/1/A)

Please provide any valuation reports or other documents setting out the value (at any time from 2001 to date) of all or any of the assets of Port Colborne Hydro Inc. currently being used directly or indirectly in the distribution of electricity in Port Colborne.

Response:

Please refer to the Comprehensive Response at Tab 3.

Supplementary SEC Interrogatory #15

(SEC #27) Please provide the valuation reports requested.

Response:

Please refer to the Comprehensive Response at Tab 3.

Initial SEC Interrogatory #34

Ref: (2/1/1/page 1 and 7/1/1/ page 2)

Please recalculate rate base on the assumption that the assets leased from Port Colborne Hydro Inc. and used in the distribution business are included in rate base. Please recalculate the deficiency/sufficiency with that new rate base, adjusting the, depreciation, cost of capital and PILs accordingly, and removing from operating expenses the lease payments to Port Colborne Hydro Inc.

Response:

Please refer to the Comprehensive Response at Tab 3.

Supplementary SEC Interrogatory #17

(SEC #34) Please provide the recalculation requested.

Response:

Please refer to the Comprehensive Response at Tab 3.

Supplementary SEC Interrogatory #16

(SEC #33) Please provide the amount, due date, and payment date of each lease payments to Port Colborne in 2008. Please advise if any change in the payment pattern is anticipated in 2009 and, if so, what that change is expected to be.

Response:

Please refer to CNPI's interrogatory response to SEC Supplemental Interrogatory #16 dated February 13, 2009.

2. The allocation of expenditures and affiliate income

Initial SEC Interrogatory #5

Ref: (FE-Ex.2/1/1/AppD/page 2)

Please provide a copy of the most recent CNPI five year plan, including forecast, budgets, and strategic update, as described in the evidence.

Response:

CNPI was asked to provide the most recent five-year plan, including forecast, budgets and strategic updates. Corporate performance, operating expenditures, and capital expenditures for CNPI's distribution business units for the 2009 to 2013 period were provided. These schedules highlight the forecast trends in future capital and operating expenditures, and demonstrates the company's longer term planning. In addition, the performance targets show the areas of focus by management.

Furthermore, a narrative and rationale in respect of capital projects and operating expenses for the 2009 Test Year were provided in detail in the pre-filed evidence.

As indicated in the response, CNPI's five-year business plan is prepared as an integrated part of FortisOntario's strategic plan which primarily includes information that is not relevant to the application. Since the FortisOntario strategic plan is unrelated to the operation of CNPI-Eastern Ontario Power, Fort Erie or Port Colborne, much of the information is confidential and falls outside the scope of the Proceedings. CNPI submits that the information provided is the core operational forecast related to a five-year plan for the service areas in question and is the most detailed CNPI has available in this regard.

Supplementary SEC Interrogatory #1

(SEC #5) Please file all of the requested CNP multi-year business plan, including all parts of the FortisOntario multi-year strategic planning that refer to CNP. If material in this document is confidential or commercially sensitive, please file in confidence under the Board's rules therefor.

Response:

Please refer to the response to Initial SEC Interrogatory #5 above.

Initial SEC Interrogatory #15

Ref: (FE-ExA/3/2/page 1)

Please provide the detailed calculation of the Test Year forecast of Utility Income before Taxes of $1,802,000 for CNP-Transmission, including a calculation of rate base and return on equity.

Response:
In SEC interrogatory #15, the intervenor asked for a calculation of the test year utility income before income taxes, the calculation of rate base and return on equity.

The Applicant provided its transmission business unit 2009 income before income taxes in the interrogatory response. This information is relevant to the Application for the determination of the Company's 2009 income taxes payable and the allocation between the distribution and transmission business units. The Application also includes in Note 16 to CNPI's 2007 audited financial statements (Exhibit 1, Tab 3, Schedule 1, Appendix A) the 2007 and 2006 segmented earnings and capital assets for the transmission business unit.

In response to SEC Supplemental Interrogatory #19, the Applicant provided the forecast 2009 transmission rate base. This information is relevant to the Application as it relates to the allocation of the 2009 income taxes between the distribution and transmission business units.

The Applicant has not provided the calculation of return on equity of its transmission business unit because it believes it is not relevant to the determination of just and reasonable rates for the distribution business units. The shared service costs evidence includes a report prepared by an independent consultant which both describes the methodology used to allocate the shared services and gives an opinion of the reasonableness of that methodology (Exhibit 4, Tab 2, Schedule 4, Appendix B). The Applicant's shared service costs for the period 2006 EDR to 2009 Test Year including descriptions and variance analysis has been provided in evidence (Exhibit 4, Tab 2, Schedule 4). The detailed calculations of the 2009 forecast shared service charges for each business unit is provided in response to SEC interrogatory #9.

Therefore, an analysis of whether the return on CNPI's transmission business is "unusually high" as stated by SEC is an enquiry that clearly falls outside the scope of this proceeding.

Supplementary SEC Interrogatory #7

(SEC #15) Please provide the requested information with respect to CNP Transmission. The Board's practice on this issue is clear. Where material amounts are being allocated between affiliates, or between business units, the Board needs to be able to see financial information with respect to those affiliates or business units to determine whether the allocations are reasonable.

Response:

Please refer to the response to Initial SEC Interrogatory #15 above.

Initial SEC Interrogatory #16

Ref: (FE-Ex.1/3/IIAppA/page 11)

Please provide details of the services provided by the Applicant to Cornwall Electric for which it was paid $1,549,000 in 2007, and the services provided by Cornwall Electric to the Applicant for which the Applicant paid $329,000 in 2007. Please provide an income statement, in regulatory format, for Cornwall Electric, for the Historical Year, the Bridge Year, and the Test Year.

Response:

In SEC interrogatory #16, the intervenor asked for details of services provided by the Cornwall Electric to the Applicant and services provided by the Applicant to Cornwall Electric. In addition, the intervenor requested an income statement, in regulatory format, for Cornwall Electric, for the Historical Test, Bridge Year, and Test Year.

In its December 12, 2008 response, the Applicant provided the requested information with respect to the services provided between the Applicant and Cornwall Electric.

With respect to the intervenor's request for an income statement in regulatory format, Cornwall Electric's electricity rates are determined using a price cap formula. As such, Cornwall Electric does not prepare income statements in the regulatory format as requested by the intervenor. Cornwall Electric is regulated by the Ontario Energy Board and has a distribution license ED-2004-0405. The Company is not connected to the IESO – controlled grid and purchases electricity from Hydro Quebec under long-term supply contracts. Cornwall Electric does however file annually with the OEB audited financial statements in accordance with the Board's Electricity Reporting and Record Keeping Requirement ("RRRs").

The Applicant does not believe that Cornwall Electric's historical and future income statements are relevant to the determination of just and reasonable rates for the Applicant's distribution business units. Furthermore, financial statements do not provide guidance on the appropriateness of cost allocation.

The shared service costs evidence includes a report prepared by an independent consultant which both describes the methodology used to allocate the shared services between the business units and gives an opinion of the reasonableness of that methodology (Exhibit 4, Tab 2, Schedule 4, Appendix B). The Applicant's shared service costs for the period 2006 EDR to 2009 Test Year including descriptions and variance analysis has been provided in evidence (Exhibit 4, Tab 2, Schedule 4). The detail calculations of the 2009 forecast shared service charges for each business unit is provided in response to SEC interrogatory #9.

The Applicant has responded to all interrogatories with respect to shared services costs.

Furthermore, in regard to the reasonableness of the cost for the services provided by Cornwall Electric to CNPI, CNPI has reviewed a proposal from a third-party service provider performing similar services and has determined that the fully loaded costs incurred by CNPI is less than the third-party service provider's price. Therefore, CNPI believes the fully loaded costs paid to Cornwall Electric are approximate to or are less than fair market value.

The intervenor makes reference to a 2006 Enbridge decision as example of the Board's past practice of requiring the disclosure of financial information with respect to affiliates. The relevant section of the 2006 Enbridge decision referenced by the intervenor pertained to customer care costs that Enbridge paid to an unregulated affiliate. The Board subpoenaed the unregulated affiliate's financial information for the purpose of determining whether Enbridge's cost for the services were no more than its affiliate's fully allocated costs plus a reasonable return on invested capital. The basis for this unusual inquiry was that in 2003, the Board disallowed customer care costs in Enbridge's rate application after finding Enbridge paid the costs to an affiliated company in excess of what the Board found to be fair market value for the services provided. These circumstances are unique, and certainly do not reflect the circumstances of CNPI. Therefore, CNPI submits that the Enbridge example referenced by SEC is not applicable to CNPI's application.

Supplementary SEC Interrogatory #8

(SEC #16) Please provide the requested information with respect to Cornwall, for the reasons set forth above.

Response:

Please refer to the response to Initial SEC Interrogatory #16 above.

3. Executive employee compensation.

Supplementary SEC Interrogatory #21

(EPRF #12) Please advise how many actual employees are included in the three FTEs, including persons who are allocated in part to that category. If the number is more than three, please report the employee compensation in that category as requested.

Response:

CNPI's position with respect to executive compensation disclosure is that it has complied with the requirements of the Board and should not be required to disclose any further information. Specifically, CNPI has complied with the requirement set out in section 6.2.5 of the 2006 Electricity Distribution Handbook (the "Handbook") which provides:

> *"Where there are three, or fewer, full-time equivalents (FTEs) in any category, the applicant may aggregate this category with the category to which it is most closely related. This higher level of aggregation may be continued, if required, to ensure that no category contains three, or fewer, FTEs."*

CNPI's compliance with this requirement has been set out in evidence (Exhibit 4, Tab 2, Schedule 5, Appendix A) and in its responses to Interrogatories (Response to SEC Supplemental Interrogatories #21, and Responses to EPRF FE #13, EPRF PC #7, and EPRF EOP #12).

Further, there is no basis in fact for SEC's argument, as it has incorrectly referred to the number of FTE's in the Applications. The Affidavit is not factually correct. In paragraph 21 of William Jay Shepherd's Affidavit sworn on February 25, 2009 (EB-2008-0222/3/4), he states:

> *"SEC has also requested CNP to advise of the number of actual employees included in the three FTE's (including persons allocated in part to the category) and if the number is more than three, to provide SEC with the gross amount of employee compensation in the executive category."*

The Applications do not have "three FTE's". Each Application has one, or less than one FTE (Exhibit 4, Tab 2, Schedule 5, Appendix A). The Application for CNPI FE has only one FTE in the Executive category. The Application for CNPI PC has only 0.60 of an FTE. The Application for CNPI EOP has only 0.30 of an FTE. Accordingly, none of the Applications has "three FTE's". Even on an

aggregate basis, which CNPI argues is not the basis as set out in the Handbook, there are only 1.9 FTE's.

CNPI has included Executive compensation and benefits in its revenue requirement, and the costs have been included in Exhibit 4, Tab 2, Schedule 5, Appendix A in the category of Management. The Management category is the category to which Executive is most closely related. The Executive category is not as closely related to the categories of Non-union or Union.

SEC has also inferred incorrectly that the Executive employees are CNPI employees. To be clear, the Executive employees that have allocated their time spent towards the FTE's in the Executive category of the CNPI Applications are employees of FortisOntario, an affiliate of CNPI.

CNPI submits that the number of employees that make up an FTE in any category is irrelevant to the Applications and do not trigger any disclosure requirements on an individual category basis. In fact, there could be numerous employees that comprise one "full-time equivalent", and this would not require any disclosure on an individual category basis as long as there are "three or fewer full-time equivalents (FTE's) in any category" (Handbook, Schedule 6-4: Employee Compensation, pg 48). In response to a question during the technical conference, CNPI did disclose that there are four executives who provide executive services to CNPI (TC Transcript, p. 38, Line 8). These executives have estimated time spent on each of the business units represented by each Application. As noted above, for each Application there is one or fewer FTE's, which clearly falls within the threshold of "three or fewer FTE's". In addition, these allocations have been reviewed by an independent third party consultant (BDR North America Inc.), which has determined that CNPI's executive allocation approach is reasonable and consistent with acceptable methods of distribution cost allocation (Exhibit 4, Tab 2, Schedule 4, Appendix b). For these reasons, CNPI has correctly aggregated the Executive compensation information with the category of Management, and CNPI is not required to disclose the compensation of the employees of FortisOntario that comprise the FTE (or portion of an FTE) in each Application.

Finally, CNPI disagrees with the observation that by disclosing the gross amount of the four executives' compensation that comprise the one FTE (or portion of an FTE), the protection of individual disclosure will not be defeated. Since CNPI has provided the number of FortisOntario employees that have allocated their time to the Executive category of each Application, the individual average salary could be calculated by dividing the gross amount by four. Accordingly, a requirement to disclose gross compensation of the Executive category would defeat any purpose to protect individual disclosure.

Tab 3

TAB 3

COMPREHENSIVE RESPONSE REGARDING THE LEASE

Background

1. On April 12, 2002, the Ontario Energy Board (the "Board") granted leave to Port Colborne Hydro Inc. ("PCHI") to lease its electricity distribution assets located within the municipal boundaries of the City of Port Colborne to CNPI on the terms and conditions of the Master Implementation Agreement and the Lease Agreement between PCHI and CNPI (collectively the "Lease").

   Decision and Order dated April 12, 2002, RP-2001-0041, Tab 4.

2. Notice of Application was published on October 10, 2001. There were no interventions.

   Decision and Order dated April 12, 2002, RP-2001-0041, Tab 4.

3. As lessee, CNPI operates PCHI's distribution assets in exchange for a gross monthly payment of $127,350. In 2008, CNPI paid PCHI $121,902.87 per month after adjustments. CNPI's monthly Lease payment amount is expected to remain consistent with this figure for 2009.

   Response to SEC Interrogatory #16, Tab 5.

4. CNPI has the option to purchase PCHI's distribution assets at the expiration of the term of the Lease for their fair market value at that time, which the parties agreed to be $6,900,000.

   Decision and Order dated April 12, 2002, RP-2001-0041, Tab 4.

5. On September 6, 2005, CNPI applied to the Board for an order fixing just and reasonable rates for the distribution of electricity in Port Colborne to take effect on May 1, 2006 (Application RP-2005-0020/EB-2005-0345; the "2006 EDR Application").

6. In the 2006 EDR Application CNPI specifically sought Board approval to include the Lease payments in its 2006 revenue requirement.

Manager's Summary of the 2006 EDR Application, Tab 6.

7. SEC was a registered intervenor and participated actively in the 2006 EDR Application.

8. In the Board's Decision and Order dated April 28, 2006 (the "Decision"), the Board approved rates for CNPI (Port Colborne) that allowed for recovery of the Lease payments as part of CNPI's revenue requirement. That Decision was not challenged.

Decision and Order dated April 28, 2006, RP-2005-0020, Tab 7.

SEC's Information Requests Regarding the Lease

9. SEC now requests information in relation to PCHI's finances, assets and rate base for the purpose of determining whether the Lease is "in substance a sales agreement".

SEC Notice of Motion at para. 4.

10. The information requested by SEC is unnecessary for the purpose of determining whether the Lease is a true lease or in substance a sales agreement. As set out below: (i) section 3(14) Ontario Regulation 124/99 codifies the criteria established by the accounting profession and the jurisprudence for distinguishing a true lease from a sale (the "Criteria"); and (ii) the Lease satisfies the Criteria, as found in the advance tax ruling from the Ministry of Finance (Ontario) dated July 24, 2001 (the "Advance Tax Ruling").

Advance Tax Ruling, Tab 8.

11. Because the Lease is conclusively a true lease and is not in substance a sale, SEC's information requests are unnecessary and should be denied.

(i) The Test for Establishing a True Lease

12. Tests to distinguish a true lease from a sale (or capital lease) have been developed by the Canadian Institute of Chartered Accountants (the "CICA") and by Canadian courts.

13. The CICA Handbook treats a capital lease, under which the lessor transfers substantially all of the benefits and risks of ownership related to the leased property to the lessee, as a sales agreement under which the lessee is treated as the owner of the property.

14. The CICA Handbook distinguishes true leases from capital leases, since under a true lease, the lessor retains a significant economic interest in the leased property. According to the CICA Handbook (article 3065.06), a lease should be treated as a capital lease or sale if one or more of the following conditions are present at the inception of the lease:

> (a) There is reasonable assurance that the lessee will obtain ownership of the leased property by the end of the lease term. Reasonable assurance that the lessee will obtain ownership of the leased property would be present when the terms of the lease would result in ownership being transferred to the lessee by the end of the lease term or when the lease provides for a bargain purchase option. ("Part a")
>
> (b) The lease term is of such a duration that the lessee will receive substantially all of the economic benefits expected to be derived from the use of the leased property over its life span. Although the lease term may not be equal to the economic life of the leased property in terms of years, the lessee would normally be expected to receive substantially all of the economic benefits to be derived from the leased property when the lease term is equal to a major portion (usually 75 percent or more) of the economic life of the leased property. ("Part b")
>
> (c) The lessor would be assured or recovering the investment in the lease property and of earning a return on the investment as a result of the lease agreement. This condition would exist if the present value, at the beginning of the lease term, of the minimum lease payments, excluding any portion thereof relating to executory costs, is equal to substantially all (usually 90 percent or more) of the fair value of the leased property, at the inception of the lease. ("Part c")
>
> CICA Accounting Standards Handbook, April 2005, pages 3065(5)-(7), Tab 9.

15. At common law, the courts have traditionally emphasized one threshold issue when asked to determine whether a lease is in substance a sale. In a decision that has been affirmed and applied in numerous subsequent cases, the Ontario Court of Appeal articulated the key factor to be whether the purchase price of the leased property under the lessee's option to purchase represents fair market value::

> What I consider to be a practical definition of the distinction between a true lease and a lease by way of security was adopted in Re Crown Cartridge Corp., Debtor (1962), 220 F. Supp. 914, by Croake D.J. from the decision of Referee Asa S. Herzog:

> The test in determining whether an agreement is a true lease or a conditional sale is whether the option to purchase at the end of the lease term is for a substantial sum or a nominal amount. ... If the purchase price bears a resemblance to the fair market price of the property, then the rental payments were in fact designated to be in compensation for the use of the property and the option is recognized as a real one. On the other hand, where the price of the option to purchase is substantially less than the fair market value of the leased equipment, the lease will be construed as a mere cover for an agreement of conditional sale.
>
> *Re Ontario Equipment (1976) Ltd.* (1982), 141 D.L.R. (3d) 766 (Ontario Court of Appeal), Tab 10.

16. Both the CICA Handbook test and the common law test have been incorporated into the Criteria in section 3(14) of Ontario Regulation 124/99.

17. Section 3(14) of Ontario Regulation 124/99 excludes certain leasing transactions from the transfer tax imposed under subsection 94(1) of the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A ("Electricity Act").

18. A lease will not qualify for the exception from transfer tax in section 3(14) of Ontario Regulation 124/99, and the transfer tax will be payable on the leased property, if any of the following Criteria are present:

> (a) the lessee automatically acquires title to the leased property at less than its fair market value before or upon the termination of the lease;
>
> (b) the lessee has a conditional or unconditional right to acquire the title to the leased property at less than its fair market value before or upon the termination of the lease;
>
> (c) the term of the lease, including any renewal or extension provided for in the lease or in another agreement entered into as part of the arrangement relating to the lease, is greater than or equal to at least 75 per cent of the anticipated economic life of the leased property; or
>
> (d) the net present value when the lease begins of the lease payments that are required by the lease agreement at that time, including any guarantee of the residual value of the leased property and any penalty payable for a failure to renew the lease or to extend its term, is greater than or equal to 90 per cent of the value of the leased property when the lease begins.

Electricity Act, section 94; O. Reg. 124/99, section 3(14), Tab 11.

19. The Criteria incorporate the tests for distinguishing true leases from capital leases found in the CICA Handbook and the common law.

20. Part "a" of the CICA Handbook corresponds with Criteria (a) and (b), as these provisions identify an automatic transfer of title or a low purchase option as indicative of a sale.

21. Part "b" of the CICA Handbook corresponds with Criterion (c). Both provisions provide that a lease term greater than or equal to at least 75 per cent of the anticipated economic life of the leased property is indicative of a sale.

22. Part "c" of the CICA Handbook corresponds with Criterion (d), in that both provisions provide that a net present value of the lease payments that is greater than or equal to 90 per cent of the value of the leased property is indicative of a sale.

23. Furthermore, the common law test described above is also reflected in the Criteria. Specifically, the common law test corresponds with Criteria (a) and (b).

24. The inclusion of both the CICA Handbook and common law tests in the Criteria is not a coincidence. Clearly, the purpose of the Criteria is the same as the purpose of the CICA Handbook test and the common law test – to distinguish a true lease from a sale. Therefore, if a lease satisfies the Criteria, there can be no question that it is a true lease and not in substance a sale.

(ii) The Lease Satisfies the Criteria

25. On July 24, 2001, the Ontario Ministry of Finance issued the Advance Tax Ruling.

26. The Ministry of Finance reviewed the terms and underlying economics of the Lease and determined that the Lease:

    (a) satisfied Criteria (a) and (b), since CNPI did not have a right to acquire the leased property during or at the end of the Lease term for less than its fair market value. In particular, the Ministry of Finance accepted that the $6,900,000 option price was not less than the leased property's fair market value at the end of the lease term and represented a substantial premium over its estimated book value;

(b) satisfied Criterion (c), since the 10 year lease term was less than 75 per cent of the estimated economic life of the property; and

(c) satisfied Criterion (d), since the net present value of the Lease payments at the commencement of the Lease was less than 90 per cent of the fair market value of the property.

Advance Tax Ruling, Tab 8.

27. As a result, the Ministry of Finance ruled as follows:

> Pursuant to subsection 3(14) of Ontario Regulation 124/99 of the EA, the Lease is a transfer of a leasehold interest in property described in subsection 94(1) of the EA, to which subsection 94(1) of the Electricity Act does not apply.
>
> Advance Tax Ruling, Tab 8.

28. Because the Lease satisfies the Criteria, and the Criteria serve as the test for distinguishing a true lease from a sale, there can be no doubt that the Lease is a true lease and not in substance a sale.

The Affidavit of Jay Shepherd

29. The Affidavit of Jay Shepherd suggests that the Lease could be a tax planning technique to disguise a sale.

30. For the reasons set out above, disguising a sale as a lease is an ineffective method for avoiding transfer tax. The Criteria prevent the avoidance of transfer tax by ensuring that a lease is truly a lease and not a sale. Had the Lease been a sale in disguise, it would have attracted transfer tax. The Lease was not subject to transfer tax.

Conclusion

31. The purpose of the SEC's information requests regarding the Lease is to determine whether the Lease is in substance a sale. Because the economic substance of the Lease has already been determined by the Advance Tax Ruling, the SEC's information requests are unnecessary and should therefore be denied.

ISSUE ESTOPPEL

32. Even if SEC is granted access to the information requested, CNPI submits that it cannot use that information to challenge the inclusion of the Lease payments in CNPI's operating costs for the purpose of setting revenue requirement, as that issue has already been determined by the Board on a final basis.

33. Issue estoppel precludes the re-litigation of an issue that has already been decided in another proceeding. Issue estoppel operates not only in respect to issues, but also to material facts embraced in prior proceedings.

> *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 20 ["*Danyluk*"], Tab 12.

34. Issue estoppel applies to judicial decisions made by administrative tribunals. The decisions of the Board fall into this category.

> *Rasanen v. Rosemount Instruments Limited*, [1994] 17 O.R. (3d) 267 (Ont. C.A.) at para. 37 ["*Rasanen*"], Tab 13.
>
> *O'Brien v. Canada (Attorney General)*, [1993] F.C.J. No. 333, Tab 15.
>
> *Danyluk* at para. 21, Tab 12.

35. Before issue estoppel will be applied in a given case, the following three-part test must be satisfied:

> (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies...
>
> *Angle v. MNR*, [1975] 2 S.C.R. 248 at 254 ["*Angle*"], Tab 15.

36. As described in the following paragraphs, the three-part test is satisfied in CNPI's case.

(i) The Same Issue was Decided

37. At issue before the Board in the 2006 EDR Application was whether the Lease payments should be included in the 2006 revenue requirement.

38. In the Manager's Summary of the 2006 EDR Application, CNPI wrote:

> ...CNPI Port Colborne proposes the following treatment of this transaction... the operating lease payments are included in the 2006 revenue requirement...
>
> Manager's Summary of the 2006 EDR Application, Tab 6.

39. The rates ordered by the Board in the 2006 EDR Application included the Lease payments. Furthermore, the Board wrote in the Decision that it considered the entire record in the proceeding:

> While the Board has considered the entire record in this proceeding, it has made reference in this Decision only to such evidence and argument as is necessary to provide context to its findings.
>
> Decision and Order dated April 28, 2006, RP-2005-0020, page 3, Tab 7.

40. As such, the issue that SEC is raising in this proceeding, whether the Lease payments should be included in revenue requirement as an operating cost, has already been determined by the Board.

(ii) The Decision was Final

41. The Board's Decision in the 2006 EDR Application was final. SEC did not appeal the Board's Decision, although it had the right to do so.

(iii) The Parties are the Same

42. SEC was a registered intervenor in the 2006 EDR Application. Therefore, the parties are the same.

43. SEC had the opportunity to challenge the Lease's inclusion as an operating expense in the 2006 EDR Application. As an intervenor, SEC had the opportunity to test the evidence presented and to file written argument.

Decision and Order dated April 28, 2006, RP-2005-0020, Tab 7.

Rasanen at para. 47, Tab 13.

44. Because the three-part test for issue estoppel is satisfied in this case, CNPI submits that any attempt by SEC to challenge the inclusion of the Lease payments as an operating expense in revenue requirement is estopped. Since the information requested regarding the Lease will ultimately be used by SEC to make such a challenge, the Board should deny the SEC's information requests.

45. SEC has submitted that even if the Board finds that the three-part test is met, it has a broad discretion to refuse to apply issue estoppel in the interests of justice, in accordance with the *Danyluk* case.

46. *Danyluk* stands for the principle that a decision-maker should exercise its discretion to refrain from applying the doctrine of issue estoppel where its application would result in an injustice.

Danyluk at para. 63, Tab 12.

47. In that case, Danyluk claimed $300,000 in unpaid wages and commissions from her former employer; first by way of a complaint under the *Employment Standards Act*, R.S.O. 1990, c. E. 14 ("ESA"), and subsequently in the context of a wrongful dismissal action. In the ESA proceeding, Danyluk did not have an opportunity to see, test, or respond to the evidence tendered by her former employer in response to her complaint, and her ESA claim was rejected. As a result of the ESA decision, Danyluk was estopped from claiming the unpaid wages in her wrongful dismissal action, notwithstanding her inability to participate in the ESA proceeding. The Supreme Court of Canada overturned the lower court's decision. Because Danyluk was not treated fairly in the ESA proceeding, the application of issue estoppel based on that proceeding would not further the interests of justice.

Danyluk at paras. 6-7, Tab 12.

48. CNPI submits that no injustice will result from the application of issue estoppel to SEC's motion. Indeed, CNPI submits that an injustice would result if issue estoppel were <u>not</u>

applied in this case. To deny a cost that was previously approved would cast uncertainty and preclude utilities such as CNPI from relying on Board decisions when creating business plans and making operational decisions.

49. Issue estoppel must be applied in this case to bind all parties to the Board's Decision. As found in *Rasanen*, "the policy objectives underlying issue estoppel, such as avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings are enhanced in appropriate circumstances by acknowledging as binding the integrity of tribunal decisions." The Board must affirm the binding nature of its decisions by refusing to revisit them in subsequent proceedings.

> *Rasanen* at para. 37, Tab 13.

50. If this issue is permitted to be re-litigated, utilities will have no comfort that they can rely on previously-approved revenue requirements when making rate applications to the Board. In this case, there has been no change to the relevant operating expense at issue, and the Decision has not been appealed. To reopen the issue now would result in not only uncertainty for utilities, but also for customers. Administrative tribunals such as the Board "should strive for continuity, consistency and a degree of predictability. Justice demands that equality of treatment and impartiality prevail when the merits of a case are considered".

> Robert W. Macaulay & James L. H. Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Thomson Canada Limited, 2005-3) vol. 6 at 6-6, Tab 16.

51. CNPI requires business certainty on which costs it can recover through rates and which it cannot. It would be unfair for the Board, having allowed recovery of the costs of the Lease, to now deny or investigate a possible denial of that recovery. To do so would be inconsistent with the prior Decision, which dealt squarely with the matter in issue on this motion. Such inconsistency would work an injustice on utilities such as CNPI:

> Inconsistency creates its own form of injustice, because it theoretically obviates the need to treat like cases alike. Furthermore, it means that a party may tailor its activities according to a give [sic] line of agency decisions, only to one day have the same agency 'repent and recant', thereby throwing its affairs into disarray.

Robert W. Macaulay & James L. H. Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Thomson Canada Limited, 2005-3) vol. 6 at 6-10, Tab 16.

52. This is a proper case for the application of issue estoppel. The legal test for issue estoppel is met. Further, if SEC is permitted to re-open the Lease issue by way of these proceedings, there will be an injustice to CNPI and other utilities which rely on consistency and predictability from the Board in the context of rate-making applications.

53. Therefore, SEC should not be permitted to reopen the issue of whether the Lease is properly included in CNPI's operating expenses, which is exactly what SEC is attempting to do by way of its information requests regarding the Lease.

Tab 4

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

RP-2001-0041

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c.15 (Sched. B);

AND IN THE MATTER OF an application by Port Colborne Hydro Inc., pursuant to subsection 86(1) of the *Ontario Energy Board Act, 1998,* for leave to lease to Canadian Niagara Power Inc. the electricity distribution assets located within the municipal boundaries of the City of Port Colborne;

AND IN THE MATTER OF a notice of proposal by Canadian Niagara Power Inc. pursuant to section 81 of the *Ontario Energy Board Act, 1998.*

BEFORE: Sheila K. Halladay
Presiding Member

George A. Dominy
Member and Vice Chair

Fred Peters
Member

DECISION AND ORDER

On August 20, 2001, the Corporation of the City of Port Colborne (the "City"), Port Colborne Hydro Inc. ("Port Colborne Hydro"), Canadian Niagara Power Inc.

("CNPI") and Canadian Niagara Power Company Limited. ("CNP") (Port Colborne, Port Colborne Hydro, CNPI and CNP are collectively the "Applicants") filed an application (the "Application") with the Ontario Energy Board (the "Board").

In the Application, Port Colborne was seeking an order of the Board granting leave, pursuant to subsection 86(1) of the *Ontario Energy Board Act, 1998* (the "Act"), for Port Colborne Hydro to lease to CNPI, for ten years, all of the electricity distribution assets owned by Port Colborne Hydro and located within the City of Port Colborne ("Port Colborne"), under the terms and conditions of the Master Implementation Agreement and Lease Agreement (collectively the "Lease") between the Applicants, both dated July 19, 2001.

In the Application, CNPI requested orders of the Board:

1. amending the Distribution Licence ED-1999-0160 of CNPI, effective on the date of the approval of the Lease, to include the current service area of Port Colborne Hydro in CNPI's licensed service area; and

2. approving the acquisition by CNPI, as an affiliate of a licensed generator (CNP), of a leasehold interest in a distribution system in Ontario, pursuant to section 81 of the Act.

Notice of Application was published on October 10, 2001. There were no interventions. The Board issued a Notice of Review pursuant to section 81 of the Act on October 18, 2001. The Board issued a Notice of Written Hearing on November 30, 2001, indicating that a Written Hearing would commence on January 8, 2002 or such later date as the Board determined.

On November 27, 2001, Board staff requested additional information from the Applicants to clarify certain evidence and to complete the record. The Applicants filed the requested information on December 11, 2001.

Copies of the Application, including the evidence filed in this proceeding, are available for review at the Board's offices. While the Board has considered all of the evidence filed in this proceeding, the Board has only referenced the evidence to the extent necessary to provide background to this Decision and Order.

In the Application, the Applicants have proposed that CNPI would assume the current Board-approved rates of Port Colborne Hydro applicable in Port Colborne. The Board notes that any change to the rates will require the approval of the Board.

The Applicants also stated that CNPI would assume operational control of and would receive all revenues relating to electricity distribution in Port Colborne. CNPI would pay to Port Colborne Hydro $127,350 per month for the term of the Lease, subject to certain adjustments as detailed in Clause 3.3 of the Lease Agreement.

The Applicants noted that, at the expiration of the Lease, CNPI has an option to purchase the then existing electricity distribution assets from Port Colborne Hydro for $6,900,000. If CNPI does not exercise its option, Port Colborne Hydro would acquire from CNPI all of the capital assets added to the electricity distribution system in Port Colborne over the term of the Lease. The Board notes that either alternative would require the regulatory approvals necessary at the time of transfer, including the leave of the Board.

The Board notes that, since the ultimate ownership of the electricity distribution assets in Port Colborne is not certain at this time, during the term of the Lease the Board will require that the electricity distribution system for Port Colborne be operated separately from the other electricity distribution systems owned or operated by CNPI.

The Board determines that, based on the evidence, the impact of the proposal would not adversely affect the development and maintenance of a competitive

electricity market.

The Board finds that, based on the evidence, approval of the lease of the electricity distribution assets of Port Colborne Hydro to CNPI is in the public interest.

THE BOARD ORDERS THAT:

1. Port Colborne Hydro Inc. is granted leave to lease to Canadian Niagara Power Inc. the electricity distribution assets which are located within the municipal boundaries of the City of Port Colborne on the terms and conditions of the Master Implementation Agreement and the Lease Agreement between Port Colborne Hydro Inc. and Canadian Niagara Power Inc. (the "Lease Agreement"). For greater certainty, this order does not include approval of the final disposition of the electricity distribution assets under Section 16 of the Lease Agreement.

2. The Distribution Licence ED-1999-0069 of Port Colborne Hydro Inc. is amended in the manner set out in Appendix "A" to this Decision and Order.

3. The Distribution Licence ED-1999-0160 of Canadian Niagara Power Inc. is amended in the manner set out in Appendix "B" to this Decision and Order.

4. The acquisition by Canadian Niagara Power Inc. of an interest in an electricity distribution system in Ontario is approved pursuant to subsection 82(3) of the *Ontario Energy Board Act, 1998.*

5. Canadian Niagara Power Inc. shall forthwith advise the Ontario Energy Board confirming the date that the Lease Agreement comes into effect.

6. Canadian Niagara Power Inc. shall forthwith advise the Ontario Energy Board of

the adjusted monthly lease payment calculated in accordance with the terms of the Lease Agreement.

7. Canadian Niagara Power Inc. shall charge rates in the service area within the municipal boundaries of the City of Port Colborne in accordance with the rate schedules attached as Appendix "C" to this Decision and Order effective upon the date that the Lease Agreement comes into effect.

8. The costs of and incidental to this proceeding are fixed at $600.00 and shall be paid by Port Colborne Hydro Inc. immediately upon receipt of the Ontario Energy Board's invoice.

DATED at Toronto, April 12, 2002.

ONTARIO ENERGY BOARD

Peter H. O'Dell
Assistant Board Secretary

APPENDIX 'A' TO

BOARD DECISION AND ORDER NO. RP-2001-0041

April 12, 2002

Peter H. O'Dell
Assistant Board Secretary

Section 1 (Definitions) is amended by adding the following definition:

"Lease" means the Master Implementation Agreement and the Lease Agreement, both dated as of July 19, 2001, between Port Colborne Hydro Inc. as Lessor, and the Corporation of the City of Port Colborne as Shareholder of the Lessor, and Canadian Niagara Power Inc. as Lessee, and Canadian Niagara Power Company Limited as the Lessee Guarantor.

Section 10 (Provision of Information to the Board) is amended by adding the following clauses:

10.3 Port Colborne Hydro Inc. shall forthwith provide the Board with a copy of any written notice issued under Section 12 of the Lease and any Termination Notice given under Section 13 of the Lease.

10.4 Port Colborne Hydro Inc. shall promptly notify the Board of a termination of the Lease for any reason.

Section 21 (Disposal of Assets) is amended by adding the following paragraphs:

Port Colborne Hydro Inc. shall not assign its interest in the Lease without obtaining the prior approval of the Board, except for a mortgage or charge to secure any loan or indebtedness or to secure any bond, debenture or other evidence of indebtedness.

Port Colborne Hydro Inc. shall not make any material change to the terms and conditions of the Lease without obtaining the prior approval of the Board.

APPENDIX 'B' TO

BOARD DECISION AND ORDER NO. RP-2001-0041

April 12, 2002

Peter H. O'Dell
Assistant Board Secretary

Section 1 (Definitions) is amended by adding the following definition:

> "Lease" means the Master Implementation Agreement and the Lease Agreement, both dated as of July 19, 2001, between Port Colborne Hydro Inc. as Lessor, and the Corporation of the City of Port Colborne as Shareholder of the Lessor, and Canadian Niagara Power Inc. as Lessee, and Canadian Niagara Power Company Limited as the Lessee Guarantor.

The first sentence of Section 3 (Authorization) is deleted and replaced with the following:

> Canadian Niagara Power Inc. is authorized, subject to the conditions set out in this licence, to own and operate distribution systems in the service areas described in Schedule 1 of the licence. Canadian Niagara Power Inc. shall operate the distribution system located within the municipal boundaries of the City of Port Colborne in accordance with the Lease, subject to any other licence conditions. Where there is a conflict between the Lease and a licence condition, the licence condition shall prevail.

Section 10 (Provision of Information to the Board) is amended by adding the following clause:

> 10.3 Canadian Niagara Power Inc. shall promptly notify the Board of a termination of the Lease for any reason.

Section 21 (Disposal of Assets) is amended by adding the following paragraphs:

> Canadian Niagara Power Inc. shall not assign its interest in the Lease without obtaining the prior approval of the Board, except for a mortgage or charge to secure any loan or indebtedness or to secure any bond, debenture or other evidence of indebtedness.

Canadian Niagara Power Inc. shall not make any material change to the terms and conditions of the Lease without obtaining the prior approval of the Board.

Section 18 (Separation of Business Activities) is amended by adding the following clause:

18.6 The Licensee shall maintain separate accounting and financial records, including records of capital investments, and shall file separate rates applications with respect to the electricity distribution business operated within the municipal boundaries of the City of Port Colborne.

The first sentence of the fourth paragraph of Schedule 1 (Definition of Distribution Service Area) is deleted and replaced with the following sentence.

The distribution service areas are:

(a) within the municipal boundaries of the Town of Fort Erie; and

(b) within the municipal boundaries of the City of Port Colborne.

APPENDIX 'C' TO

BOARD DECISION AND ORDER NO. RP-2001-0041

April 12, 2002

Peter H. O'Dell
Assistant Board Secretary

Canadian Niagara Power Inc. within the City of Port Colborne RP-2001-0041
Schedule of Rates and Charges EB-2001-0492
Effective March 1, 2002

Time Periods for Time of Use (Eastern Standard Time)

Winter: All Hours, October 1 through March 31
Summer: All Hours, April 1 through September 30
Peak: 0700 to 2300 hours (local time) Monday to Friday inclusive, except for public holidays including New Year's Day, Good Friday, Victoria Day, Canada Day, Civic Holiday (Toronto) Labour Day, Thanksgiving Day, Christmas Day and Boxing Day.
Off Peak: All Other Hours.

Cost of Power rates valid only until subsection 26(1) of the Electricity Act, 1998 comes into effect.

RESIDENTIAL

Monthly Service Charge	(per month)	$12.40
Distribution Volumetric Rate	(per kWh)	$0.0093
Cost of Power Rate	(per kWh)	$0.0758

GENERAL SERVICE < 50 KW

Monthly Service Charge	(per month)	$25.08
Distribution Volumetric Rate	(per kWh)	$0.0055
Cost of Power Rate	(per kWh)	$0.0747

GENERAL SERVICE > 50 KW (Non Time of Use)

Monthly Service Charge	(per month)	$512.91
Distribution Volumetric Rate	(per kW)	$1.5708
Cost of Power Demand Rate	(per kW)	$6.2246
Cost of Power Energy Rate	(per kWh)	$0.0526

GENERAL SERVICE > 50 KW (Time of Use)

Monthly Service Charge	(per month)	$512.91
Distribution Volumetric Rate	(per kW)	$1.5708
Cost of Power - Winter Peak	(per kW)	$11.8211
Cost of Power - Summer Peak	(per kW)	$0.0000
Cost of Power - Winter Peak	(per kWh)	$0.0707
Cost of Power - Winter Off Peak	(per kWh)	$0.0422
Cost of Power - Summer Peak	(per kWh)	$0.0000
Cost of Power - Summer Off Pe	(per kWh)	$0.0000

STANDBY SERVICE

Monthly Standby Charge	(per kW)	$1.45
Distribution Volumetric Rate	(per kW)	$1.1432
Cost of Power - Winter Peak	(per kW)	$12.0500
Cost of Power - Summer Peak	(per kW)	$9.0200
Cost of Power - Winter Peak	(per kWh)	$0.0707
Cost of Power - Winter Off Peak	(per kWh)	$0.0422
Cost of Power - Summer Peak	(per kWh)	$0.0597
Cost of Power - Summer Off Pe:	(per kWh)	$0.0313

SENTINEL LIGHTS (Non Time of Use)

Monthly Service Charge	(per connection)	$1.46
Distribution Volumetric Rate	(per kW)	$3.5760
Cost of Power Demand Rate	(per kW)	$23.2617

STREET LIGHTING (Non Time of Use)

Monthly Service Charge	(per connection)	$1.04
Distribution Volumetric Rate	(per kW)	$2.1909
Cost of Power Demand Rate	(per kW)	$23.2526

UN-METERED SCATTERED LOADS

Un-metered scattered loads include traffic lights, telephone booths, cable amplifiers and radio antennae. Energy usage is based on connected load estimates. Charges per account are as follows:

Monthly Service Charge	(per month)	$25.08
Distribution Volumetric Rate	(per kWh)	$0.0055
Cost of Power Rate	(per kWh)	$0.0747

SPECIFIC SERVICE CHARGES

Transformer
Losses: adjustment shall be made in accordance with Section IV, clause 7 of the Standard Application of Rates until replaced by the Transformer Loss provisions in the Rate Handbook.

Allowance for Ownership: (per kW of billing demand)
service at less than 115 kv (per kW) $0.60

SPECIFIC SERVICE CHARGES (continued)

Customer Administration	
Occupancy Charge/Account set up Charge	$8.80
Arrears Certificate	$10.70
Temporary Boat Hook-up Charge (per kilowatt of service capacity)	$2.00
Supply and Installation of Time of Use Meter	Actual Cost of meter and installation
Non-Payment of Account	
Late Payment Charge (per month)	1.50%
(per annum)	19.56%
Returned Cheque Charge - Actual Bank Charges plus	$13.50
Collection Charge	$9.00
Reconnection - during regular hours	$17.60

Tab 5

INTERROGATORY # 16

Ref: [FE-Ex.1/3/1/AppA/page 11]

Please provide details of the services provided by the Applicant to Cornwall Electric for which it was paid $1,549,000 in 2007, and the services provided by Cornwall Electric to the Applicant for which the Applicant paid $329,000 in 2007. Please provide an income statement, in regulatory format, for Cornwall Electric, for the Historical Year, the Bridge Year, and the Test Year.

RESPONSE:

CNPI-Fort Erie Services Provided to Cornwall Electric – 2007

	($'000)
Administrative services and rent charged [1]	$ 1,141
Intercompany fee for shared asset charges [2]	408
	$ 1,549

[1] Amount included in the 2007 Administrative Services and Rent Charged to Affiliate amount on page 4 of Exhibit 4, Tab 2, Schedule 4.

[2] See Exhibit 1, Tab 3, Schedule 1, Appendix B, page 2.

Cornwall Electric provides engineering and operations' services, and customer service services to CNPI-Gananoque. The $329,000 represents the cost of providing the services. These charges are recorded through time allocations based on actual time spent performing these functions and the number of customers billed. See pages 10 and 11 of the BDR report (Exhibit 4, Tab 2, Schedule 4, Appendix B) for further details.

The Application is for CNPI – Fort Erie. The requested financial information relating to Cornwall Electric is not relevant to the Application.

Tab 6

CHAPTER 1- INTRODUCTION

Introduction

This document is the Summary of Application which forms part of the application by CNPI for 2006 Electricity Distribution Rates. CNPI is a licensed distributor with three distribution service areas as more particularly described in Schedule 2-1. This rate application is in respect of the Port Colborne service area. Separate rate applications for the Fort Erie and Gananoque service areas are being filed simultaneously with this rate application. In addition, CNPI has filed an application for final recovery of regulatory assets. In this regard, a comprehensive review has been requested.

On April 15, 2002 CNPI commenced an operating lease agreement with Port Colborne Hydro Inc. ("PCHI") and the City of Port Colborne to lease the electricity distribution business of PCHI. The OEB issued its Decision and Order (RP-2001-0041) on April 12, 2001 approving the transaction. The term of the lease is ten years. CNPI maintains and operates the leased assets, and pays for all operating and capital expenditures during the term of the lease. CNPI also receives revenues associated with operating the leased assets. The lease is considered an operating lease according to Canadian general accepted accounting principles. Accordingly, the lease payments are expensed by CNPI and the capital assets at the commencement of the lease remain on the books of PCHI.

Given the uncommon nature of this transaction and the size of the operating lease payments (i.e., minimum annual lease payments amount to $1.5 million), the principle for rate making purposes is to ensure that rates are based on the total costs of service among the customers of Port Colborne.[1] Therefore, the 2006 EDR rate application for CNPI Port Colborne proposes the following treatment of this transaction:

- the capital assets leased, net of depreciation since the lease date, belonging to Port Colborne Hydro Inc. are excluded from the rate base of CNPI Port Colborne;

[1] Bonbright, in his study on public utility rates, lists the recovery of cost of service as a primary criterion of a sound rate structure. James C. Bonbright, *Principles of Public Utility Rates* (Arlington, Virginia: Public Utilities Reports, Inc., Second Edition 1988), 385.

- the depreciation expense associated with the capital assets leased is excluded from the revenue requirement;
- the operating lease payments are included in the 2006 revenue requirement; and
- the capital expenditures since the lease commencement date are also included in the rate base.

Since commencement of the lease, CNPI has made a significant capital investment in its distribution system. This has benefited ratepayers through increased reliability and efficiencies. Whiled facing the uncertainties of a deregulated market, CNPI has demonstrated its long term commitment to ratepayers and the industry through its continued investment and participation in the electricity industry consolidation process.

CNPI is filing this rate application to update its revenue requirement, rate base and electricity distribution rates. CNPI is also applying for a reduction in retail transmission rates using a methodology in accordance with the guidelines provided by the OEB.[2]

An essential component of this application is the allocation methodology that was reviewed and updated for the allocation of shared costs within business units of CNPI and FortisOntario. As a result of the acquisitions of electricity distribution companies since 2002, CNPI and FortisOntario have undergone significant growth. The number of business units within the organization has increased and it was considered necessary to undertake a review of the cost allocation methodology. In 2005, FortisOntario and CNPI undertook this review and, with the assistance of Barker, Dunn & Rossi, developed a revised cost allocation methodology. The results of the review as well as the revised cost allocation methodology are outlined in a report attached as Appendix 1 to this Summary of Application. This revised allocation methodology has been used in the 2006 EDR Model.

CNPI is filing this rate application utilizing Option 2 of the 2006 Electricity Rate Handbook. The application is based on a 2004 historical test year with Tier 1

[2] Letter from the OEB to All Electricity Distribution Utilities dated July 2, 2005 Re: Retail Transmission Service Rate Adjustments

adjustments. 2004 costs reflect the synergies that have been achieved through efficiencies in the consolidation of distribution acquisitions.

CNPI acknowledges that Option 2 of the historic test year EDR model does not explicitly permit the additional adjustments from the revised allocation methodology undertaken by CNPI in 2005. The OEB has stated that "an applicant wishing to make additional adjustments would be required to file on a full 2006 forward test year."[3] CNPI had originally submitted an application with full supporting documentation for the forward test year however, upon further consideration of the matter that application was withdrawn on October 12, 2005 in favour of this historical test year application. In order to accurately portray the test year, it was necessary to reallocate the historical data using the revised cost allocation methodology described in this Summary of Application. The 2003 and 2004 allocated costs that appear in this 2006 EDR Application differ from the RRR submissions. Where applicable, these differences have been noted in the application.

CNPI's strategic objective is to continue to grow its distribution business through acquisitions. This has been demonstrated by CNPI's acquisition of the Port Colborne and Gananoque service territories since 2002. FortisOntario has also acquired Cornwall Electric. Further savings may be achieved and passed onto ratepayers through the continued acquisition and consolidation process.

[3] RP-2004-0188 2006 Electricity Distribution Rate Handbook - Report of the Board page 12.

Tab 7

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

RP-2005-0020
EB-2005-0345

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B);

AND IN THE MATTER OF an Application by Canadian Niagara Power Inc. Port Colborne for an order or orders approving or fixing just and reasonable distribution rates and other charges, effective May 1, 2006.

BEFORE: Paul Vlahos
Presiding Member

Bob Betts
Member

DECISION AND ORDER

Canadian Niagara Power Inc. Port Colborne ("Port Colborne") is a licensed distributor providing electrical service to consumers within its defined service area. Port Colborne filed an application (the "Application") with the Ontario Energy Board (the "Board") for an order or orders approving or fixing just and reasonable rates for the distribution of electricity and other matters, to be effective May 1, 2006.

Port Colborne is one of over 90 electricity distributors in Ontario that are regulated by the Board. To streamline the process for the approval of distribution rates and charges for these distributors, the Board developed and issued the 2006 Electricity Distribution Rate Handbook (the "Handbook") and complementary spreadsheet-based models. These materials were developed after extensive public consultation with distributors, customer groups, public and environmental interest groups, and other interested parties. The Handbook contains requirements and guidelines for filing an application.

The models determine the amounts to be included for the payments in lieu of taxes ("PILs") and calculate rates based on historical financial and other information entered by the distributor.

Also included in this process was a methodology and model for the final recovery of regulatory assets flowing from the Board's decision dated December 9, 2004 on the Review and Recovery of Regulatory Assets – Phase 2 for Toronto Hydro, London Hydro, Enersource Hydro Mississauga and Hydro One Networks Inc. ("Hydro One"). In Chapter 10 of the decision, the Board outlined a Phase 2 process for the remaining distributors. By letter of July 12, 2005, the Board provided guidance and a spreadsheet-based model to the distributors for the inclusion of this recovery as part of their 2006 distribution rate applications.

As a distributor that is embedded in Hydro One Network's low voltage system, the Applicant has included the recovery of certain Regulatory Assets that have been allocated by Hydro One Networks. The amount claimed by the Applicant was provided by Hydro One Networks as a reasonable approximation of the actual amount that Hydro One Networks will assess the Applicant. To the degree that the amount differs from the actual amount approved for Hydro One Networks in another proceeding (RP-2005-0020/EB-2005-0378), this difference will be reconciled at the end of the Regulatory Asset recovery period, as set out in the Phase II regulatory assets decision issued on December 9, 2004 (RP-2004-0064/RP-2004-0069/RP-2004-0100/RP-2004-0117/RP-2004-0118).

In its preliminary review of the 2006 rate applications received from the distributors, the Board identified several issues that appeared to be common to many or all of the distributors. As a result, the Board held a hearing (EB-2005-0529) to consider these issues (the "Generic Issues Proceeding") and released its decision (the "Generic Decision") on March 21, 2006. The rulings flowing from that Generic Decision apply to this Application, except to the extent noted in this Decision. The Board notes that pursuant to ss. 21 (6.1) of the *Ontario Energy Board Act, 1998*, and to the extent that it is pertinent to this Application, the evidentiary record of the Generic Issues Proceeding is part of the evidentiary record upon which the Board is basing this Decision.

In December 2001, the Board authorized the establishment of deferral accounts by the distributors related to the payments that the distributors make to the Ministry of Finance in lieu of taxes. The Board is required, under its enabling legislation, to make an order

with respect to non-commodity deferral accounts once every twelve months. The Board has considered the information available with respect to these accounts and orders that the amounts recorded in the accounts will not be reflected in rates as part of the Rate Order that will result from this Decision. The Board will continue to monitor the accounts with a view to clearing them when appropriate.

Public notice of the rate Application made by Port Colborne was given through newspaper publication in its service area. The evidence filed was made available to the public. Interested parties intervened in the proceeding. The evidence in the Application was tested through written interrogatories from Board staff and intervenors, and intervenors and Port Colborne had the opportunity to file written argument. While the Board has considered the entire record in this proceeding, it has made reference in this Decision only to such evidence and argument as is necessary to provide context to its findings.

Port Colborne has requested an amount of $4,642,119 as revenue to be recovered through distribution rates and charges. Included in this amount is a credit of $282,828 for the recovery of regulatory assets. Except where noted in this Decision, the Board finds that Port Colborne has filed its Application in accordance with the Handbook and the guidelines for the recovery of regulatory assets.

Notwithstanding Port Colborne's general compliance with the Handbook and associated models, in considering this Application the Board reviewed the following matters in detail:

- Low Voltage Rates;
- Corporate and Shared Costs Allocation Study;
- Comprehensive Regulatory Assets Decision (EB-2006-0011); and
- Consequences of the Generic Decision (EB-2005-0529).

Low Voltage Rates

Port Colborne included in its Application recovery of ongoing Low Voltage ("LV") charges that Hydro One Networks will be levying on Port Colborne for Low Voltage wheeling distribution services provided to Port Colborne

The Board notes that this estimate reflects Hydro One Networks' current approved LV rate of $0.56/kW. The Board further notes that Hydro One Networks applied for an LV rate of $0.63/kW in its 2006 rate application RP-2005-0020/EB-2005-0378, and the Board has approved this rate.

The Board is of the view that the LV adjustment that Port Colborne has included in its Application is insufficient to recover its expected LV charges in 2006, as this amount does not reflect the updated Hydro One Networks rate. Although the Generic Decision provides that embedded distributors are to track differences between LV costs charged by the host distributor(s) and corresponding revenues recovered from ratepayers, the Board seeks to minimize systemic sources of variance. The Board is of the view that Port Colborne 's rates should reflect the LV rates authorized by the Board for the host distributor. Accordingly, the Board has revised the amount for LV charge recovery in Port Colborne 's revenue requirement.

Corporate and Shared Costs Allocation Study

Port Colborne has applied to adjust its cost of service to reflect the outcome of a study that allocates corporate and shared costs. These are costs associated with the services provided to Port Colborne that reside in other business units.

Port Colborne is affiliated with FortisOntario and shares that corporate relationship with several other business units or corporate entities. FortisOntario owns and operates a transmission business unit, unregulated generation assets, and Canadian Niagara Power Inc. ("CNPI"). In turn, CNPI owns Port Colborne and three other Ontario local electricity distribution companies. Certain general plant and administrative and general functions are shared by these affiliated business units. In order to determine the revenue requirements for 2006 electricity distribution rates for Port Colborne, FortisOntario conducted a study to allocate the corporate and shared costs among its regulated and unregulated business units.

Port Colborne has applied the results from the study in the EDR model. The Board has reviewed the results of the study and accepts the resulting cost consequences for the determination of 2006 rates.

In its argument, the School Energy Coalition ("SEC") requested that the Board order an independent review of the levels and allocation of costs from FortisOntario and CNPI to its LDC operations. SEC was concerned about the levels of shared services and the

corporate relationships among the LDC's and their parent organizations. The Board notes that SEC itself did not find obvious problems with the study.

In the report's documented scope, it is clear that the role of the consultant was to provide an independent review of the allocation study. The Board sees no reason to order a further independent review.

There are several specific examples of these cost allocations resulting in a reduction of the revenue requirement by shifting some of the costs to affiliated entities.

While the Board is generally satisfied with the results of the cost allocation study, and therefore accepts its use in determining 2006 revenue requirements, the study has not been sufficiently tested in this hearing for the Board to endorse its methodology beyond accepting the cost consequences for setting 2006 rates.

Comprehensive Regulatory Assets Decision (EB-2006-0011)

In November 2005, Port Colborne submitted an application for final recovery of its regulatory asset balances under the comprehensive review option. Pursuant to Procedural Order #2, RP-2005-0020/EB-2006-0011, parties conducted a settlement conference on March 27 and 28, 2006. As stated in its decision in that proceeding, the Board accepted the settlement agreement and the cost of service consequences that flowed from the agreement. The Board now finds that the Applicant has appropriately adjusted its 2006 EDR application to reflect the regulatory assets settlement in 2006 distribution rates.

Consequences of the Generic Decision on this Application

The Generic Decision contains findings relevant to funding for smart meters for electricity distributors. The Applicant did not file a specific smart meter investment plan or request approval of any associated amount in revenue requirement. Absent a specific plan or discrete revenue requirement, the Generic Decision provides that $0.30 per residential customer per month be reflected in the Applicant's revenue requirement. The Board finds that this increase in the revenue requirement amount will be allocated equally to all metered customers and recovered through their monthly service charge. This increment is reflected in the approved monthly service charges contained in the Tariff of Rates and Charges appended to this Decision. Pursuant to the Generic

Decision, a variance account will be established, the details of which will be communicated in due course.

With respect to standby rates, the Generic Decision provided that existing and proposed standby rates should be declared interim upon the effective date of the rates approved in this decision. Given that Port Colborne proposed to continue its legacy standby, those rates are declared interim at the proposed level as of the effective date of the Tariff of Rates and Charges accompanying this Decision.

Resulting Revenue Requirement

As a result of the Board's determinations on these issues, the Board has adjusted the revenue requirement to be recovered through distribution rates and charges to $4,673,735 including a credit amount of $282,828 for the recovery of Regulatory Assets.

In its letter of December 20, 2004 to electricity distributors, the Board indicated that it would consider the disposition of the 2005 OEB dues recorded in Account 1508 in this proceeding. However, given that the final 2005 OEB dues are not available because of the difference in fiscal years for the Board and the distributors, and given that the model used to develop the Application does not incorporate this provision, the Board will review and dispose of the 2005 OEB dues at a later time.

Cost Awards

This Application is one of a number of applications before the Board dealing with 2006 rates chargeable by distributors. Intervenors may be parties to multiple applications and, if eligible, their costs associated with a specific distributor may not be separable. Therefore, for these applications, the matter of intervenor cost awards will be addressed by the Board at a later date, upon the conclusion of the current rate applications. If an intervenor that is eligible to recover its costs is able to uniquely identify its costs associated with this Application, it must file its cost claim within 10 days from the receipt of this Decision.

THE BOARD ORDERS THAT:

1. The Tariff of Rates and Charges set out in Appendix "A" of this Order is approved, effective May 1, 2006, for electricity consumed or estimated to have been consumed on and after May 1, 2006. The application of the revised distribution rates shall be prorated to May 1, 2006. If Canadian Niagara Power Inc. Port Colborne's billing system is not capable of prorating changed loss factors jointly with distribution rates, the revised loss factors shall be implemented upon the first subsequent billing for each billing cycle.

2. The Tariff of Rates and Charges set out in Appendix "A" of this Order supersedes all previous distribution rate schedules approved by the Ontario Energy Board for Canadian Niagara Power Inc. Port Colborne, and is final in all respects, except for the standby rates, which are approved as interim.

3. Canadian Niagara Power Inc. Port Colborne shall notify its customers of the rate changes no later than with the first bill reflecting the new rates.

DATED at Toronto, April 28, 2006.

ONTARIO ENERGY BOARD

Peter H. O'Dell
Assistant Board Secretary

Appendix "A"

RP-2005-0020
EB-2005-0345

April 28, 2006

ONTARIO ENERGY BOARD

Tab 8

Ministry of Finance
33 King Street West
Oshawa ON L1H 8H5

Corporations Tax
Branch

Ministère des Finances
33 rue King ouest
Oshawa ON L1H 8H5

Direction de l'imposition
des compagnies

Ontario

Oshawa (905) 433-5422
Toronto (416) 920-9048, Ext 5422
Ontario and Quebec 1-800-262-0784

Refer to/Réf: Ann Townsend
Tel./Tél: 905-433-6148
Fax: 905-433-6747

July 24, 2001

Mr. Patrick Monahan
Davies Ward Phillips & Vineberg LLP
44th Floor
1 First Canadian Place
Toronto, ON M5X 1B1

Dear Mr. Monahan:

Re: Canadian Niagara Power Company Limited/Port Colborne Hydro Inc. Lease Request for Advance Tax Ruling
***Electricity Act*, 1998**

This is in reply to your letter dated April 23, 2001, in which you requested an advance tax ruling under the *Electricity Act*, 1998 on behalf of Canadian Niagara Power Company Limited, Canadian Niagara Power Inc., the Corporation of the City of Port Colborne and Port Colborne Hydro Inc. (collectively the "Parties"). We also acknowledge your fax of June 21, 2001, the revised and restated application of July 9, 2001 and our telephone conversations in connection herewith.

We understand that, to the best of your knowledge and that of the Parties involved, none of the issues involved in this ruling request is in an earlier return; is being considered by the Corporations Tax Branch in connection with a previously-filed tax return; is under objection; is before the courts; or is the subject of a previously-issued ruling.

Defined Terms

In this letter, unless otherwise expressly stated:

(a) "CNP" means Canadian Niagara Power Company Limited:

(b) "CNPI" means Canadian Niagara Power Inc.

(c) "City" means the Corporation of the City of Port Colborne:

(d) "Hydro" means Port Colborne Hydro Inc.

(e) "Leased Business" means the electricity distribution business of Hydro and includes, but is not limited to, the Leased Assets;

(f) "Leased Assets" has the meaning assigned in paragraph 11 below;

(g) "Lease" means the lease agreement providing for the lease of the Leased Assets;

(h) "EA" means the *Electricity Act, 1998,* S.O. 1998, C. 15, Sch. A, as amended to the date hereof;

(i) "Effective Date" means the date the Lease becomes effective;

(j) "OMERS" means the Ontario Municipal Employees Retirement System;

(k) "Lease Events of Default" means events, which are to be specifically defined under the Lease, to which, Hydro can terminate the Lease;

(l) "LOI" means Letter of Intent;

(m) "RFP" means Request for Proposal.

Our understanding of the facts and of the proposed transaction is as follows:

Facts and Proposed Transaction

1. On January 16, 2001, CNP and the City signed a LOI in which it was proposed that CNPI lease and operate the fixed assets of Hydro for a ten year period. The Parties are currently negotiating a definitive lease agreement setting out the terms upon which the assets are to be leased and operated by CNPI.

2. The City is a municipality as defined under the *Municipal Act* (Ontario). Hydro was incorporated by the City on June 4, 1999, under the *Ontario Business Corporations Act*, pursuant to section 142 of the EA . Hydro serves approximately 9,000 customers within the City. Substantially all of the assets of the Port Colborne Hydro-Electric Commission were transferred to Hydro effective March 1, 2000 pursuant to the terms of By-Law 3867/12/00 enacted by the City on January 31, 2000.

3. The City is the sole shareholder of Hydro. Therefore, pursuant to the terms of the EA, the transfer effected by Transfer By-Law 38767/12/00 was exempt from tax under subsection 94(1) of the EA.

4. In July of 2000, the City issued a confidential RFP. On August 1, 2000, the City received various bids which included bids to purchase the shares of

Hydro as well as various alternative transactions such as a lease of the assets of Hydro.

5. The City undertook an extensive evaluation process with the assistance of Borden Ladner Gervais LLP and Henley International Inc., financial advisor to the City. Their evaluation involved a consideration of a wide range of quantitative and qualitative issues, including price, reputation of bidder, treatment of Hydro employees, commitment to maintain a local presence and commitment to maintaining service levels to the residents of the City. The City selected CNP as a preferred bidder.

6. CNP is a corporation incorporated and resident in Ontario that, through its wholly-owned subsidiary CNPI, currently distributes electricity to 14,000 customers in Fort Erie and operates approximately 32 kilometres of transmission lines, six transformer stations and 900 kilometres of distribution lines. CNP has been generating electricity in Ontario since 1905, making it one of Ontario's oldest utilities. CNP is one of the few electricity companies in Ontario that is privately owned and, through its energy marketing division, is one of the few utilities engaged in wholesale energy transactions.

7. CNPI was incorporated by CNP under the *Ontario Business Corporations Act* on March 31, 1999. CNPI holds a distribution licence from the Ontario Energy Board. CNP is the sole shareholder of CNPI.

8. The parties to the Lease will be Hydro and CNPI, along with CNP as shareholder of CNPI and guarantor of CNPI's obligations and the City as shareholder of Hydro and guarantor of certain of Hydro's obligations.

9. The lease term will be ten years from the Effective Date. The Lease will be effective upon, *inter alia*, receipt of all required regulatory approvals. An application for approval of the Lease will be made to the Ontario Energy Board in the near future.

10. The monthly lease payment under the Lease will be $127,350.00 per month of the lease term subject to adjustment in accordance with paragraph 22 below. Payment of these amounts will fully satisfy CNPI's obligations to pay rent under the Lease.

11. The Leased Assets will include all of Hydro's assets used for the purpose of distributing electricity in the City, including: real property, easements, all of the improvements and facilities constructed or installed on the real property, machinery and equipment, inventory, buildings, poles and vehicles. The total estimated appraised value of the Leased Assets is [redacted]

12. Throughout the lease term, CNPI will operate the Leased Business and maintain and repair the Leased Assets. CNPI will also have the right, at its own expense, to make modifications or improvements to the electricity distribution system in the City. CNPI will acquire and hold title to all assets which it purchases or contributes (including assets purchased to replace Leased Assets) during the lease term.

13. CNPI will offer to employ all persons employed by Hydro as at the closing on terms that are substantially similar, in the aggregate, to their existing terms and conditions of employment. CNPI will be responsible for all employee liabilities during the Lease term and, in general, the employees will participate

in employee benefit plans established or maintained by CNPI or its affiliates. The employees are currently members of OMERS and it is contemplated that such participation will continue, with CNPI making the required contributions to OMERS. However, in the event that continued participation in OMERS is not possible, the employees will participate in a pension plan sponsored by CNPI.

14. Based on the depreciation rates used by Hydro, the remaining economic life of the Leased Assets is approximately 17 years. The depreciation rates used by Hydro are those that were prescribed for all hydro-electric commissions in Ontario by Ontario Hydro in accordance with the manual titled Accounting for Municipal Electric Utilities in Ontario. These depreciation rates reflect the estimated service life of the property. The Lease term of 10 years is approximately 60 per cent of the anticipated economic life of the Leased Assets.

15. During the lease term, Hydro can terminate the Lease only in the event of certain Lease Events of Default (which are to be specifically defined under the Lease). A Lease Event of Default will generally be found to exist only in circumstances where there has been an event or circumstance that gives rise to : (i) a material risk of sale, forfeiture or loss of all or a substantial portion of the Leased Assets; or (ii) an interference in any material manner with the distribution of electricity in the City. Hydro may also terminate the Lease if CNPI fails to pay the rent when due and such default continues unremedied for a period of 15 business days. In the event that Hydro wishes to terminate the Lease prior to the expiry of the term, Hydro must purchase from CNPI the assets that CNPI has purchased or contributed with its own funds pursuant to paragraph 12 above.

16. Neither CNP nor CNPI has any right to terminate the Lease prior to the expiry of the lease term.

17. None of the Parties has any option or right (either under the Lease or otherwise) to extend the lease term beyond ten years from the Effective Date.

18. At the end of the lease term, CNPI will have an option, at its discretion, to acquire the Leased Assets for their fair market value at that time, which the Parties agree to be $6.9 million. There is no penalty payable for failure to exercise this option. The book value of the Leased Assets at the end of the lease term is estimated to be [redacted] CNPI does not have either an automatic unconditional right or a conditional right to acquire the Leased Assets for less than their fair market value prior to or on the expiry of the lease term.

19. Subject to paragraph 20 below, if CNPI elects not to exercise its option to purchase the Leased Assets at the end of the term, the City shall purchase from CNPI any assets that have been purchased by CNPI for the business during the lease term for their net book value minus $160,000.

20. If, at the expiry of the term of the Lease, and based upon a report from an independent engineer or environmental consultant, the Leased Assets or a substantial portion thereof have been destroyed, damaged beyond economic repair, or confiscated or seized by a governmental authority, then Hydro can require CNPI to purchase the Leased Assets for a purchase price of $6.9 million.

21. CNPI will not lease or acquire Hydro's accounts receivable or, subject to paragraph 23 below, assume liability for Hydro's accounts payable or other accrued liabilities as at the Effective Date of the lease. These current assets and liabilities will remain with Hydro. However, since it is contemplated that CNPI will operate the Leased Assets as a going concern throughout the term of the Lease, CNPI will assume responsibility for collecting accounts receivable and paying accounts payable and other accrued liabilities on Hydro's behalf. In the event that, pursuant to this arrangement, amounts received by CNPI on Hydro's behalf exceed the amounts it pays, the excess will be returned to Hydro; conversely, in the event that CNPI pays Hydro liabilities that exceed amounts actually collected by CNPI on Hydro's behalf, Hydro will reimburse CNPI for the shortfall.

22. The Leased Assets includes inventory of Hydro as at the Effective Date. The inventory as at December 31, 2000, as reflected in the Hydro balance sheet of that date, had a net book value of approximately $550,000, and that amount has been utilized in the calculation of the lease payments due under the Lease. However, since inventory in the business fluctuates slightly from time to time, the rent must be adjusted to take account of the fact that the net book value of the inventory actually on hand at the Effective Date will vary slightly from $550,000. In particular, the lease payment will be adjusted downward in the event that the inventory at the Effective Date has a net book value that is less than $550,000, or upward in the event that the net book value of the inventory at the Effective Date exceeds $550,000. Further, if during the lease term CNPI makes use of prepaid expenses of the business as of the closing, the amount of the prepaid expenses so utilized will be added to the CNPI lease payment for the following month.

23. In addition to paying cash, CNP will satisfy its obligation to pay rent by the assumption of the following Hydro liabilities as at the Effective Date: (i) liability for customer deposits that have been paid to Hydro; (ii) liability for post-retirement benefits (other than pension entitlements) for employees and former employees of the business; and (iii) liability for vested sick leave of employees earned as of the closing date.

24. CNP will apply to the Ontario Energy Board to amend its licence to include the Port Colborne area.

25. The Parties have authorized Davies Ward Phillips & Vineberg LLP to make a request for an advance ruling on their behalf.

Ruling Given

Provided that the above description of the facts and proposed transactions is accurate and constitutes a complete disclosure of all of the relevant facts and proposed transactions and that the proposed transactions are carried out in the manner described in your submission, the following ruling is given:

> **Pursuant to subsection 3(14) of *Ontario Regulation 124/99* of the EA, the Lease is a transfer of a leasehold interest in property described in subsection 94(1) of the EA, to which subsection 94(1) of the Electricity Act does not apply.**

Nothing in this ruling should be construed as confirming that the values of the assets submitted is correct.

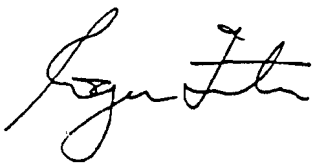
The ruling is based on the EA and the regulations to the EA as they currently read.

The ruling does not take into account any future amendments to the EA or the regulations.

The ruling is given subject to the limitations of, and with the qualifications set forth in, Corporations Tax Branch *Information Bulletin 2-77R,* "Advance Corporations Tax Rulings", dated September 14, 1981, as amended by *Information Bulletin 2741,* Ontario Budget 1988", dated July 1988 and are binding. The bulletin applies with the necessary modifications for purposes of the EA.

We trust the above satisfies your request. If you require further information, please contact Ann Townsend at 905-433-6148.

Yours truly,



Roger Filion
Senior Manager, Tax Advisory

Tab 9

accounting standards

— minimum lease payments for the lessee as described above; and
— any residual value or rental payments beyond the lease term guaranteed by a third party unrelated to either the lessee or lessor, provided that the guarantor is financially capable of discharging the obligations under the guarantee.

(r) **Residual value of the leased property** is the estimated fair value of the leased property at the end of the lease term.

(s) **Sale-leaseback transaction** is the sale of property with the purchaser leasing the property back to the seller.

(t) **Unguaranteed residual value** is that portion of the residual value of leased property that is not guaranteed or is guaranteed solely by a party related to the lessor.

CLASSIFICATION

This Section classifies leases as follows: .04

(a) from the point of view of the lessee — capital and operating leases; and

(b) from the point of view of the lessor — sales-type, direct financing and operating leases.

This Section adopts the view that property has benefits and risks associated with its ownership. Benefits may be represented by the expectation of profitable operation over the property's economic life and of gain from appreciation in value or realization of a residual value. Risks include possibilities of losses from idle capacity or technological obsolescence and of variations in return due to changing economic conditions. This Section adopts the view that a lease that transfers substantially all of the benefits and risks of ownership to the lessee is in substance an acquisition of an asset and an incurrence of an obligation by the lessee and a sale or financing by the lessor. .05

From the point of view of a lessee, a lease would normally transfer substantially all of the benefits and risks of ownership to the lessee when, at the inception of the lease, one or more of the following conditions are present: .06

(a) There is reasonable assurance that the lessee will obtain ownership of the leased property by the end of the lease term. Reasonable assurance that the lessee will obtain ownership of the leased property would be present when the terms of the lease would result in ownership being transferred to the lessee by the end of the lease term or when the lease provides for a bargain purchase option.

(b) The lease term is of such a duration that the lessee will receive substantially all of the economic benefits expected to be derived from the use of the leased property over its life span. Although the lease term may not be equal to the economic life of the leased property in

terms of years, the lessee would normally be expected to receive substantially all of the economic benefits to be derived from the leased property when the lease term is equal to a major portion (usually 75 percent or more) of the economic life of the leased property. This is due to the fact that new equipment, reflecting later technology and in prime condition, may be assumed to be more efficient than old equipment that has been subject to obsolescence and wear.

(c) The lessor would be assured of recovering the investment in the leased property and of earning a return on the investment as a result of the lease agreement. This condition would exist if the present value,[1] at the beginning of the lease term, of the minimum lease payments, excluding any portion thereof relating to executory costs, is equal to substantially all (usually 90 percent or more) of the fair value of the leased property, at the inception of the lease.

In view of the fact that land normally has an indefinite useful life, it is not possible for the lessee to receive substantially all the benefits and risks associated with its ownership, unless there is reasonable assurance that ownership will pass to the lessee by the end of the lease term.

.07 From the point of view of a lessor, a lease would normally transfer substantially all of the benefits and risks of ownership to the lessee when, at the inception of the lease, all the following conditions are present:

(a) any one of the conditions in paragraph 3065.06;[2]

(b) the credit risk associated with the lease is normal when compared to the risk of collection of similar receivables; and

(c) the amounts of any unreimbursable costs that are likely to be incurred by the lessor under the lease can be reasonably estimated. If such costs are not reasonably estimable, the lessor may retain substantial risks in connection with the leased property. This may occur, for example, when the lessor has a commitment to guarantee the performance of, or to effectively protect the lessee from obsolescence of, the leased property.

.08 Other conditions have been advanced as evidence that substantially all the benefits and risks of ownership have been transferred to the lessee. The existence of any of the following conditions by themselves is not sufficient evidence that substantially all the benefits and risks of ownership have been transferred to the lessee:

(a) Lessee pays cost incident to ownership. This condition is considered inappropriate because in virtually all leasing agreements the lessee will either directly or indirectly pay such costs.

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[1] The discount rate used by the lessee would be the lower of the lessee's rate for incremental borrowing and the interest rate implicit in the lease, if known.

[2] When assessing whether the condition set out in paragraph 3065.06(c) exists, the discount rate used by the lessor would be the interest rate implicit in the lease.

(b) Lessee has the option to purchase the asset for the lessor's unrecovered investment. This condition is considered inappropriate because there is no assurance that the lessee will exercise the option.

(c) Leased property is special purpose to the lessee. This condition is considered insufficient because the concept of "special purpose" is relative and difficult to define. In addition, the fact that the leased property is special purpose does not, in itself, evidence a transfer of substantially all of the benefits and risks of asset ownership. Although it is expected that most lessors would lease special purpose property only under terms that transfer substantially all of those benefits and risks to the lessee, nothing in the nature of special purpose property necessarily entails such terms.

.09 ▶ *A lease that transfers substantially all of the benefits and risks of ownership related to the leased property from the lessor to the lessee should be accounted for as a capital lease by the lessee and as a sales-type or direct financing lease by the lessor.* [JAN. 1979]

.10 ▶ *A lease where the benefits and risks of ownership related to the leased property are substantially retained by the lessor should be accounted for as an operating lease by the lessee and lessor.* [JAN. 1979]

.11 A renewal, an extension or a change in the provisions of an existing lease would be considered as a new lease and classified in accordance with paragraphs 3065.09-.10 (for a renewal or extension of an existing sales-type lease, see paragraph 3065.50).

.12 When the classification of a lease, arising from a renewal, an extension or a change in the provisions of an existing lease, results in a capital lease being replaced by an operating lease, the asset and related obligation would be removed from the accounts of the lessee. The net adjustment would be included in income of the period. When the classification of the new lease is the same as the original lease, the asset and obligation related to the original lease would be adjusted to conform to the recalculated balances.

.13 When the classification of a lease, arising from a renewal, an extension or change in the provisions of an existing lease, results in a sales-type or direct financing lease being replaced by an operating lease, the remaining net investment would be removed from the accounts of the lessor and the leased asset recorded as an asset at the lower of its original cost, present fair value or present carrying amount. The net adjustment would be included in income of the period.

Tab 10

Re

Ontario Equipment (1976) Ltd.

(1982), 35 O.R. (2d) 194

(1982), 141 D.L.R. (3d) 766

33 O.R. (2D) 648

125 D.L.R. (3d) 321

ONTARIO
Court of Appeal

Lacourciere, Zuber and Thorson JJ.A.

February 17, 1982

NOTE: An appeal from the following decision of Henry J. (1981), 33 O.R. (2d) 648, 125 D.L.R. (3d) 321 (H.C.J.) was dismissed. The following was endorsed on the Appeal Record by

LACOURCIERE J.A.: -- Judgment of Henry J. affirmed for the reasons given by him. Appellant ordered to pay the costs of the appeal.

M.D. O'Reilly, Q.C., for appellant.

M.R. Kestenberg, for respondent.

* * * * *

Re Ontario Equipment (1976) Ltd.

33 O.R. (2D) 648
125 D.L.R. (3d) 321

ONTARIO

SUPREME COURT OF ONTARIO
IN BANKRUPTCY
HENRY J.

19TH JUNE 1981.

Personal property security -- Security interest -- Lease with option to purchase -- Substantial sum payable for exercise of option -- Whether lease creates security interest -- Personal Property Security Act, R.S.O. 1970, c. 344, s. 2.

A lease with an option to purchase does not necessarily create a security interest under s. 2 of the Personal Property Security Act, R.S.O. 1970, c. 344 (now R.S.O. 1980, c. 375). Unless the lease in effect amounts to a conditional sale it is not required to be registered under the Act. Where a substantial sum is payable by the lessee for the exercise of the option the probable inference is that the transaction is a genuine lease and does not create a security interest.

[Re Crown Cartridge Corp., Debtor (1962), 220 F. Supp. 914; Re Speedrack Ltd. (1980), 1 P.P.S.A.C. 109, 33 C.B.R. (N.S.) 209, 11 B.L.R. 220, refd to]

APPLICATION to declare subordinate a lessor's interest in certain equipment.

M. D. O'Reilly, Q.C., for applicant, trustee in bankruptcy.

M. R. Kestenberg, for respondent.

HENRY J. (orally):-- The issue in this application by the trustee is whether a lease of a truck for a term of three years, at the end of which the lessee was entitled to buy the truck, is a lease intended as security under s. 2 of the Personal Property Security Act, R.S.O. 1970, c. 344, as amended [now R.S.O. 1980, c. 375], and as such must be registered under that Act to protect the lessor's interest against the trustee in bankruptcy of the lessee.

The application of the Personal Property Security Act to a lease is found in s. 2, which reads, in part, as follows:

> 2. Subject to subsection 1 of section 3, this Act applies,
>
> (a) to every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest, including, without limiting the foregoing,
>
> . . . . .
>
> (ii) an assignment, lease or consignment intended as security ...

If the lease is intended as security it must be perfected by registration under the Act otherwise it is subordinate to the interest of the trustee in bankruptcy. The trustee seeks an order declaring that the lease here in question is a security interest requiring perfection under the Personal Property Security Act and declaring that the security interest is unperfected and subordinate to the interest of the trustee.

The lessor, Toronto Motor Car Leasing, is a division of Sorenson Chrysler Plymouth Inc., an automobile dealer which both sells automobiles and leases them to customers. The lessor provided two main types of lease agreements called an open end lease and a closed end lease. The distinction between the two was explained by Gary Peacock, the general manager of Toronto Motor Car Leasing, in his affidavit as follows:

4. The quotation was on the basis of an Open End lease whereby the Lessee agreed to purchase the leased vehicle at the agreed upon price in order to avoid the possibility of the payment of an excess mileage charge at the end of the lease. The excess mileage charge is a charge pursuant to the terms of a Closed End lease and is a factor in consideration of the market value of the vehicle on re-sale by the Lessor. Under normal circumstances a reasonable number of kilometers at the expiration of a three year lease is 80,000 kilometers.

Under the open end lease here in issue, the dealer lessor acquired a small truck for lease to its customer, the bankrupt herein, and in September, 1980, leased it for a term of three years to the bankrupt. By the terms of the lease, the lessee is responsible for most of the obligations of ownership including insurance, maintenance, repairs and licensing. At the end of the term the lessor is obliged to sell the vehicle at a price determined by the market and is entitled to recover $2,500 for itself. If the price is insufficient to provide $2,500, the lessee must make good the deficiency; if the price exceeds $2,500, the lessee is entitled to the excess. The customer, the lessee, has the option of buying the vehicle at the best price offered to the lessor -- in effect, the right of first refusal at a price determined by the market.

The rationale of this arrangement is explained by Mr. Peacock in his affidavit as follows:

> 6. Pursuant to the terms of the Lease Agreement, the Lessee arranges liability, collision and comprehensive insurance coverage for the motor vehicle rather than the lessor. The reasoning for these insurance arrangements is to avoid the inequality of a Fleet Policy carried by the Lessor and enables a Lessee, with a good driving record to obtain more favourable premiums. However in the instant case, the Lessee had a Fleet Policy and advised the Lessor of the addition to the said Policy of the leased vehicle. Attached hereto and marked as exhibit "C" to this my Affidavit is a true copy of the confirmation received from the insurance agency of the Lessee with respect to insurance coverage.
>
> 7. Toronto Motor Car Leasing maintains an inventory of vehicles for the purpose of leasing, however was required to purchase the motor vehicle in question as the required vehicle was not in its inventory. Attached hereto and marked as exhibit "D" to this my Affidavit is a true copy of the sales agreement with Sorenson Chrysler Plymouth Inc. in the total amount of $7,525.00. Toronto Motor Car Leasing purchases its vehicles whether or not Chrysler products from various automobile dealers dependent upon price and availability.
>
> 8. The monthly payment of $239.00 exclusive of Provincial Sales Tax is calculated based on the estimated depreciation of the vehicle and interest carrying costs to Toronto Motor Car Leasing which at the time was 13.25 per cent per annum. The estimated value of the vehicle at Lease end was $1,895.00. Attached hereto and marked as exhibit "E" to this my Affidavit is a true copy of the Vehicle Cost and Rate Worksheet prepared by me in preparation of the Lease Agreement.

> 9. It was my intention at all times and that of Toronto Motor Car Leasing to enter into a Lease Agreement both in form and in substance. The Open End Lease in the instant case provides the Lessor with its reasonable profit at Lease end and simultaneously was intended to provide the Lessee with a basis to control the ultimate costs of the Lease by removing the excess mileage factor and in its place substituting the maximum liability amount.

The lessee, Ontario Equipment (1976) Limited, is in bankruptcy by virtue of a receiving order made February 13, 1981. The trustee takes the position that the lease is akin to a conditional sale agreement whereby the property remains in the vendor until the purchase price is paid in full, a transaction which must be registered under the Personal Property Security Act to protect the vendor against the claims of creditors, including a trustee in bankruptcy. The trustee submits that the transaction is in reality one of purchase and sale on the security of the lease which has not been registered under the Personal Property Security Act, and hence the interest of the lessor as owner of the vehicle is subordinate to that of the trustee.

It is of the essence of a lease intended as security within the meaning of the Personal Property Security Act that the property in the subject of the lease is to pass ultimately to the lessee, who is obliged to pay the lessor what might be reasonably regarded as the purchase price with interest and carrying charges over the life of the lease. In such a case the transaction is not unlike a conditional sale agreement or hire purchase agreement.

What I consider to be a practical definition of the distinction between a true lease and a lease by way of security was adopted in Re Crown Cartridge Corp., Debtor (1962), 220 F. Supp. 914, by Croake D.J. from the decision of Referee Asa S. Herzog:

> The test in determining whether an agreement is a true lease or a conditional sale is whether the option to purchase at the end of the lease term is for a substantial sum or a nominal amount. ... If the purchase price bears a resemblance to the fair market price of the property, then the rental payments were in fact designated to be in compensation for the use of the property and the option is recognized as a real one. On the other hand, where the price of the option to purchase is substantially less than the fair market value of the leased equipment, the lease will be construed as a mere cover for an agreement of conditional sale.

The critical issue in every case is the intention of the parties and this depends upon the facts of the case. In Re Speedrack Ltd. (1980), 1 P.P.S.A.C. 109, 33 C.B.R. (N.S.) 209, 11 B.L.R. 220, for example, the facts led to the conclusion that the lease was a security for the financing of the ultimate purchase of the subject-matter, and the failure to register a financing statement left the security interest unperfected and subordinate to the interest of the trustee in bankruptcy.

Each case must stand on its own facts. In the case at bar the terms of the lease assure to the lessor recapture of its cost plus a profit with the guarantee that it will recoup $2,500 on the final sale at market price. As I interpret the lease agreement, the lessee is not obliged to take title at the end of the term. I am aware that Mr. Peacock in his affidavit says that under the open end lease "the lessee agreed to purchase the leased vehicle at the agreed upon price". That, however, is not my interpretation of the agreement; clearly the lessee has an option. It may elect to purchase or not. It cannot be said that the final transaction is such that no reasonable lessee would refuse to purchase the vehicle, which would be some evidence that the intention of the parties was that the transaction from the be-

ginning was in reality an agreement of purchase and sale. The prospect of the lessee reaping a profit on final liquidation of the vehicle is not conclusive of this intention. It is quite consistent with the lessor holding out an incentive to the lessee to maintain the value of the asset during the term of the lease by proper maintenance, repair and careful use.

Parties must be free to contract as they see fit without restraint except as clearly imposed by law. It is only if on a reasonable view of the agreed arrangements the lessor has financed the purchase of the vehicle under the guise of a lease which is in reality a security instrument, that the Act requires registration to protect the interest of the lessor owner against creditors.

In the present case I am not persuaded that the lease is anything more than a straightforward leasing arrangement which recovers for the lessor, as owner, over the effective life of the vehicle, his cost, together with a reasonable profit. The lessor is entitled to do that. There is no additional evidence, as there was in Re Speedrack Ltd., supra, to lead to the conclusion that the true nature of the transaction was a sale of the asset financed on the security of the lease.

The trustee's application will therefore be dismissed with costs. The trustee will also be entitled to its costs out of the assets of the bankrupt estate.

Application dismissed.
11 -- 125 D.L.R. (3d)

Tab 11

Electricity Act, 1998

S.O. 1998, CHAPTER 15
SCHEDULE A

Municipal electricity property: transfer tax

94. (1) A municipal corporation or municipal electricity utility shall not transfer to any person any interest in real or personal property that has been used in connection with generating, transmitting, distributing or retailing electricity unless, before the transfer takes effect, it pays to the Financial Corporation the amount determined by multiplying the fair market value of the interest by the prescribed percentage or furnishes security in that amount to the Financial Corporation that meets such requirements as may be prescribed and that is satisfactory to the Financial Corporation. 2000, c. 42, s. 36 (1).

Forms of property

(1.1) For the purposes of subsection (1), real or personal property that has been used in connection with generating, transmitting, distributing or retailing electricity includes cash, amounts receivable, investments, customer lists, licences, goodwill and other intangible property used in connection with those activities. 2000, c. 42, s. 36 (1).

Same

(2) For the purpose of subsection (1), an interest in real or personal property that has been used in connection with generating, transmitting, distributing or retailing electricity shall be deemed to include any interest in a corporation, partnership or other entity that derives its value in whole or in part from real or personal property that has been used in connection with generating, transmitting, distributing or retailing electricity. 1998, c. 15, Sched. A, s. 94 (2).

Deductions from amount payable

(3) Subject to subsection (5), the amount payable under subsection (1) in a taxation year by a municipal electricity utility may be reduced by the following amounts:

1. Any amount payable and paid by the municipal electricity utility under section 93 in respect of the part of the taxation year up to and including the date of the transfer or in respect of a previous taxation year.
2. Any amount payable and paid by the municipal electricity utility under Part II, II.1 or III of the *Corporations Tax Act* or Part III of the *Taxation Act, 2007* in respect of the part of the taxation year up to and including the date of the transfer or in respect of a previous taxation year.
3. Any amount that the municipal electricity utility would be liable to pay as tax under Part I of the *Income Tax Act* (Canada) in respect of the taxation year if that tax were computed on the basis that the municipal electricity utility had no income during the taxation year other than the capital gain realized on the transfer of its interest in the property.

4. Any amount that the municipal electricity utility would be liable to pay as tax under Part I of the *Income Tax Act* (Canada) in respect of the taxation year if that tax were computed on the basis that the municipal electricity utility had no income during the taxation year other than an amount included in income under paragraph 14 (1) (b) of the *Income Tax Act* (Canada) in respect of the transfer of its interest in the property. 1998, c. 15, Sched. A, s. 94 (3); 2000, c. 42, s. 36 (2); 2002, c. 22, s. 63 (1, 2); 2004, c. 16, Sched. D, Table; 2004, c. 31, Sched. 11, s. 4 (1); 2007, c. 7, Sched. 12, s. 3 (5).

Same

(4) Subject to subsections (5) and (6.1), the amount payable under subsection (1) in a taxation year by a municipal corporation may be reduced by the following amounts:

1. Any amount payable and paid by a municipal electricity utility under section 93 in respect of the part of the taxation year up to and including the date of the transfer or in respect of a previous taxation year, but only if the municipal electricity utility is related to the municipal corporation immediately before the transfer.

2. Any amount payable and paid by a municipal electricity utility under Part II, II.1 or III of the *Corporations Tax Act* or Part III of the *Taxation Act, 2007* in respect of the part of the taxation year up to and including the date of the transfer or in respect of a previous taxation year, but only if the municipal electricity utility is related to the municipal corporation immediately before the transfer. 2000, c. 42, s. 36 (3); 2002, c. 22, s. 63 (3, 4); 2004, c. 16, Sched. D, Table; 2007, c. 7, Sched. 12, s. 3 (5).

Same

(5) An amount referred to in paragraph 1, 2, 3 or 4 of subsection (3) or paragraph 1 or 2 of subsection (4) may be applied under those subsections to reduce the amount payable by a municipal corporation or municipal electricity utility under subsection (1) only to the extent that it has not previously been applied to reduce an amount payable by a municipal corporation or municipal electricity utility under subsection (1). 1998, c. 15, Sched. A, s. 94 (5); 2005, c. 31, Sched. 6, s. 2 (1).

Same

(6) A municipal electricity utility shall be deemed to be related to a municipal corporation for the purpose of subsection (4) if they are related persons within the meaning of section 251 of the *Income Tax Act* (Canada). 1998, c. 15, Sched. A, s. 94 (6).

Exception

(6.1) Despite subsection (6), if two or more municipal corporations hold an interest in a municipal electricity utility at the time of the transfer, the amount determined under paragraphs 1 and 2 of subsection (4) in respect of the transfer is the amount calculated in respect of each corporation using the formula,

$$A \times B/C$$

in which,

"A" is the total of the amounts,

(a) that are payable and paid by the municipal electricity utility under section 93 in respect of the part of the taxation year up to and including the date of the transfer or in respect of a previous taxation year, and

(b) that are payable and paid by the municipal electricity utility under Part II, II.1 or III of the *Corporations Tax Act* or Part III of the *Taxation Act, 2007* in respect of the part of the taxation year up to and including the date of the transfer or in respect of a previous taxation year,

"B" is the fair market value of the municipal corporation's interest in shares of the municipal electricity utility at the time of the transfer, and

"C" is the aggregate fair market value of all issued and outstanding shares of the municipal electricity utility at the time of the transfer.

2000, c. 42, s. 36 (4); 2002, c. 22, s. 63 (5); 2004, c. 16, Sched. D, Table; 2007, c. 7, Sched. 12, s. 3 (5).

Refund

(7) Amounts paid under this section in respect of a transfer may be refunded in accordance with the regulations if the proceeds of the transfer are reinvested in the prescribed manner. 2004, c. 31, Sched. 11, s. 4 (2).

Same

(7.1) In such circumstances as may be prescribed, a municipal corporation or municipal electricity utility shall repay an amount refunded to it under subsection (7). 2004, c. 31, Sched. 11, s. 4 (2).

Same

(8) Subsection (1) does not apply to transfers prescribed by the regulations. 1998, c. 15, Sched. A, s. 94 (8).

(9) Repealed: 2005, c. 31, Sched. 6, s. 2 (2).

(9.1) Repealed: 2005, c. 31, Sched. 6, s. 2 (3).

Payments to Minister of Finance

(10) After Part V is repealed under section 84.1, payments referred to in subsection (1) must be paid to the Minister of Finance, instead of to the Financial Corporation. 1998, c. 15, Sched. A, s. 94 (10); 2000, c. 42, s. 36 (5).

Status of police village

(10.1) A police village shall be deemed to be a municipal corporation for the purposes of this section. 2000, c. 42, s. 36 (6).

(11) Spent: 1998, c. 15, Sched. A, s. 94 (11).

Electricity Act, 1998

ONTARIO REGULATION 124/99

TRANSFER TAX ON MUNICIPAL ELECTRICITY PROPERTY

3. (1) Each of the transfers described in this section is prescribed as a transfer to which subsection 94 (1) of the Act does not apply.

...

(14) Subsection 94 (1) of the Act does not apply to the transfer of a leasehold interest in property described in subsection 94 (1) of the Act unless, at the time of the transfer,

(a) the lessee automatically acquires title to the leased property at less than its fair market value before or upon the termination of the lease;

(b) the lessee has a conditional or unconditional right to acquire the title to the leased property at less than its fair market value before or upon the termination of the lease;

(c) the term of the lease, including any renewal or extension provided for in the lease or in another agreement entered into as part of the arrangement relating to the lease, is greater than or equal to at least 75 per cent of the anticipated economic life of the leased property; or

(d) the net present value when the lease begins of the lease payments that are required by the lease agreement at that time, including any guarantee of the residual value of the leased property and any penalty payable for a failure to renew the lease or to extend its term, is greater than or equal to 90 per cent of the value of the leased property when the lease begins. O. Reg. 124/99, s. 3 (14); O. Reg. 454/00, s. 1 (1).

Tab 12

Indexed as:

Danyluk v. Ainsworth Technologies Inc.

Mary Danyluk, appellant;
v.
Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson, respondents.

[2001] 2 S.C.R. 460

[2001] S.C.J. No. 46

2001 SCC 44

File No.: 27118.

Supreme Court of Canada

2000: October 31 / 2001: July 12.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (82 paras.)

Administrative law -- Issue estoppel -- Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions -- Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions -- Employment standards officer dismissing employee's complaint -- Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel -- Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel -- Whether preconditions to application of issue estoppel satisfied -- If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the Employment Standards Act ("ESA") seeking [page461] unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her $2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

Held: The appeal should be allowed.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

[page462]

The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

The preconditions require the prior proceeding to be judicial. Here, the ESA decision was judicial. First, the administrative authority issuing the decision is capable of receiving and exercising adjudicative authority. Second, as a matter of law, the decision was required to be made in a judicial manner. While the ESA officers utilize procedures more flexible than those that apply in the courts, their adjudicative decisions must be based on findings of fact and the application of an objective legal standard to those facts.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or

tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in Harelkin and collateral attack in Maybrun.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a matter [page463] of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

Cases Cited

Considered: Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248; disapproved in part: Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267; referred to: Re Downing and Graydon (1978), 21 O.R. (2d) 292; Farwell v. The Queen (1894), 22 S.C.R. 553; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; R. v. Sarson, [1996] 2 S.C.R. 223; Robinson v. McQuaid (1854), 1 P.E.I.R. 103; Bell v. Miller (1862), 9 Gr. 385; Raison v. Fenwick (1981), 120 D.L.R. (3d) 622; Wong v. Shell Canada Ltd. (1995), 15 C.C.E.L. (2d) 182; Machin v. Tomlinson (2000), 194 D.L.R. (4th) 326; Hamelin v. Davis (1996), 18 B.C.L.R. (3d) 112; Thrasyvoulou v. Environment Secretary, [1990] 2 A.C. 273; R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706; McIntosh v. Parent, [1924] 4 D.L.R. 420; British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1; Schweneke v. Ontario (2000), 47 O.R. (3d) 97; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999), 176 N.S.R. (2d) 173; Guay v. Lafleur, [1965] S.C.R. 12; Thoday v. Thoday, [1964] P. 181; Machado [page464] v. Pratt & Whitney Canada Inc. (1995), 12 C.C.E.L. (2d) 132; Randhawa v. Everest & Jennings Canadian Ltd. (1996), 22 C.C.E.L. (2d) 19; Heynen v. Frito-Lay Canada Ltd. (1997), 32 C.C.E.L. (2d) 183; Perez v. GE Capital Technology Management Services Canada Inc. (1999), 47 C.C.E.L. (2d) 145; Munyal v. Sears Canada Inc. (1997), 29 C.C.E.L. (2d) 58; Alderman v. North Shore Studio Management Ltd., [1997] 5 W.W.R. 535; R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128; Harelkin v. University of Regina, [1979] 2 S.C.R. 561; Poucher v. Wilkins (1915), 33 O.L.R. 125; Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321; Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd. (1988), 22 B.C.L.R. (2d) 89; General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72; Arnold v. National Westminster Bank plc, [1991] 3

All E.R. 41; Susan Shoe Industries Ltd. v. Ricciardi (1994), 18 O.R. (3d) 660; Iron v. Saskatchewan (Minister of the Environment & Public Safety), [1993] 6 W.W.R. 1.

Statutes and Regulations Cited

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Employment Standards Act, R.S.O. 1990, c. E.14, ss. 1 "wages", 2(2), 6, 65(1)(a), (b), (c) [rep. & sub. 1991, c. 16 (Supp.), s. 9(1)], (7) [ad. idem, s. 9(2)] 67(1) [am. idem, s. 10(1)], (2) [rep. & sub. idem, s. 10(2)], (3) [ad. idem], (5) [idem], (7) [idem], 68(1) [am. idem, s. 11(1); am. 1991, c. 5, s. 16; am. 1993, c. 27, sch.], (3) [rep. & sub. 1991, c. 16 (Supp.), s. 11(2)], (7).
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APPEAL from a judgment of the Ontario Court of Appeal (1998), 42 O.R. (3d) 235, 167 D.L.R. (4th) 385, 116 O.A.C. 225, 12 Admin. L.R. (3d) 1, 41 C.C.E.L. (2d) 19, 27 C.P.C. (4th) 91, [1998] O.J. No. 5047 (QL), dismissing the appellant's appeal from a decision of the Ontario Court (General Division) rendered on June 10, 1996. Appeal allowed.

Howard A. Levitt and J. Michael Mulroy, for the appellant. John E. Brooks and Rita M. Samson, for the respondents.

Solicitors for the appellant: Lang Michener, Toronto. Solicitors for the respondents: Heenan Blaikie, Toronto.

The judgment of the Court was delivered by

1 **BINNIE J.**:-- The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some $300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the Employment Standards Act, R.S.O. 1990, c. E.14 ("ESA" or "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper and unfair, denied the claim. I agree that in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice [page466] should not be applied mechanically to work an injustice. I would allow the appeal.

I. Facts

2 In the fall of 1993, the appellant became involved in a dispute with her employer, the respondent Ainsworth Technologies Inc., over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. These letters were generally copied to her lawyer, Mr. Howard A. Levitt. Her principal complaint concerned an alleged entitlement to commissions of about $200,000 in respect of a project known as the CIBC Lan project, plus other commissions which brought the total to about $300,000.

3 The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had resigned and physically escorted her off the premises.

4 An employment standards officer, Ms. Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994 met with her for about an hour. The appellant gave Ms. Burke various documents including her correspondence with the employer. They had no further meetings.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed [page467] damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

6 On June 1, 1994, solicitors for the employer wrote to Ms. Burke responding to the appellant's claim. The employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms. Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop.

7 On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she or-

dered the employer to pay the appellant $2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms. Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

8 The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs [page468] from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. Ontario Court (General Division) (June 10, 1996)

9 The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. Following Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267 (C.A.), he concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. Court of Appeal for Ontario (1998), 42 O.R. (3d) 235

10 After reviewing the facts of the case, Rosenberg J.A. for the court identified, at pp. 239-40, the issues raised by the appellant's appeal:

> This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision [page469] should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

11 In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

12 In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. He considered Re Downing and Graydon (1978), 21 O.R. (2d) 292 (C.A.), to be "determinative of this issue" (p. 249).

13 Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel (at p. 252):

> The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to consider [page470] and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law (at p. 252):

> These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature. Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

15 Rosenberg J.A. noted that if the appellant had applied, under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded, at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

[page471]

III. Relevant Statutory Provisions

17 Employment Standards Act, R.S.O. 1990, c. E.14

1. In this Act,

...

"wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

(a) tips and other gratuities,
(b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,
(c) travelling allowances or expenses,
(d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; ("salaire")

...

6. -- (1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

65. -- (1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,

(a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;
(b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or
(c) issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the [page472] Director, of administration costs in the amount of 10 per cent of the wages or $100, whichever is the greater.

...

(7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding against the employer even though a review hearing is held to determine another person's liability under this Act.

...

67. -- (1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled or has found that the employee has no other entitlements or that there are no actions which the employer is to do or is to refrain from doing in order to be in compliance with this Act, the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.

(2) An employee who considers himself or herself aggrieved by the refusal to issue an order to an employer or by the issuance of an order that in his or her view does not include all of the wages or other entitlements to which he or she is entitled may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) or the date of the issue of the order or such longer period as the Director may for special reasons allow for a review of the refusal or of the amount of the order.

(3) Upon receipt of an application for review, the Director may appoint an adjudicator who shall hold a hearing.

...

(5) The adjudicator who is conducting the hearing may with necessary modifications exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.

...

[page473]

(7) The order of the adjudicator is not subject to a review under section 68 and is final and binding on the parties.

> 68. -- (1) An employer who considers themself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery or service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72 (2), apply for a review of the order by way of a hearing.
>
> ...
>
> (3) The Director shall select a referee from the panel of referees to hear the review.
>
> ...
>
> (7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

IV. Analysis

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of [page474] justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: Farwell v. The Queen (1894), 22 S.C.R. 553, at p. 558; Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; R. v. Sarson, [1996] 2 S.C.R. 223.

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making [page475] process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

22 The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in The Doctrine of Res Judicata in Canada (2000), at p. 94 et seq., including Robinson v. McQuaid (1854), 1 P.E.I.R. 103 (S.C.), at pp. 104-5, and Bell v. Miller (1862), 9 Gr. 385 (U.C. Ch.), at p. 386. The modern cases at the appellate level include Raison v. Fenwick (1981), 120 D.L.R. (3d) 622 (B.C.C.A.); Rasanen, supra; Wong v. Shell Canada Ltd. (1995), 15 C.C.E.L. (2d) 182 (Alta. C.A.); Machin v. Tomlinson (2000), 194 D.L.R. (4th) 326 (Ont. C.A.); and Hamelin v. Davis (1996), 18 B.C.L.R. (3d) 112 (C.A.). See also Thrasyvoulou v. Environment Secretary, [1990] 2 A.C. 273 (H.L.). Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, inter alia, to their legal nature and the position within the state structure of the institutions that issue them": R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

23 In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on [page476] the application of issue estoppel and the relevance of the rule against collateral attack.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in McIntosh v. Parent, [1924] 4 D.L.R. 420, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in Angle, supra, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", Farwell, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in Angle, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of

law or of mixed fact and law ("the questions") that [page477] were necessarily (even if not explicitly) determined in the earlier proceedings.

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in Angle, supra, at p. 254:

> (1) that the same question has been decided;
> (2) that the judicial decision which is said to create the estoppel was final; and,
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

26 The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the ESA to deal with the claim, the ESA officer lost jurisdiction when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel per rem judicatem in the circumstances of this case, and erred in failing to do so.

A. The Statutory Scheme

1. The Employment Standards Officer

27 The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum [page478] employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There [page479] are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

2. The Review Process

30 The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer's decision. Under s. 67(3), "the Director may appoint an adjudicator who shall hold a hearing" (emphasis added). The word "may" grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

31 It seems clear the legislature did not intend to confer an appeal as of right. Where the Director [page480] does appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of "may" and "shall" (and in the French text, the instruction that the Director "peut nommer un arbitre de griefs pour tenir une audience" (emphasis added)) puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

32 If an internal review were ordered, an adjudicator would then have looked at the appellant's claim de novo and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her $300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

[page481]

B. The Applicability of Issue Estoppel

1. Issue Estoppel: A Two-Step Analysis

33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; Schweneke v. Ontario (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

34 The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

35 A common element of the preconditions to issue estoppel set out by Dickson J. in Angle, supra, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K. Turner and K. R. Handley, The Doctrine [page482] of Res Judicata (3rd ed. 1996), paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, was the decision made in a judicial manner? These are distinct requirements:

> It is of no avail to prove that the alleged res judicata was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.
>
> (Spencer Bower, Turner and Handley, supra, para. 20)

36 As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent ex curia statement of Handley J. (the current editor of The Doctrine of Res Judicata) that:

> The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to res judicata estoppels.
>
> ("Res Judicata: General Principles and Recent Developments" (1999), 18 Aust. Bar Rev. 214, at p. 215)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard capable of supporting an issue [page483] estoppel? In my opinion, the answer to this question is yes.

(a) The Institutional Framework

38 The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: Re Downing and Graydon, supra, per Blair J.A., at p. 305:

> In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important indicia of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. An earlier legislative limit of $4,000 on unpaid wages (excluding severance pay and benefits payable under pregnancy and parental provisions) was eliminated in 1991 by S.O. 1991, c. 16, s. 9(1), but subsequent to the ESA decision in the present case a new limit of $10,000 was imposed. This is the same limit as is imposed on the Small Claims Court by the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 23(1), and O. Reg. 626/00, s. 1(1).

(b) The Nature of ESA Decisions Under Section 65(1)

39 An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

40 One distinction between administrative and judicial decisions lies in differentiating adjudicative [page484] from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in Guay v. Lafleur, [1965] S.C.R. 12, at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in Thoday v. Thoday, [1964] P. 181 (Eng. C.A.), at p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objec-

tive legal standard to those facts. This is characteristic of a judicial function: D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (1998), vol. 2, s. 7:1310, p. 7-7.

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

(c) Particulars of the Decision in Question

43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

44 The appellant contends that it is not enough to say the decision ought to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in Rasanen, supra, per Abella J.A., at p. 280:

[page485]

> As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. [Emphasis added.]

45 Trial level decisions in Ontario subsequently adopted this approach: Machado v. Pratt & Whitney Canada Inc. (1995), 12 C.C.E.L. (2d) 132 (Ont. Ct. (Gen. Div.)); Randhawa v. Everest & Jennings Canadian Ltd. (1996), 22 C.C.E.L. (2d) 19 (Ont. Ct. (Gen. Div.)); Heynen v. Frito-Lay Canada Ltd. (1997), 32 C.C.E.L. (2d) 183 (Ont. Ct. (Gen. Div.)); Perez v. GE Capital Technology Management Services Canada Inc. (1999), 47 C.C.E.L. (2d) 145 (Ont. S.C.J.). The statement of Métivier J. in Munyal v. Sears Canada Inc. (1997), 29 C.C.E.L. (2d) 58 (Ont. Ct. (Gen. Div.)), at p. 60, reflects that position:

> The plaintiff relies on [Rasanen] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

46 In Wong, supra, the Alberta Court of Appeal rejected an attack on the decision of an employment standards review officer and held that the ESA decision was adequate to create an estoppel as long as "the appellant knew of the case against him and was given an opportunity to state his position" (para. 20). See also Alderman v. North Shore Studio Management Ltd., [1997] 5 W.W.R. 535 (B.C.S.C.).

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47 In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision maker erred in carrying out his or her functions. As early as R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128 (H.L.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in "the observance of the law in the course of its exercise" (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: Harelkin v. University of Regina, [1979] 2 S.C.R. 561, at pp. 584-85. The decision remains a "judicial decision", although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

48 I mentioned at the outset that estoppel per rem judicatem is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in Harelkin, supra. In that case a university student failed in his judicial review application to quash the decision of a [page487] faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the Harelkin barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

49 The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though Maybrun, supra, says that an act in excess of a jurisdiction which the decision maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to Maybrun, on which forum [page488] the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected

the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

51 In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law [page489] governing judicial review in Harelkin, supra, and collateral attack in Maybrun, supra.

52 Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

53 I turn now to the three preconditions to issue estoppel set out by Dickson J. in Angle, supra, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) That the Same Question Has Been Decided

54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: Poucher v. Wilkins (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law [page490] that are necessarily bound up with the determination of that "issue" in the prior proceeding.

55 The parties are agreed here that the "same issue" requirement is satisfied. In the appellant's wrongful dismissal action, she is claiming $300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

(b) That the Judicial Decision Which Is Said to Create the Estoppel Was Final

56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

58 I have already noted that in this case, unlike Harelkin, supra, the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike Harelkin she had no "adequate alternative remedy" available to her as of right. The ESA [page491] decision must nevertheless be treated as final for present purposes.

(c) That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: Machin, supra; Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321 (C.A.), per Laskin J.A., at pp. 339-40. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd. (1988), 22 B.C.L.R. (2d) 89 (S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see Holmested and Watson, supra, at 21 s. 24, and G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 Can. Bar Rev. 623.

60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in The Law of Evidence in Canada (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

[page492]

61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in

relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

63 In Bugbusters, supra, Finch J.A. (now C.J.B.C.) observed, at para. 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel per rem judicatem is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s dictum was adopted and applied by the Ontario Court of Appeal in Schweneke, supra, at paras. 38 and 43:

[page493]

> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist... . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask -- is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> ...
>
> ... The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also Braithwaite, supra, at para. 56.

64 Courts elsewhere in the Commonwealth apply similar principles. In Arnold v. National Westminster Bank plc, [1991] 3 All E.R. 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, per Lord Keith of Kinkel, at p. 50:

> One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result ... .

65 In the present case Rosenberg J.A. noted in passing at pp. 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

66 In my view it was an error of principle not to address the factors for and against the exercise of [page494] the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

67 The list of factors is open. They include many of the same factors listed in Maybrun in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in Minott, supra. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

> (a) The Wording of the Statute from which the Power to Issue the Administrative Order Derives

68 In this case the ESA includes s. 6(1) which provides that:

> No civil remedy of an employee against his or her employer is suspended or affected by this Act. [Emphasis added.]

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an issue would be an abuse: Rasanen, supra, per Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

[page495]

70 While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings -- including any available appeals -- has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

> (b) The Purpose of the Legislation

71 The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In Bugbusters, supra, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. Forest Act, R.S.B.C.

1979, c. 140. The expense claim was allowed despite an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, per Finch J.A., at para. 30, was that

> a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursement] proceedings [under the Forest Act].

A similar point was made in Rasanen, supra, by Carthy J.A., at p. 290:

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking discovery [page496] and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American Restatement of the Law, Second: Judgments 2d (1982), vol. 2 s. 83(2)(e), which refers to

> procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. Counsel for the respondent justly observed, with some exasperation:

> As the record makes clear, Danyluk was represented by legal counsel prior to, at the time of, and subsequent to the cessation of her employment. Danyluk and her counsel were well aware of the fact that Danyluk had an initial choice of forums with respect to her claim for unpaid commissions and wages... .

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) The Availability of an Appeal

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: Harelkin, supra, at p. 592. Here the employee had no right of appeal, but the existence of a potential administrative review and her failure to take advantage of it [page497] must be counted against her: Susan Shoe Industries Ltd. v. Ricciardi (1994), 18 O.R. (3d) 660 (C.A.), at p. 662.

(d) The Safeguards Available to the Parties in the Administrative Procedure

75 As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

76 Morden A.C.J.O. pointed out in his concurring judgment in Rasanen, supra, at p. 295: "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." Laskin J.A. made a similar point in Minott, supra, at pp. 341-42.

(e) The Expertise of the Administrative Decision Maker

77 In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack (Maybrun, supra, at para. 50):

[page498]

> ... where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or raison d'être, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal.

(f) The Circumstances Giving Rise to the Prior Administrative Proceedings

78 In the appellant's favour, it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) As Laskin J.A. pointed out in Minott, supra, at pp. 341-42:

> ... employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them ... .

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the $300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

(g) The Potential Injustice

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the [page499] problem identified by Jackson J.A., dissenting, in Iron v. Saskatchewan (Minister of the Environment & Public Safety), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

> The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

81 On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

82 I would therefore allow the appeal with costs throughout.

cp/e/qllls

Tab 13

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Rasanen v. Rosemount Instruments Limited

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94 CLLC para. 14,024 at 12110

45 A.C.W.S. (3d) 666

Action No. C9813

Court of Appeal for Ontario,

Morden A.C.J.O., Carthy and Abella JJ.A.

February 10, 1994

Counsel:

David Harris and Stacey Ball, for appellant.

Harold Margles and James Holloway, for respondent.

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1 ABELLA J.A.: -- This is an appeal from a judgment dismissing Henry Rasanen's action for wrongful dismissal [28 C.C.E.L. 152, 90 C.L.L.C. 14,030]. Prior to instituting his wrongful dismissal action, Rasanen has made a claim for termination pay, pursuant to s. 40 (now s. 57) of the

Employment Standards Act, R.S.O. 1980, c. 137 (now R.S.O. 1990, c. E.14). After a hearing during which Rasanen and his employer gave evidence, the referee, appointed pursuant to s. 50(1) (now s. 68(1)) of the Employment Standards Act, concluded that no money for termination pay was owing to Rasanen. Because the trial judge was of the view that the issues before him and the referee were the same, he dismissed Rasanen's claim on the basis of issue estoppel. This application of the doctrine of issue estoppel forms the basis for this appeal.

Facts

2 Rosemount Instruments Limited distributes instrumentation for nuclear, aerospace and industrial use. Its head office for Canada is in Calgary, Alberta. Rasanen, an engineer, started work with Rosemount in January, 1974, as its Ontario branch manager. In 1981, Rosemount offered Rasanen the position of marketing manager in Calgary. He refused to move to Calgary because of, in his words, "family and financial-commitment considerations" and remained as Ontario branch manager. In 1982, he accepted a position in Toronto as manager of nuclear aerospace, marketing and sales. In this role, he reported directly to Colin Kent, Rosemount's Canadian president, had two sales persons and two clerical employees reporting to him, and earned a salary equivalent to that of the marketing manager.

3 In 1984, as a result of a corporate restructuring based on actual and projected reductions in sales, Rasanen's position became redundant. He was 42 years old and was earning a base annual salary of $45,150. At the company's annul conference for senior managers on August 14, 1984, Kent told Rasanen about the reorganization and the resulting elimination of his current position as of October 1, 1984. He then offered Rasanen, someone he valued and hoped to retain as an employee, two alternative positions.

4 The first position he offered was as Canada-wide marketing manager, the position Rasanen had been offered and had rejected in 1981 because it meant moving to Calgary. In this position, Rasanen would have almost the same number of employees reporting directly to him, enjoy the same bonus and salary level as his former position, and would report directly to the president.

5 Because Rasanen had previously rejected the possibility of moving his family to Calgary, Kent offered him a second alternative, a newly created position in Toronto called "major accounts manager". Rasanen could remain at the same salary level with the potential for a larger bonus. No employees, however, would be reporting directly to him and he himself would be reporting to the president through the sales manager.

6 The next day, Rasanen rejected the newly created Toronto position and told Kent he would discuss the Calgary job with his wife. The next week, with Rosemount paying for their travel expenses, the couple and their two children went to Calgary to look into the possibility of relocating.

7 Rasanen found the decision difficult to make and, as a result, delayed telling Kent whether he would accept the Calgary position. Kent made repeated attempts to contact Rasanen, finally reaching him on September 4th. Rasanen told Kent he would be unable to decide before the end of September. Kent, reminding Rasanen that the implementation date for the restructuring was October 1st, requested a response by September 10th. None was given.

8 After many attempts, Kent finally reached Rasanen on September 12th, again asking for a decision. Rasanen replied that he had sought legal advice and that a lawyer would soon be in touch with Kent. Before receiving any communication from anyone on Rasanen's behalf, Kent met with

Rasanen in Toronto on September 19th to discuss any concerns personally, but Rasanen declined comment.

9 Very shortly after this meeting, Kent received a letter from Rasanen's lawyer stating, in part, as follows:

> We understand that Mr. Rasanen has been offered two alternatives by the company, one being the transfer of his position to that of Industrial Marketing Manager in Calgary, Alberta, and the other being a transfer of his position to major Accounts Manager in Toronto, Ontario. As we understand the situation currently, our client has not been offered the opportunity of continuing his current position. Having reviewed the alternative positions proposed, and the circumstances surrounding them, we are of the opinion that they both represent a unilateral and fundamental change in Mr. Rasanen's employment position, amounting to a constructive termination.

(Emphasis added)

10 The letter purported to be an offer to reach a "satisfactory resolution", and a response was requested from the company "within ten days".

11 The company's reply, within the ten days, was the following letter, addressed to Rasanen from Kent:

> On Tuesday August 14, 1984, you were informed of the plan to re-organize the sales and marketing structure of the Company, and of the reasoning behind those plans. Part of this re-organization plan involved the elimination of the position of Manager, Nuclear/Aerospace Marketing and Sales, your present position. As you were told, the date that this plan was to be put into effect was October 1, 1984.
>
> On August 14th you were offered the position of Marketing Manager to be situated at the Head Office in Calgary. This position comprised the duties and responsibilities of the present position of Industrial Marketing Manager plus the marketing responsibilities for Aeronautical and Nuclear as well. The salary range and incidental benefits of this position were the same as that of your present position. This was explained to you.
>
> Due to the number of years of service that you have and to the high regard in which you were held by the Company, a new position was created to allow you to have a selection of positions from which to choose. This position was entitled Major Accounts Manager and was to be situated in Toronto. It was designed to fill a need of the sales organization and it was designed with your strengths in mind. It was designed as an excellent vehicle for your talents and as an important addition to our selling effort. This position was offered to you in good faith.

At the meeting in my office on August 14th, you were offered the choice of jobs mentioned above and were asked to give due consideration to the matter and to make your decision known as soon as possible so that the re-organization could be publicized and effected by the planned date of October 1, 1984. Your initial reaction on August 14th was that you were not interested in the Major Accounts Manager position and you said nothing subsequently to change my understanding.

Having heard nothing from you, I called your office the week of August 27th to enquire as to your decision, but was told that you were on vacation for the week.

On September 4th, I called you and you informed me that you would need until the end of September to make your decision. I said that we needed a response sooner than that so that plans could be effected and asked for a response by no later than September 10th.

I called you three times on September 10th, twice on September 11th and twice on September 12th and left a message each time to return my call as soon as possible. I understand that you called back late on September 11th but I didn't get this message until the next day. I finally received your call late on the afternoon of September 12th. At that time you stated that you would not discuss the matter of the offered positions, that you had sought advice and that your advisors would write to me the following week. I pressed you to discuss the matter then as I needed to know your plans so that the proposed re-organization could proceed on time. You still refused to discuss the matter in any way.

A letter dated September 17th, 1984, from Brian A. Grosman, Q.C. was received in Calgary on September 19th.

Given the facts that you rejected the Major Accounts Manager position, refused to accept the Marketing Manager position by the requested deadline or to discuss the matter other than through an attorney, it is apparent that you are not interested in either position.

Since it is important that our re-organization plan proceed on schedule, your present position and, because of your refusal to accept either choice of lateral transfer, your employment with Rosemount Instruments Ltd. will end on September 30, 1984. (Emphasis added)

Prior proceedings

12 Rasanen left Rosemount on September 30th and instituted two legal proceedings. His Employment Standards Act claim and his wrongful dismissal action were started almost contempora-

neously at the end of 1984. The hearing before the referee took place on January 14, 1986. The trial, on the other hand, did not take place until June 21, 1989. Because the essence of this appeal is whether the trial judge erred in concluding that he was bound by the refereee's decision based on issue estoppel, it is important to examine how the issues were framed in the process under the Employment Standards Act.

13 Rasanen's claim under the Employment Standards Act was for eight weeks' pay in lieu of written notice, pursuant to s. 40(1) (now s. 57(1)) of that Act. That section stated:

> 40(1) No employer shall terminate the employment of an employee who has been employed for three months or more unless he gives: . . . . .
>
> (d) eight weeks notice in writing to the employee if his period of employment is ten years or more,
>
> and such notice has expired.

The $4,000 ceiling on the quantum of wages recoverable, imposed by s. 47(1)(c), has since been eliminated (R.S.O. 1990, c. E.14, s. 65(1), as amended by 1991, c. 16, s. 9(1)).

14 According to s. 2(a) of R.R.O. 1980, Reg. 286 (now R.R.O. 1990, Reg. 327) under the Employment Standards Act, an employer was exempt from these requirements if an employee was "laid off after refusing an offer by his employer of reasonable alternate work". Moreover, s. 40(3)(c) (now s. 57(10)(c)) of the Act, stated that no termination notice was required if "an employee . . . has been guilty of wilful . . . disobedience . . . that has not been condoned by the employer".

15 The first step in the then three-step process was an investigation into a complaint by an employment standards officer. Rasanen's claim was denied at this initial stage under s. 49(1) (now s. 67(1)). In a letter dated February 1, 1985, he was advised that the reason for this decision was the following:

> As we explained, Rosemount Instruments' August 1984 offer of another position within their Mississauga operation with no apparent loss of salary or benefits, a possible reduction in responsibility, actual work, time, travel, etc. constituted an offer of reasonable alternate employment. Your reluctance or refusal to accept this offer in late September 1984 is deemed to be a notification to your employer that you intended to leave his employ. As such you have no entitlement to termination benefits as per the provisions of the legislation and, as noted previously, we cannot continue our action.

16 Rasanen, as he was then entitled by the legislation to do, requested a review of this decision by a second employment standards officer under s. 49(2) (now s. 67(2)) on the grounds that he "did not voluntarily leave the employ of the company" and was "given insufficient time to properly evaluate the alternate employment offered".

17 Rasanen was successful on this review and, on June 4, 1985, a letter was sent to Rosemount from the Employment Standards Branch requiring immediate payment of the termination pay. The employment standards officer, finding in Rasanen's favour after interviewing the employer and em-

ployee and examining relevant documents, set out the terms of his inquiry as follows in his "Officer's Narrative Report":

> The employer, in initiating new alternative terms of employment for Mr. Rasanen, and in alleging that he quit, as a reason for not providing him with notice or pay in lieu as per the legislation; has the burden to prove that: --
>
> Firstly, The alternate position offers were reasonable alternate work, and by their refusal, the employer could be exempt from the termination requirements.
>
> Secondly, The employee voluntarily quit his employment, and was not in fact discharged by the employer contrary to the notice of payment in lieu requirements of the Employment Standards Act.

18 The officer concluded that neither offer represented reasonable, alternate employment. He also found that there was "no foundation to characterize the events leading to Rasanen's termination from which it could be inferred that he quit . . . His employment was terminated by the employer . . . ".

19 Rosemount, as it was then entitled by the legislation to do, requested a further review by way of a hearing before an independent referee under s. 50(1) (now s. 68(1)). That hearing, at which both Kent and Rasanen gave evidence, resulted in the referee's decision which the trial judge held to be binding on him. In his decision, the referee characterized the employer's position at p. 13 of his reasons as follows:

> . . . the company takes the position that Mr. Rasanen quit, in refusing an offer of reasonable alternate employment, or that he was properly terminated under the Act for wilful disobedience, in refusing to accept and perform reasonable alternate employment. Either way, the company points out, the issue is the same: do the positions offered constitute "reasonable alternate employment" vis-à-vis the respondent Henry Rasanen; or, more precisely, did the terms of employment offered by the company under its restructuring proposal constitute a fundamental breach of Mr. Rasanen's contract of employment?

The referee then observed (at p. 14):

> Clearly, the issue is a question of fact in each issue, and appears to turn essentially on what are found to have been the reasonable expectations of the parties, together, as one would anticipate with an examination of all of the circumstances surrounding the alternative job offer.
>
> The same approach to the issue can be seen in the decision of the various courts dealing with the question of wrongful dismissal.

He then examined carefully the relevant "wrongful dismissal" jurisprudence for guidance on what constitutes a "fundamental breach of the employment contract", and concluded that the significance

of any given set of factors in determining whether such a breach had occurred "appears to be a question of fact in each case". He then cited the following observation of Dubin J.A. in Canadian Bechtel Ltd. v. Mollenkopf (1978), 1 C.C.E.L. 95 (Ont. C.A.) at p. 98:

> If the employer . . . acted in good faith and in the protection of its own business interests, the plaintiff would have had no right to refuse the transfer.

20 This observation is relied upon by the referee, at p. 17 of his reasons, as an appropriate analogous interpretive guide and "as an indication that courts here as well will grant some latitude to employers, who, acting in good faith, find it necessary to effect certain changes in the employment conditions of an employee, and that the court will not necessarily find that the changes amount to a fundamental breach".

21 Relying largely, then, on the language and approach found in "wrongful dismissal" case law, the referee made the following findings based on the evidence he heard and read:

(a) that a transfer of Rasanen to Calgary was not within the reasonable expectations of the parties and that, as a result, Rosemount was not entitled to insist that he accept a Calgary transfer as "reasonable alternate work";
(b) that notwithstanding Rasanen's concerns about loss of prestige, the alternative offer of the best available senior position in Toronto was reasonable and represented an overall increase in earnings potential;
(c) that Rasanen cut off all communication with Rosemount before they had a chance to consider and respond to some of his concerns, like the loss of a direct reporting relationship with the president or the absence of a personal secretary;
(d) that Rosemount's two options were offered in good faith;
(e) that the choice offered to Rasanen did, in fact, constitute reasonable alternate employment; and
(f) that Rasanen, while "perfectly entitled, for his own reasons, to decline to accept either of the options", was not entitled in the circumstances to do so and claim termination pay as well.

22 As a result, the order of the employment standards officer was vacated and replaced by the referee's finding that no money for termination pay was owing to Rasanen.

23 At the trial over three years later, both Rasanen and Rosemount were represented by counsel. As in the hearing before the referee, the only witness called on behalf of Rasanen was Rasanen himself. No one testified on behalf of Rosemount. The evidence was completed on the first day.

24 The trial judge reviewed both the facts of the case and the reasons of the referee before concluding that the doctrine of issue estoppel applied. In the alternative, it was his view that if the doctrine was inapplicable, there was, in any event, no fundamental breach of the employment contract given what he considered to be equally advantageous status, pay and benefits in the Calgary position. While he disagreed with the referee as to which of the Toronto or Calgary jobs Rasanen ought to have accepted, the trial judge agreed that because a sufficiently reasonable job alternative was made available by Rosemount, no liability attached. He rejected Rasanen's submission that the reassignment constituted constructive dismissal by quoting extensively from the reasons of Finlayson

J.A. in Smith v. Viking Helicopter Ltd. (1989), 68 O.R. (2d) 228, 31 O.A.C. 368, who in turn reiterated the "good faith" test in Canadian Bechtel, supra, relied upon by the referee.

25 In other words, an analysis under either the Employment Standards scheme or the "wrongful dismissal" jurisprudence would, according to the trial judge, yield no remedy for Rasanen.

Analysis

26 The appellant argued that none of the conditions precedent to the application of issue estoppel existed in this case; the matters to be decided in the wrongful dismissal action and the Employment Standards Act claim were not the same; the issue determined by the referee was not necessary to the result; the hearing before the referee was neither judicial nor final, and the parties were not the same in both proceedings. Additionally, the appellant maintained that the Employment Standards Act itself, by stating in s. 6 that no civil remedy is affected by the Act, mandates the parallel pursuit of remedies in the courts.

27 At its simplest, issue estoppel is intended to preclude relitigation of issues that have been determined in a prior proceeding. As stated by Middleton J.A. in McIntosh v. Parent (1924), 55 O.L.R. 552 at p. 555, [1924] 4 D.L.R. 420 (C.A.):

> Any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established . . .

It arises as a doctrinal response to the "twin principles . . . that there should be an end to litigation and . . . that the same party shall not be harassed twice for the same cause": Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853 (H.L.) at p. 946, G. Spencer Bower and A.K. Turner, The Doctrine of Res Judicata, 2nd ed. (London: Butterworths, 1969), at p. 10; see also the reasons of Lord Denning in McIlkenny v. Chief Constable of West Midlands Police Force, [1980] 2 All E.R. 227 (C.A.), affirmed on other grounds, [1981] 3 All E.R. 727 sub nom. Hunter v. Chief Constable of West Midlands Police Force (H.L.). As a species of estoppel, it is distinguishable from, but clearly conceptually related to, "cause of action estoppel" or res judicata, which precludes the bringing of an action when the same cause of action has already been determined by a court of competent jurisdiction: Thoday v. Thoday, [1964] 1 All E.R. 341 (C.A.) at p. 352.

28 The proceedings before us involve issue estoppel. Lord Guest summarized the requirements of issue estoppel as follows in Carl-Zeiss-Stiftung, supra, at p. 935:

> . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

29 The proper inquiry in deciding whether the requirements have been met is whether the question to be decided in these proceedings is the same as was contested in the earlier proceedings and was, moreover, so fundamental to the decision that it could not stand without the determination of

that question: Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248 at pp. 254-55, 47 D.L.R. (3d) 544, per Dickson J.; Spens v. Inland Revenue Comrs, [1970] 3 All E.R. 295 (Ch. Div.) at p. 301, per Megarry J., quoting Bower and Turner, op. cit., at pp. 181-82.

30 In my view, the question to be decided in these proceedings is the same question that was, and was necessarily, decided in the earlier Employment Standards Act proceedings: was there any entitlement by the employee to compensation from the employer arising from the termination of his employment? There is no doubt that under the Employment Standards Act this question has a different linguistic and quantitative formulation than at common law. But a different characterization and process does not, in this case, mean a different question.

31 The employee's entitlement to termination pay in both proceedings required a determination of whether the employer fundamentally violated a duty arising from the employment relationship giving rise to liability and compensation. The process under the Employment Standards Act ended with a dismissal of the employee's claim because of findings that reasonable alternative employment was available and that the employer acted in good faith. The question of whether there was entitlement to termination pay was accordingly answered in the negative. These are the same questions that were to be answered in the appellant's wrongful dismissal proceeding. The questions are not only the same, they are fundamental to the decision.

32 Having had the questions answered in the Employment Standards Act claim, the appellant had conclusive answers for any subsequent litigation. Even if one accepts the argument that the referee did not have to decide whether there was a fundamental breach, he did have to decide whether reasonable alternate employment was offered, a crucial question in the wrongful dismissal action. In deciding that there was a reasonable alternative, the referee decided the central question of whether or not entitlement existed in the wrongful dismissal action.

33 The first requirement for the application of issue estoppel, that the earlier proceedings were determinative of the issues arising in the subsequent action, has therefore, in my view, been satisfied.

34 The second requirement is that there be a prior, final, judicial decision. The appellant argued that the procedure before the referee was not sufficiently "judicial", and that the absence of discovery, costs, production of documents and a judge rendered it so dissimilar a process to that of the courts that no decision resulting from it should be binding.

35 This is an argument, in my opinion, which seriously misperceives the role and function of administrative tribunals. They were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly: see, for example, Law Reform Commission of Canada, Report 26: Report on Independent Administrative Agencies: A Framework for Decision Making (Ottawa: Supply and Services Canada, 1985); Canadian Bar Association Task Force, Report on the Independence of Federal Administrative Tribunals and Agencies in Canada (The Ratushny Report) (Ottawa: Canadian Bar Association, 1990); Robert Macaulay, Directions: Review of Ontario's Regulatory Agencies (Toronto: Queen's Printer for Ontario, 1989); Groupe de travail sur les tribunaux administratifs, Rapport sur les tribunaux administratifs: L'Heure est aux decisions (the Ouellette Report) (Quebec: Les Publications du Quebec, 1987); H.W. Arthurs, Without the Law: Administrative Justice and

Legal Pluralism in Nineteenth-Century England (Toronto: University of Toronto Press, 1985); R.A. MacDonald, "Absence of Jurisdiction: A Perspective" (1983), 43 R. du B. 307; J. Willis, "Three Approaches to Administrative Law: The Judicial, The Conceptual, and The Functional" (1935), 1 U. of T. L.J. 53.

36 Tribunals are bound by the rules of natural justice and, at a minimum, the parties are entitled to know the case they have to meet and to have an opportunity to meet it. The methodology of dispute resolution in these tribunals may appear unorthodox to those accustomed only to the courtroom's topography, but while unfamiliar to a consumer of judicial justice, it is no less a form and forum of justice to its consumers. As Blair J.A. said in Downing v. Graydon (1978), 21 O.R. (2d) 292 at p. 310, 92 D.L.R. (3d) 355 (C.A.):

> There are no rigid rules of procedure which must be followed to satisfy the requirements of natural justice. Courts have been careful not to place decision-making officials and tribunals in a procedural strait-jacket and, in particular, not to require them to hold judicial type hearings in every case. The purposes of beneficent legislation must not be stultified by unnecessary judicialization of procedure.

37 As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. If the purpose of issue estoppel is to prevent the retrial of "[a]ny right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction" (McIntosh v. Parent, supra), then it is difficult to see why the decisions of an administrative tribunal having jurisdiction to decide the issue, would not qualify as decisions of a court of competent jurisdiction so as to preclude the redetermination of the same issues: Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121; Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94. On the contrary, the policy objectives underlying issue estoppel, such as avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings, are enhanced in appropriate circumstances by acknowledging as binding the integrity of tribunal decisions.

38 The appellant is unable to identify any specific disadvantage resulting from the procedure in the referee hearing, other than noting that traditional tools like discovery, production or costs are unavailable under the Employment Standards Act scheme. He had -- and took -- full opportunity to make his case and respond to that of his adversary. His argument, in my view, rests more on the theoretical proposition that an adjudicated decision made anywhere except by a judge in a courtroom is inherently less reliable, and therefore not binding in another proceeding.

39 This is a proposition many courts have already rejected: see, for example, Benincasa v. Ballentine (1978), 7 C.P.C. 81 (Ont. H.C.J.); Yee v. Gim (1978), 87 D.L.R. (3d) 67, [1978] 3 W.W.R. 733 (B.C.S.C.); Daniel v. Hess (1965), 54 W.W.R. 290 (Sask. Div. Ct.); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Nor is it responsive to the required flexibility and uniqueness of tribunal adjudication. Within their areas of expertise and jurisdiction, these tribunals are the courts for their intended beneficiaries, are perceived by these beneficiaries to be making enforceable decisions, and are expected by these beneficiaries to be making such decisions far more expeditiously

but no less reliably and determinatively than the courts. These are, in my view, reasonable expectations.

40 There is no basis for restricting the application of issue estoppel to decisions made by judges in the ordinary course of litigation. By analogy, the hearing by the referee, if not technically "judicial", is designed to be an independent, fair, impartial and binding adjudicative process, and therefore satisfies the spirit of the requirement. It was a decision made in a hearing in which the appellant knew the case he had to meet, had a chance to meet it, and lost. Had he won, the decision would have been no less binding.

41 The remaining aspect of this second requirement is that the decision be final and conclusive of the relevant issues. Of this there can be no doubt. Section 50(7) (now s. 68(7)) of the Employment Standards Act states:

> 50(7) A decision of the referee under this section is final and binding upon the parties . . .

The referee's decision is subject only to judicial review. No judicial review was sought. The decision is therefore final.

42 No one disputes that the referee had the jurisdiction to decide the questions he decided, and I have earlier expressed my view that the questions he decided were conclusive of the issues in the wrongful dismissal action. What remains is the appellant's contention that the referee's decision was not final and binding as against him because he was not a party to the hearing held pursuant to s. 50 of the Act. This leads to an examination of whether the third requirement of issue estoppel was met in this case, namely, whether the same parties or their privies are common to both proceedings.

43 The respondent argued that even if there was no privity or mutuality because the parties were not the same, this court should none the less follow leading American decisions and several Canadian judgments by embracing non-mutual issue estoppel. (An excellent review of the jurisprudence and analysis of this development can be found in Garry D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 Can. Bar Rev. 623.)

44 In my view, it is not necessary to apply the non-mutual preclusion because the appellant was, if not a party to the earlier proceeding, certainly a privy. It was a hearing resulting from a claim he initiated. He participated in the two stages which preceded a referee hearing under the Employment Standards Act -- the initial investigation and the officer's review of the investigation. The Ministry of Labour, through counsel, appeared on the appellant's behalf for the purpose of promoting his claim and defending the officer's decision in his favour. He not only had notice of every step of the process and hearing, he was present at the hearing, gave evidence, heard the evidence and argument of all parties, and submitted or reviewed the relevant documentation filed.

45 The referee's decision has the usual preambular references:

> IN THE MATTER OF the Employment Standards Act, R.S.O. 1980, c. 137, as amended, s. 50(3)

AND IN THE MATTER of an Application for Review of Order No. 00462 by Rosemount Instruments Ltd.

Referee: M.G. Mitchnick

Applicant: Employee: Rosemount Instruments Ltd.Henry A. Rasanen

Date, Time and Place of Hearing January 14, 1986 -- 10 a.m.Toronto, Ontario

[su1]APPEARANCES[xu: For the Applicant: W. Manuel, Counsel P. Kent

For the Ministry: Donald W. Wilson, Counsel Ed Hazen, Employment Standards Officer Henry A. Rasanen, Employee

46 The referee hearing is the final stage in the process the appellant initiated. As the above designations indicate, the process is a dispute between an employer and an employee. The appellant Rasanen was the "Employee". The employer Rosemount was the "Applicant" who applied for the hearing in appeal from the officer's decision. The "Appearances" refer to two sets of personnel: those appearing for the Applicant employer and those appearing for the ministry. Since the two disputants are desigated as being the "Applicant" and the "Employee", and since the Applicant employer is represented by counsel and Rosemount's president, the remaining appearances must of necessity be on behalf of the Employee Rasanen. The ministry appears, therefore, on behalf of the Employee Rasanen and in support of his favourable order. There was a clear community of interest between Rasanen, the employee whose claim was the subject of the proceedings culminating in the referee hearing, and the Ministry of Labour: both were seeking to uphold the prior determination made by an employment standards officer in those proceedings.

47 The appellant clearly called the witnesses he wanted, introduced the relevant evidence he needed, and had the chance to respond to the evidence and arguments against him. He had the assistance of counsel provided by the Ministry of Labour and there was no evidence that he sought his own counsel or that his choice would have been denied if sought. He enjoyed, in short, the full benefits that an official "party" designation would have provided, regardless of whether he was referred to specifically as a party in s. 50(4) (now s. 68(4)) of the Employment Standards Act. He had a meaningful voice, through his own evidence and through the assistance of the ministry, in a proceeding which decided the very issue he sought to raise in his subsequent action. The third requirement that he be a party or privy to the prior proceeding has therefore been satisfied.

48 The appellant's remaining argument is that s. 6 (now s. 6(1)) of the Employment Standards Act precludes the application of issue estoppel to proceedings under the Act. It currently states:

> 6(1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

The effect of this section, he argues, is that civil proceedings are available concurrently with proceedings under the Employment Standards Act and that issue estoppel cannot, accordingly, be applied to prevent full and consecutive access to those civil remedies.

49 The purpose of the Act is "to protect the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination": Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986 at p. 1003, 91 D.L.R. (4th) 491, per Iacobucci J.; see also Innis Christie, Geoffrey England and W. Brent Cotter, Employment Law in Canada, 2nd ed. (Toronto: Butterworths, 1993) at p. 810; R.J. Adams, "Employment Standards in Ontario" (1987), 42 Industrial Relns. Q. Rev. 46. Section 4 of the Act confirms that these standards are only "minimum requirements" and that any more beneficial employment term provided by law or contract prevails over the statutory minimums delineated in the Employment Standards Act. Ac-

cording to the appellant, it is because the remedies available under the Act are minimal that civil -- and greater -- remedies are simultaneously pursuable in the courts.

50 The fact that an employee is not prevented from seeking a civil remedy does not, it seems to me, lead inexorably to the conclusion that he or she can do so as if no prior proceeding before the tribunal had taken place. If employees wish to pursue a more expeditious route yielding statutory benefits, they have access to the Employment Standards Act provisions and scheme. If, on the other hand, they wish to formulate their claim as a civil action seeking broader remedies, this option is equally open to them. Whichever forum is chosen first, issue estoppel is reciprocally available and parties may find, in any subsequent proceeding, that they are bound by a prior determination on the same issue, even if that determination was made by a tribunal.

51 The courts have given increasing latitude to tribunal decision-making since the landmark C.U.P.E. decision (C.U.P.E., Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417), reserving judicial review to patently unreasonable decisions or those made without jurisdiction, whether or not they agreed with the result. In National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 at p. 1343, 74 D.L.R. (4th) 449, Wilson J. quotes with approval the following excerpt from Harry W. Arthurs, "Protection Against Judicial Review" (1983), 43 R. du B. 277 at p. 289:

> There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation. (See also A.J. Roman, "Independence and Accountability of Administrative Tribunals: A Delicate Balance" Canadian Bar Association, Continuing Legal Education, August 24, 1993.)

52 More recently, L'Heureux-Dubé J., in Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles), [1993] 2 S.C.R. 756 at pp. 774-76, 154 N.R. 104, confirmed the Supreme Court's approach as follows:

> The patently unreasonable error test is the pivot on which judicial deference rests. As it relates to matters within the specialized jurisdiction of an administrative body protected by a privative clause, this standard of review has a specific purpose: ensuring that review of the correctness of an administrative interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision. The process by which this standard of review has progressively been accepted by courts of law cannot be separated from the contemporary principle of curial deference, which is, in turn, closely linked with the development of extensive administrative justice (see Cory J.' s reasons in PSAC No. 1 and PSAC No. 2, supra, and National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 (per Wilson J.)). Substituting one's opinion

> for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks at the same time, thwarting the original intention of the legislature. For the purposes of judicial review, statutory interpretation has ceased to be a necessarily "exact" science and this Court has again recently [in United Brotherhood], confirmed the rule of curial deference set forth for the first time in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.; United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316; PSAC No. 2, supra, Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644; Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 1 S.C.R. 1722; National Corn Growers Assn. v. Canada (Import Tribunal), supra, and CAIMAW v. Paccar of Canada Ltd., supra. In the recent decision PSAC No. 2 [now reported at [1993] 1 S.C.R. 941], Cory J. noted that this was a strict test (at p. 964):
>
> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

53 It would be anomalous if the courts, while deferring to the final and binding nature of tribunal decisions for judicial review purposes, did not treat these same decisions as binding in subsequent judicial proceedings where the same issues arise. While it is certainly true, therefore, that the appellant was free to pursue his remedies in either a court or at the Employment Standards Branch, he was not free to presume that he was immune from being bound by a final decision of either forum on the same issue. There is no logical inconsistency between the right to select a remedial avenue, and the preclusive application of issue estoppel in a subsequent proceeding if its requirements have been met. The fact that s. 6 preserves the possibility of a civil remedy does not mean that it suspends the operation of issue estoppel in appropriate cases.

54 The trial judge was correct in applying issue estoppel in the circumstances of this case.

55 Because this conclusion is dispositive of the appeal, it is not necessary to deal with the appellant's second argument that the trial judge erred when he determined that the appellant was required to accept the alternate job in Calgary.

56 I would dismiss the appeal with costs.

57 CARTHY J.A. (concurring in the result): -- I have read the reasons of Abella J.A. and respectfully disagree with her view as to the application of issue estoppel, although I agree as to the ultimate disposition of this appeal.

58 The plaintiff appeals from the dismissal by R.E. Holland J. of his claim for damages for wrongful dismissal [28 C.C.E.L. 152, 90 C.L.L.C. 14,030]. The trial judge found that a decision emanating from a hearing conducted pursuant to the Employment Standards Act, R.S.O. 1980, c. 137 ("E.S.A."), in which it was found that the appellant was not entitled to compensation under that

Act for his termination, created an issue estoppel which prevented the appellant from asserting the claim in this action. The trial judge further found that the alternative employment offered by the respondent to the appellant should have been accepted and that if he was wrong on the issue estoppel question, the claim should be dismissed on the ground that there was no wrongful dismissal. The trial judge then assessed the damages at $44,793.43 together with prejudgment interest as agreed between the parties. The appellant does not take issue with the damages or prejudgment interest but says that the trial judge erred in his determination with respect to issue estoppel and wrongful dismissal.

59 At the time of his termination in 1984, the appellant was manager of nuclear and aero marketing sales for Canada, was stationed in Toronto and reported directly to the president of Rosemount Instruments Ltd. ("R.I.L."), the respondent. At that time the respondent was planning a reorganization of the company and the appellant's position was to be eliminated. The appellant was offered the position of marketing manager, which would attract the same salary and responsibility, but would require him to relocate to Calgary. In the alternative, and presumably in the event that the appellant did not wish to move to Calgary for personal reasons, he was offered the position of major accounts manager in Toronto. This position, in terms of reporting responsibility, would place him lower in the hierarchy and with lesser management responsibilities than his position at the time. In the latter position, his income would probably remain the same although it would be dependent in part upon commissions which could result in a higher or lower income.

60 The appellant refused both alternatives and brought this action as well as an application under the E.S.A. for the termination allowance provided for under that statute, which in his case would be eight weeks' pay or $4,400. In the proceeding under the E.S.A., an employment standards officer decided, under s. 49(1), that the appellant was not entitled to termination pay because he had been offered reasonable alternative work: see R.R.O. 1980, Reg. 286, s. 2(a). That finding was reviewed under s. 49(2), at the request of the appellant, and it was found that he was entitled to termination pay. The officer therefore issued an order to the employer, under the powers conferred by s. 47, to pay to the appellant the amount of $4,400. Then, at the request of the respondent, a hearing was conducted under s. 50 before a referee who concluded that reasonable alternative work had been offered and that the appellant's application should be denied.

61 The subsections of the E.S.A. mapping the above procedure read, at the applicable time in 1985, as follows:

> 49(1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled under this Act he may refuse to issue an order to an employer . . .
>
> (2) An employee who considers himself aggrieved by the refusal to issue an order to an employer may apply to the Director in writing . . . for a review of the refusal and the Director shall cause the complaint to be reviewed by an employment standards officer . . .

> 50(1) An employer who considers himself aggrieved by an order made under section 39, 39c or 47, upon paying the wages ordered to be paid and the penalty thereon, if any, may . . . apply for a review of the order by way of a hearing.
>
> . . . . .
>
> (4) The employer, the employment standards officer from whose order the application for review is taken and such other persons as the referee may specify are parties to an application for review under this section and on the review the employer shall be the applicant and the employment standards officer and such other persons specified by the referee, if any, shall be the respondents.
>
> . . . . .
>
> (7) A decision of the referee under this section is final and binding upon the parties . . .

62 The important feature of the hearing at the third stage is that the employer and employment standards officer are parties to the hearing, but the employee is not a party unless so specified by the referee, which was not done in this case.

63 The trial judge noted in his reasons that three conditions must be fulfilled in order for issue estoppel to apply. The same matter must fall for decision in both proceedings, the earlier decision must be final, and the parties must be the same. The trial judge concluded, without explanation, that the latter two conditions were met. He then reviewed the referee's reasons for decision, satisfying himself that the same issues had been dealt with by the referee as were now being considered by him, and dismissed the action on the ground of issue estoppel. He held that s. 6 of the E.S.A., which provides that "[n]o civil remedy of an employee against his or her employer is suspended or affected by this Act", does not prevent the doctrine of issue estoppel from applying. In coming to this conclusion, he relied upon Browne v. CKWX Ltd. (1985), 7 C.C.E.L. 191 (B.C. Co. Ct.).

64 My starting point in analyzing the application of issue estoppel is s. 6 of the E.S.A. which reads:

> 6. No civil remedy of an employee against his employer is suspended or affected by this Act.

65 Does this mean that nothing occurring in the course of proceedings under the Act can be pleaded or argued in defence of a civil action? The intent of the language cannot be that broad because, as was conceded by counsel for the respondent, a recovery under the Act must as a matter of fairness and common sense diminish the damages that can be claimed in a civil action. I prefer to read this section as a simple acknowledgement that the Act itself does not bar seeking a civil remedy. The claims and defences which may be put forward in a civil action are such as the court permits. Issue estoppel is a rule of the common law which gives effect to the policy of the court to prevent certain persons who have been involved in earlier determinations from raising findings against them for fresh debate. The applicability of issue estoppel must be determined by the court based upon common law principles applied to the facts, which in this case include an earlier hearing before a tribunal.

66 The requirements of issue estoppel were set out by Lord Guest in Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853 (H.L.) at p. 935, quoted with approval by Dickson J. in Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248 at p. 254, 47 D.L.R. (3d) 544:

> . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies . . .

Thus, one of the features of issue estoppel is that the parties or their privies are the same in the present and earlier dispute. In the present case, the trial judge concluded that the appellant and respondent were parties to the proceedings under the E.S.A. This does not appear to be so.

67 As noted above, the parties to the earlier hearing were the employer, represented by his counsel, and the employment standards officer, represented by counsel from the ministry. The employee was in attendance and gave evidence but was not represented by counsel, except to the extent that the ministry was defending the earlier order.

68 The fact that the parties are not identical has not always been taken as conclusive of whether issue estoppel applies. This was the case in Nigro v. Agnew-Surpass Shoe Stores Ltd. (1977), 18 O.R. (2d) 215, 82 D.L.R. (3d) 302 (H.C.J.). That case involved a second action following upon an earlier action in which a plaintiff had sued a series of defendants for damages caused by a fire and had recovered against one of them. A separate plaintiff, suffering similar damages, sought to go to trial against the same defendants and those defendants had taken third party proceedings against each other. Motions were brought to dismiss the claims against the parties who had been found not to be negligent in the earlier action and to dismiss the third party proceedings. Weatherston J. concluded that issue estoppel is not limited to cases where there is an identity of the parties and that, because issue estoppel is a rule of public policy in which the court exercises its inherent jurisdiction to prevent an abuse of process, he was entitled to take a broader view of the circumstances. One of those circumstances was that a third motion before him had been brought by the plaintiffs to strike the paragraphs of the statement of defence denying the liability of Agnew-Surpass, as it had been found liable in the earlier action. Weatherston J. concluded that by bringing this motion the plaintiffs had identified themselves with the plaintiff in the first action. He therefore brought to an end all issues in the second action which had been litigated in the first action, even though the plaintiff had not been a party to the first.

69 That is an excellent example of the court's application of issue estoppel as a rule of public policy balancing the right of the plaintiff to litigate an issue against the court's concern as to duplicative and conflicting results and the use of its limited facilities. The issue before this court is whether, on a policy basis, issue estoppel should apply against the appellant, notwithstanding that he was not a party to the earlier proceedings.

70 The E.S.A. provisions assure employees that a wide variety of minimum standards of employment are maintained. The Act also provides for quick and efficient administrative procedures to enforce those standards. The Act does not contemplate a wide- open and time-consuming confrontation between the contestants. At the hearing stage in the present proceedings, the employment standards officer took control on behalf of the employee, presumably for the sake of efficiency and to save the employee the expense of retaining a lawyer. There is no suggestion in the prescribed procedure that the E.S.A. purports to usurp the normal function of the courts in applying the common

law, which includes full discovery and trial, and representation throughout. Section 6 is a positive statement to the contrary.

71 The right of discovery is not a nominal factor. In wrongful dismissal cases oral and documentary discovery can potentially change the entire texture of the factual basis for the claim or defence from what can be identified on a peremptory procedure directed at quick justice. Further, the right of personal representation is fundamental to the assertion of common law rights, and its denial, except by discretionary leave, is an indicator that common law rights are not being affected. In my view it is not a case of conflict between the function of a tribunal and the courts, or a lack of respect of one for the decision of the other. It is rather that a tribunal has been assigned its function of providing expeditious, but limited, relief and the court is left to provide the more thorough and time-consuming common law relief.

72 The evidence of the appellant as to the steps he took fits with my view of the intended operation of the Act. He says that he applied for unemployment insurance but found there would be an extensive waiting period because his employer indicated that he had quit his employment. He therefore applied for the limited benefits under the E.S.A. in order to tide him over. That is what the Act appears to invite.

73 It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking discovery and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount. Neither representation nor discovery is affordable for a $4,000 claim and that is undoubtedly why the Act provides for representation on behalf of the employee by a representative of the ministry. I would adopt the language of Lord Upjohn in Carl-Zeiss- Stiftung, supra, at p. 947:

> All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

74 It is my conclusion that, in this case, it would be unfair to the appellant to consider him as so closely associated with the proceeding under the E.S.A. as to invoke issue estoppel against his common law claim for wrongful dismissal damages.

75 I now consider the decision in Browne v. CKWX Ltd., supra, which was relied upon by the trial judge. That case arose after proceedings under the Canada Labour Code, R.S.C. 1970, c. L-1 [as amended by 1977-78, c. 27, s. 21], which contains a similar provision to s. 6 of the E.S.A. It was held by the county court judge that the same issue had been dealt with in the proceedings under the statute and could not be litigated again in court. However, the distinguishing feature of the federal statute is that the employee is, by the provisions of s. 61.5 of that Act, quite clearly a party to the hearing.

76 Since the time when the argument of this appeal was heard, we have had our attention drawn to the decision of Andrekson J. in Fayant v. Campbell's Maple Village Ltd. (Alta. Q.B.), reasons released November 17, 1993 [reported 21 C.P.C. (3d) 35, 14 Alta. L.R. (3d) 382]. There are similarities between the facts and legislation, there and here, but the reasons rely in large part on the reasons of R.E. Holland J. in this case. To the extent that they do not, I see nothing to dissuade me from the conclusions recited above.

77 Turning then to the merits of the appellant's wrongful dismissal claim, the trial judge relied upon the judgment of this court in Smith v. Viking Helicopter Ltd. (1989), 68 O.R. (2d) 228, 31 O.A.C. 368, and found that there was no constructive dismissal in the offer to transfer the appellant to Calgary.

78 The trial judge stated at p. 14 of his reasons [p. 159 C.C.E.L.]:

> I would have come to the conclusion that the plaintiff should have accepted the move from Toronto to Calgary so long as that move did not involve demotion or loss of pay or benefits and so long as his employer paid the reasonable costs of the move. I realize that this is contrary to the view of the referee. Also contrary to the view of the referee, I would have concluded that the plaintiff was not obliged to accept the new job that was offered to him in Toronto since that job was in effect a demotion. He would no longer have reported to the president and no one would be reporting to him. The job also entailed no managerial duties.

I agree with this conclusion. It is clear on the evidence that the move to Calgary would not involve a demotion or loss of pay or benefits and that, although there was no written policy, other employees of the company had been transferred and their costs of moving had been paid.

79 It was argued before this court that a memorandum dated December 4, 1981, from the appellant to his superior, created an implied term of the contract that the appellant could not be moved to Calgary. That memorandum reads, in part:

> The position of Marketing Manager with the attendant move to Calgary has been carefully evaluated from all aspects. Due to family and financial commitment considerations I cannot accept the position with a move to Calgary. Agreeing to the move and not having it work out would be of no benefit to my family, myself or RIL.

80 This was in response to an earlier invitation to assume that same job in Calgary and was not associated with any restructuring of the company or the elimination of his position in Toronto. The company did not respond to this memorandum and took no action to alter the terms of employment other than to accept his decision and leave him in the same position in Toronto. When the new circumstances arose in 1984 he was again offered the position and, as the plaintiff conceded in cross-examination, the position in Toronto was offered as an alternative in the event that the appellant did not wish to move to Calgary. At no point in his evidence did the appellant refer to this 1981 memorandum as a term of his agreement and, in fact, he recounted that after the alternatives were presented to him in 1984, he took his family to Calgary, surveyed housing developments, and they consulted together as to whether to make the move. No doubt his personal circumstances were part of that decision, but one would have expected a different reaction, both then and at trial, if there was any belief that he had a contractual right not to move.

81 The focus in a wrongful dismissal action must be on the conduct of the employer. In my view, this employer was entitled to restructure its operations as it did, and was being perfectly fair in offering the appellant a comparable position located in Calgary with a back-up alternative of a lesser position in Toronto. The appellant's reasons for rejecting a move to Calgary may have been perfectly valid from a personal viewpoint, but they cannot be imposed upon an employer who is oper-

ating reasonably in the conduct of its business. Further, the appellant acknowledged in his evidence that the job market was very tight at the time and, having made his decision to stay in Toronto, he should have taken the alternative position to mitigate his potential loss and to provide him with an employed base from which to seek out a new position.

82 For these reasons I would dismiss the appeal with costs.

83 MORDEN A.C.J.O. (concurring): -- I have had the benefit of reading the reasons of Carthy and Abella JJ.A. I agree with the conclusion of Abella J.A. that issue estoppel is applicable as a defence in this action and, also, with Carthy J.A.'s conclusion that the trial judge was right in dismissing the action on the merits apart from the defence of issue estoppel. It follows that I agree the appeal should be dismissed with costs.

84 I shall deal, briefly, with the application of issue estoppel. The effect of s. 6 of the Employment Standards Act, R.S.O. 1980, c. 137, should be considered first. Its purpose is to make it clear that the minimum employment standards provided for in the Act are not to stand in the way of an employee seeking and obtaining more favourable common law relief. Section 4 of the Act provides that an employment standard shall be deemed a minimum standard only and that, if an employee has more favourable employment benefits than those provided for in the minimum standard, the more favourable benefits are to prevail.

85 Section 6 indicates, in my view, that an employee is not obliged to choose between proceeding under the Act or seeking a civil remedy in the ordinary courts. One reading of the provision would preclude the application of issue estoppel in a subsequent court proceeding. The section provides that a civil remedy shall not be affected by the Act. It could be said that holding that a decision in a proceeding under the Act gives rise to an issue estoppel in a subsequent court proceeding amounts to the Act affecting a civil remedy. In this regard, I am not concerned with the example of an employee who is required to give credit for the amount of his statutory recovery in a subsequent civil action against his employer. I do not think that receipt of an earlier part payment can be said to affect the employee's common law remedy.

86 I think, however, that it is appropriate to give s. 6 a narrower interpretation and to conclude that it does not provide that a civil remedy cannot, in proper cases, be affected by a proceeding under the Act, thereby leaving room for the application of the doctrine of issue estoppel. Having regard, however, to the policies of ss. 4 and 6, I think that it should be applied with circumspection.

87 I turn now to the three conditions for the application of issue estoppel.

88 The first is that the same question has been decided in the earlier proceeding. If the court action is to be decided on the basis of constructive dismissal, as it was, I think that the decision of the referee that the appellant had refused "an offer by his employer of reasonable alternative work" (s. 2(a) in the regulation [R.R.O. 1980, Reg. 286]) is a decision on the same question which inevitably has to be decided in the action and is one that goes to the root of the action. While the underlying policy of the Employment Standards Act and that of the common law in unjust dismissal cases may not be identical in all respects, on this particular issue I see no significant legal distinction between the policies of the Act and of the common law. The trial judge did treat the case as one of potential constructive dismissal and dismissed the action because there was no constructive dismissal in the offer of the Calgary position. The appellant's basic argument on this ground of the appeal is that the trial judge erred in finding that this was an offer of a reasonably alternative position.

89 Having regard to the way the case was pleaded it was possible to consider the case as one of straight unjust dismissal. In such a case notice was required unless there was cause for summary dismissal, the cause being founded on the conduct of the employee. In this context the application of issue estoppel presents some difficulty. The exact bearing and effect of refusing an offer of reasonable alternate work could only be determined in conjunction with other considerations, such as the length of time the employee had to consider the offer, in determining the seriousness of the employee's conduct and, hence, whether there was, in the circumstances, cause, or whether notice should have been given. In this setting I am not persuaded that the same question is involved. The courts have taken a "fastidious approach" to the "same question" test (Spencer-Bower and Turner, The Doctrine of Res Judicata, 2nd ed. (1969) at p. 179) which, for reasons I have given earlier, I think is particularly relevant in this case. Having regard to the findings of the trial judge, this basis for reviewing the trial judge's application of issue estoppel does not arise.

> (I note that, by its terms, s. 2(a) of the regulation applies to persons who are "laid off", not "terminated". These two terms have different meanings in the Act and the regulation. I do not think that s. 1(b) of the regulation, which provides that "[f]or the purposes of Part XII of the Act . . . termination of employment' includes a lay-off of a person for a period longer than a temporary lay-off", assists in interpreting "laid off" in the regulation. Because s. 2(a) has been accepted as being applicable throughout both proceedings, and because the case does not ultimately turn on this point, I do not express any concluded opinion on it.)

90 With respect to the second condition of issue estoppel, that the judicial decision which is said to create the estoppel was final, it is not in issue that the referee's decision was final. I did not, with respect, understand the appellant to submit that the absence of a judge in the earlier proceeding was a relevant consideration. It is well-established that the decision of a non-court tribunal can give rise to an issue estoppel: Spencer-Bower and Turner, op cit. at pp. 20-21 and 24-26 and 16 Hals., 4th ed., reissue (1992), para. 1012.

91 The appellant did submit that the more expeditious procedure under the Employment Standards Act (that is, more expeditious than that governing an ordinary civil action) was a fact to be taken into account in not applying issue estoppel. I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel. However, in this case, whatever the procedure was that governed the statutory proceeding, the appellant frankly admitted that it placed him at no disadvantage in the presentation of his case and so I do not think that the procedural aspect is relevant in this case.

92 As far as the parties or privies requirement of issue estoppel is concerned, it is clear that in the eyes of the Employment Standards Act the appellant was not a party to the proceeding before the referee. Section 50(4) provided that the parties were the employer and the employment standards officer and, further, that the employer was the applicant and the employment standards officer was the respondent. However, the interests of the employment standards officer and the employee were the same and, for all practical purposes, counsel for the employment standards officer represented the employment standards officer and the appellant. The appellant was, at the least, a privy.

Appeal dismissed.

Tab 14

Indexed as:

O'Brien v. Canada (Attorney General) (F.C.A.)

IN THE MATTER OF an application to review and set aside, pursuant to Section 28 of the Federal Court Act, R.S.C. 1985, Chapter F-7
AND IN THE MATTER OF a Decision of an Appeal Board established pursuant to Section 5(d) of the Public Service Employment Act rendered by Gaston Carbonneau, Chairperson, on the 20th day of March, 1991 with respect to the appeal of Gertrude O'Brien, Lynn Meharg, Josephine Gervasi, Helen O'Keefe and Barbara Lum under Section 21 of the Public Service Employment Act, R.S.C. 1985, c. P-33
Between
Gertrude O'Brien, Lynn Meharg, Josephine Gervasi, Helen O'Keefe and Barbara Lum, Applicants, and
The Attorney General of Canada, Respondent

[1993] F.C.J. No. 333

153 N.R. 313

12 Admin. L.R. (2d) 287

40 A.C.W.S. (3d) 103

Appeal No. A-291-91

Federal Court of Appeal
Ottawa, Ontario

Hugessen, Stone and Décary JJ.

Heard: February 23, 1993
Judgment: April 16, 1993

(8 pp.)

A. Raven, for the Applicant.
M. Ciavaglia, for the Respondent.

The judgment of the Court was delivered by

DECARY J.:-- The applicants are all unsuccessful candidates in a closed competition to fill CR-05 positions with the Canada Employment and Immigration Commission.

One of the questions put by the selection board to each of the candidates, for the purpose of assessing their personal suitability qualifications, was a behaviour-based question ("the situational question") which asked them to describe how they had handled a sensitive situation. In order to remove any unfairness resulting from untruthful or exaggerated answers which candidates might give to the question, it was intended that the information given by each candidate be verified by the selection board by drawing from other information available on candidates. The selection board, however, never completed such confirmation and made no effort to verify any of the information or analyses provided by each of the candidates in their respective answers. Instead it proceeded to mark the situational question on the basis of whose answer sounded the most impressive, regardless of whether such answer was, in fact, accurate or even truthful.

At the conclusion of the competition, the selection board declared that only four of the thirty-two candidates were qualified, and placed the names of these four on an eligibility list.

The applicants, whose names were not placed on this list, appealed against the selections for employment made by the selection board, pursuant to section 21 of the Public Service Employment Act[1] ("the Act"). They felt that several of the questions used by the selection board to assess their qualifications, including the situational question, were inadequate and that by basing its selections upon the answers given thereto, the selection board had contravened the merit principle enshrined in section 10 of the Act.

A Public Service Commission Appeal Board ("the Appeal Board") was established to hear the appeals. In his decision, rendered March 20, 1991, chairperson Carbonneau made a finding of fact that the situational question could only constitute a valid method of testing personal suitability if the accuracy of each of the candidates' answers thereto were verified by the selection board. Notwithstanding clear evidence that the selection board had not done the verification, chairperson Carbonneau proceeded to conclude that it had and found that the situational question did not, after all, contravene the merit principle. He dismissed that ground of appeal.

There is absolutely no doubt, and counsel for the respondent did not argue otherwise, that that finding of the Appeal Board was made without regard and contrary to the evidence presented at the hearing and would, in ordinary circumstances, warrant the intervention of this Court.

The problem, however, is that the Appeal Board went on to allow the appeals on other grounds relating solely to questions concerning the candidates' knowledge. Since at least one of the present applicants, Ms. Lum, had passed the knowledge test, the fact that the appeal was allowed could be of no assistance to her if, as the Appeal Board wrongly held, she had been properly found unsuitable on the basis of her answer to the situational question. Notwithstanding this fact, however, the respondent argues that this Court is without jurisdiction to review the rejection by the Appeal Board of the first ground. Counsel submits, basically, that this Court can only review the final decision an appeal board has been mandated to make, or an order made during the course of proceed-

ings, if it is "one that the tribunal has been mandated to make" and is one "from which legal rights and obligations flow"[2], and that the only decision or order an appeal board has been mandated to make by its governing legislation is to allow or dismiss an appeal before it. Counsel also submits that an objection to the reasons for a decision is not a valid ground of appeal and that a review of the reasons of an appeal board is not within the purview of section 28 of the Federal Court Act.[3]

Not so, replies counsel for the applicants: because of the doctrine of issue estoppel, an appeal board would not be competent, on a second appeal from a selection process, to re-hear allegations which were explicitly or implicitly rejected in its decision on the first appeal. The decision of the Appeal Board is therefore final insofar as the issue of the situational question is concerned.

The doctrine of issue estoppel having been raised only at the hearing, we invited counsel to file written submissions on the issue of whether that doctrine applies to proceedings before the Public Service Commission Appeal Board. We have now received these submissions. Both counsel agree that the doctrine applies. I agree with counsel and am grateful to them for the quality of their submissions, the essence if not the words of which are reproduced hereafter.

Issue estoppel precludes re-litigation by the same parties of issues which have been finally determined in a previous decision.[4] This Court has implicitly extended the applicability of the doctrine of issue estoppel, developed in the context of judicial proceedings, to proceedings before statutorily established administrative tribunals. In Boucher v. Public Service Commission Appeal Board,[5] Pratte J.A. held that a second appeal board erred in refusing to entertain the applicant's appeal as it had not dealt with the applicant's main allegation in the first appeal. In Duplessis v. Public Service Commission Appeal Board,[6] Pratte J.A. for the majority, held that an appeal board did not err in refusing to entertain a second appeal on the merits as the first appeal board had impliedly rejected all grounds of appeal including those sought to be argued in the second appeal. In Hansen v. A.G. Canada,[7] Mahoney J.A. set aside a second appeal board decision which had found that the appellant was estopped from challenging the manner in which her abilities had been assessed by the selection board after the first appeal, obviously on the basis that the appellant could not be estopped from attacking an assessment of her abilities which had not been made at the time of the first appeal inquiry.

The underlying rationale of these decisions, it seems to me, is that an appeal board is not competent, on a second appeal from a selection process, to re-hear allegations which were explicitly or implicitly rejected in its decision on the first appeal. That is, the doctrine of issue estoppel applies to appeal board decisions.

The question of the applicability of the doctrine of issue estoppel to decisions of administrative tribunals was recently canvassed by Muldoon J. in Canada (Attorney General) v. Canadian Human Rights Commission et al.[8]. The learned judge concluded as follows:

> ... There appears to be no sound policy reason for declining to apply this estoppel principle to the decisions of adjudicative boards, commissions and other tribunals insofar as their pronouncements do in fact determine at least nominally contentious issues inter partes, in the same way as courts do. ... (at 65)

The underlying notion of issue estoppel is to

> prohibit one party to previous litigation from putting a concluded issue finally determined therein, into contention again in newly instituted proceedings taken against the same opponent before the same, or another, tribunal having jurisdiction to adjudicate and determine that issue anew. ... (at 66)

It would be illogical and inefficient for a section 21 appellant to raise before an appeal board, and have squarely addressed by it, an issue respecting an alleged defect in the selection process, and then be permitted in subsequent section 21 proceedings to reargue the same point solely because unrelated corrective action has led to the establishment of a new eligibility list, new proposals for appointment and the generation of new section 21 appeal rights. Application of the principle of issue estoppel to circumstances involving section 21 appeals is consistent with the interests of justice and administrative efficiency having regard for the nature of the appeal process.

In the circumstances of the present case, the applicants argued before the Appeal Board the issue of the situational question. This issue was considered and rejected by the Appeal Board in a manner which, as I have already concluded, justifies the intervention of the Court under former paragraph 28(1)(c) of the Federal Court Act. Absent judicial intervention at this stage, the doctrine of issue estoppel would prevent the applicants from re-litigating this question in subsequent section 21 appeal proceedings even though they might be prejudiced by the decision the Appeal Board has wrongly made. The Court, in my view, has the jurisdiction as well as the duty to intervene.

I would allow the application, set aside the decision of the Appeal Board, dated March 20, 1991, and remit the matter to the Appeal Board with directions to allow the appeals on the additional ground that the failure to verify the information given in the answers to the situational question violated the merit principle.

DECARY J.
HUGESSEN J.:-- I agree.
STONE J.:-- I agree.

1 R.S.C. 1985, c. P-33.

2 Anheuser-Busch Inc. v. Carling O'Keefe, [1983] 2 F.C. 71 at 75; Canadian Pacific Airlines Ltd. et al. v. Canadian Air Line Pilots Association et al. (1988), 84 N.R. 81 at 85.

3 See Davidson v. Canada (Solicitor General), [1989] 2 F.C. 341 at 350 (C.A.).

4 See Angle v. M.N.R., [1975] 2 S.C.R. 248; Dumont Vins & Spiritueux Inc. v. Celliers du Monde Inc., [1992] 2 F.C. 634 (C.A.)

5 [1978] 2 F.C. 204 (C.A.).

6 [1978] 2 F.C. 355 (C.A.).

7 (28 May 1991), A-1016-90 (F.C.A.) [unreported].

8 (1991), 43 F.T.R. 47 (F.C.T.D.).

Tab 15

Indexed as:

Angle v. Canada (Minister of National Revenue - M.N.R.)

Ethel Annabelle Angle, Appellant; and
Minister of National Revenue, Respondent.

[1975] 2 S.C.R. 248

Supreme Court of Canada

1973: November 7 / 1974: May 27.

Present: Martland, Judson, Spence, Laskin and Dickson JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Estoppel -- Benefit from construction by a controlled company -- Assessment -- Alleged debt of taxpayer to the company -- Writ of extent against the taxpayer as debtor of the company -- Whether principle of "issue estoppel" applicable.

Appellant, president and controlling shareholder of Transworld Explorations Limited, caused the company to construct a pool house, with furniture and fixtures, at the rear of her property. Six months after the foundations were in, appellant purported to lease to the company the whole of her property for five years at one dollar per year. After construction was complete, appellant leased the property to the company by a second lease for one year, at a rental of $6,000 payable in monthly instalments of $500. In order to create the impression that the pool house had been paid for, the husband of appellant arranged a bank loan of $50,000 to appellant. This sum was deposited to the credit of the company, which could not withdraw it until the loan was paid. The husband then gave the appellant a cheque drawn on the company's account and signed by him as agent for the company in order that she could repay the bank loan, which she did.

Appellant was assessed under s. 8(1)(c) of the Income Tax Act, R.S.C. 1952, c. 148, $52,243.58 for benefits from construction of the pool house, and $5,995.82 for furniture and fixtures. On appeal the Exchequer Court concluded that appellant had received the house as owner of the freehold and that the procedure employed by appellant did not constitute payment for the house, and it affirmed the assessment except for the furniture and fixtures.

Some time after these proceedings the Minister of National Revenue, in an effort to collect arrears of taxes from another company, obtained ex parte an order for a writ of extent in the second degree, against Transworld as debtor of the other company; a writ of extent in the third degree was also is-

sued against appellant as debtor of Transworld. Other writs of extent were also issued, but set aside following a motion to set aside; however, the writ issued against appellant was upheld. The latter appealed this decision, on the ground that the judgment of the Exchequer Court rendered the matter of appellant's alleged indebtedness res judicata.

Held (Spence and Laskin JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Dickson JJ.: There is a distinction between the "cause of action estoppel" where another action is brought for the same cause of action as has been the subject of previous adjudication, and "issue estoppel" where, the cause of action being different, some point or issue of fact has already been decided. The requirements of issue estoppel are (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. The determination on which it is sought to found the estoppel must be so fundamental to the substantive decision that the latter cannot stand without the former.

The question to be decided in these proceedings was the existence of a debt by Mrs. Angle to Transworld, whereas the question in the earlier proceedings was the amount of Mrs. Angle's income tax assessment. The question not being eadem questio, this is not a case of issue estoppel.

The claim that Mrs. Angle is indebted to Transworld is founded upon her sworn statement during examination for discovery in the tax proceedings. The Transworld balance sheet confirmed her evidence. It is not alleged and there is no evidence to suggest that she subsequently paid her debt to the company.

Per Spence and Laskin JJ., dissenting: Leave was given to refer to the reasons in the original tax judgment and they showed that the pool house which gave rise to the "benefit" was also the foundation of the debt allegedly owing by appellant to Transworld. Further, the appellant and the Minister were parties both to the tax appeal and to the present proceedings, into which the appellant was drawn by the Minister through a writ of extent, albeit they had their origin in a tax claim against a third person. Because of the difference in the two proceedings, issue estoppel is what the appellant must stand on.

Issue estoppel, as a principle, has been recognized in Canadian law. The application of this principle is not in any way affected because it is directed against a Minister of the Crown. There is no reason to introduce any anomalies or exceptions to its general application if the facts call for it.

The Minister's contention that the pool house transaction can be both a benefit and a loan or debt at the same time ignores the basis upon which he sought and succeeded in his reassessment of the appellant, namely s. 8(1)(c). Any question of a loan, arising from the arrangements for a bank credit to Transworld which was ultimately repaid by a Transworld cheque (leaving Transworld and the appellant where they were before), was negated by the Exchequer Court as having been dependent upon a lease which was ineffective to support it. A device which failed as a defence to a reassessment, and so determined by a final judicial decision, cannot be later reactivated as between the same parties to provide a different basis upon which to attempt to capture the same sum twice.

Cases Cited

[Angle v. Minister of National Revenue, [1969] C.T.C. 624; Thoday v. Thoday, [1964] P. 181; Hoysted v. Federal Commissioner of Taxation (1921), 29 C.L.R. 537, [1926] A.C. 155; Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853; Duchess of Kingston's Case (1776), 20 St. Tr. 355, 538n; R. v. Hutchings (1881), 6 Q.B.D. 300; Society of Medical Officers of Health v. Hope, [1960] A.C. 551; Spens v. I.R.C., [1970] 3 All. E.R. 295; Curlett v. Minister of National Revenue, [1961] Ex. C.R. 427, aff. 62 D.T.C. 1320; R. v. Poynton, [1972] 3 O.R. 727; Attorney General for Trinidad and Tobago v. Enriché, [1893] A.C. 518, referred to.]

APPEAL from a judgment of the Exchequer Court of Canada ordering that a writ of extent be issued. Appeal dismissed, Spence and Laskin JJ. dissenting.

C.C. Sturrock, for the appellant.
N.A. Chalmers, Q.C., and G.O. Eggertson, for the respondent.

Solicitor for the appellant: C.C. Sturrock, Vancouver. Solicitor for the respondent: N.D. Mullins, Vancouver.

The judgment of Martland, Judson and Dickson JJ. was delivered by

DICKSON J.:-- In early 1966 Mrs. Angle caused Transworld Explorations Limited, a company of which she was president and controlling shareholder, to construct at the expense of the company, an indoor swimming pool, sauna bath, mineral bath, barbecue, bar, fireplace, sitting room and office at the rear of property owned by her on Stevens Drive in West Vancouver, British Columbia. The then s. 8(1)(c) of the Income Tax Act provided that where a benefit or advantage was conferred on a shareholder by a corporation the amount or value would be included in computing the income of the shareholder and, acting under the section, the taxing authorities added to Mrs. Angle's income for the years 1966 and 1967 a total of $52,243.58 for benefits from construction of the pool house and $5,995.82 for furniture and fixtures. Mrs. Angle appealed the assessment. The appeal was heard by Sheppard D.J. in the Exchequer Court of Canada [[1969] C.T.C. 624.] and judgment was delivered on November 17, 1969. The judge defined what he referred to as the basic issues in these words:

> That the pool house (i) was received by the appellant as lessor not as "shareholder" within Section 8(1)(c), (ii) was paid for by the appellant and therefore was not "a benefit or advantage" (iii) or in any event was a benefit received only on expiration of a lease, therefore not in 1966 or 1967 but in 1968.

The short facts and the manner in which the judge disposed of each of the issues follow:

(i) On November 1, 1966, six months after the foundations of the pool house were built and after receiving advice that the value of the pool house might be added to her income, Mrs. Angle purported to lease to Transworld the whole of her lot on Stevens Drive for a term of five years at a rental of one dollar per year. A year later, on November 27, 1967, after the pool house had been constructed, a second lease was entered into whereby she purported to lease the property to Trans-

world for a term of one year at a rental of $6,000 payable $500 per month. The judge held that the pool house was not received by Mrs. Angle as lessor because it was let into the soil: that is, construction was begun before there was any lease; the leases did not operate to divest Mrs. Angle of the pool house vested in her as owner of the freehold and accordingly the benefit was not received by her as lessor but as owner.

(ii) The scheme by which it was sought to create the impression that Mrs. Angle had paid for the pool house took this form. Her husband arranged for the Toronto-Dominion Bank to loan her $50,000 on December 27, 1967. The proceeds of the loan were deposited to the credit of Transworld but, as the money was assigned to the bank as security for the loan, it could not be withdrawn by Transworld until the loan was paid. In February 1968 Mr. Angle gave Mrs. Angle a cheque for $50,000 drawn on the Transworld account and signed by him as agent for the company with which she repaid the bank loan. The judge rightly concluded that this trumpery did not amount to payment for the pool house.

(iii) The judge rejected Mrs. Angle's contention that no benefit would vest in her until the expiration of the lease, holding that the benefit vested not by virtue of an assignment or conveyance by the lessee, but by virtue of Mrs. Angle being the owner of the freehold on which the building was erected. In the result the judge dismissed the appeal and confirmed the assessment except as to furniture and fixtures.

Some time after the proceedings in the Exchequer Court, the Minister of National Revenue sought to collect arrears of taxes amounting to $40,266.71 from a company, Kansas City Traders Ltd., and obtained a Writ of Extent ordering the sheriff of the County of Vancouver to extend and seize the assets of that company in the amount of the arrears. There being small prospect of collecting directly from Kansas City Traders, the Minister obtained ex parte an order for the issuance of a Writ of Extent in the Second Degree against Transworld in the amount of $40,266.71, Transworld being indebted to Kansas City Traders; a Writ in the Third Degree against Mrs. Angle in the amount of $34,612.33, on the allegation that Mrs. Angle was indebted to Transworld in this sum; a Writ of Extent in the Fourth Degree against Mr. and Mrs. Adolf Franz Bauer, purchasers in 1968 of the Stevens Drive property from Mrs. Angle; and a Writ of Extent in the Fifth Degree against the legal firm which acted for Mrs. Angle on the sale. A motion was brought before Sheppard D.J. to set aside the writs issued against Mrs. Angle, against Mr. and Mrs. Bauer and against the legal firm. As a result, the writs against Mr. and Mrs. Bauer and against the legal firm were set aside but the writ against Mrs. Angle allowed to stand. An appeal has now been taken to this Court on behalf of Mrs. Angle, the main ground being that the judgment of the Exchequer Court rendered the matter of Mrs. Angle's alleged indebtedness to Transworld res judicata.

In earlier times res judicata in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel per rem judicatam. This form of estoppel, as Diplock L.J. said in Thoday v. Thoday [[1964] P. 181.], at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. We are not here concerned with cause of action estoppel as the Minister's present claim that Mrs. Angle is indebted to Transworld in the sum of $34,612.33 is obviously not the cause of action which came before the Exchequer Court in the s. 8(1)(c) proceedings. The second species of estoppel per rem judicatam is known

as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in Hoystead v. Federal Commissioner of Taxation [(1921), 29 C.L.R. 537.], at p. 561:

> I fully recognize the distinction between the doctrine of res judicata where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

Lord Guest in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [[1967] 1 A.C. 853.], at p. 935, defined the requirements of issue estoppel as:

> ... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.....

Is the question to be decided in these proceedings, namely the indebtedness of Mrs. Angle to Transworld Explorations Limited, the same as was contested in the earlier proceedings? If it is not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. That is plain from the words of De Grey C.J. in the Duchess of Kingston's case [(1776), 20 St. Tr. 355, 538n.], quoted by Lord Selborne L.J. in R. v. Hutchings [(1881), 6 Q.B.D. 300.], at p. 304, and by Lord Radcliffe in Society of Medical Officers of Health v. Hope [[1960] A.C. 551.]. The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: per Lord Shaw in Hoystead v. Commissioner of Taxation [[1926] A.C. 155.]. The authors of Spencer Bower and Turner, Doctrine of Res Judicata, 2nd ed. pp. 181, 182, quoted by Megarry J. in Spens v. I.R.C. [[1970] 3 All. E.R. 295.], at p. 301, set forth in these words the nature of the enquiry which must be made:

> ... whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter cannot stand without the former. Nothing less than this will do.

The claim in the present proceedings that Mrs. Angle is indebted to Transworld in the amount of $34,612.33 is founded upon a sworn statement of Mrs. Angle, during her examination for discovery in the tax proceedings, that she owed Transworld a balance of $34,000, being $50,000 less a credit for shares transferred by her to Transworld. The Transworld balance sheet as at January 31, 1969 confirmed her evidence. It showed $34,612.33 to be "Due from shareholder".

In my opinion the question to be decided in these proceedings is not the same question as was decided in the earlier proceedings. The primary question in the earlier proceedings was the amount of Mrs. Angle's income tax assessment and in order to determine that issue it was necessary to consider several subsidiary issues raised by Mrs. Angle in support of her appeal. I have quoted the judge's statement of those issues and in effect they were (i) that the pool house was received by her as a lessor and not as a shareholder or (ii) alternatively, that she had paid for the pool house through the $50,000 bank loan. A submission that she was still indebted for the pool house would have been impossible to reconcile with her contention that the pool house had been paid for.

A finding of no liability by Mrs. Angle to Transworld was not legally indispensable to the judgment on the income tax appeal or a necessary finding to support that judgment. A tax assessment in respect of a benefit or advantage received is not inconsistent with an obligation to pay for the benefit or advantage where, for example, there is no apparent intention to honour the obligation. The decision that a taxable benefit has been received can stand in an appropriate case with an alleged obligation to pay for that benefit. See Curlett v. Minister of National Revenue [[1961] Ex. C.R. 427, affd. 62 D.T.C. 1320.]; and R. v. Poynton [[1972] 3 O.R. 727.]. In these proceedings the Minister is claiming from Mrs. Angle payment of indebtedness to Transworld. If Transworld or its shareholders were suing Mrs. Angle for recovery of corporate funds expended on the construction of the pool house, the s. 8(1)(c) proceedings in the Exchequer Court would afford her no defence. It is true that one of the leases contained a clause whereby Transworld purported to surrender to Mrs. Angle all its interest in the improvements for $49,768.51 and when the lease was struck down this clause suffered a similar fate. But that was not, and was not tantamount to, a finding that Mrs. Angle was not indebted to Transworld. Transworld was not a party to the proceedings and the Exchequer Court did not have jurisdiction to make such a finding.

As long ago as 1893, Lord Hobhouse said in the Privy Council in Attorney General for Trinidad and Tobago v. Eriché [[1893] A.C. 518.], at p. 522:

> It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of res judicata the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the hint. In the Duchess of Kingston's Case, Sm. L.C. vol. ii. p. 642, which is constantly referred to for the law on this subject, it is laid down that in order to establish the plea of res judicata the Court whose judgment is invoked must have had jurisdiction and have given judgment directly upon the matter in question; but that if the matter came collaterally into question in the first Court, or were only incidentally cognizable by it, or merely to be inferred by argument from the judgment, the judgment is not conclusive.

The question not being eadem questio, I am of the opinion that this is not a case for application of the principle of issue estoppel.

Two collateral points were taken on behalf of Mrs. Angle. First, that there was no evidence upon the ex parte application for the issuance of the writs of extent as to how the alleged debt from Transworld to Kansas City Traders Ltd. arose or, if there was a debt, that it was payable. No objection was taken in the Court below to the writs of extent issued against Kansas City Traders Ltd. or against Transworld. Transworld has not challenged the writ against it, and it is not open to Mrs. Angle to do so at this time. Second, that even if Mrs. Angle was indebted to Transworld, there was no evidence she was indebted after January 31, 1969 and more particularly at the time of the application for the writs of extent, October 30, 1970. On discovery October 6, 1969 Mrs. Angle said she was indebted to Transworld. The books of account and records of Transworld were taken out of the country by Mrs. Angle and her husband on leaving Canada in 1968 to reside in Las Vegas, Nevada and Mrs. Angle has since refused to produce those books and records. It is not alleged and there is no evidence to suggest that since October 6, 1969 she paid Transworld the amount of her debt to that company. There is an affidavit of a Las Vegas chartered accountant stating that the decision of the Exchequer Court eliminated the character of the indebtedness of $34,612.33 as a debt or loan,

and a similar affidavit of a Vancouver solicitor, but as I have indicated, I am of the opinion that the decision of the Exchequer Court did not have any such effect.

I would accordingly dismiss the appeal with costs.

The judgment of Spence and Laskin JJ. was delivered by

LASKIN J. (dissenting):-- This appeal concerns the propriety of a writ of extent in the third degree issued against the appellant at the instance of the respondent Minister. On the motion to set aside the writ, the sufficiency of the material upon which the ex parte application for the writ was made was challenged. Beyond that, it was contended that the basic foundation for the writ, an alleged debt owing to the second degree debtor who in turn was indebted to the first degree debtor from whom the Minister claimed unpaid income taxes, could not be asserted by the Minister because of the preclusive effect of res judicata. I am of the opinion that the more appropriate preclusive principle in this case is issue estoppel and that the appellant is entitled to succeed on that ground. I find it unnecessary therefore to deal with the alleged deficiency of supporting material for the issue of the writ of extent against the appellant.

On October 3, 1968, a writ of extent was issued against Kansas City Traders Ltd. for the recovery out of its assets of $103,395.03 for unpaid taxes. By October, 1970, the amount of its indebtedness had been reduced to $40,266.71. On October 30, 1970, a successful application was made by the Minister for the issue of writs of extent in the second, third, fourth and fifth degrees against, respectively, Transworld Exploration Ltd., in the amount of $40,266.71 as being indebted to Kansas City in the amount of $44,707.70; the appellant, in the amount of $34,612.33, as being the amount of a debt owing by her to Transworld; and a firm of lawyers who acted for the appellant and were assignees of an agreement of sale of her house and the purchasers of the house under the agreement for sale, also in the amount of $34,612.33. On motion to set aside the writs of extent in the third, fourth and fifth degrees, the motion succeeded as to the firm of lawyers and as to the purchasers of the house, but was dismissed as to the appellant.

The ex parte application for the writs of extent herein and the motion to set them aside were heard by Deputy Judge F.A. Sheppard of the Exchequer Court. He had also presided at the appeal of the appellant herein against a tax assessment which involved adding to her taxable income for the years 1966 and 1967 the value of a "benefit", being a pool house constructed at the rear of her residence by Transworld. At that time the appellant was the principal shareholder and president of Transworld; and, despite her central contention that she was indebted to Transworld for the cost of the pool house, she was unable to persuade Sheppard J. that the Minister was wrong in assessing her for it as a benefit under the then s. 8(1)(c) of the Income Tax Act, R.S.C. 1952, c. 148, as amended. Judgment against the appellant was given in reasons delivered on November 17, 1969, long before the application for a writ of extent against her: see Angle v. Minister of National Revenue [[1969] C.T.C. 624.]. It is under this judgment that issue estoppel arises.

On the motion to set aside the writs of extent, Sheppard J. refused to consider his reasons for judgment in the appellant's tax appeal, speaking on this point as follows:

> There was no proof of the reasons for judgment nor that the alleged benefit or advantage within the reasons was the alleged indebtedness of Mrs. Angle to Transworld. For Mrs. Angle, it was contended that as the same judge was hearing the motion who had determined the judgment ... therefore judicial notice could be

> taken of the judgment. The judgment is not a fact of which judicial notice may be taken.

There are occasions when insistence on excessive technicality (especially when the Crown or a Minister of the Crown in his official capacity is involved) gives credence to Mr. Bumble's well-known remonstrance in Dickens' "Oliver Twist." In this Court, leave was given to refer to the reasons in the tax judgment and, that done, counsel for the appellant and for the Minister agreed to the obvious, namely, that the pool house which gave rise to the "benefit" was also the foundation of the debt allegedly owing by the appellant to Transworld. I turn, therefore, to consider what was determined in the tax appeal and why it gives rise to issue estoppel in the present proceeding.

In adding $51,482.26 to the appellant's income for 1966 and another $4,912.94 for 1967, as benefits from the construction of the pool house by Transworld, the Minister invoked s. 8(1)(c). His position was upheld by Sheppard J., save for the deduction of $4,151.62 from the additional reassessment for 1966, representing the value of some furniture and fixtures. It is desirable to set out s. 8(1) and (2) in whole, and those provisions are as follows:

> 8. (1) Where, in a taxation year,
>
> (a) a payment has been made by a corporation to a shareholder otherwise than pursuant to a bona fide business transaction,
> (b) funds or property of a corporation having been appropriated in any manner whatsoever to, or for the benefit of, a shareholder, or
> (c) a benefit or advantage has been conferred on a shareholder by a corporation,
>
> otherwise than
>
> (i) on the reduction of capital, the redemption of shares or the winding-up, discontinuance or reorganization of its business,
> (ii) by payment of a stock dividend, or
> (iii) by conferring on all holders of common shares in the capital of the corporation a right to buy additional common shares therein
>
> the amount or value thereof shall be included in computing the income of the shareholder for the year.
>
> 8. (2) Where a corporation has, in a taxation year, made a loan to a shareholder, the amount thereof shall be deemed to have been received by the shareholder as a dividend in the year unless
>
> (a) the loan was made
>
> (i) in the ordinary course of its business and the lending of money was part of its ordinary business,

(ii) to an officer or servant of the corporation to enable or assist him to purchase or erect a dwelling house for his own occupation,

(iii) to an officer or servant of the corporation to enable or assist him to purchase from the corporation fully paid shares of the corporation to be held by him for his own benefit, or

(iv) to an officer or servant of the corporation to enable or assist him to purchase an automobile to be used by him in the performance of the duties of his office or employment,

and bona fide arrangements were made at the time the loan was made for repayment thereof within a reasonable time, or

(b) the loan was repaid within one year from the end of the taxation year of the corporation in which it was made and it is established, by subsequent events or otherwise, that the repayment was not made as part of a series of loans and repayments.

Appellant contested the reassessment of her income on the ground that she did not obtain the pool house as a shareholder but as a lessor, that she was genuinely indebted to Transworld for it and that if there was any benefit it was received at the expiry of an alleged lease in 1968. None of these contentions was made out, and appellant's counsel said in this Court that it could be taken that Mrs. Angle did not expect to have to pay for the pool house. Although her attempted evasion of tax liability through a leasing scheme was exposed as a sham this does not make her contention in the present proceeding unsupportable. It is the Minister and not Mrs. Angle who is taking an inconsistent position in the light of what was decided in the tax appeal.

The appellant and the Minister were parties both to the tax appeal and to the present proceedings, into which the appellant was drawn by the Minister through a writ of extent, albeit they had their origin in a tax claim against a third person. Because of the difference in the two proceedings, it is not res judicata in its cause of action sense upon which the appellant can rely. Issue estoppel is what she must stand on and, as a principle, it is nothing new either in this Court or in the Courts of sister jurisdictions like the United Kingdom, Australia and the United States: see Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2) [[1967] 1 A.C. 853.]; Thoday v. Thoday [[1964] P. 181.]; Blair v. Curran [(1939), 62 C.L.R. 464.]; Note, Collateral Estoppel by Judgment, (1952), 52 Col. L. Rev. 647.

There is no mystery as to what was decided in the tax appeal, Angle v. Minister of National Revenue, supra. An alleged lease to Transworld of the appellant's residential property (including the pool house) and an associated loan arrangement relating to a release by Transworld of its interest in the pool house for the sum of approximately $50,000 were both held to be ineffective. The associated loan was a circular arrangement which resulted in Transworld paying off the loan to itself; and for good measure Sheppard J. held that there could be no obligation of the appellant to pay the $50,000 because it was conditional upon the surrender by Transworld of its rights in the pool house and it had none because title had already vested in the appellant as owner of the freehold. Thus, it was that the value of the pool house was taxable as a "benefit" under s. 8(1)(c).

On what basis then does the Minister contend that there is a debt owing to Transworld by the appellant for the pool house in the sum of $34,612.33? This sum represents the balance after a credit of $15,000 allowed against the total cost as being the value of certain shares in another company transferred by the appellant to Transworld. However, the appellant, in the same tax appeal in which the value of the pool house was assessed against her as a benefit, was also charged with a profit of $12,750 on the transfer of the shares. Transworld's balance sheet as of January 31, 1969 shows $34,612.33 as due from the appellant, with a note that "[it] represents a forced debit balance by the Vancouver District Taxation Office, by it escrowing cash on sale of [appellant's] house ...". Notwithstanding Sheppard J.'s characterization of the value of the pool house on the tax appeal as a s. 8(1)(c) benefit, the Minister now says that he can still urge the $34,612.33 to be a debt because (1) the appellant admitted it to be a debt on her examination for discovery in the tax appeal proceedings; and (2) it is still owing as between Transworld and the appellant; and (3), in any event the value of the pool house can be at the same time both a benefit and a debt or a loan.

Appellant's assertion on her examination for discovery that the cost of construction of the pool house was a debt owing by her to Transworld was part of her case against the Minister's reassessment which was based by him on s. 8(1)(c). Sheppard J. rejected this construction of the pool house transaction and affirmed the Minister's position. For the Minister now to insist on the existence and validity of the debt, as if the assertion on discovery was a disembodied proposition, is unacceptable reprobation and approbation. Nor is his position any better in alleging that there is an outstanding debt as between the appellant and Transworld and that he is entitled to act on that fact in the writ of extent proceedings despite the determination made by Sheppard J. in the tax appeal. I propose to deal with this contention in the light of the authorities and of principle in respect of issue estoppel.

The Minister's position in law is founded on res judicata in its traditional cause of action sense. In tax matters, this was a position which rejected res judicata as an answer to tax liability for a particular year although the taxpayer had successfully challenged liability on the same ground in a previous year: see Caffoor v. Income Tax Commissioner [[1961] A.C. 584.]. Long before this case, the High Court of Australia had recognized that there may be issue estoppel where res judicata in its cause of action or subject matter sense would not be open: see Hoysted (or Hoystead) v. Commissioner of Taxation [(1921), 29 C.L.R. 537.]. Both the majority and dissenting opinions appreciated the distinction, and the reversal of the majority judgment by the Privy Council did not disavow it: see [1926] A.C. 155. Indeed, the Judicial Committee expressly approved the dissenting reasons of Higgins J. who had held that the tax commissioners were estopped by reason of a previous judgment of the High Court of Australia between the same parties relating to an earlier assessment, a judgment which, the Privy Council said (at p. 171) "was not merely incidental or collateral to the question [in issue, but] was fundamental to it". However, the Privy Council, at about the same time, but constituted differently as to the entire Board, took the res judicata subject matter approach in Broken Hill Proprietary Co. Ltd. v. Broken Hill Municipal Council [[1926] A.C. 94.]; and it was this case, and a later one in the House of Lords, Society of Medical Officers of Health v. Hope [1960] A.C. 551.], that the Privy Council followed in Caffoor.

It acknowledged that the Hoystead case was not consistent with the authorities relied on in Caffoor and explained it as not having been argued on the principle of the Broken Hill case, namely, that the determination of an assessment for one year could not set up an estoppel upon an assessment for another year. Rather, said Lord Radcliffe, referring in Caffoor at p. 601, to the Hoystead case:

> ... the attention of the Board was wholly occupied with a discussion of what is quite a different issue in connection with estoppel, whether there can in law be estoppel per rem judicatam in respect of an issue of law which, though fundamental to the issue, has been conceded and not argued in an earlier proceeding.

Assuming, as is indicated in Caffoor, that the principles applied in the tax assessment cases "form a somewhat anomalous branch of the general law of estoppel per rem judicatam and are not easily derived from or transferred to other branches of litigation in which such estoppels have to be considered" (see [1961] A.C. at pp. 599-600), the present case does not involve successive tax assessments against the appellant and hence cannot rest on the indicated anomaly. Moreover, so far as English cases are concerned, it seems to me that what was said on issue estoppel in Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2) [[1967] 1 A.C. 853.]. makes it unlikely that any anomalous rule, such as that upon which Caffoor appeared to be based, retains any survival value. At any rate, I would reject the introduction of such an anomaly into the law of Canada.

I cannot fail to note that none of the Law Lords in the Carl Zeiss case examined either Caffoor or Broken Hill, and only Lord Reid mentioned Hoystead and then only on the question whether issue estoppel applies equally to a point of assumption or admission as to a point fully litigated. In the present case, there was full litigation, to finality, of the issue and characterization of the value of the pool house, and hence the doubtful point in issue estoppel arising from what was said in the Hoystead case does not arise here.

The basis of issue estoppel as well as a cause of action estoppel has been variously explained; for example, that it is "founded on considerations of justice and good sense" (see New Brunswick Railway Co. v. British and French Trust Corp. Ltd. [[1939] A.C. 1.], at p. 19); that it is "founded upon the twin principles so frequently expressed in Latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause" (Carl Zeiss case, per Lord Upjohm at p. 946, per Lord Guest at p. 933); that is founded on "the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and ... the right of the individual to be protected from vexatious multiplication of suits and prosecutions ..." (Spencer-Bower and Turner, Res Judicata, (2nd ed, 1969), p. 10). Although, as Lord Reid said in the Carl Zeiss case, at p. 913, "issue estoppel may be a comparatively new phrase" (and is also known, especially in American decisions and writings, as collateral estoppel or issue proclusion), as a principle it goes back almost two hundred years in English case law to the Duchess of Kingston's Case [(1776), 20 St. Tr. 355.]. It has been recognized as well in Canadian case law as the following statement by Middleton J.A. in McIntosh v. Parent [(1924), 55 O.L.R. 552.], at p. 555, attests:

> When a question is litigated the judgment of the Court is a final determination between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or as an answer to a claim set up cannot be retried in a subsequent suit between the same parties or their privies though for a different cause of action. The right, question or fact once determined must as between them be taken to be conclusively established so long as the judgment remains ...

Issue estoppel has been recognized in this country and in this Court in criminal cases (see, for example, Wright, McDermott and Feeley v. The Queen [[1963] S.C.R. 539.], and it is no less applicable in civil matters. Nor is the application of that principle in any way affected because it is directed against a Minister of the Crown: see Fonseca v. Attorney General of Canada [(1889), 17 S.C.R. 612.], at p. 619. I see no reason to introduce any anomalies or exceptions to its general application if the facts call for it. The remaining question here then is whether the facts as between the appellant and the Minister bring issue estoppel into play.

The Minister's contention that the pool house transaction can be both a benefit and a loan or debt at the same time ignores the basis upon which he sought and succeeded in his reassessment of the appellant. There are two related points here which call for comment. First, the Minister founded his claim against the appellant upon s. 8(1)(c) and not upon s. 8(1)(a) or (b) or s. 8(2). Any question of a loan, arising from the arrangements for a bank credit to Transworld which was ultimately repaid by a Transworld cheque (leaving Transworld and the appellant where they were before), was negated by Sheppard J. as having been dependent upon a lease which was ineffective to support it. A device which failed as a defence to a reassessment, and so determined by a final judicial decision, cannot, in my view, be later reactivated as between the same parties to provide a different basis upon which to attempt to capture the same sum twice. There were, arguably, "funds or property" within s. 8(1)(b) or "a benefit or advantage" within s. 8(1)(c) conferred upon the appellant by Transworld, and the Minister chose to make his case under s. 8(1)(c). The logic of his present position would equally warrant him in claiming that a debt exists under s. 8(1)(b) which could be the subject of a writ of extent. If the Minister had succeeded in making his case in the tax appeal under s. 8(2), it would have been on the basis that there had been a loan which did not come within any of the exceptions to taxability. That, however, was not how the Minister chose to characterize the value of the pool house, and, clearly, on the facts there was no basis for contending that there had been a loan, giving rise in that aspect to a debt.

Even on the assumption that as between Transworld and the appellant a debt had arisen at the time, I do not think that the Minister can urge this against the appellant in the present case. There are two affidavits in the record of this case, by a chartered accountant and by a solicitor respectively, which state and explain why the sum of $34,612.33 was written off as an indebtedness as of January 31, 1970. It is immaterial whether these affidavits, upon which there was no cross-examination, be taken at face value. At worst, they underline the position taken by the Minister against the appellant in the tax appeal. Where issue estoppel is concerned I do not think that there is any warrant for invoking a jus tertii. Moreover, to do so in the present case would be to rely, in another form, on the same rejected view of the transaction that the Minister has asserted with respect to the appellant's admission on her examination for discovery in the tax appeal. The matter in issue is one between parties or their privies, and here this means only the Minister and the appellant.

I would, accordingly, allow the appeal and vary the order of Sheppard J. by directing that the writ of extent in the third degree against the appellant be set aside. She is entitled to her costs in this Court and also in the Exchequer Court in respect of the writ of extent against her.

Appeal dismissed with costs, SPENCE and LASKIN JJ. dissenting.

Tab 16

PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 2

by

ROBERT W. MACAULAY, Q.C.

and

JAMES L.H. SPRAGUE, B.A., LL.B.

Contributors

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

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in Canada are called by their creators, "tribunals" in their mandating legislation and I believe for obvious reasons — they first and foremost are an agency of Parliament or the Legislatures, which courts (basically) are not.

Before proceeding further, however, it may be useful to identify what I believe is the major factor in administrative law which has given rise to the major role played by policy-making in agency decision-making and the resulting confusion respecting rule-making. This is the legal restraint upon agencies to use their decisions as precedents, or, in other words, the inapplicabilty of stare decisis in administrative decision-making.

6.2 THE ROLE OF PRECEDENT IN AGENCY DECISION-MAKING (STARE DECISIS)

Unlike administrative bodies, the traditional courts are generally bound to follow their own rulings. In so doing, parties in court proceedings rely heavily on the doctrine of precedent or stare decisis to substantiate their claims. Judicial decisions are usually categorized as either authoritative or persuasive. If authoritative, they must be strictly followed; if persuasive, they may follow them. The authoritative or persuasive status of decisons depends upon the level of the court which issued them. Within a jurisdiction (e.g. a province, and one may treat the federal court as a separate province simply for the purposes of this discussion), the decisions of a higher court are authoritative (or binding) upon all lower courts. Decisions of the same level of court are persuasive (although courts generally say that they should be reluctant to depart from their own earlier decisions). Decisions of courts of other jurisdictions (e.g. courts of provinces, other than the province of the court hearing the case) of whatever level are persuasive. Decisions of the Supreme Court are authoritative everywhere in Canada. Decisions of the Privy Council prior to 1949 are also authoritative across Canada. In determining which judicial decisions are authoritative for administrative agencies one can use as a general rule of thumb that decisions of the courts of the same jurisdiction as the agency will be authoritative if the judges of that court are appointed by the federal government (i.e. courts known as s. 96 courts — referring to the appointment power set out in s. 96 of the Constitution) while decisions of courts whose judges are appointed by the provincial government will be merely persuasive. Decisions of courts of other juridictions, of whatever level are merely persuasive to an agency. Decisions of the Supreme Court of Canada are authoriative for all Canadian agencies.

In performing their mandates agencies should strive for continuity, consistency and a degree of predictabilty. Justice demands that equality of treatment and impartiality prevail when the merits of a case are considered. On the other hand, in the face of legal uncertainties and novel situations, it is not desirable to accord precedent and stare decisis a pivotal role. Facts are often not comparable. Old precedents are expanded, twisted and contorted so many times that they often

application, the agency can take into account as a factor the value of consistency in the matter.[14.1]

The purpose of not encumbering agencies with the dead weight of precedent is to guarantee a flexibility and responsiveness in their decision-making which is not always forthcoming in the courts. Hence all the need to consider each case on its own merit. The danger is, however, that in releasing agencies from the moorings of stare decisis, they are being furnished, in effect, with a licence to be inconsistent. Inconsistency creates its own form of injustice, because it theoretically obviates the need to treat like cases alike. Furthermore, it means that a party may tailor its activites according to a give line of agency decisions, only to one day have the same agency "repent and recant", thereby throwing its affairs into disarray.

I believe that that it is this inability of agencies to resort to precedent which, in an effort to avoid purely ad hoc decision-making and to attain consistency in decision-making where appropriate which has led to the great role played by guidelines (and rule-making) in agency life.[14.2]

14.1 See, in illustration, *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board)*, 2005 CarswellAlta 1737, 2005 ABQB 866, 45 Admin. L.R. (4th) 9 (Alta. Q.B.), affirmed 2007 CarswellAlta 839, 2007 ABCA 217, 62 Admin. L.R. (4th) 243 (Alta. C.A.). In that case, the Alberta Court of Appeal affirmed the decision of the province's Court of Queen's Bench in which the Queen's Bench judge stated, among other things:

> I cannot conclude that an administrative tribunal errs by following its own decisions. While such tribunals are precluded from fettering their discretion or avoiding their decision-making responsibilities, that does not mean that they cannot refer to past decisions and attempt to maintain a reasonable degree of consistency in appropriate cases.

See also *Ontario (Minister of Municipal Affairs & Housing) v. Transcanada Pipelines Ltd.* (2000), 186 D.L.R. (4th) 403, 2000 CarswellOnt 1072 (Ont. C.A.), leave to appeal refused (2000), 2000 CarswellOnt 4249, 2000 CarswellOnt 4248 (S.C.C.). ("A tribunal is not bound to follow its own decisions on similar issues although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it.")

The Alberta Court of Appeal in *Johnston v. Alberta (Director of Vital Statistics)*, 2008 CarswellAlta 644, 2008 ABCA 188 (Alta. C.A.) recognized that consistency was a desirable end in agency decision-making and noted that it could be achieved through the development of a body of decisions as well as through the creation of policies:

> Although consistency is a desired objective, the means of achieving that objective may vary, and are not restricted to the formulation of a policy. Indeed, one method of achieving consistency is by way of a body of decisions, as is implemented by courts in their dissemination of jurisprudence.

14.2 At the same time, neither past decisions or guidelines issued by an agency are "nothings" which can simply be ignored. See the discussion later in this text under heading 6.20 "Practice Hints in Dealing With Agency Guidelines for Agencies and Practitioners" under the heading "Cannot Simply Ignore Guidelines".