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File 15119

March 18, 2009

VIA COURIER AND EMAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

RE: Ontario Power Generation
Board File: EB-2009-0038
Submissions of Power Workers' Union in respect of Ontario Power Generation's motion for review and variance of Board Decision with Reasons dated November 3, 2008

Enclosed please find two paper copies of the Submissions of Power Workers' Union in connection with the above-referenced proceedings.

A copy has been sent to the Board via email, and an electronic copy has been filed through the Board's *RESS* filing system.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Richard P. Stephenson

RPS:jr

encl.

Doc 717258v1

EB-2009-0038

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 Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998*, for an Order or Orders determining payment amounts for the output of certain of its generating facilities.

SUBMISSIONS OF POWER WORKERS' UNION

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TAB 1

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 Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998*, for an Order or Orders determining payment amounts for the output of certain of its generating facilities.

SUBMISSIONS OF POWER WORKERS' UNION

Overview:

1. These are the submissions of the Power Workers' Union ("PWU") in respect of Ontario Power Generation ("OPG")'s motion for review and variance of the Board's Decision with Reasons dated November 3, 2008 in EB-2007-0905. These submissions are filed pursuant to Procedural Order No. 1 dated March 2, 2009.

2. The PWU was an intervenor and active participant in EB-2007-0905. The PWU supported OPG's application, including its position with respect to the matters subject to this motion.

3. By correspondence dated February 6, 2009 to the Board Secretary, the PWU supported OPG's request that the Board convene an oral hearing for the purpose of considering OPG's motion to vary the Board's Decision in EB-2007-0905.

4. The PWU submits herein that the threshold to review and vary the Board's Decision in EB-2007-0905 has been met, and that the decision should be varied so as to eliminate the $342,000,000 reduction in OPG's revenue requirement, and to establish a variance account to record the revenue requirement reduction of $342,000,000 incorporated in the test period

payments amounts and directing that the disposition of that account be conducted in conjunction with consideration of the analysis of prior tax returns in OPG's next application regarding payment amounts.

The First Issue: Does OPG's Motion Raise a Substantial Question as to the Correctness of the Decision?

5. The PWU submits that OPG's motion has raised a substantial question as to the correctness of the decision on at least two main grounds.

6. First, the PWU submits that the Board's revenue requirement reduction of $342,000,000 was made without evidentiary or legal foundation. The PWU adopts and supports OPG's submissions contained at paragraphs 27 – 49 of its written submissions in this respect.

7. Secondly, the PWU submits that the Board's finding on this issue constitutes a denial of procedural fairness and natural justice.

8. As noted by OPG, the OEB disposed of the regulatory tax loss and mitigation issue on a basis that was never raised or argued during the hearing. As a result, neither OPG Board Staff or Intervenors, including the PWU, were given the opportunity to make submissions to the Board regarding this potential outcome.

9. Pursuant to s. 10.1 of the *Statutory Powers Procedures Act*, a party to a hearing is afforded the following rights:

> **10.1 A party to a proceeding may, at an oral or electronic hearing,**
>
> **a. call and examine witnesses and present evidence and submissions; and,**
> **b. conduct cross examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.**

10. The proposition that a tribunal which decides a matter on grounds that are not advanced or argued by a party before it violates natural justice has been recognized on numerous occasions by Canadian courts.

11. This aspect of the requirements of natural justice is discussed at length by the British Columbia Supreme Court in *Amacon Property Management Services Inc. v. Dutt*:

> **[27] The petitioner argues that the process that led to the arbitrator's decision was procedurally unfair because the arbitrator decided the matter on grounds that were not advanced or argued by either party. In particular, the petitioner says that by finding liability in negligence when negligence was not argued by either party, the arbitrator denied the petitioner its right to be informed of the issues under consideration and an opportunity to present submissions on those issues. The petitioner submits that the arbitrator did not act fairly and the matter must be submitted for reconsideration.**
>
> **[31] The petitioner's argument is based on the common law principle of *audi alteram partem*, which provides that it is the right of a person affected by a decision to be heard. This principle is a fundamental requirement of natural justice: *Communications, Energy and Paperworkers Union of Canada, Powell River Local 76 v. Power Engineers and Boiler and Pressure Vessel Safety Appeal Board*, 2001 BCCA 743 (CanLII), 2001 BCCA 743, 97 B.C.L.R. (3d) 11 at para. 11. The connection between deciding an issue on a point of law not argued by the parties and violation of the *audi alteram partem* principle was explained in *R. v. Barlow, Augustine and Augustine reflex*, (1984), 57 N.B.R. (2d) 311 (Q.B.), where Meldrum J. stated at 316:**
>
> > **Our system of Justice is based on an adversarial system. Each side is expected to present the facts justifying its position and to argue the appropriate law.**
> >
> > **The judge is an arbiter, not a participant. Before he can judge he must hear both sides. Audi alteram partem is a rule recognized by all as basic.**
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> > **The judge may, sometimes unfortunately must, do independent research into the law. Even then, however, fairness to both sides demand that the judge at trial shall not go off on a frolic of his own. It is not unusual after the case has been argued, that the trial Judge may find an authority or note a facet of the case which obviously was missed by both. Properly he should then offer to each side an opportunity to be heard on the point before he reaches an independent conclusion.**

[32] A similar point is made in the speech of Lord Hodson in ***Official Solicitor to the Supreme Court v. K. and Another***, [1965] A.C. 201 (H.L.), at 234:

> It is said with force, as Russell L.J. remarked, that it is contrary to natural justice that the contentions of a party in a judicial proceeding may be overruled by considerations in the judicial mind which the party has no opportunity of criticising or controverting because he or she does not know what they are: moreover, the judge may (without the inestimable benefit of critical argument) arrive at a wrong conclusion on the undisclosed material. Even worse, the undisclosed evidence may, if subjected to criticism, prove to be misconceived or based on false premises.

[33] The principle that an adjudicator should not decide a case on a point on which the parties have not had a reasonable opportunity to present submissions is implicit in the Supreme Court of Canada's decision in ***International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.***, 1990 CanLII 132 (S.C.C.), [1990] 1 S.C.R. 282. In that case, the court held that where a decision-maker consults with other members of her tribunal on matters of law or policy, she is bound to give the parties a reasonable opportunity to respond to any new ground arising from the consultation (at 339).

> Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a "fair opportunity of answering the case against [them]": Evans, *de Smith's Judicial Review of Administrative Action* (4th ed. 1980), at p. 158. It is true that on factual matters the parties must be given a "fair opportunity ... for correcting or contradicting any relevant statement prejudicial to their view": *Board of Education v. Rice*, [1911] A.C. 179, at p. 182; see also *Local Government Board v. Arlidge*, [1915] A.C. 120, at pp. 133 and 141, and *Kane v. Board of Governors of the University of British Columbia*, supra, at p. 1113. However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. ...
>
> I therefore conclude that the consultation process described by Chairman Adams in his reconsideration decision does not violate the *audi alteram partem* rule provided that factual issues are not discussed at a full board meeting and that the parties are given a reasonable opportunity to respond to any new ground arising from such a meeting. ...

> **[34] In my opinion, the fact that the new ground of decision arose from the arbitrator's own thought process, rather than from consultation with others, is not a basis for distinguishing *Consolidated-Bathurst*.**
>
> **[35] The petitioner has also cited *MacNeil v. Workers' Compensation Board* (N.S.) et al., 2001 NSCA 3 (CanLII), and *Myers v. Windsor (Town)*, 2003 NSCA 64 (CanLII), in support of its argument on this point. These decisions stand for the proposition that an administrative tribunal exercising appellate jurisdiction under statute may commit error if it decides a case on a ground not advanced by the parties and which they have not been given an opportunity to address.**
>
> **[36] In this case, the arbitrator interpreted and applied the facts adduced by the parties to an issue that neither of the parties had raised or argued, without giving the parties notice that he was considering the issue or an opportunity to make submissions. The issue raised by the arbitrator, negligence, involves principles of law and interpretations of the evidence very different from those involved with the issues argued by counsel. Negligence was not a facet of the case missed the parties, and, with respect to the arbitrator, he should have offered each side an opportunity to be heard on the point before he reached an independent conclusion. Accordingly, I conclude that, in all of the circumstances, the arbitrator did not act fairly.[1]**

12. It is submitted that the analysis of the Court in *Amacon*, and the cases cited therein is directly applicable to the present case. The Board's analysis and conclusion with respect to the issue of regulatory tax loss and mitigation was never raised by any party, or by the Board itself, during the course of the hearing. As a result, OPG, and Intervenors like the PWU were deprived of the opportunity to address the Board with respect to the issue. This constitutes a denial of natural justice requiring the Board's Decision on this issue to be set aside.

13. For these reasons, it is submitted that the "threshold in question" has been established, and it is appropriate for the Board to consider the merits of OPG's motion.

---

[1] *Amacon Property Management Services Inc. v. Dutt*, 2008 BCSC 889 (CanLII). See also: *MacNeil v. Workers' Compensation Board* (N.S.) et al., 2001 NSCA 3 (CanLII), *Myers v. Windsor (Town)*, 2003 NSCA 64 (CanLII), *McCarthy v. Nova Scotia (Workers' Compensation Appeal Tribunal)*, 2001 NSCA 79 (CanLII)

The Second Issue: **Should the Board's Reduction in OPG's Revenue Requirement in Respect of the Regulatory Tax Loss and Mitigation Issue be Varied?**

14. Consistent with the submissions of OPG in its motion, the PWU submits that the Board's conclusion with respect to the regulatory tax loss and mitigation issue must be set aside on two grounds:

    a. First, there was no evidence in support of the Board's findings and uncontradicted evidence to the contrary; and,

    b. Secondly, the imposition of an additional reduction in revenue requirement as "mitigation" denied OPG the opportunity to earn a fair return:

        i. In setting just and reasonable rates, the Board is required to permit OPG to earn a "fair return";

        ii. The Board made no finding that the disallowed amount was in excess of what was required in order to provide OPG with a fair return;

        iii. By imposing the additional revenue reduction, the Board has improperly denied OPG the opportunity to earn a fair return.

Conclusion:

15. As a result, the PWU submits that the threshold question has been established and that it is appropriate for the Board to vary its decision in the manner submitted by OPG.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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TAB 2

para. 31-36

Amacon Property Management Services Inc. v. Dutt, 2008 BCSC 889 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Amacon Property Management Services Inc. v. Dutt,*** 2008 BCSC 889

Date: 20080708

Docket: S070576
Registry: Vancouver

Between:

Amacon Property Management Services Inc.

Petitioner

And

Anil Dutt, Jiang Hen Zhang, Maozi (Maggie) Zhang, Xiang Hui Wu Zhane, Min (Mindy) Wu, Hongwei Cheng, Jiang Hai Bin, Rong (Rebecca) He, Gurdeep (Gordie) Bimb, Laara Raynier, Yeune See Ming, Abdelaziz Azzaoui, Parveneh Donyadar, Tony Gazyura, Olena Gazyura, Joselito Mordeno, Karima Wahedi, George Leung, Lian Cheng Zhao, Li Ping, Li Jiang, Wen Luo Feng, Doreen Borilla, Cesar Borilla, Ke Ying, Li Hong, Xue Fei Ao, Ying Chen Cui, G.E. (Shelly) Zhang, Jian Feng Hou, and Crystal Wang

Respondents

Before: The Honourable Mr. Justice Slade

Reasons for Judgment

Counsel for the Petitioner:	I. Schil
Counsel for the Respondents:	K.E. Duce
Date and Place of Hearing:	February 27, 200 Vancouver, B.C
Supplementary Submissions: by Petitioner:	April 14, 200
by Respondents:	April 28, 200

I. INTRODUCTION

[1] The petitioner seeks an order that the decision of an arbitrator under the ***Residential Tenancy Act*** be set aside and remitted to the arbitrator for further consideration.

[2] The question on the arbitration was whether the respondents were entitled to an abatement of rent, or damages for loss of amenities, due to a lack of heat and hot water during a period in which the petitioner was replacing the boilers that provided heat to the respondents' rental apartments.

[3] The arbitrator found that the lack of heat during the replacement of the boilers did not warrant an abatement of rent. In this regard, the arbitrator found that the repairs were necessary, and did not take an inordinately long period to effect. However, the arbitrator found that the petitioner had negligently failed to adequately communicate with the respondents concerning the impending and continuing loss of heat, and was therefore liable to the respondents for damages.

II. BACKGROUND

[4] The rental property at issue in this matter comprises four 60 unit apartment buildings located in Richmond, British Columbia at 6211 Gilbert Road ("6211"), 6311 Gilbert Road ("6311"), 6411 Gilbert Road and 6511 Gilbert Road (collectively, the "Richmond Gardens Apartments"). The Richmond Gardens Apartments were built in or about 1971.

[5] The respondents are, or were at all material times, tenants of 6211 and 6311. Eight of the respondents occupied suites in 6211, nineteen occupied suites in 6311. Rents paid by the respondents under their respective tenancy agreements cover, among other things, the provision of heat.

[6] The boilers which were replaced were the originals that had been installed when the buildings were constructed. Professional inspections conducted in February 2006 showed that these boilers would not be able to provide heat through 2006-2007 winter season. A complete boiler replacement was required.

[7] Boiler replacement in 6211 commenced on May 9, 2006 and was completed on June 7, 2006. Boiler replacement for 6311 commenced on May 15, 2006 and was completed on June 30, 2006. As of those completion dates, the central heating system in each of 6211 and 6311 was once again operational.

[8] At the conclusion of the boiler replacement work on 6211 and 6311, the petitioner was informed by the contractor, and independently determined, that the central heating system was operating. The petitioner believed that the units in those buildings were receiving heat.

[9] On or about June 5, 2006, the petitioner issued a notice to the respondent tenants of 6211, advising that the boilers had been replaced and requesting that they advise as to any ongoing heating problems. The petitioner did not receive any response to that notice. Due to an oversight, no such notice was delivered to 6311.

[10] On August 1, 2006, during the course of the hearing before the arbitrator, some of the respondents gave evidence that heat had not yet been restored to some of the units. As a result, the petitioner took steps to address any outstanding concerns regarding the provision of heat, and issued a request that the respondents provide notice of any such concerns. In total, 20 units in 6211 and 6311 were identified as still experiencing problems with heat. By August 12, 2006, heat had been restored to 14 of those units. Heat was restored to the remaining six units by the end of August 2006.

III. PROCEEDINGS BEFORE THE ARBITRATOR

[11] This arbitration process under the ***Residential Tenancy Act*** was commenced by way of a series of "Application for Arbitration" forms delivered for each unit, most dated June 5, 2006. Those forms were delivered for eight of the 60 units in 6211 and 19 of the 60 units in 6311. Some

applications list more than one tenant applicant. As a result, the arbitration process adjudicated the claims of 31 applicants. These applicants make up all of the respondents in this proceeding.

[12] Each of the Application for Arbitration forms specified the following relief:

> I request an Order directing the landlord to complete and repair the hearing system to my apartment and reinstate the heating which I have been without since May 12, 2006: I further request a an [sic] Order for Reduction of Rent in the amount of $950.00 per month until such time as the landlord has complied with the Arbitrator's Order and retroactively since May 12, 2006. I further request an Order that the Landlord pay me the sum of $100.00 per day because of the loss of heat to my apartment which is within the landlord's care, control and power to correct and that the landlord has withheld this essential service. I further request a Monetary Order in the amount of $5,000.00 for my loss of amenity (heat), injury to dignity and feelings and the landlord's vexatious and unconscionable behaviour with regard to the heat to my apartment is clearly retaliatory and a contravention of the Residential Tenancy Act.

[13] The hearing before the arbitrator proceeded on June 29, August 1 and October 5, 2006. At the hearing, evidence, in oral or written form, was led by the respondents from six of the eight units in 6211 and 13 of the 19 units in 6311. Eight of the 31 respondents in respect of which Applications for Arbitration were filed did not provide any evidence at the hearing.

[14] In their initial written argument, the respondents founded their claim on three bases:

> (a) a breach of section 27 of the Act (ie. terminating services or facilities);
>
> (b) a breach of the tenancy agreements;
>
> (c) "aggravated damages" as a result of the Landlord's "deliberate acts against the [Tenants]".

[15] In essence, the respondents' position at the hearing was the petitioner was in breach of the ***Act*** and the tenancy agreements due to its failure to provide heat.

[16] In their written argument delivered after the hearing dates, the respondents maintained these claims, but also sought "aggravated damages" as a result of the alleged failure of the petitioner to restore the heat in a timely manner.

[17] In its written argument, the petitioner responded to the claims raised by the respondents. The petitioner's fundamental position was that the temporary suspension of services for the purpose of repair or replacement did not constitute a breach of s. 27 of the ***Act*** or a breach of the tenancy agreements. The petitioner also disputed the respondents' entitlement to aggravated damages.

[18] In written reasons dated December 5, 2006, the arbitrator said that s. 27 of the ***Act*** had "only minimal application to the matter", as the petitioner was obliged by statute to undertake necessary repairs.

[19] The arbitrator also concluded that the temporary loss of heat for the purpose of undertaking the necessary repairs did not constitute a breach of the tenancy agreements and, further, that there was no basis for aggravated damages.

[20] However, having disposed of the two bases under which the respondents had advanced their claims, the arbitrator embarked upon a tort analysis, as if the respondents had been advancing a claim in negligence. The arbitrator's description of this issue was as follows:

> A tenant can have no claim against a landlord for disruption or loss during needed repairs unless the landlord was negligent.... In this case there is no dispute that the repairs were

necessary. The issue therefore becomes whether the respondent was negligent.

[21] The arbitrator went on to conclude that the repairs had not taken too long, but was critical of the manner in which the petitioner had communicated with the respondents during the repair process, as follows:

> However, again the conduct of the [Landlord] in not communicating with the tenants prevented the [Tenants] from properly assessing the situation and reacting in an appropriate way to the loss of heat and mitigating their loss. The Landlord provided one notice to one building, 6211, and no notice at all to 6311. The evidence shows a half-hearted attempt at warning the tenants of both building of the impending, and continuing, loss of heat. Communication during and after the repairs was virtually non-existent to the point where the [Tenants] did not know the boilers had been replaced and that there were supposed to now have heat.
>
> I find it was reasonably foreseeable that if the [Landlord] did not communicate with the [Tenants] properly as outlined above that the [Tenants] would suffer a loss. The [Landlord] owed the applicants a duty of care, with which the [Landlord] failed to comply. A loss resulted and I assess the loss of the [Tenants] at $250 per month per [Tenant] for three months, or $750. I apply the same loss to the [Tenants] who reside in both buildings.

[22] With respect to the respondents who had not provided evidence at the hearing, the arbitrator's conclusion was as follows:

> In response to the submission of Mr. Libby that the claims of those applicants who did not appear be summarily dismissed, the ***Act*** and the Rules of Procedure permit a party to appear via an agent and no such order is made.

[23] In a "Supplementary Decision and Reasons" dated February 5, 2007, the arbitrator amended the award to include three units which had been inadvertently excluded from the original reasons.

IV. POSITIONS OF THE PARTIES

The Petitioner

[24] The petitioner's position is as follows:

(a) the arbitrator decided the matter on a ground which was not asserted by the respondents and on which the petitioner was not given an opportunity to make submissions, and thus did not give the petitioner a fair hearing;

(b) the decision of the arbitrator was patently unreasonable in that there was no legal basis on which the arbitrator could have concluded that the petitioner's failure to communicate with the respondents caused any loss or damages; and

(c) the damages awarded by the arbitrator were patently unreasonable in that there was no evidence before the arbitrator to support such an award.

The Respondents' Position

[25] The respondents say that, although the specific question of negligence was not argued at the hearing, a determination based on the law of negligence worked no unfairness to the petitioner as the arbitrator took account only of evidence presented at the hearing. The respondents also argue that the finding of the arbitrator, based on negligence, and the quantum of the award of compensation, were

not patently unreasonable.

V. ISSUES

[26] These are the issues:

1. Did the arbitrator, by basing his finding on the application of the law of negligence, an issue not raised at the hearing, deny the petitioner natural justice?

2. Irrespective of the answer to question 1, was the decision of the arbitrator, or any aspect of that decision, patently unreasonable?

3. If the answer to either question is "yes", what is the appropriate remedy?

VI. APPLICATION OF THE LAW

Natural Justice

[27] The petitioner argues that the process that led to the arbitrator's decision was procedurally unfair because the arbitrator decided the matter on grounds that were not advanced or argued by either party. In particular, the petitioner says that by finding liability in negligence when negligence was not argued by either party, the arbitrator denied the petitioner its right to be informed of the issues under consideration and an opportunity to present submissions on those issues. The petitioner submits that the arbitrator did not act fairly and the matter must be submitted for reconsideration.

[28] The respondent accepts that the specific question of negligence was not stated at the original hearing, but says that "the facts which form the basis of the finding of negligence were before the arbitrator and were argued by both parties". More specifically, the respondent says that it was argued at the hearing that s. 32 of the ***RTA*** could not provide a complete defence to the deprivation of services contrary to s. 27, and that a finding of negligence was responsive to this argument. The respondent asserts that there is no basis for finding that the arbitrator's conclusion on negligence is unfair because the arbitrator's conclusion was "simply a natural consequence of the defence raised by the Landlord".

[29] The ***Residential Tenancy Act***, S.B.C. 2002, c. 78 (the "***RTA***") and the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45 (the "***ATA***") contain interlocking provisions that provide that questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the director acted fairly. Section 78.1 of the ***RTA*** makes s. 58 of the ***ATA*** apply to the director as if the director were a tribunal and to proceedings under the ***RTA***. Section 58 of the ***ATA*** prescribes the standard of review for decisions of tribunals whose enabling enactments contain privative clauses. The ***RTA*** contains a privative clause at s. 84.1(1). This section states:

> (1) The director has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in a dispute resolution proceeding or in a review under Division 2 of this Part and to make any order permitted to be made.
>
> (2) A decision or order of the director on a matter in respect of which the director has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[30] Sections 58(1) and 58(2)(b) of the ***ATA*** together provide that questions about the application of common law rules of natural justice and procedural fairness in proceedings before the director must be decided having regard to whether, in all of the circumstances, the director acted fairly.

> 58(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it

has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

...

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

...

[31] The petitioner's argument is based on the common law principle of *audi alteram partem*, which provides that it is the right of a person affected by a decision to be heard. This principle is a fundamental requirement of natural justice: ***Communications, Energy and Paperworkers Union of Canada, Powell River Local 76 v. Power Engineers and Boiler and Pressure Vessel Safety Appeal Board***, 2001 BCCA 743 (CanLII), 2001 BCCA 743, 97 B.C.L.R. (3d) 11 at para. 11. The connection between deciding an issue on a point of law not argued by the parties and violation of the *audi alteram partem* principle was explained in ***R. v. Barlow, Augustine and Augustine*** reflex, (1984), 57 N.B.R. (2d) 311 (Q.B.), where Meldrum J. stated at 316:

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> The judge may, sometimes unfortunately must, do independent research into the law. Even then, however, fairness to both sides demand that the judge at trial shall not go off on a frolic of his own. It is not unusual after the case has been argued, that the trial Judge may find an authority or note a facet of the case which obviously was missed by both. Properly he should then offer to each side an opportunity to be heard on the point before he reaches an independent conclusion.

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> It is said with force, as Russell L.J. remarked, that it is contrary to natural justice that the contentions of a party in a judicial proceeding may be overruled by considerations in the judicial mind which the party has no opportunity of criticising or controverting because he or she does not know what they are: moreover, the judge may (without the inestimable benefit of critical argument) arrive at a wrong conclusion on the undisclosed material. Even worse, the undisclosed evidence may, if subjected to criticism, prove to be misconceived or based on false premises.

[33] The principle that an adjudicator should not decide a case on a point on which the parties have not had a reasonable opportunity to present submissions is implicit in the Supreme Court of Canada's decision in ***International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.***, 1990 CanLII 132 (S.C.C.), [1990] 1 S.C.R. 282. In that case, the court held that where a decision-maker consults with other members of her tribunal on matters of law or policy, she is bound to give the parties a reasonable opportunity to respond to any new ground arising from the consultation (at 339).

> Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a "fair opportunity of answering the case against [them]": Evans, de Smith's Judicial Review of Administrative Action (4th ed. 1980), at p. 158. It is true that

> on factual matters the parties must be given a "fair opportunity ... for correcting or contradicting any relevant statement prejudicial to their view": ***Board of Education v. Rice***, [1911] A.C. 179, at p. 182; see also ***Local Government Board v. Arlidge***, [1915] A.C. 120, at pp. 133 and 141, and ***Kane v. Board of Governors of the University of British Columbia***, *supra*, at p. 1113. However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. ...
>
> I therefore conclude that the consultation process described by Chairman Adams in his reconsideration decision does not violate the *audi alteram partem* rule provided that factual issues are not discussed at a full board meeting and that the parties are given a reasonable opportunity to respond to any new ground arising from such a meeting. ...

[34] In my opinion, the fact that the new ground of decision arose from the arbitrator's own thought process, rather than from consultation with others, is not a basis for distinguishing ***Consolidated-Bathurst***.

[35] The petitioner has also cited ***MacNeil v. Workers' Compensation Board (N.S.) et al.***, 2001 NSCA 3 (CanLII); 2001 NSCA 3, and ***Myers v. Windsor (Town)***, 2003 NSCA 64 (CanLII), 2003 NSCA 64, in support of its argument on this point. These decisions stand for the proposition that an administrative tribunal exercising appellate jurisdiction under statute may commit error if it decides a case on a ground not advanced by the parties and which they have not been given an opportunity to address.

[36] In this case, the arbitrator interpreted and applied the facts adduced by the parties to an issue that neither of the parties had raised or argued, without giving the parties notice that he was considering the issue or an opportunity to make submissions. The issue raised by the arbitrator, negligence, involves principles of law and interpretations of the evidence very different from those involved with the issues argued by counsel. Negligence was not a facet of the case missed the parties, and, with respect to the arbitrator, he should have offered each side an opportunity to be heard on the point before he reached an independent conclusion. Accordingly, I conclude that, in all of the circumstances, the arbitrator did not act fairly.

Standard of Review

[37] Above it was explained that s. 58 of the ***ATA*** applies to the director as if the director were a tribunal and to proceedings under the ***RTA***. Section 58(2)(a) of the ***ATA*** provides that the standard of review of a finding of fact or law or an exercise of discretion in respect of a matter over which the tribunal has exclusive jurisdiction is patent unreasonableness.

> 58(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

[38] Since the definition of "patently unreasonable" in s. 58(3) applies only to discretionary decisions, its meaning in relation to non-discretionary decisions comes from the common law.

[39] Recently the Supreme Court of Canada changed the common law on standard of review in ***Dunsmuir v. New Brunswick***, 2008 SCC 9 (CanLII), 2008 SCC 9. Before ***Dunsmuir*** there were three standards of review at common law: correctness, reasonableness *simpliciter*, and patent unreasonableness. ***Dunsmuir*** decided that when courts review administrative decisions under the common law, there are only two standards of review: correctness and reasonableness. Since the Supreme Court's judgment in ***Dunsmuir*** was pronounced, courts in British Columbia have grappled with how to reconcile the disappearance of patently unreasonable as a common law standard of review with its persistence in the ***ATA***.

[40] In ***Howe v. 3770010 Canada Inc.***, 2008 BCSC 330 (CanLII), 2008 BCSC 330, Gerow J. found that s. 58(2)(a) of the ***ATA*** applied to the review of an arbitrator's decision rendered under the authority of the ***Manufactured Home Park Tenancy Act***, S.B.C. 2002, c. 77, an act that is in some sense a companion to the ***RTA***. For the definition of the patently unreasonable standard mandated by s. 58(2)(a), Gerow J. looked to the common law because the definition provided in s. 58(3) applied only to discretionary decisions. The learned justice noted at ¶18 that in ***Dunsmuir v. New Brunswick***, the Supreme Court "concluded at para. 45 that the two standards of patently unreasonable and reasonableness simpliciter should be collapsed into a single form of 'reasonableness' review", and reviewed the decision at issue according to the reasonableness standard defined in ***Dunsmuir***.

[41] In ***Gogol v. Workers' Compensation Appeal Tribunal***, 2008 BCSC 489 (CanLII), 2008 BCSC 489, counsel submitted that the court was not bound by ***Howe v. 3770010 Canada Inc.*** because ***Dunsmuir*** was decided while ***Howe*** was under reserve and that the question of whether ***Dunsmuir*** has any impact in the face of a statutory standard does not appear to have been fully argued. The judge in ***Gogol*** found that it was not necessary to decide the point because counsel were content to rely on the pre-***Dunsmuir*** test for patent unreasonableness.

[42] In ***Carter v. Travelex Canada Limited***, 2008 BCSC 405 (CanLII), 2008 BCSC 405, Hinkson J. concluded at ¶14 that "despite the recent decision of the Supreme Court of Canada in *Dunsmuir*, three standards of review remain applicable on judicial review in British Columbia depending upon the nature of the question or questions raised". Hinkson J. purported to apply the "patently unreasonable" standard, and saw "nothing unreasonable" in the decision under review.

[43] In ***Glandon v. (British Columbia) Residential Tenancy Branch***, 2008 BCSC 727 (CanLII), 2008 BCSC 727, Rice J. decided a judicial review of a ***RTA*** arbitrator according to the patently unreasonable standard of review prescribed by s. 58 of the ***ATA***. His lordship did not refer to any definition for the patently unreasonable standard, and concluded his judgment at ¶39 by making an alternative finding on the reasonableness standard set out in ***Dunsmuir***:

> In accepting the patently unreasonable standard of review specified in the *Administrative Tribunals Act*, I do not disregard the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9. There the Court merged the two standards of reasonableness simpliciter and patent unreasonableness into one under the title "reasonableness". It is not clear whether the finding in *Dunsmuir* applies to the situation

where the standard of review of patent unreasonableness is set out in a statute. If this is determined to be the case, then I would apply the new reasonableness standard in place of patent unreasonableness and come to the same result.

[44] The above review indicates that the question of how to apply the patently unreasonable standard of review mandated by the ***ATA*** in view of ***Dunsmuir*** is unsettled. I have not found it necessary to attempt a resolution of this question.

Substantive Argument: Causation

[45] The petitioner argues that the arbitrator's decision was patently unreasonable for finding that it had complied with s. 32 of the ***RTA*** but had been negligent in failing to communicate properly with the tenants. The petitioner says that even assuming it had a duty to communicate with the tenants, the respondents failed to prove causation before the arbitrator.

[46] The petitioner correctly states that a party claiming in negligence must not only prove that he or she has suffered damages, but also that those damages were caused by the tortfeasor's negligence. The petitioner submits that it was therefore incumbent on the respondents to establish that the damages they suffered were caused by the petitioner's negligent failure to communicate. The petitioner says that the respondents didn't allege or attempt to prove damages. While there was some evidence to show that some of the respondents suffered inconvenience from the lack of heat, the petitioner asserts there was no evidence to suggest that this inconvenience was caused by the result of the petitioner's failure to communicate. Instead, says the petitioner, it is clear that any damages suffered resulted from the lack of heat during the repairs.

[47] The petitioner's submission goes into further details of the evidence of the respondents' knowledge of and reactions to the lack of heat. The gist of these details is that the evidence suggests that all of the respondents realized that heat was not available shortly after the boilers were shut down and that many of them took measures to compensate for the lack of heat.

[48] The respondent does not make a detailed reply to the petitioner's argument. The relevant portion of the respondent's reply reads as follows:

> [The respondents'] primary complaint was that the Landlord took too long to effect repairs and did not tell the Tenants what they were doing. Both sides led evidence on this issue. The Arbitrator decided against the Tenants on the first complaint but accepted as a finding of fact that the failure to communicate with the Tenants on the first complaint but accepted as a finding of fact that the failure to communicate with the Tenants caused them harm and damage which they could otherwise have avoided.

[49] In ***Resurfice Corp. v. Hanke***, 2007 SCC 7 (CanLII), 2007 SCC 7, 2007 SCC 7 (CanLII), [2007] 1 S.C.R. 333, the Supreme Court of Canada explained that the plaintiff's burden under the "but for" test for causation is to show that "but for" the negligent act or omission of the defendant, the injury would not have occurred. In this case, the arbitrator found liability based on a negligent omission, *i.e.*, a failure to communicate. To establish causation, it must be shown that "but for" the failure to communicate the respondents (1) would have had more accurate knowledge of when heat would not be available and when heat would be restored (as compared with the knowledge they had given the failure to communicate) and (2) would have avoided certain losses as a result of this improved knowledge. In other words, only losses that would have been avoided if the petitioner had provided adequate communication about the heating situation can be causally linked to the failure to communicate.

[50] The arbitrator made the finding of fact that "the conduct of the [petitioner] in not communicating with the tenants prevented the applicants from properly assessing the situation and reacting in an appropriate way to the loss of heat and mitigating their loss." By the words "prevented from ... mitigating their loss", it is apparent that the arbitrator means that the tenants, because they were

prevented from properly assessing the situation, were made to suffer a greater loss than that which they would have if they had been properly informed by the applicant. The petitioner's complaint is that the arbitrator made this finding of fact, which establishes causation, when there was no evidence before him to support it.

[51] In ***Toronto Board of Education v. Ontario Secondary School Teacher's Federation, District 15***, 1997 CanLII 378 (S.C.C.), [1997] 1 S.C.R. 487, the majority of the Supreme Court of Canada found that an arbitration board's decision was patently unreasonable because two critical findings of fact were unsupported by any evidence. Cory J. for the majority set out the test to be applied when reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence at 508:

> It has been held that a finding based on "no evidence" is patently unreasonable. However, it is clear that a court should not intervene where the evidence is simply insufficient. As Estey J., dissenting in part, noted in ***Douglas Aircraft Co. of Canada v. McConnell***, 1979 CanLII 5 (S.C.C.), [1980] 1 S.C.R. 245, at p.277:
>
> > ... a decision without any evidence whatever in support is reviewable as being arbitrary; but on the other hand, insufficiency of evidence in the sense of appellate review is not jurisdictional, and while it may at one time have amounted to an error reviewable on the face of the record, in present day law and practice such error falls within the operational area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, and hence is free from judicial review.
>
> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence viewed reasonably, is incapable of supporting a tribunal's finding of fact": ***Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Pluming and Pipefitting Industry, Local 740***, 1990 CanLII 22 (S.C.C.), [1990] 3 S.C.R. 644, at p.669 per McLachlin J.

[52] On this application, the fact of what evidence was given at the hearing before the arbitrator is established by two affidavits, one sworn by the lawyer who represented the petitioner at the hearing and the other by a respondent tenant who attended the hearing.

[53] The lawyer who represented the petitioner at the hearing deposes that "there was no evidence presented at the hearings with respect to nine of the 27 units in the proceeding". In the same affidavit, the affiant sets out the names of eleven tenants who did not present any evidence, oral or written, at the hearing. Attached to the affidavit as Exhibit "A" is a table, which explains that, although eleven tenants did not provide evidence, evidence in relation to some suites was provided by co-tenants of two of the eleven.

[54] A tenant who attended the hearing deposes as to the evidence she gave at the hearing. The affiant also deposes that exhibits annexed to her affidavit accurately reflect the oral and written evidence tendered at the hearings. Attached as Exhibit "A" to the affidavit are true copies of summaries of the oral evidence given at the hearing, prepared by the persons who gave the evidence. These summaries are attributed to the following tenants:

- Anil Dutt of 119 – 6211,
- Shaysteh Dutt of 119 – 6211,
- Hongwei Cheng of 120 – 6211,
- Jing Wang of 104 – 6311,
- Abdelaziz Azzaoui of 108 – 6311,
- Jiang Fen Hou of 112 – 6311,

- Li Hong of 304 – 6311,
- George Leung of 311 – 6311, and
- Lian Cheng Zhao of 318 – 6311.

[55] I note that Shaysteh Dutt is not a respondent in this proceeding. Curiously, the summary attributed to Ying Chen Cui is also signed by one Yauli Wang, who is not named as a respondent. Though Li Ping did not submit a statement or testify orally at the hearing, the statement given by her husband, Lian Cheng Zhao, describes hardships that she suffered.

[56] Attached as Exhibit "B" to the affidavit are true copies of the written statements that were submitted as evidence at the hearing. These statements are attributed to the following tenants:

- Gurdeep Bimp of 115 – 6211,
- Maozi Zhang of 121 – 6211,
- Jiang Hen Zhang of 320 – 6211,
- Olena and Tony Gazyura of 115 – 6311,
- Yeune See Ming of 313 – 6311,
- Wen Luo Feng of 319 – 6311, and
- Ying Chen Cui of 321 – 6311.

[57] Curiously, the statement attributed to Yeune See Ming is also signed by one Ren Ping, who is not named as a respondent.

[58] In total, this affidavit is evidence that 17 tenants, though only 16 respondents, provided some evidence at the hearing about heating problems in 15 different units and the adverse experiences of 17 respondents. All of the summaries and statements include evidence relating to hardships suffered from lack of heat.

[59] There is a conflict between the two affidavits. The lawyer who represented the petitioner at the hearing deposes that Jiang Hen Zhang did not present any evidence at the hearing before the arbitrator, either oral or in writing. In a table annexed as Exhibit "A" to the lawyer's affidavit, in which the lawyer identifies which tenants provided evidence in respect of which units, Jiang Hen Zhang is listed as having the address "320 – 9211" and his evidence at the hearing as "NONE". The tenant who attended the hearing deposes at paragraph 12 of her affidavit that Exhibit "B" to her affidavit contains a true copy of a written statement submitted to the hearing by Jiang Hen Zhang of 320 – 6211 Gilbert Road. Given that this proceeding concerns only units at 6211 and 6311 Gilbert Road, and that the tenant's affidavit evidence is supported by a handwritten statement of evidence that is signed in the name "Jianghen Zhang", I find that there was evidence provided by Jiang Hen Zhang in respect of unit 320 at 6211 Gilbert Road.

[60] There is a further anomaly in that an affidavit filed on behalf of the petitioner states that Rong (Rebecca) He, of 116 – 6211, gave oral evidence at the hearing, but the respondent has not submitted any evidence that Ms. He gave evidence at the hearing or any indication of what her evidence at the hearing was. The affidavit deposed by the lawyer who represented the petitioner at the hearing includes the parenthetical comment "(evidence given by co-tenant, Rong (Rebecca) He)" next to the name Jian Hai Bin in a list of tenants who did not give evidence at the hearing. I infer from this evidence that Ms. He testified at the hearing about her own experience and about the experience of her co-tenant, Jiang Hai Bin.

[61] Between the two affidavits, it is established that no evidence was given in respect of eight units (units 311 and 312 at 6211 Gilbert Road, and units 102, 113, 118, 122, 201 and 317 at 6311 Gilbert Road), or in respect of the experiences of eight respondents (Min (Mindy) Wu, Xiang Hui Wu Zhane,

G.E. (Shelly) Zhang, Parvaneh Donyadar, Joselito Mordeno, Karima Wahedi, Crystal Wang, and Xue Fei Ao).

[62] It is not the function of this Court on an application for judicial review to weigh or re-weigh the evidence. As long as there was evidence on which the arbitrator could base his findings of fact, this Court must not intervene. In this case, for those tenants about whose experiences some evidence was given, there was evidence which, viewed reasonably, was capable of supporting the arbitrator's findings. However, in relation to those tenants about whom no evidence was given, the arbitrator's findings were patently unreasonable.

[63] The respondent has not pointed to any authority that would sanction the arbitrator using evidence of the experiences of some tenants to make findings of fact, solely by inference, regarding the experiences of other tenants for whom there is no other evidence.

[64] My findings in this section concerning the arbitrator's findings of fact, in relation to the respondents that gave evidence, go only to the question whether the decision should be set aside as patently unreasonable due to an absence of any evidence to support the finding. The petitioner is entitled to a hearing before the arbitrator on the application of the law of negligence.

Remedy

[65] I have concluded that the petitioner was denied natural justice as a consequence of the arbitrator basing a decision on a matter, in particular negligence, that was not raised by the parties, and in respect of which the parties had no opportunity to present argument.

[66] I have also concluded that, with respect to the eight respondents of whom no evidence was adduced that could support a finding of negligence, the decision of the arbitrator was patently unreasonable.

[67] Accordingly: (1) the decision as it relates to the above-mentioned respondents, namely Min (Mindy) Wu, Xiang Hui Wu Zhane, G.E. (Shelly) Zhang, Parvaneh Donyadar, Joselito Mordeno, Karima Wahedi, Crystal Wang, and Xue Fei Ao, is set aside; (2) in relation to the remaining respondents, the matter is remitted to the arbitrator for reconsideration; (3) the arbitrator is directed to afford to the petitioner, and the respondents, the opportunity to present argument on the application of the law of negligence to the evidence presented at the hearing before the arbitrator that commenced June 29, and continued on August 1 and October 5, 2006.

[68] The petitioner is awarded the costs of this application.

"H.A. Slade J."
The Honourable Mr. Justice H.A. Slade