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January 13, 2010

Delivered by E-mail and Courier

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

Dear Ms. Walli:

Re: Final Argument of Brantford Power Inc.
OEB File No. EB-2009-0063

We are counsel to Brantford Power Inc. ("BPI") with respect to the above-captioned matter. Please find accompanying this letter an electronic version of BPI's Final Argument in this matter. Two original hard copies will follow by courier.

Should you have any questions or require further information, please do not hesitate to contact me.

Yours very truly,
BORDEN LADNER GERVAIS LLP

Original signed by James C. Sidlofsky

James C. Sidlofsky
JCS/jv

Encls.
cc: G. Mychailenko, BPI
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N. Butt, BPI
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EB-2009-0063

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 Brantford Power Inc. to the Ontario Energy Board for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1, 2008 (EB-2007-0698);

AND IN THE MATTER OF a Motion by Brant County Power Inc. to review and vary the implementation of the Board's Interim Order dated April 21, 2008 in the rates proceeding;

AND IN THE MATTER OF a Motion by Brant County Power Inc. to review and vary the implementation of the Board's Decision dated July 18, 2008 and the Board's Order dated August 29, 2008 in the rates proceeding

BRANTFORD POWER INC. FINAL ARGUMENT

FILED JANUARY 13, 2010

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TAB 1

EB-2009-0063

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BRANTFORD POWER INC. FINAL ARGUMENT

FILED JANUARY 13, 2010

I. INTRODUCTION

1. On February 28, 2009, Brant County Power Inc. ("BCP") filed a motion (the "Motion") requesting the Board to review and vary its April 21, 2008 Interim Order (the "Interim Order"), July 18, 2008 Decision (the "Decision"), and August 29, 2008 Rate Order (the "Rate Order") in respect an Application filed December 20, 2007 (the "Application") by Brantford Power Inc. ("Brantford") for an order approving just and reasonable distribution rates to be effective May 1, 2008 (EB-2007-0698).

2. At the heart of the Motion is a billing dispute. BCP and Brantford disagree in respect of the proper distribution charges payable by BCP at three points of Brantford's distribution system - Colborne Street West, Colborne Street East and Powerline Road - which assets were purchased by Brantford on October 15, 2005 and have provided distribution services to BCP since. Prior to May 1, 2008, Brantford did not bill and BCP did not pay for distribution services for any of these three stations. During this time BCP benefited from a period of free ridership and an effective revenue-to-cost ratio of 0 (Brantford received no revenue from BCP but incurred costs to provide

service to BCP). Since May 1, 2008 Brantford has billed, but BCP has (except for one exception) continued not to pay for distribution services. As of September 30, 2009 Brantford had invoiced BCP $499,521.55 for distribution services beginning May 1, 2008, of which $464,787.95 remains outstanding.

3. During the course of this proceeding, Brantford became aware that BCP had not been settling its payments on account of transmission services with the IESO for Colborne East and Colborne West and that Brantford's other customers had in fact been paying BCP's transmission costs for these two connection points since February 2006. Brantford has been charging BCP and BCP has paid for transmission services for Powerline Road at the GS>50kW rate class for the period commencing December 2005 until August 2008, and these amounts are not in dispute. BCP ceased paying the Powerline Road invoices in August 2008. Since February 2006, Brantford erroneously did not bill and BCP did not pay for retail transmission services ("RTS") at Colborne East and Colborne West. Again BCP has benefited from a period of free ridership and an effective revenue-to-cost ratio of 0. The parties agreed to defer this proceeding in April 2009 to allow BCP and Brantford to explore this matter further and, failing a resolution, the proceeding was resumed in September 2009 to include the RTS issues. Through the interrogatory process, it became clear that BCP has continued to collect RTS charges from its customers, but instead of remitting these payments to Brantford, BCP has instead accumulated roughly $4.2 million in accounts #1584 and 1586 which it now seeks to dispose of for the benefit of BCP ratepayers in its 2010 IRM Application. Brantford submits that this treatment is entirely inappropriate, that BCP has already collected the RTS charges from its customers and that BCP should be required to remit the entire amounts owed to Brantford. Brantford issued an invoice to BCP in the amount of $555,375.14 for RTS charges owing in respect of Colborne East and Colborne West on December 8, 2009 for the period beginning September 2008 (notably, this is not the entire amount Brantford seeks recovery for), however BCP has not yet paid that invoice which was due December 29, 2009.

4. Throughout its Argument in Chief, BCP expressly ignores these periods of free ridership where BCP and its customers benefited from a revenue-to-cost ratio of 0. Instead, BCP seeks at several instances in its Argument in Chief to artificially limit Brantford's recovery for amounts owing despite the fact that Brantford and its customers have continuously subsidized BCP's use of the Brantford distribution system since October 2005 and that limiting Brantford's recovery does not reflect the principle of cost responsibility. At no point does BCP acknowledge that, in an attempt to come to a reasonable resolution of these issues, Brantford has already proposed to limit its recovery of distribution charges to those beginning on May 1, 2008 (and not those owing back to October 2005).

5. It is in this context that BCP shifts the focus of its arguments to the proper rate classification of BCP, arguing that the GS>50kW rate classification approved by the Board in the Decision is not appropriate for BCP, a separate "Embedded Distributor" class would be preferred, and that a revenue-to-cost ratio of 1.39:1 means that BCP will be cross-subsidizing other users of Brantford's distribution system in a manner entirely inconsistent with the principles of cost-responsibility. Interestingly, BCP never once suggests that perhaps it should pay a revenue-to-cost ratio of higher than unity for a period of time to compensate Brantford ratepayers who have since October 2005 been subsidizing BCP's service. Further, where BCP provides distribution services to Brantford at the Jennings Road Connection point BCP charges Brantford (and Brantford has paid) for distribution and transmission services pursuant to the GS>50kW classification. Table 1 below includes a comparison of distribution rates charged by Brantford versus those charged by BCP for the GS>50kW rate class for an assumed 5000kW demand (notably BCP charges roughly 100% more than Brantford). Brantford acknowledges that cost responsibility is a fundamental principle of Ontario's modern ratemaking regime, however in its Cost Allocation Report dated November 28, 2007 the Board expressly adopted an incremental approach to implementing the results of the cost allocation model, noting that sometimes achieving a revenue-to-cost ratio of unity is neither feasible nor desirable. Brantford's proposed rate classification for BCP, and the associated

revenue-to-cost ratio which clearly falls within the Board's allowable range, was subject to scrutiny during the Application process, and the Board ultimately accepted this classification as reasonable on the basis that Brantford should also follow developments of the Board's generic proceeding EB-2007-0031 on this issue. Brantford submits that the Board's Decision in this respect should stand.

Table 1: Comparison of 2009 GS>50kW Rates

COMPARISON OF BRANTFORD AND BCP 2009 RATES

GENERAL SERVICE>50kW CLASS (APPLIED TO NEIGHBOURING LDCS)

Demand: 5000

	BRANTFORD 2009 RATES		**BCP 2009 RATES**	
Monthly Service charge	$304.99	$304.99	$29.72	$29.72
Volumetric [per kW]	$2.6955	$13,477.50	$5.6124	$28,062.00
		$13,782.49		**$28,091.72**

6. To bolster its claims surrounding these billing disputes, and to get around the Board's clear rules in respect of the allowable timeline to bring a motion to review, BCP has also made a number of procedural claims, including arguing that Brantford failed to deliver effective notice and arguing that there are were several deficiencies in the Application that warrant a re-hearing of the case. As indicated in greater detail below, Brantford has provided detailed evidence that it did indeed provide effective notice to BCP, and BCP has failed to discharge its burden of proof that such notice was not delivered. Instead Brantford submits that BCP failed to exercise reasonable diligence in failing to raise its issues during the original proceeding and BCP seeks to use this Motion, now more than 2 years after the original Application was filed, to rehear issues that could have been addressed in the original proceeding.

7. Brantford's final argument generally follows the order of submissions made by BCP in its Argument in Chief dated December 30, 2009. Brantford confirms the submissions it made in its November 5, 2009 Motion Record and adopts those

submissions for the purposes of this final argument. For ease of reference, and to avoid unnecessary duplication of documents, Brantford has included cross references to the applicable sections of its Motion Record throughout this final argument.

II. FACTS NOT IN DISPUTE

8. The Motion has raised a number of issues where BCP and Brantford dispute the proper interpretation of the facts. Before moving into the thick of these disputes, it is useful at this point to assess the situation and to outline those facts that are not in dispute.

   (a) Prior to May 1, 2008 BCP was not charged for distribution services by Brantford although services have been provided since 2005. This implies a revenue to cost ratio of 0.

   (b) BCP was given notice in the Summer of 2007 that Brantford planned to start charging BCP for distribution services rendered. Setting aside whether such charge would be a "wheeling" charge or a distribution rate (which is in dispute), BCP was aware that it was a Brantford customer and that an application made by Brantford to set just and reasonable rates would have an impact on the rates charged to BCP.

   (c) BCP currently provides services to Brantford at the Jennings Road Connection point and charges Brantford for distribution and transmission services pursuant to the GS>50kW classification (See BCP IR Response at page 13, response to Brantford IR #4).

   (d) Although it is an IESO market participant, BCP was not settling its RTS charges with the IESO for Colborne East and Colborne West, and Brantford has instead been paying these costs on BCP's behalf since February 2006.

   (e) Brantford has been charging BCP and BCP has paid RTS charges for Powerline Road at the GS>50kW rate class for the period commencing December 2005 until August 2008, and these amounts are not in dispute.

III. BACKGROUND FACTS AND TIMELINES

9. In contrast, BCP's summary of background facts at paragraphs 13- 16 of its Argument in Chief includes two specific areas where Brantford does dispute the implications of the materials presented by BCP.

10. First, at paragraphs 14-15 BCP suggests that as a wholesale market participant it does not receive the same level of distribution service from Brantford that other customers receive and that this warrants a different rate treatment. Brantford is not aware of a unique rate class which is applicable for a wholesale market participant, Brantford certainly does not have such a rate class as a result of its approved Decision, and it is worth noting that BCP has not produced an example of such a unique rate. Brantford addressed the definitions of an "embedded distributor" and "wheeling" from a rate-setting perspective at paragraphs 40-44 of its Motion Record and Brantford's position in respect of these issues remains unchanged. This issue is addressed further beginning at paragraph 39 below.

11. Second, at paragraph 16, BCP has included reference to the Board's letter dated July 9, 2003, to suggest that the Board has previously determined that BCP is not properly classified as being served by Brantford. Brantford has two submissions in respect of this letter. First, this letter evidences that when Brantford realized it previously mistakenly charged its retail transmission service rate to BCP the Board accepted (emphasis added) "**Brantford's proposed solution** to reimburse Brant Count Power **for all amounts billed** pursuant to the retail transmission charges between May 1, 2002 and November 30, 2002." When Brantford encountered a billing error in respect of retail transmission services that resulted in an overpayment by BCP, Brantford proposed and repaid the entire amount of the overpayment (which is not what BCP is proposing in respect to its underpayment for retail transmission services in respect of Colborne East and Colborne West). Second, the Board's finding that BCP is not properly classified as being served by Brantford is no longer applicable as Brantford purchased the feeders from Hydro One in October 2005. At that time, the circumstances changed and BCP became embedded to Brantford rather than Hydro One.

IV. THE LEGAL BASIS OF THE MOTION AND THE PROPER STANDARD OF REVIEW

A. The Legal Basis of the Motion

12. BCP is relying upon Rules 42-44 of the Board's *Rules of Practice and Procedure* (the "Rules") as the legal basis for the Motion. While BCP was not a party to the original proceeding the Board granted leave to BCP to bring the Motion pursuant to Rule 42.02 on April 1, 2009. The Board granted leave without seeking submissions from Brantford on whether BCP meets the Board's review threshold under Rule 42.01.

13. Brantford submits that BCP has failed to meet the Board's threshold to conduct a review under Rule 42.01. The Board detailed its approach to the threshold question in its May 22, 2007 NGEIR Decision (attached as Tab 2) as to whether the grounds in the Motion (1) raise a question as to the correctness of the order or decision; and (2) provide enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended. For the five reasons that follow, Brantford submits that BCP has failed on both counts.

> ***Motions to Review the Natural Gas Electricity Interface Review Decision*** **(EB-2006-0322, EB-2006-0338, EB-2006-0340) (Ontario Energy Board, May 22, 2007) at pp. 17-18**

14. BCP is relying primarily on grounds (i) and (iii), and to a lesser extent ground (iv) of Rule 44.01 to bring its Motion. Rule 44.01 states:

> "44.01 Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
>
> (ii) change in circumstances;
>
> (iii) new facts that have arisen;
>
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision or any part pending the determination of the motion."

15. First, Brantford submits that BCP has failed to establish the existence of an error in fact (44.01(i)) that raises a question as to the correctness of the Decision. BCP suggests at paragraph 7(a) of its Argument in Chief that the Decision was based upon evidence that underforecasts the demand for the GS>50kW rate class. This allegation is based upon incorrect assumptions. Brantford provided initial clarifications in this regard in paragraphs 67-72 of its November 5, 2009 Motion Record, and Brantford provides further clarification beginning at paragraph 44 below. Brantford submits that it correctly forecasted the demand for the GS>50kW rate class, and that there is no question as to the correctness of the Decision in this regard.

16. Second, Brantford submits that BCP has failed to establish that new facts have arisen (44.01(iii)) that raise a question as to the correctness of the Decision. BCP argues at paragraph 7(b) of its Argument in Chief that Brantford did not inform the Board of its discussions with BCP regarding a separate rate classification for BCP. Brantford clarified the scope of these discussions in paragraphs 23-36 of its November 5, 2009 Motion Record and beginning at paragraph 7 of the Affidavit of Heather Wyatt. Brantford submits that there was no good reason to inform the Board of its discussions with BCP as those discussions were not material to the Application. Brantford submits it is unreasonable to expect a distributor to inform the Board of all of its discussions with customers about billing matters - instead the onus should be on the customer to intervene in a proceeding to ensure that any of its unique concerns get heard. Brantford further submits that this issue fails to raise a question as to the correctness of the Decision.

17. Third, Brantford submits that BCP has failed to establish that there are facts that were not previously placed in evidence in the proceeding that could not have been discovered by reasonable diligence at the time have arisen (44.01(iv)) that raise a question as to the correctness of the Decision. BCP argues at paragraph 7(c) that the impact on BCP of both distribution and RTS charges was not put before the Board at the time of the Decision. Brantford submits that this fails to raise a question as to the

correctness of the Decision. BCP further argues at paragraph 7(d) that BCP's proposed rate classification would result in a revenue to cost ratio of at "least 1.39:1". This is within the Board's threshold of 0.80 to 1.80 set out in the Board's November 29, 2007 EB-2007-0667 Cost Allocation Report, and fails to raise a question as to the correctness of the Decision. BCP also argues that the distribution charge by Brantford represents approximately 8% of BCP's revenue requirement. Brantford submits that the distribution charge represents approximately 2.5% of Brantford's revenue requirement; that Brantford's customers should not be expected to cross-subsidize assets that were historically used to service BCP and its customers (an effective revenue to cost ratio of 0); and that this issue fails to raise a question as to the correctness of the Decision.

18. Fourth, Brantford submits that BCP received effective notice of the Application (discussed further beginning at paragraph 20 below) and that any of the issues raised by BCP in the Motion could and should have been have been addressed during the original proceeding. BCP failed to exercise reasonable diligence at the time of the Application by not intervening in the original proceeding and raising its issues at that time. If BCP had intervened in the original proceeding, many of its issues could have been addressed, the parties would have avoided the unnecessary costs and expenses associated with this Motion (both financial and utility resource costs), and Brantford would have avoided the unnecessary regulatory uncertainty this ongoing Motion has caused.

19. Finally, and in the alternative, Brantford submits that in the event that the Board finds an error, new facts or established facts that were not previously on the record (which Brantford expressly denies), such a finding fails to provide enough substance to the issues raised in the Motion such that a review based on those issues could result in the Board deciding that the Decision should be varied, cancelled or suspended.

B. The Allegation of Lack of Appropriate Notice in the Circumstances

20. Brantford submits that the burden of proving that notice was not sufficiently given rests on the party bringing the Motion. This is especially true in circumstances

where that party seeks to bring the Motion nearly 6 months after the Decision, in direct contrast to the Board's Rule 42.03. Brantford submits that BCP failed to discharge this burden.

21. Brantford submits that BCP's allegation at paragraphs 18-30 of its Argument in Chief that it did not receive "appropriate" notice of the Application relates directly to the threshold issue, as discussed under paragraph 18 above. Brantford submits that it did provide appropriate notice of the Application to BCP, as detailed in paragraphs 23-36 of Brantford's Motion Record. Specifically:

    (a) In the Summer of 2007, Brantford advised BCP that it would be applying for an embedded distribution rate in its 2008 rate application. BCP acknowledges that such a discussion took place, indicating at a minimum that BCP was aware that any application by Brantford for just and reasonable rates would likely impact the rates charged by Brantford to BCP (see paragraph 17 of BCP's Amended Motion Record and paragraph 16 of its Argument in Chief).

    (b) Brantford produced as evidence a commissioned affidavit dated January 22, 2008 that notice of the Application was sent directly to Ms. D. Sleeth, then CEO of BCP on January 14, 2008. Such correspondence was not returned to Brantford as undeliverable as would be the standard practice for regular mail.

    (c) The same affidavit evidences that a copy of the Application and evidence was posted on the Brantford website, and was readily available for inspection and review by BCP and other potential intervenors.

    (d) The same affidavit evidences that the notice was published on January 18, 2008 in the Brantford Expositor, the English language newspaper with the highest circulation in both Brantford's and BCP's respective service areas. A copy of this notice was filed by Brantford in response to SEC IR #1.

22. BCP indicates that "current management" reviewed their files and have "found no record of having received" notice of the Application. The Board should note that both Ms. Sleeth (the original recipient of the notice and the "primary regulatory contact for BCP at the time") and Mr. Brooker (the party to the Summer 2007 discussions) are no longer with BCP (BCP Response to SEC IR#4). Given this, there is a wide range of possible explanations as to why BCP's current management no longer has record of receiving notice of the Application. It could have been

discarded, taken home, or misfiled during a change in management - to name just three possibilities. None of these possibilities has been addressed in BCP's evidence.

23. Brantford has filed an affidavit commissioned shortly after serving notice, and well before this dispute arose, as evidence that the notice was sent to Ms. Sleeth, however BCP has not reciprocated with an affidavit signed by Ms. Sleeth indicating she did not receive notice of the Application. BCP's argument that the emails it has filed as evidence which indicates that Ms. Sleeth did not receive any notice is, at best, misleading. The e-mails relied upon by BCP are inconclusive, as Ms. Sleeth indicates "were we to receive notification on what the rate would be" suggesting that while Ms. Sleeth was surprised when learning of the specific rate, she could very well have received notice of the Application.

24. In addition to the specific notice sent directly to BCP, BCP also received notice of the Application by way of the formal notice published in the January 18, 2008 Brantford Expositor, the newspaper with the highest circulation in BCP's service area.

25. BCP is itself a licensed and regulated distributor that is knowledgeable and understands the Board's regulatory processes in a manner that is more sophisticated than Brantford's typical customer base. Despite this and despite the fact that the form of notice used by Brantford was the one it was instructed to use in the Board's Letter of Direction dated January 9, 2009, BCP argues that the notice sent by Brantford was deficient. BCP suggests a very high standard on the content of the notice - that a party reviewing the notice should be able to ascertain how it would be impacted if approval of the application was granted – apparently without having to do any additional investigation or diligence. Brantford submits that this is not the correct standard nor does it correspond with the Board's practice. That practice includes some general information about the application and information regarding the impacts on typical residential and small commercial consumers, and then indicates the actual Application is available for public scrutiny by impacted customers. BCP acknowledges that Brantford's Application did contain evidence of

its proposal to charge BCP in accordance with the GS>50kW rate class (see paragraph 25 of BCP's Argument in Chief). Brantford submits that, particularly given BCP's sophisticated understanding of the regulatory process, BCP failed to exercise reasonable diligence in not reviewing the Application. If BCP had particular questions regarding the Application, it should have intervened in the original proceeding and submitted interrogatories in respect of the Application. As BCP notes at paragraph 81 of its Argument in Chief, "[h]ad BCP participated in the original hearing, a different perspective would have been brought forth and a different outcome would have been advocated."

26. BCP relies on *Conception Bay South (Town) v. Newfoundland (Public Utilities Board)* ("Conception Bay") to support its proposition that content of the notice is important and must permit the reader to understand the impact. However, the court's holding in Conception Bay is based on the particular facts of that case (see paragraph 29 of the decision) and can be distinguished from the present case in at least three material ways: (i) unlike in the present situation, no notice was sent directly to the applicants in Conception Bay; (ii) the applicants themselves were individuals and town councils, none of whom had a special knowledge or understanding of the public utility regulatory process and none understood the proposed tax surcharge (whereas BCP did understand that a rate application by Brantford would change the charges payable by BCP); and (iii) there was no statutory provision specifying the notice to be given (in contrast, the *Statutory Powers and Procedures Act*, the Rules and the Board's Letter of Direction dated January 9, 2009 specify in detail the form of notice Brantford was to give). For these reasons, Brantford submits that Conception Bay is not helpful in guiding the Board's determination of whether "effective" notice was delivered.

C. The Standard of Review

27. BCP has submitted that the "standard of review" of a motion to review an OEB decision is correctness, "the most stringent standard of review required by law," and that if the reviewing tribunal would not have reached the same decision, it must consider the matter

de novo. This approach is inappropriate, and confuses the standard of review applicable on judicial review with the discretion to be exercised by a tribunal in reconsidering its own decision.

28. The threshold to be met in order for BCP's motion to be considered by the Board was whether it "raise[s] a question regarding the correctness of the decision." However, this threshold issue should be distinguished from the question of the test to be applied by the Board in hearing the motion itself.

29. The motion in question is not a judicial review to which the standard of review jurisprudence applies, but is a motion for reconsideration or variance of an order under Rules 44.01 and 45.01 of the Rules. Section 21.1 of the *Statutory Powers Procedure Act* provides that:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or an part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.
>
> ***Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22, s. 21.1**

30. A tribunal's power to reconsider or vary its own decision is broad and discretionary. Apart from any requirement that reconsideration be confined to the same subject matter, or be sought or effected within a statutorily-prescribed time, courts have not further restricted the power of a tribunal to rehear and reconsider a matter.

31. The appropriate question to be considered in this case is not whether the decision was correct, on a *de novo* basis, but rather whether there is good reason for the Board to exercise its discretion to vary the decision. For example, the Board may consider it inappropriate to vary a decision based on concerns best addressed at a later date or through another mechanism. Thus, this Board declined to review a section of a connection procedures decision in *Re Hydro One Networks Inc.* It acknowledged that the power to review was broad, and that the issue (of regulatory treatment of capital contributions made by distributors) was not addressed by the parties to the decision in issue, but held that the issue was nonetheless "best addressed in future rates cases or

through a process aimed at resolving the issue on a more generic basis," and "in a policy process." Thus, the Board did not go on to determine, as BCP puts it, "whether it would have reached the identical result as the original tribunal." Rather, it exercised its discretion to conclude that there was no good reason to vary its decision.

> ***Re Hydro One Networks Inc.,*** **2007 WL 5095121 (Ont. Energy Bd.), 2007 CarswellOnt 9174 at paras. 78-81**

32. This approach is also evident in the Board's decision with respect to motions to review the *Natural Gas Electricity Interface Review Decision (NGEIR)* in May 2007. The Board held that (i) there must be an identifiable error in the decision that is material and relevant to the outcome, (ii) if the error is corrected, the outcome of the decision would change, and (iii) it is not enough to argue that conflicting evidence should have been interpreted differently. This approach contrasts with the approach put forward by BCP in this motion, by which this panel would be required to impose a decision *de novo*.

> ***Motions to Review the Natural Gas Electricity Interface Review Decision*** **(EB-2006-0322, EB-2006-0338, EB-2006-0340) (Ontario Energy Board, May 22, 2007) at pp. 17-18**

33. The Alberta Court of Appeal has cautioned against a reconsideration panel substituting its own appreciation of the facts for that of the original panel, unless the purported errors are substantial. The Court explained the rationale as follows:

> As established by the Supreme Court, factual findings are given deference on appeal so as to limit the number of appeals and their associated costs, to promote the autonomy and integrity of the trial process, and to respect the advantageous position of the original trier of fact: *Housen v. Nikolaisen*…. These rationales are no different for reconsideration proceedings before the Board. **The number of reconsideration motions, and the associated costs, would skyrocket if every finding of fact were subject to review.** Furthermore, deferring to the factual findings of the Original Panel protects the integrity of the process; the Original Panel has to be assumed to have commensurate ability to the Reconsideration Panel since the panel members are equally members of the Board. [citation omitted, emphasis added]

***I.A.M. & A.W., Local 99 v. Finning International Inc.*, 2007 CarswellAlta 1366 (C.A.) at para. 46**

34. Finally, it must be noted that the issue determined in the original proceeding before the Board in this case was that of "just and reasonable" rates. "Reasonableness" necessarily involves questions to which there is not just one specific particular answer, but rather a range of potential outcomes. Therefore, even if the reconsideration panel would have reached a different specific outcome from the original panel, the original panel may nonetheless have determined just and reasonable rates. Only if an identified relevant and material error led the original panel to set rates outside the range of just and reasonable rates may there be good reason for the reconsideration panel to exercise its discretion vary the original decision.

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190

V. ISSUES AND ARGUMENT

A. Brantford had authority to begin charging BCP on May 1, 2008

35. BCP argues at paragraphs 31-41 of its Argument in Chief that Brantford did not have authority under its Interim Rates Order to begin charging BCP for distribution services beginning on May 1, 2008 on the basis that Brantford did not have the legal authority to charge BCP for distribution services prior to September 1, 2008. Specifically, BCP indicates that Brantford's 2007 Rate Order (EB-2007-0510) did not include an "embedded distributor" rate class, BCP's demand was not included in the load forecast, and allowing recovery during this period would allow Brantford to overearn for the period from May 1, 2008 to August 31, 2008.

36. Brantford has issued invoices to BCP reflecting a total of $109,902.92 for distribution services between May 1, 2008 and August 31, 2008 (Brantford notes that it was unable to recreate BCP's calculation of $117,751.61 included at paragraph 32 of its Argument in Chief). Brantford reiterates its response to SEC IR#3 that it began on May 1, 2008 charging BCP in accordance with its then current 2007 Rate Order pursuant to the most relevant and appropriate rate classification, the GS>50kW rate

class. Brantford submits that its use of the GS>50kW rate class is entirely reasonable in the circumstances; see Brantford's response to Board Staff IR#1(b). Brantford acknowledges that the 2007 Rate Order is less than ideal in that it artificially caps the GS>50kW rate class at a maximum demand level that, with the benefit of hindsight, is inappropriate. However, Brantford does not agree with BCP's conclusion that because BCP's demand at the Colborne East point (incorrectly referenced as Colborne West in BCP's paragraph 36) is historically greater than 5,000kW, Brantford therefore has no legal authority to charge BCP **any rates** for its distribution services in respect of the Colborne East or the Colborne West or Powerline Road service points.

37. Brantford submits that BCP's position is both strict and legalistic in relation to Colborne West, it has no correlation to cost responsibility in relation to all three connection points, and it contradicts the Board's broad role as an economic regulator that promotes economic efficiency and cost effectiveness in the distribution of electricity. BCP's interpretation leads to some incredible outcomes. For example, a distributor with a rate order like Brantford's 2007 Rate Order would be barred from charging any new industrial load customers with a demand greater than 5,000kW any rates for distribution services until a new rate order was obtained. The distributor's other customers would be required to subsidize services to the new customer until a new rate order was obtained. Similarly, BCP submits that Brantford should be barred from charging BCP for distribution services, and that Brantford's other ratepayers should rightfully subsidize BCP's use of these assets.

38. Brantford submits that it had authority to charge BCP at the GS>50kW rate class pursuant to Brantford's 2007 Rate Order between May 1, 2008 and August 31, 2008. To prevent the misperception that Brantford intends to overearn as a result of charging BCP rates over this period, Brantford submits that it will apply the monies collected from BCP for this period to deferral account 1508 – Other Regulatory Assets, which will be applied first, to offset the reasonable costs incurred by Brantford in respect of this proceeding (which costs are incremental to Brantford's Board approved revenue requirement and were incurred directly in response to this

Motion in an effort to collect funds owing), and second as a refund to Brantford's other customer groups.

B. The GS>50kW Rate Category is a Reasonable and Appropriate Rate Classification

39. BCP argues at paragraphs 42-48 of its Argument in Chief that the Board-approved GS>50kW rate classification is inappropriate and should not apply to BCP. In contrast with this position, BCP provides services to Brantford at the Jennings Road Connection point and charges Brantford for distribution and transmission services pursuant to the GS>50kW classification (See BCP response to Brantford IR #4). Brantford reiterates its submissions found at paragraphs 50-52 of its Motion Record in respect of this inconsistency.

40. The essence of BCP's argument is that it is sufficiently different from Brantford's other GS>50kW customers to qualify for a unique rate classification. Brantford submits that this is in fact not the case, as more particularly detailed in Brantford's response to Board Staff IR#4, which addresses in evidence many of the specific concerns raised by BCP in argument. Specifically Brantford's evidence is that there are primarily four services to BCP that are different from other customers in the GS>50kW class: (i) wholesale rather than retail metering (annual cost decrease of $600 relative to other GS>50kW customers); (ii) recloser assets to isolate the BCP and Brantford distribution systems (annual cost increase of $4480 relative to other GS>50kW customers); (iii) load switching (cost increase due to more complex switching requirements); and (iv) collection for non-payment (significantly higher than other GS>50kW customers).

41. Brantford reiterates its submissions made at paragraphs 37-49 of its Motion Record. Specifically, Brantford notes that its Board approved rate classification for BCP is in accordance with Board Staff's proposal in its Discussion Paper dated January 29, 2009 in EB-2007-0031 which is reproduced again below:

> **Embedded Distributors**
>
> Staff proposes that embedded distributors be treated as customers of similar size. Both distributors and customer groups suggested in consultation that there is essentially no difference in demand drivers. It is not clear that the

differences in customer-related costs (e.g. customer service, collection and bad debts) is sufficiently different from other large customers for a separate class.

42. Brantford submits that the Board's Decision, which explicitly considered and approved Brantford's use of the GS>50kW rate classification for BCP, should stand and that Brantford's obligation to monitor the progress of EB-2007-0031 should remain as the proper rate classification of embedded distributors is a matter or general policy and not a matter that should be decided in a manner unique to this proceeding (See excerpt of page 16 of the Decision below).

> **Rate Classes**
>
> The Company is a host to one embedded distributor, Brant County Power, and also serves one large customer with demand greater than 5000 kW.
>
> Board staff noted that the Company did not propose separate rate classifications for these loads; rather, they are being served within the GS>50 kW rate class.
>
> With respect to the large customer, the Company noted that the customer is new in this size range and the Company did not want to jeopardize the timing of its application for 2008 rates by designing and implementing a new rate class. The Company proposed that it would undertake a cost allocation study to support the establishment of a large user rate class for its next rate rebasing.
>
> With respect to the embedded distributor, Brantford clarified in response to an interrogatory that it intends to begin billing the embedded distributor in the 2008 rate year, and will do so by using the GS>50 kW rate classification. Board staff submitted that host distributors should be proposing a rate for embedded distributors, but noted that the practice of using the General Service rate is not unusual.
>
> **Board Findings**
>
> The Board accepts as reasonable the Company's proposal to defer the rate classification matter for the time of its next rebasing application. The Board notes that the issue of rates for embedded distributors is in the scope of a study currently underway at the Board (EB-2007-0031), the Rate Design study. The Board expects Brantford to keep itself informed as to potential developments through that process.

43. Instead of being charged on the basis of the Board approved GS>50kW rate classification, BCP argues that it should be charged an "Embedded Distributor" rate

similar to the practices of Cambridge and North Dumphries Hydro, Kitchener-Wilmot Hydro and Erie Thames. Brantford reiterates its submissions found at paragraphs 53-61 of its Motion Record that embedded distributor rates similar to any of Cambridge and North Dumphries Hydro, Kitchener-Wilmot Hydro and Erie Thames are not appropriate for the purposes of calculating an applicable distribution rate for BCP. It is worth noting that at paragraph 59, BCP states that "[a] proper cost allocation study with a revenue to cost ratio of 1:1 would accord with the principles of cost causality and avoid cross utility subsidization. This would permit a just and reasonable rate to be created." However, BCP then seems to favour the Cambridge rate, which has a revenue cost ratio of 0.15:1 rather than 1:1. BCP's choice of comparative LDCs appear to have been arbitrarily chosen in a manner that minimizes the rate payable by BCP and appears to have no relationship to cost causality.

C. Brantford Correctly States it GS>50kW Demand Forecast.

44. BCP argues at paragraphs 50-59 that Brantford understated its forecast of the GS>50kW demand by roughly 72,961 kW less than what BCP would expect. Brantford submits that BCP makes a number of incorrect assumptions to arrive at its conclusion, which is entirely incorrect. Brantford reiterates its submissions included at paragraphs 67-72 of its Motion Record and confirms that Brantford has correctly calculated its GS>50kW demand forecast. As is more fully detailed below, BCP's submissions in respect of the GS>50kW demand forecast are based on incorrect assumptions and miscalculations.

45. BCP includes the following table under paragraph 52 of its Argument in Chief:

Table 3 - Brantford Forecasted Demand

		Historical Actual	*Historical Board Approved*	*Historical Actual normalized*	*Bridge Year Estimated*	*Bridge Year Forecast Normalized*	*Test Year Normalized*
		2006	*2004*	*2006*	*2007*	*2007*	*2008*
GS>50kW	*#*	*407*	*391*	*407*	*408*	*408*	*413*[15]
	kWh	*590,877,017*	*576,070,695*	*587,687,806*	*595,176,890*	*593,273,557*	*588,310,448*
	kW	*1,447,706*	*1,442,700*	*1,463,650*	*1,461,947*	*1,477,561*	*1,635,606*

46. This table includes footnote 15, where BCP indicates that it finds it unclear whether Brantford considered BCP to be 1 or 3 customers. Brantford confirms that it treated BCP as three customers, one for each of the three delivery points, with a total forecasted demand of 170,406 kW (as further detailed in response to BCP IR#2).

47. For example, if Brantford were to remove BCP from the 2008 "Test Year Normalized" column of this table, the revised column would read as shown in Table 2 below.

Table 2: Brantford Forecasted Demand (BCP Removed)

GS>50kW	Test Year Normalized
year	2008
# customers	410
kWh	588,310,448
kW	1,465,200

48. BCP then presents the following table under paragraph 52 of its Argument in Chief:

Table 4 Forecast Growth with Individual Customer Information

	Test Year – Bridge Year	BCP[16]	Other Large User[17]	Remaining >50kW Customers
# of customers	5	1 or 3	1	1 or 3
kWh	(5,036,891)	77,273,702	>0	>0
kW	158,045	170,406	60,000[18]	>600 or 1800

49. BCP makes an incorrect assumption in this table, which is repeated at paragraphs 53 and 57 of its Argument in Chief, when it assumes that Brantford did not forecast any demand for an "Other Large User" in the GS>50kW rate class. Brantford submits that BCP misinterpreted the response to BCP IR#1 when arriving at this conclusion. Brantford's response to BCP IR#1 reflects the fact that Brantford did not forecast a stand-alone Large User rate class, but this does not mean that Brantford did not account for one large use customer. Instead, all customers that Brantford proposed to include in the GS>50kW rate class, including Brantford's large use customer (>5000kW) and BCP, were already included within the GS>50kW demand forecast.

50. BCP also appears to have made an error in the calculation of the Test Year kWh minus the Bridge Year kWh in its Table 4. Brantford calculated the Test Year kWh minus the Bridge Year kWh as –4,963,109 kWh by subtracting the Test Year Normalized kWh from the Bridge Year Forecast Normalized kWh found Table 3 of BCP's Argument in Chief (which is excerpted at paragraph 45 above).

51. Finally, BCP made some assumptions about the remaining new GS>50kW customers (excluding BCP) that need to be corrected to reflect the actual numbers. Brantford has made the applicable corrections to BCP's Table 4 in Brantford's Table 3 below.

Table 3:Forecast Growth with Individual Customer Information (Corrected)

	Test Year – Bridge Year	**BCP**	**Other Large User**	**Remaining >50kW Customers**
# of customers	5	3	0	2
KWh	(4,963,109)	0[1]	0	1,309,212
kW	158,045	170,406	0	3,260

52. BCP acknowledges at paragraph 54 of its Argument in Chief that the forecasted kWh is appropriate. Brantford based its energy forecast for the GS>50kW class on energy of the 410 normalized customers (excluding BCP). Brantford based its demand forecast for the GS>50kW class on the calculated demand of the 410 normalized customers plus the 170,406 kW that BPI forecasted for the total of the three BCP delivery points.

53. At paragraph 55, BCP suggests that the 158,045 kW increase in demand is incorrect because it is less than the demand forecasted for BCP. Brantford submits that its demand forecast is correct. Brantford forecasted a 1.05% reduction in kWh and kW for the class before the effects of any new customers and BCP.

54. At paragraph 56, BCP miscalculates the anticipated reduction in demand as approximately 1,460kW (a reduction of approximately 0.1% and not 1%). This

[1] Brantford uses 77,273,702kWh in the calculation of the BCP kW only. This value is not used anywhere else in the original Brantford Application.

actual reduction of demand is 12,361kW. Brantford's Test Year demand forecast for the GS>50kW class is lower than its Bridge Year Forecast Normalized demand.

55. Brantford submits that the argument made by BCP in paragraph 57 of its Argument in Chief is incorrect, as BCP based its math on incorrect assumptions and miscalculations that Brantford has clarified in the preceding paragraphs. Brantford submits that the Board should find that the forecasted demand is accurate and that a revised forecast is not required. Finally, Brantford submits that all of the appropriate Brantford demand customers, including BCP, are and should be included in the GS>50kW rate class.

D. The Costs Being Allocated to BCP are Appropriate.

56. BCP argues at paragraphs 60-63 that the revenue-to-cost ratio applicable to the GS>50kW of 1.39:1 is inappropriate and that the Board should require a "proper cost allocation study be performed in order that a specific rate for BCP may be established." BCP appears to suggest that it would like the Board to order Brantford to complete a new cost allocation study for the benefit of BCP, apparently because BCP would be happier with a revenue-to-cost ratio of 1:1.

57. On September 29, 2006 the OEB issued its directions on Cost Allocation Methodology for Electricity Distributors ("the Directions"). On November 15, 2006, the Board issued the Cost Allocation Information Filing Guidelines for Electricity Distributors ("the Guidelines"), the Cost Allocation Model ("the Model") and User Instructions (the "Instructions") for the Model. Brantford prepared its cost allocation model consistent with the Directions, the Guidelines, the Model and the Instructions and for the Application Brantford updated the model with 2008 data. For 2008 and 2009 applications, the Board has consistently approved the use of cost allocation models prepared in this manner and Brantford submits that it is inappropriate for the Board to depart from its policy on this point because of the demands of a single customer.

58. In the alternative, Brantford submits that if BCP is asking Brantford to create a "proper cost allocation study", that the onus is on BCP to clearly specify what is not "proper" about Brantford's existing study and to describe in specific terms and not by way of general statements what Brantford would have to do to create a "proper cost allocation study."

59. The Board established its policy on cost allocation in its Cost Allocation Report dated November 28, 2007. In this report the Board adopted an incremental approach as it relates to revenue-to-costs ratios, noting that "a range approach is preferable to implementation of a specific revenue-to-cost ratio" and that "a revenue-to-cost ratio of one may not be achievable or desirable." Instead, the Board adopted an approach of creating bands or ranges of tolerance around revenue-to-cost ratios of one. For the GS>50kW rate class, this range is 0.8 to 1.8. Brantford submits that the GS>50kW revenue-to-cost ratio of 1.39 is clearly within the Board's range. In addition, as noted in Brantford's response to Board Staff IR#13(i), Brantford has requested adjustments to revenue-to-cost ratios in its 2010 rate application that, if approved, will bring the GS>50kW class down to a revenue-to-cost ratio of 1.24:1.

60. BCP's suggestion that it is not appropriate that it accounts for roughly 2.5% of Brantford's revenue requirement when it is only 3 customers ignores the premise that Brantford's cost allocation model suggests that a distributor's costs for customers similar to BCP are driven primarily by demand. Further, BCP questions the appropriateness of the allocation of underground assets to BCP "given that BCP utilizes only 60 meters of underground assets." Brantford notes that the feeders serving BCP are not express feeders (see Brantford response to Board Staff IR#4) and Brantford utilizes an integrated system which allows it to switch load from virtually any point and may involve additional underground assets from which BCP benefits. In this way, Brantford can continue to maintain a reliable supply of electricity to BCP. Brantford reiterates its submission that its cost allocation methodology is appropriate, that it applied it consistently in its Application and that

the submissions of BCP in this regard raise no question as to the correctness of the Decision.

61. At paragraph 63 of its Argument in Chief, BCP proposes that "the Board should require a proper cost allocation study be performed in order that a specific rate for BCP may be established." BCP argues that the costs allocated to an embedded distributor in the cost allocation model are not appropriate. The question is whether it is reasonable to require Brantford to develop a unique cost allocation model because of BCP. Brantford's argument in this regard is that BCP does not differ sufficiently from other GS>50kW customers as more specifically set out in Brantford's response to Board Staff IR#4. This conclusion appears to be consistent with that of Board Staff in their January 29, 2009 Discussion Paper discussed under Part B above. Brantford further submits that it did commit to undertake an updated cost allocation study in its 2008 EDR for its next rebasing application.

62. In addition, Brantford submits that the Board may want to consider other policy objectives when it is considering any revenue-to-cost ratio applicable to BCP, particularly because BCP has benefited from a revenue to cost ratio of 0 for the period between October 2005 and May 1, 2008 (assuming the outstanding invoices already issued by Brantford get paid). Specifically, at paragraph 7(d) of its Argument in Chief BCP argues that a 1.39:1 revenue-to-cost ratio BCP "would be subsidizing Brantford ratepayers by more than $120,000 each and every year." However, during the period that BCP enjoyed free ridership (October 2005 to May 2008), when Brantford did not charge BCP for distribution services, Brantford's customers in effect subsidized BCP. So, for instance, using $303,000 (which assumes a revenue to cost ratio of 1:1, which ratio Brantford disagrees with) as the annual revenue to be collected from BCP or $25,250.00 per month (excluding GST), over 30 months, this amount equates to a subsidy of $757,500.00 (not including interest charges to reflect the time value of money). Brantford submits that should the Board elect to proceed with a BCP-unique revenue-to-cost ratio, the Board should consider addressing this net subsidy when assigning that revenue-to-cost ratio to BCP.

E. No Loss Factor is Needed for BCP

63. BCP argues at paragraphs 64-67 that an "appropriate" loss factor applicable to BCP would make a significant difference and that the use of the larger loss factor will overstate the losses for such customers. Brantford submits that BCP's position on this issue is incorrect and misleading. As Brantford noted in response to Board Staff IR#11, a loss factor is computed only for Brantford's energy consumers. Since BCP is not an energy customer to Brantford (indeed BCP is an IESO market participant which purchases its own commodity), Brantford does not bill BCP for its commodity and does not apply a loss factor to BCP's accounts.

F. Proper Treatment of Retail Transmission Costs

64. BCP argues at paragraphs 68-73 of its Argument in Chief that its obligation for any retail transmission services charges owing should be limited to either (i) September 1, 2008, or (ii) in the alternative, December 1, 2007. BCP submits that the former is consistent with its position that Brantford was not authorized to charge BCP as a customer prior to September 1, 2008 and the latter is in keeping with the Retail Settlement Code's 24 month limitation of liability for residential customers who are not themselves responsible for a billing error.

65. If the Board were to accept BCP's first proposal and limit Brantford's recovery of the charges for retail transmission services to September 1, 2008 this would result in an underpayment by BCP to Brantford for charges which Brantford paid to the IESO and over recoveries which are owed back to Brantford's customers between February 2006 and September 1, 2008 of (excluding GST) $1,005,044.92 for Colborne East and $369,698.20 for Colborne West.

66. If the Board were to accept BCP's second proposal and limit Brantford's recovery of the charges for retail transmission services to December 1, 2007 this would result in an underpayment by BCP to Brantford for charges which Brantford paid to the IESO and over recoveries which are owed back to Brantford's customers between February

2006 and December 1, 2007 of (excluding GST) $701,343.57 for Colborne East and $255,835.41 for Colborne West.

67. Brantford reiterates and adopts the submissions provided in paragraphs 93-106 of its Motion Record. BCP received service from these assets since October 2005, and from February 2006 Brantford paid amounts on account of transmission services that should have been paid by BCP for retail transmission services. Brantford expressly rejects the September 1, 2008 threshold as inappropriate for the reasons noted above beginning at paragraph 35. Brantford further rejects the December 1, 2007 limitation as both arbitrary and inappropriate. Brantford erred in not passing this cost directly onto BCP. Section 7.7 of the Retail Settlement Code sets out the relevant rule for billing errors which is applicable to this situation:

> "Where a billing error, from any cause, has resulted in a consumer or retailer being under billed […] the distributor shall charge the consumer or retailer with the amount that was not previously billed. […] For non-residential consumers or for instances of wilful damage, the relevant time period is the duration of the defect."

68. BCP, as a licensed distributor, is clearly not a residential consumer, and cannot avail itself of the limitation of liability applicable to residential customers. From a policy perspective this makes sense. Brantford's ratepayers have effectively been subsidizing BCP's retail transmission charges since February 2006, and any attempt to limit BCP's liability to 24 months from the date of the invoice would leave Brantford's ratepayers paying the difference.

69. In contrast, there is no harm to BCP's customers in paying the full amount owed to Brantford. BCP received these services for free while it continued to collect retail transmission service rates from its customers on account of these services, and is now being obligated to pay for these services. BCP failed to provide an adequate response to Brantford's Interrogatory 2(b), (c) and (d), in which Brantford requested a breakdown of amounts recovered by BCP for transmission services, amounts paid to various parties and amounts booked to deferral and variance accounts 1584 and 1586 by month. In response BCP has provided aggregated and annualized data.

However, based on Brantford's analysis of this annualized data, Brantford notes that BCP has approximately $4.2 million in those accounts to be disposed of. Brantford submits that of this $4.2 million, roughly $2.1 million is owed to Brantford for retail transmission costs. There is no good reason for the Board to not require BCP to pay the entire amount owing. BCP does not risk underrecovery from its retail customers because the entire amount can be paid through these accounts.

G. Interest

70. Brantford submits that the proper treatment of interest on any distribution or transmission charges owing by BCP is a matter properly determined by the Board in its discretion. Brantford will comply with the Board's direction in this regard.

H. Payment Proposal

71. At paragraphs 78-79 of its Argument in Chief BCP proposes that it be required to make payment to Brantford in respect of amounts owed through monthly payments of the greater of $100,000 or such other figure as BCP determines until such time as the monies owed are paid in full. BCP argues that this repayment schedule will provide BCP with "a manageable cashflow."

72. Brantford submits that BCP has produced no evidence of a cashflow problem, that repayment of the amounts in dispute was certainly a likely outcome of this proceeding, and that if BCP had a cashflow problem that it wanted the Board to consider it should have produced evidence of this problem in this proceeding. As it stands, BCP has instead alluded to cashflow issues in argument without expressly stating or producing evidence that BCP will have a cashflow problem if required to repay Brantford over a shorter time period.

73. Brantford further submits that BCP's repayment plan is characterized by an open-ended period over which such repayment would be made. At a minimum, particularly in light of BCP's poor payment record, Brantford would like to be assured of certainty of repayment over a maximum period of 24 months.

74. Brantford submits that BCP's proposed treatment of retail transmission service charges owing is unreasonable. As an alternative, Brantford submits that if the Board finds that BCP has collected the amounts for retail transmission services for its customers, which the balances in their DVAs indicate they have, the Board should find that the entire amount owing to Brantford for retail transmission services should be paid in full upon resolution of this hearing.

75. In respect of distribution charges and any other amounts owing, Brantford submits that BCP should be required to produce compelling evidence that a monthly payment plan is necessary. If the Board determines that a monthly payment plan is necessary, Brantford is prepared to accept a payment plan of monthly instalments provided that such repayment is paid over a period of no longer than 6 months for the balance due and provided interest is payable on such balance for the duration of the repayment period.

I. Other issues not addressed in BCP's Argument in Chief

76. Brantford would also like to draw the Board's attention to the following three issues, which BCP did not raise in its Argument in Chief.

77. First, BCP has not raised the issue of the Deferral and Variance account rate riders in its Argument in Chief. Brantford's position on this issue is that if BCP is unwilling to pay the rate riders, it should not be eligible to receive monies back if and when the DVAs are disposed in favour of Brantford's customers. Unless directed otherwise by the Board, Brantford does not propose to establish a unique DVA rate rider applicable to BCP.

78. Second, in the event the Board does grant BCP new rates as a result of this Motion, Brantford would like to draw the Board's attention to its response to Board Staff IR#7. Brantford adopts the submissions made in this response as its own in this Final Argument. Specifically, BPI's position if the Board should determine that changes to Brantford's existing rates are warranted (although Brantford argues that such changes

are not warranted) is that new rates need to be implemented so that Brantford is ensured that it can fully recover its Board-approved revenue requirement.

79. Finally, at paragraph 82 of its Argument in Chief BCP indicates that "[t]his charge [distribution charges from BPI] represents approximately 8% of BCP's revenue requirement and will severely restrict BCP in its forthcoming cost of service rate application. The rate is therefore not just and reasonable." Brantford submits that BCP has provided no evidence of how Brantford's distribution charges will severely restrict BCP's next cost-of-service rate application as those charges would be included as a pass-through cost to BCP's customers. Finally, Brantford submits that BCP's interpretation does not correspond with the generally accepted interpretation of "just and reasonable rates". See *ATCO Gas v. Alberta Energy Utilities Board*, [2006] 1 S.C.R. 140 at para. 65. Indeed, Brantford submits that by denying any or all of the recovery of the amounts owing to Brantford would result in a situation where other Brantford ratepayers are effectively subsidizing BCP's use of the distribution assets resulting in unjust and unreasonable rates for those other customers.

VI. RELIEF

80. Brantford respectfully requests that the Board reject BCP's Motion, and confirm that:

(a) BCP must pay Brantford in full for all distribution service provided by Brantford from May 1, 2008 at BPI's General Service > 50 kW rate; and

(b) BCP must pay Brantford in full for all retail transmission service provided by Brantford since Brantford acquired the three feeders from Hydro One and began paying those charges to the IESO at BPI's General Service > 50 kW rate.

81. In the alternative, if the Board finds that a change to BCP's existing distribution rates is appropriate, BCP respectfully requests that:

(a) the changes should be applied in a manner that allows Brantford to recover the revenue requirement approved by the Board in the Decision, as that

revenue requirement is adjusted from time to time through the Board's 3rd generation IRM process; and

(b) For the period May 1, 2008 to August 31, 2008, BCP must pay Brantford for services at Brantford's GS>50kW rates that were in effect at the time; and

(c) For the period of September 1, 2008 to the implementation date of the Board's decision in this review proceeding (the "Implementation Date"), BCP and all other Brantford customers would be subject to the rates set out in Brantford's Board approved Schedule of Rates and Charges that took effect on September 1, 2008 (to ensure Brantford's other customers are not subject to rate increases for the period between September 1, 2008 and the Implementation Date); and

(d) Any new rates would only take effect as of the Implementation Date.

82. In the alternative, if the Board determines that BCP should have the benefit of a reduced distribution rate dating back to September 1, 2008, Brantford respectfully requests that:

(a) the difference between Brantford's then-approved GS>50kW rate and the new BCP rate times the BCP volumes for the period between September 1, 2008 and the Date would be tracked in a variance account 1574 for recovery, with carrying charges, at Brantford's next rebasing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13TH DAY OF JANUARY, 2010

BORDEN LADNER GERVAIS LLP

Original Signed by James C. Sidlofsky
James C. Sidlofsky
Counsel to Brantford Power Inc.

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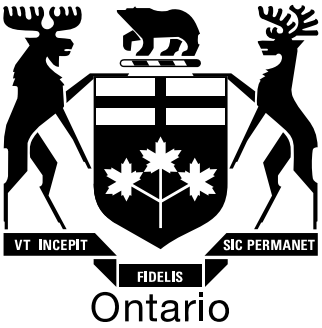
TAB 2

Ontario Energy Board

Commission de l'Énergie de l'Ontario



EB-2006-0322
EB-2006-0338
EB-2006-0340

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

EB-2006-0322
EB-2006-0338
EB-2006-0340

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

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedur*e.

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

EXECUTIVE SUMMARY

In November of 2006 the Board issued a Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The NGEIR Decision addressed the key issues of natural gas storage rates and services for gas-fired generators, and storage regulation.

In the NGEIR Decision, the Board determined that it would cease regulating the prices charged for certain storage services but that the rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The Board received three Notices of Motion for review of certain parts of the NGEIR Decision. The Board held an oral hearing to consider the threshold questions that the Board should apply in determining whether the Board should review those parts of the NGEIR Decision and whether the moving parties met the test or tests.

The Board finds that the motions do not pass the threshold tests applied by the Board, except in two areas.

First, the Board finds that the decision to cap the storage available to Union Gas Limited's in-franchise customers at regulated rates to 100 PJ is reviewable.

Second, the Board finds that the decisions regarding additional storage requirements for Union Gas Limited's in-franchise gas-fired generator customers and Enbridge's Rate 316 are reviewable.

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Section A: Introduction

The Board received three Notices of Motion for review of its Decision in the Natural Gas Electricity Interface Review proceeding[1] ("NGEIR"). Motions were filed by the City of Kitchener ("Kitchener") and the Association of Power Producers of Ontario ("APPrO"). There was also a joint notice by the Industrial Gas Users' Association ("IGUA"), the Vulnerable Energy Consumers Coalition ("VECC") and the Consumers Council of Canada ("CCC")

On January 25, 2007, the Board issued a Notice of Hearing and Procedural Order which established a schedule for the filing of factums by the moving parties, any responding parties' factums, and an oral hearing date for hearing the threshold question. On February 8, 2007, factums were filed by Kitchener, APPrO, IGUA, and jointly by CCC and VECC.

Responding factums were filed on February 15, 2007 by Board Staff, Union Gas Limited, Enbridge Gas Distribution Inc., Market Hub Partners Canada Ltd., School Energy Coalition, The Independent Electricity System Operator and BP Canada Energy Company.

In its Procedural Order No.2, the Board indicated that, at the upcoming oral hearing, parties should confine their submissions to the material in their factums and to responding to the factums of other parties. The Board also stated that parties should address only the issues set out in the Board's Procedural Order No. 1, namely:

1) What are the threshold questions that the Board should apply in determining whether the Board should review the NGEIR Decision? and

2) Have the Moving Parties met the test or tests?

[1] EB-2008-0551 (November 7, 2006)

On March 5 and 6, 2007, the Board heard the oral submissions of all the parties with the exception of the Independent System Operator and BP Canada who had advised the Board that they would not be appearing at the oral hearing.

The NGEIR Decision

On November 7, 2006 the Board issued its Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The 123-page NGEIR Decision addressed the key issues of:

1) Rates and services for gas-fired generators, and

2) Storage regulation.

The parties reached settlements with Enbridge and Union on most of the issues related to rates and services for gas-fired generators. These settlements were approved by the Board. The oral hearing and the NGEIR Decision addressed the broad issue of storage regulation and any issues that were not settled in the settlement negotiations.

The issue concerning storage regulation was whether the Board should refrain from regulating the prices charged for storage services under section 29 (1) of the Ontario Energy Board Act, 1998. The Board found that the storage market is workably competitive and that neither Union nor Enbridge have market power in the storage market. The Board determined that it would cease regulating the prices charged for certain storage services; however, the Board found that rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The motions requested the following decisions made in the NGEIR Decision be either reviewed and changed; cancelled, or clarified, in a new Board proceeding:

Kitchener

- The aggregate excess methodology for allocating storage space
- The 100 PJ cap on Union's regulated storage

APPrO

- Whether short notice balancing service should be included on the tariffs of Union and Enbridge

IGUA/CCC/VECC

- Parts of the NGEIR Decision pertaining to storage, storage regulation and storage allocation be cancelled
- Review to be heard by a different Board panel

The parties outlined the grounds for the motions which included allegations of errors of fact and in some cases, errors of law.

Organization of the Decision

In this Decision, the Board organized the issues raised by the parties into sections that cover the same or similar topics. In each section following the section on the threshold test, the Board identifies the issue or issues raised, and makes a finding whether the issues are reviewable by applying the threshold test.

The sections of this Decision are:

A. Introduction (this section)
B. Board Jurisdiction to Hear Motions
C. Threshold Test
D. Board Process

E. Board Jurisdiction under Section 29
F. Status Quo
G. Onus
H. Competition in the Secondary Market
I. Harm to Ratepayers
J. Union's 100 PJ Cap
K. Earnings Sharing
L. Additional Deliverability for Generators and Enbridge's Rate 316
M. Aggregate Excess Method of Allocating Storage
N. Orders
O. Cost Awards

The Board has reviewed the factums and arguments of all parties but has chosen to set out or summarize the factums or arguments by parties only to the extent necessary to provide context to its findings.

Section B: Board Jurisdiction to Hear the Motions

Under Rule 45.01, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

In the case of IGUA's motion, which raises questions of law and jurisdiction, counsel for Board Staff argued that the Board should not, and indeed could not, review the NGEIR Decision as these grounds are not specifically enumerated in Rule 44.01 as possible grounds for review. Counsel for Board Staff argued that the Board has no inherent power to review its decisions and the manner in which it exercises such power must fall narrowly within the scope of the *Statutory Powers Procedure Act* (SPPA), which grants the Board this power.

The Board's power to review its decisions arises from Section 21.1(1) of the SPPA which provides that:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

Part VII (sections 42 to 45) of the Board's Rules of Practice and Procedure deal with the review of decisions of the Board. Rule 42.01 provides that "any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision". Rule 42.03 requires that the notice of motion for a motion under 42.01 shall include the information required under Rule 44. Rule 44.01 provides as follows:

> Every notice of motion made under Rule 42.01, in addition to the requirements of Rule 8.02, shall:
>
> > (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion.

Counsel for Board Staff argued that while the grounds for review do not have to be exactly as those described, they must be of the same nature, and that to the extent the grounds for review include other factors such as error of law, mixed error of fact and law, breach of natural justice, or lack of procedural fairness, they are not within the Board's jurisdiction. He argued that Rule 44 should be interpreted as an exhaustive list, and that as section 21.1(1) of the SPPA requires that the tribunal's rules deal with the matter of motions for review, the Board's jurisdiction is limited to the matters specifically set out in its Rules.

In support of this interpretation of the Rule 44.01, Counsel relied on the fact that an earlier version of the Board's rules specifically allowed grounds which no longer appear in Rule 44.01. Therefore, it must be assumed that the current Rules are not intended to allow motions for review based on those grounds. The relevant section of the earlier version of the Rules read as follows:

63.01 Every notice of motion made under Rule 62.01, in addition to the requirements of Rule 8.02, shall:

> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error of law or jurisdiction, including a breach of natural justice;
>
> (ii) error in fact;
>
> (iii) a change in circumstances;
>
> (iv) new facts that have arisen;
>
> (v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;
>
> (vi) an important matter of principle that has been raised by the order or decision;
>
> (b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, …

Counsel for Board Staff argued that the "presumption of purposeful change" rule of statutory interpretation should be applied to the Board's Rules. This rule applies generally to legislative instruments and is based on the presumption that legislative bodies do not go to the bother and expense of making changes to legislative instruments unless there is a specific reason to do so. Applied to Rule 44, this means that the Board should be presumed to have intended to eliminate the possibility of motions for review based on grounds which are no longer enumerated. He further argued that because the SPPA requires the Board's Rules "to deal with the matter", the

Board can only deal with them in the manner allowed for by its Rules, and any deviation from the Rules will cause the Board to go beyond its power to review granted by Section 21.1(1) of the SPPA.

In general Union and Enbridge supported the argument made by counsel for Board Staff.

Other parties made several arguments to counter those put forward by counsel for Board Staff. These included:

- as the Board's rules are not statutes or regulations but deal with procedural matters the rules of statutory interpretation such as the presumption of purposeful change have little if any application

- to the extent rules of statutory interpretation apply, section 2 of the SPPA specifically requires that the Act and any rules made under it be liberally construed:

  > This Act, and any rule made by a tribunal under subsection 17.1(4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits

- that the *Interpretation Act* requires that the word "may" be construed as permissive, whereas "shall" is imperative, so the list of grounds in Rule 44 should be considered as examples. In support of this argument, counsel for CCC referred to Sullivan and Dreiger on the Construction of Statutes, Fourth Edition, Butterworths, pp 175*ff* which cites the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4th) 197

- that the Ontario Court of Appeal decision in *Russell v. Toronto(City)* (2000), 52 O.R. (3d) 9 provides that a tribunal (in that case the Ontario Municipal Board) cannot use its own policy or practice to restrict the range of matters which it will consider on a motion to review

- that the *Russell* decision gives tribunals a broad jurisdiction to review in contradistinction to the narrow right of appeal to the Divisional Court.

Findings

In the Board's view, in addition to the specific sections of the SPPA and the Board's Rules dealing with motions to review, it is helpful to look at the overall scheme of the SPPA and the Rules to determine the scope of the Board's jurisdiction to review a decision.

Originally, the SPPA was enacted to ensure that decision making bodies such as the Board provided certain procedural rights to parties that were affected by those decisions. These basic requirements apply regardless of whether a tribunal has enacted rules of practice and procedure. They include such requirements as:

- Parties must be given reasonable notice of the hearing (s 6)

- Hearings must be open to the public, except where intimate personal or financial matters may be disclosed (s 9)

- The right to counsel (s 10)

- The right to call and examine witnesses and present evidence and submissions and to 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 (s 10.1)

- That decisions be given in writing with reasons if requested by a party (s 17 (1))

- That parties receive notice of the decision (s 18)

- That the tribunal compile a record of the proceeding (s 20).

In addition to these requirements there are several practices and procedures that tribunals are allowed to adopt, if provision is made for them in an individual tribunal's rules. These include:

- Alternative dispute resolution. Section 4.8 provides that a tribunal may direct parties to participate in ADR if "it has made rules under section 25.1 respecting the use of ADR mechanisms…"

- Prehearing conferences. Section 5.3 provides that "if the tribunal's rules under section 25.1 deal with prehearing conferences, the tribunal may direct parties to participate in a pre-hearing conference…"

- Disclosure of documents. Section 5.4 provides that "if the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may,…, make orders for (a) the exchange of documents, …"

- Written hearings. Section 5.1 (1) provides that "a tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding."

- Electronic hearings. Section 5.2 provides that "a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding."

- Motions to review. Section 21.1(1) provides that "a tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

Beyond stating that a tribunal's rules have to "deal with" each of these procedures in order for the tribunal to avail itself of them, there are no restrictions on the way in which they do so. In this regard nothing distinguishes motions to review from the other "optional" procedural matters listed above. A tribunal is free to create whatever procedures it thinks appropriate to handle them, provided they are consistent with the SPPA.

The Board notes that there are situations where the SPPA does not give tribunals full discretion in developing their rules to deal with "optional" procedural powers. For example, section 4.5(3) allows tribunals or their staff to make a decision not to process a document relating to the commencement of a proceeding. This section not only requires a tribunal to have "made rules under section 25.1 respecting the making of such decisions" but also requires that "those rules shall set out … any of the grounds referred to in subsection 1 upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding;…" While a tribunal can prescribe the grounds for such a decision in its rules, the grounds must come from a predetermined list found in the SPPA. In that case, it is clear that only certain grounds are permitted, and a tribunal must restrict itself to those grounds enumerated in its rules.

The SPPA could put similar restrictions on the development of a tribunal's rules dealing with motions to review, but it does not.

While the Court of Appeal's decision in *Russell v. Toronto* dealt with motions to review under the *Ontario Municipal Board Act* rather than under the SPPA, the power granted to review decisions is effectively the same, so the principles enunciated in the *Russell* decision are applicable to the Board. The Court of Appeal found that the OMB could not

use its own policies and guidelines to restrict the scope of the power to review which was granted to it by statute. The Board therefore finds that it cannot use its Rules to limit the scope of the authority given to it by the SPPA.

The SPPA allows each tribunal to make its own Rules, so as to allow it to deal more effectively with the specific needs of its proceedings. The SPPA does not give the Board the authority to limit the substantive matters within the Board's purview.

The provisions of the SPPA dealing with the making of rules, give tribunals a very wide latitude to meet their own needs, both in the context of creating rules and in each individual proceeding:

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1

> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
>
> (4) The tribunal shall make the rules available to the public in English and in French.
>
> (5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.
>
> (6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

In the Board's view these sections of the SPPA give the Board very broad latitude to determine the procedure best suited to it from time to time. While consistency with the Act is required, the Rules are not regulations, and can be amended from time to time by the Board to suit its evolving needs.

The Board finds that there is nothing in the SPPA to suggest that rules dealing with motions to review should be interpreted or applied any differently from other provisions of the Board's Rules.

The Board's Rules

In addition to Section 2 of the SPPA which provides for a liberal interpretation of the Act and the Rules, the Board's Rules include the following provisions as a guide to their interpretation.

> 1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or any part of any rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.
>
> 2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious and cost-effective determination of every proceeding before the Board.
>
> 2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

As these provisions are of general application to all of the Board's Rules of Practice and Procedure, the Board finds that each of its individual rules should be read as if the above rules 1.03, 2.01 were part of them, except of course where restricted by the SPPA or another Act. Therefore, the Rules which "deal with the matter" of motions to

review, i.e. Rules 42 to 45, should be read in conjunction with Rules 1.03 and 2.01. Similarly, the rules dealing with alternative dispute resolution, written hearings and so on include Rules 1.03 and 2.01.

The Board finds that it should interpret the words “may include” in Rule 44.01 as giving a list of examples of grounds for review for the following reasons:

- It is the usual interpretation of the phrase;
- It is consistent with section 2 of the SPPA which requires a liberal interpretation of the Rules;
- It is consistent with Rule 1.03 of the Board’s rules which allows the Board to amend, vary or supplement the rules in an appropriate case; and
- If the SPPA had intended to require that the power to review be restricted to specific grounds it would have required the rules to include those grounds and would have required the use of the word “shall”.

With respect to the application of the principle of presumption of purposeful change urged by counsel for Board Staff, the Board notes that at the same time that its rules were amended to remove certain grounds of appeal from Rule 44.01, Rule 1.03 was also amended. The previous version of Rule 1.03 (then 4.04) read as follows:

> The Board may dispense with, amend, vary, or supplement, with or without a hearing, all or any part of any Rule, at any time by making a procedural order, if it is satisfied that the special circumstances of the proceeding so require, or it is in the public interest to do so.

When compared with the current Rule 1.03, it is apparent that the old rule was more restrictive – amendments had to be made by procedural order, and the circumstances of the proceeding had to be “special”. Given the need for a procedural order, it is reasonable to interpret the old rule as applying only to the sorts of matters dealt with in procedural orders, the conduct of the proceeding and not to other provisions of the rules. No such restriction applies in the current Rule 1.03.

The Board finds that to the extent the Rules were amended to remove specific grounds from the list for motions to review, the contemporaneous amendments to Rule 1.03 give the Board the necessary discretion to supplement this list in an appropriate case. The Board presumably was aware of that at the time of the amendments.

The Board therefore finds that it has the jurisdiction to consider the IGUA motion to review even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01.

Even if this interpretation of Rule 44.01 is incorrect, the Board can apply Rule 1.03 to supplement Rule 44.01 to allow the grounds specified by IGUA. Given the number of motions for review, the timing involved, the nature of the hearing and the nature of the alleged errors, the Board concludes that it is in the public interest to avoid splitting this case into Motions reviewed by some parties and appealed by others.

This panel is also aware that Appeals to the Divisional Court can only be based on matters of law including jurisdiction. If the position advanced by counsel for the Board staff was accepted, errors of mixed fact and law could not be effectively reviewed or appealed by any body. This, the Board believes is not consistent with Section 2 of the SPPA.

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

Findings

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> Every notice of motion… shall set out the grounds for the motion that raise a question as to the correctness of the order or decision…

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

Section D: Board Process

IGUA's grounds for review included the following alleged errors in the process used by the panel:

1. The Board has no jurisdiction to conduct what amounts to its own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers,
2. In embarking on its own public inquiry with respect to matters in issue between the parties with respect to storage regulation, the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its decision with respect to forbearance.

In particular, IGUA argued that the process adopted by the Board was flawed as it did not adhere to traditional notions of the adversarial process. IGUA's position was that a "contested rates and pricing proceeding between utilities and their ratepayers" is required to be conducted by the Board as if it were litigation between the parties as it is fundamentally an issue between them as to what the rates should be.

In IGUA's view, the Board departed from appropriate practice at the prehearing stage by

- Setting the agenda based on its priorities
- Defining the issues without input from the parties
- Directing the utilities to file evidence pertaining to some of the issues identified by the Board
- Directing that settlement discussions take place on all issues except storage regulation
- Directing all parties to file their evidence at the same time rather than dividing them by interest and having them file evidence in support of and then opposed to the issues identified by the Board

IGUA's largest area of concern however was that once evidence had been filed, "the Board did not confine its future participation in the process to the performance of the adjudicative functions of hearing and determining the matters of fact and law in dispute". IGUA's overriding complaint is that the Board was engaging in its own fact finding mission and was not confining itself to hearing and determining the disputed matters of fact and law which had been raised by parties opposite in interest to one another.

IGUA argued that once a dispute became clear as between the utilities and the ratepayers the Board had to "stay out of the arena" and allow these parties to determine how to present and argue the case, in effect constraining the Board to choose between the cases put forward by the various parties.

Examples of the alleged behaviour objected to by IGUA include:

- The Board advising the parties that it had retained its own expert, but then not filing a report from this expert nor having him made available for cross examination.
- Board members posing questions which indicated that they were searching for a forbearance solution to the Storage Regulation issues, but not asking questions about the ability of the existing regulatory regime to address the concerns which the Board raised.
- The Board advising BP Canada, a party to the hearing, that it wished to hear evidence from it on certain issues and providing a list of questions in advance – at the time counsel for ratepayer interests objected to the question as "rather leading".
- Counsel for the Board hearing team taking a position in argument adverse in interest to the evidence it had led.

Counsel for Board Staff argued that IGUA's complaints ignore critical differences between the Board and the courts and they confuse the role of the hearing panel with the roles of staff counsel in Board proceedings.

Counsel for Board Staff argued that the Board is not a court of record. It is a highly specialized tribunal that has a strong and important policy-making function. The Board is entitled to commence or initiate proceedings in its own right. It is not required to sit passively as an independent adjudicator and wait for parties to initiate proceedings before it, nor is the Board required to play a purely passive adjudicative role during the course of proceedings once they have been commenced, and particularly once they have been commenced at the instigation of the Board itself.

Counsel for Board Staff also argued that hearing panels of the Board are fully entitled to ask probing questions of witnesses who appear before them, and there is nothing whatsoever untoward about doing so.

The other parties largely supported the position of Board Staff.

Findings

At a minimum, the Board is required to comply with the provisions of the SPPA and the *Ontario Energy Board Act, 1998* ("OEB Act"). The SPPA provides parties with certain procedural rights, none of which IGUA has alleged has been disregarded by the Board in this case:

- Parties must be given reasonable notice of the hearing (s 6)
- Hearings must be open to the public, except where intimate personal or financial; may be disclosed (s 9)
- Parties have the right to counsel (s 10)
- Parties have the right to call and examine witnesses and present evidence and submissions and to 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 (s 10.1)

- Tribunals must give decisions in writing and must provide reasons if requested by a party (s 17 (1))

- Parties are entitled to notice of the decision (s 18)

- The tribunal must compile a record of the proceeding (s 20)

Beyond these basic requirements, the SPPA specifically allows tribunals to require parties to participate in various other procedures. With respect to prehearing conferences, section 5.3 of the SPPA provides that a tribunal may direct parties to participate in a prehearing conference to consider the settlement of any or all of the issues.

Section 19(4) of the OEB Act specifically allows the Board to determine matters on its own motion:

> The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise, shall determine any matter that under this Act or the regulations it may upon an application determine, and in so doing the Board has and may exercise the same powers as upon an application.

Section 21 of the OEB Act provides that:

> The Board may at any time, on its own motion and without a hearing, give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act.

Therefore as well as the power to initiate proceedings, the Board is also given the statutory right to require the preparation of evidence incidental to the exercise of its powers.

While the Board accepts IGUA's argument that in a hearing under Section 36 of the OEB Act it has the jurisdiction to hear and determine all questions of law and fact, it does not agree with IGUA's characterization of the limits on its exercise of this adjudicative function.

As the Board has an over-riding responsibility to make its decisions in the public interest the parties cannot have the final word in determining the nature of the dispute and the options open to the Board. The Board is not required to accept the position of any of the parties, provided that its process is transparent and open and the parties have a fair opportunity to exercise their rights under the SPPA.

IGUA cited several authorities in support of its argument. The Board found them of little assistance as they arose in quite different contexts, generally that of civil disputes between the parties. That is not the context within which the Board operates. We are not judges in civil disputes and the Board's mandate is much broader than determining rights between the parties.

With respect to the specific allegations made by IGUA, the Board's findings follow.

The Board was fully entitled to issue a notice of proceeding on its own motion in December of 2005 and to delineate the issues it expected the parties and the intervenors to address in the proceeding.

Pursuant to the Board's settlement guidelines and the SPPA, the Board is entitled to exclude from the ambit of a settlement conference particular issues that it believes should be heard in full in the hearing which is what the hearing panel did in this case. This is another example of an area where the Board's practice is fundamentally different from that of the courts.

The Board is fully entitled under its Rules to develop procedural orders to meet the needs of any particular proceeding and there is nothing in the Rules or the SPPA which would restrict it from directing all parties to file their evidence simultaneously. This does

not in any way impede the parties from exercising their statutory rights to have access to the evidence and to cross-examine witnesses.

In a proceeding initiated by the Board, as this one was, where there is no applicant, this procedure is an appropriate one.

With respect to the expert witness retained by Board Staff, Section 14 of the OEB Act expressly permits the Board "to appoint persons having technical or special knowledge to assist the Board." As there is no suggestion that the Board's expert played a role in the deliberations of the hearing panel or that the hearing panel relied in any way on the advice of the expert, there is nothing improper arising out of his retainer. Experts consulted by Board Staff are in the same position as staff and are not required to file evidence, or to submit to questioning by any of the parties.

The Board also finds that IGUA's complaints that the NGEIR panel members asked questions of witnesses, which IGUA complains indicated that they were searching for a forbearance solution to the storage regulation issue, are without merit. Adjudicators are entitled to ask probing questions of witnesses who testify before them, including leading questions. The fact that questions are asked or not asked does not mean that the panel has made up its mind one way or the other on an issue.

The Board also finds that the NGEIR panel was fully entitled as a result of the powers granted in section 21 of the OEB Act to act as it did in putting questions to a witness from BP Canada. It is also not an unusual occurrence for the Board to agree to hear evidence in camera, where there is confidential or sensitive commercial information involved.

The Board also finds no error in the fact that counsel for the Board hearing team made final argument in which she took a position adverse to the expert evidence that the Board hearing team led. The Board hearing team is entitled to take whatever position it chooses based on the evidence that was adduced during the hearing and nothing that Board hearing counsel did could possibly ground a complaint of breaches of the rules of

natural justice against the NGEIR hearing panel itself.

Section E: Board Jurisdiction under Section 29

The joint factum of CCC and VECC and the factum of the IGUA both allege that the original NGEIR panel erred in misinterpreting or overreaching in respect of its jurisdiction under section 29 of the OEB Act.

In particular, the CCC/VECC factum states as follows at paragraph 8:

> 8. The moving parties submit that the NGEIR Decision raises the following issues:
>
> (i) Whether the Board correctly interpreted Section 29 of the Ontario Energy Board Act (the "Act"). It is the position of the moving parties that the Board erred in its interpretation of Section 29 of the Act, thereby depriving itself of jurisdiction;
>
> (ii) Whether the Board gave effect to the legislative intent underlying Section 29 of the Act. It is the position of the moving parties that the Board failed to give effect to the intention of the Legislature in enacting Section 29 of the Act;

In its factum, IGUA alleged that the Board had no jurisdiction to conduct what IGUA characterized as the Board's "own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers". (IGUA factum par. 84(a))

IGUA also alleged that:

> …the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its Decision with respect to forbearance. (IGUA factum par. 84(b))

In addition to these general submissions by CCC/VECC and IGUA about the NGEIR panel's interpretation of its jurisdiction under Section 29, these parties also argued specifically that the NGEIR panel exceeded its jurisdiction under Section 29 by restructuring the storage businesses of Union and Enbridge. They asserted that the power to restructure the storage business comes under section 36 of the legislation. (Tr. Vol. 1, pp. 28 and 56-57)

Findings

The NGEIR panel's interpretation and application of section 29 is central to the NGEIR Decision. The NGEIR Decision therefore deals extensively with the question of the legal test to be applied under section 29, the analytical framework for assessing whether the natural gas market is competitive and finally, the assessment of market power in the natural gas sector in Ontario.

The starting point for the NGEIR Decision is the Board's interpretation of section 29 which is set out in Chapter 3 of the Decision and reads as follows:

> On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest

In Chapter 3 of the NGEIR Decision, the NGEIR panel discussed the statutory test to be used in the assessment of competition in the storage market and applies the analytical framework mandated by that statutory test. In particular, the panel reviews the history of section 29 and of the concept of forbearance and light-handed regulation.

The NGEIR panel's review of Section 29 is described at two levels. The first is the assessment of competition, which is done by applying the market power tests, and the second is the relationship between competition and the public interest.

The NGEIR panel interprets “competition” within section 29 at page 24 of the NGEIR Decision as follows:

> There are degrees of competition in any market. They range from a monopoly, where there is a sole seller, to perfect competition, where there are many sellers and no one seller can influence price and quantity in the market. It is not necessary to find that there is perfect competition in a market to meet the statutory test of “competition sufficient to protect the public interest”; what economists refer to as a “workably competitive” market may well be sufficient.
>
> It is also important to remember that competition is a dynamic concept. Accordingly, in section 29 the test is whether a class of products “is or will be” subject to sufficient competition. In this respect parties often rely on qualitative evidence to estimate the direction in which the market is moving.

The NGEIR panel further interprets its mandate at page 44 as follows:

> …Section 29 says that the Board shall make a determination to refrain “in whole or part” which the Board believes allows considerable flexibility in this regard. In addition, the Board concludes that it is required by the statute to address the public interest trade-offs, for example, between price impacts and the development of storage and the Ontario market generally.

The NGEIR panel then proceeds to assess the “level of competition” using the market power tests and finds the storage market in Ontario is subject to “workable competition”.

Following this, it then addresses the question of whether the level of competition is sufficient to protect the public interest. In so doing, the panel addresses what should be

encompassed in its consideration of the public interest in the context of the assessing competition as follows:

> The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple "yes" or "no". The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly.
>
> Some of the intervenors took the position that the public interest review should be focussed on the financial impacts. For example, Schools argued that the Board should look at the benefits and costs of forbearance, and in its view, the costs include a possible transfer of between $50 million and $174 million from ratepayers to shareholders (arising from the proposed end to the margin-sharing mechanisms and the potential re-pricing of cost-based storage to market prices). The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. [Emphasis added] (pages 42 and 43)

The NGEIR panel then proceeds to balance the Board's public interest mandate against its legislative objectives and describes the trade-offs. It does this by reviewing each of the relevant objectives (i.e., to facilitate competition in the sale of gas to users, to protect the interests of consumers with respect to prices an the reliability and quality of gas service, to facilitate rational development and safe operation of gas storage) and

conducting an assessment of whether the level of storage competition is sufficient to protect the public interest in light of each of those objectives.

At page 56 of Chapter 5, having determined that part of the storage market is workably competitive and having considered some of the key elements of the public interest, the panel addresses whether and it what circumstances the Board should refrain from setting storage prices and approving storage contracts.

> In terms of a section 29 analysis, the goal would be to continue to regulate (and set cost-based rates) for those customers who do not have competitive storage alternatives and to refrain from regulating (allow market-based prices) for those who do have competitive alternatives.

The NGEIR panel then applies its interpretation of the legislative intent of section 29 to the facts before it. That panel's understanding of its mandate under section 29 and its careful application of that mandate are evidenced in its findings at pages 56 and 57 of the decision. The NGEIR panel's application of the requisite elements of section 29 is evident in the balancing between considerations of competition with aspects of public interest.

> The parties recognized that bundled customers, in particular, do not acquire storage services separately from distribution services, do not control their use of storage, and do not have effective access to alternatives in either the primary or secondary markets. Competition has not extended to the retail end of the market, and therefore is not sufficient to protect the public interest. However, the Board finds that customers taking unbundled or semi-unbundled service should have equivalent access to regulated cost-based storage for their reasonable needs. The Board finds that it would not further the development of the competitive market, or facilitate the development of unbundled and semi-unbundled services, if these unbundled and semi-unbundled services were to include current storage services at unregulated rates. The Board also agrees with

the parties that noted that re-pricing existing storage will not provide an incentive for investment in new storage and therefore cannot be said to provide that public interest benefit.

However, customers taking unbundled and semi-unbundled services do have greater control over their acquisition and use of storage than do bundled customers. It is also the Board's expectation that these customers will have access to and use services from the secondary market. Therefore, the Board concludes it is particularly important to ensure that the allocation of cost-based regulated storage to these customers is appropriate. This issue is addressed in Chapter 6.

MHP Canada has suggested that the Board adopt full forbearance in storage pricing as a policy direction. Similarly, Union has characterized its allocation proposal and Enbridge has characterized its "exemption" approach for in-franchise customers as being "transitions" to full competition. The Board has found that the current level of competition is not sufficient to refrain from regulating all storage prices; nor do we see evidence that it would be appropriate to refrain from regulating all storage prices in the future. The current structure (for example, the full integration of Union's storage and transportation businesses and the full integration of Union as a provider of storage services and as a user of storage services) is not conducive to full forbearance from storage rate setting. In addition, there would be significant direct and indirect rate impacts associated with full forbearance from rate setting, and there is little evidence of significant attendant public interest benefits. The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there a reasonable prospect that they will be at some future time.

The submissions of both CCC/VECC and of IGUA are that the Board misinterpreted and misapplied section 29 of the OEB Act. This panel finds that there is no reviewable error

associated with the NGEIR panel's interpretation of section 29. The NGEIR Decision clearly evidences that the NGEIR panel knew and understood that section 29 was not a section that the Board had invoked in any previous decisions or analyses. For that reason, the Decision provides extensive background regarding the section and goes into significant detail regarding the appropriate framework and analysis required to be undertaken. The Decision shows that the NGEIR panel reviewed the elements of section 29 and considered each of those elements in considerable detail. Where moving parties raised specific questions regarding the application of Section 29, for example, with respect to whether the NGEIR panel had sufficient evidence upon which to make a finding that there was competition sufficient to protect the public interest and whether the NGEIR panel erred in setting a cap on the amount of natural gas storage available to in-franchise customers, the Board makes specific findings elsewhere in this Decision.

With respect to the allegation by CCC/VECC and IGUA that the NGEIR panel exceeded its jurisdiction by restructuring the storage businesses of Union and Enbridge, something which they assert should come under section 36 of the legislation, the Board also finds there is no reviewable error.

The NGEIR panel confined its considerations related to the application of the test under Section 29 in determining whether and to what extent there was competition in the natural gas storage market sufficient to protect the public interest. The portions of the decision that go on to discuss the impacts of the Section 29 decision on the structure of the natural gas storage market flow from the determination under Section 29, but the NGEIR panel does not, in its Decision, describe these as arising out of their Section 29 jurisdiction. The NGEIR proceeding was commenced pursuant to sections 19, 29 and 36 of the *Ontario Energy Board Act, 1998*. As such, the NGEIR panel acted under the authority of Section 29 and 36 in making the determinations in the NGEIR Decision. The decisions made by the NGEIR panel with respect to the allocation of storage available at cost-based rates and the treatment of the premium on market-based storage transactions were made based on evidence filed by the parties to the proceeding and the NGEIR panel considers this evidence as part of the NGEIR Decision.

The Board finds that the allegations of CCC/VECC and IGUA on this point do not raise a question as to the correctness of the decision. The NGEIR panel clearly confined itself to its legislative mandate as provided in Section 29 in determining whether the natural gas market was subject to competition sufficient to protect the public interest. The NGEIR's findings that flow from the Section 29 determination align with the evidence that was before it, did not fail to address any material issue and did not make any inconsistent findings with respect to the evidence before it, except as otherwise noted in this decision.

Section F: Status Quo

The factums and submission of both CCC/VECC and of IGUA allege that the NGEIR panel erred by failing to consider the option of retaining the current regulatory regime in respect of natural gas storage regulation. CCC/VECC and IGUA articulate this alleged error in a number of different ways in different parts of their factums and submissions.

For example, at paragraph 3 of their joint factum, CCC and VECC take the position that:

> "… the Board was obligated to consider whether a change in the status quo with respect to the regulation of storage was required and that it erred in failing to do so." IGUA's factum states that "…reasonable people, objectively examining the process which led to the Decision, will likely conclude that retaining the status quo was not a decision-making option which the Board considered, either fairly or at all, and that the Board itself was a proponent for forbearance relief."

Findings

The NGEIR Decision provides evidence in various places, of the NGEIR panel's recognition of both the current regulatory status with respect on natural gas storage in Ontario and the dynamic nature of competition generally.

In particular, Chapter 2 is described at page 5 of the decision as "…an overview of gas storage in Ontario today – the existing storage facilities, the use of storage by Union's and Enbridge's "in-franchise" customers, the "ex-franchise" market for storage, and the prices charged for storage services."

Later in the NGEIR Decision, as part of its findings on the assessment of assessment of storage competition, the Board expressly disagrees with Mr. Stauft's testimony that the regulated cost-base price for storage is a reasonable proxy for the competitive price of

storage. Implicit in this finding is the NGEIR panel's consideration of the current regulatory regime.

At page 46 of the Decision, the NGEIR Panel also considered the current regulatory regime in the context of question of the sharing of the premium which exists between the price of market-based storage and the underlying costs. The Board acknowledged the current state as follows:

> Currently, that premium is shared between utility ratepayers and utility shareholders. Under the utilities'' proposals for forbearance, the premium would be retained by the shareholders. This would result in significant transfer of funds in the case of Union (2007 estimate is $44.5 million); less so in the case of Enbridge (2007 estimate is $5 million to $6 million). The intervenors in general rejects these proposals and, as a result, opposed forbearance.

At page 47, the NGEIR panel specifically considered and expressly acknowledged the importance of the change from the status quo, but ultimately rejected these submissions as follows:

> The Board agrees that the distribution of the premium is a significant consideration. In many ways, it has been the underlying focus of the NGEIR Proceeding. However, the impact of removing the premium from rates is the result of removing a sharing of economic rents; it is not the result of competition bringing about a price increase. So while it is an important consideration which the Board must address (see Chapter 7), it is not a sufficient reason, in and of itself, to continue regulating storage prices.

There are a number of other examples throughout the NGEIR Decision that satisfy the Board that the NGEIR panel was conscious of the status quo regulatory regime and bore this in mind throughout its analysis on the narrow issue of competition and the s.

29 analysis as well as in considering the impacts upon both shareholders and ratepayers, of a completely or partial forbearance decision.

The Board also feels that the decision by the NGEIR panel to continue to regulate and set cost-based rates for existing storage services provided to in-franchise customers up to their allocated amounts evidences a clear understanding of the current regulatory framework and under what circumstances, based upon the evidentiary record before the NGEIR panel, it was appropriate to deviate from that current framework.

The Board is not convinced, however, that the analysis mandated by the legislative language of s. 29 requires the Board to consider the status quo in the way that has been suggested by some parties. Although it was important for the NGEIR panel to review the current regulatory framework to set the stage for the analysis, the Board is not convinced by the arguments of CCC/VECC, nor those of IGUA that consideration of the status quo is an integral, or even a necessary part of the s. 29 analysis. The purpose of s. 29 was clearly stated by the NGEIR panel and that is to determine whether there is or will be competition sufficient to protect the public interest. If there is a finding that competition does exist, nothing in the section requires the panel to then consider whether the current regulatory framework is sufficient to accommodate the competitive market. In fact, the section mandates that upon finding competition sufficient to protect the public interest, that "…the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act…" In this case, the Board determined that it would refrain, in part, from regulating the setting of rates and the review of contracts for natural gas storage.

The Board therefore concludes that CCC/VECC and IGUA have not demonstrated that their grounds for review based on the alleged failure of the NGEIR panel to consider retaining the status quo as a viable decision-making option raise an issue that is material and directly relevant to the findings made in the decision. This panel concludes that there is no reviewable error with respect to the NGEIR panel's alleged failure to fairly consider the status quo.

Section G: Onus

At paragraph 84(d) of its factum, IGUA alleges that the Board erred in concluding that there is no onus of proof to be assigned in the rates and pricing proceedings it initiated. IGUA alleges that the NGEIR panel erred in law in not assigning the onus of proof to the utilities.

Findings

Pages 26 to 27 of the NGEIR Decision deal explicitly with this issue. In that part of the Decision, the panel acknowledges that generally, the onus is on the applicant. The panel also, however, pointed out the unique nature of the NGEIR proceeding and the fact that the proceeding was brought on the Board's own motion.

The Board is satisfied that all parties to the NGEIR Proceeding were given a full and fair opportunity to provide submissions on the question of onus and that, based on the Decision, the NGEIR panel heard and understood those submissions. This panel is not satisfied that the question of onus is an issue that is material and directly relevant to the findings made in the Decision, nor that if a reviewing panel did decide the issue differently, that it would change the outcome of the Decision. For these reasons, the Board finds that there is no reviewable error relating to assignment of or the failure to assign onus in the NGEIR proceeding.

Section H: Competition in the Secondary Market

In the NGEIR Decision, the Board concluded that Ontario storage operators compete in a geographic market that includes Michigan and parts of Illinois, Indiana, New York and Pennsylvania, that the market is competitive and neither Union nor Enbridge have market power. This determination was made by employing the following four step process, based on the Competition Bureau's Merger Enforcement Guidelines (MEGs):

- Identification of the product market.
- Identification of the geographic market.
- Calculation of market share and market concentration measures.
- An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment).

IGUA alleged that the NGEIR panel made numerous errors in assessing sufficiency of competition in the secondary market. IGUA's allegations of errors can be summarized as follows:

- The NGEIR panel erred in misapprehending and misapplying the analytical tests used for determining market power.
- The NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services, excluding commodity, were available at Dawn, nor their prices, nor whether consumers regarded such services as substitutes for delivery services offered by Union.

- The NGEIR panel failed to recognize that the evidence of Gaz Métropolitain Inc. (GMi) did not establish that Union lacked market power in storage services transacted at Dawn, and indeed this evidence established the opposite.

Findings

IGUA alleges that the Board misapprehended and misapplied the market power analytical frameworks presented in documents from the Competition Bureau, the Federal Energy Regulatory Commission (FERC), and the Canadian Radio-Television and Telecommunications Commission (CRTC). According to IGUA, a 10 step procedure must be followed in order to correctly carry out a market power analysis instead of the four step process used by the NGEIR panel.

The Board notes that, in settling on the four step procedure that should apply to determine whether Union and Enbridge have market power and whether the storage market is competitive, the NGEIR Decision provided substantial review and analysis pertaining to Competition Bureau's Enforcement Guidelines (MEGs) and the FERC's 1996 Policy Statement on Market Power Analysis. It is evidenced in the Decision that this was the result of the review of substantial pre-filed evidence, cross examination and argument on this topic.

In the Board's view, the test to be applied is not whether a review panel of the Board would have adopted a different analytical framework. Rather, it is matter of whether in settling upon a certain analytical process, there was an error of fact or law. In view of the extensive record and the analysis and reasons provided in the NGEIR Decision, the Board finds that IGUA not raised an identifiable error in the NGEIR Decision. Rather the submissions of the moving parties are more in the nature of re-arguing the same points that were made in the original hearing. This evidence was presented and evaluated by the NGEIR panel. As the Board stated in enunciating the threshold test at Section C of this Decision, a motion for review cannot succeed if a party simply argues that the Board should have interpreted conflicting evidence differently. The Board has therefore

determined that there is not enough substance to the issues raised by IGUA such that a review of those issues could result in the Board determining that the NGEIR Decision or Order should be varied, cancelled or suspended. As such, the NGEIR panel's determination on the nature and application of market power analysis to the natural gas storage market in and around Ontario is not reviewable.

IGUA alleges that the NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services were available at Dawn, nor their prices or whether consumers regarded such services as substitutes for delivery services offered by Union.

In the Board's view, this alleged error is essentially an application of the alleged market power analysis framework error discussed above. The NGEIR panel listed several forms of evidence in support of its conclusion that the secondary market in transportation services is unconstrained and therefore serves to enlarge the geographic market from what it would otherwise have been found to be.

The NGEIR panel treated evidence on the operation of primary and secondary markets in transportation as relevant to the determination of the geographic market in a manner consistent with the market power analysis methodology that the NGEIR panel had settled upon. For the reasons stated above, the Board finds that the original NGEIR panel's use of evidence relating to the secondary market in transportation services is not reviewable.

IGUA cites the NGEIR hearing transcript (volume 10, pages 56-120) in support of its allegation that the Board failed to recognize that GMi's evidence actually supported IGUA's view that Union has market power.

The Decision (at page 35, paragraphs 4-5) clearly reflects the statements of GMi witnesses that they regularly contact alternative suppliers for comparisons to Union's services. IGUA has not shown that the NGEIR panel's findings are contrary to the evidence that was before the panel, or that the panel failed to address GMi's evidence

or made inconsistent findings with respect to that evidence. The Board therefore finds that there is no reviewable error with respect to the NGEIR panel's use of the evidence provided by GMi.

Section I: Harm to Ratepayers

IGUA and CCC/VECC alleged that the Board erred when it bifurcated the natural gas storage market between those customers that continue to benefit from storage regulation and those customers who do not. They allege that as a result of this bifurcated market, the Board conferred a windfall benefit on the shareholders of the utilities with no corresponding benefit to ratepayers and that this is unfair.

The parties also alleged that the transitional measures the Board employed to implement the new regime merely serve to underscore the error in the finding that the market should be split. The parties alleged that the market, taken as a whole, was determined not to be workably competitive, and the transitional measures are evidence that a decision to forbear from the regulation of prices was not appropriate.

Finally, CCC and VECC alleged that the Board erred in its interpretation of section 29, and acted in excess of its jurisdiction, by moving assets out of rate base, with no credit to the ratepayer. They argued that the effect of the NGEIR Decision is to allocate the rate base storage assets of the utilities between in-franchise and ex-franchise customers, and to allow for a new shareholder business within each utility. They submitted that doing those things does not naturally follow from a finding that the rates charged by the utilities to ex-franchise customers do not need to be regulated.

Findings

The Board finds that the issues raised in this area have not met the threshold test for the matter to be forwarded to a reviewing panel of this Board. The NGEIR panel did not err in failing to consider the facts, the evidence, or in exercising its mandate. There were no facts omitted or misapprehended in the NGEIR panel's analysis nor are the moving parties raising any new facts.

It was entirely within the NGEIR panel's mandate and discretion how to assess the competitive position of segments of the market and how to address the regulatory treatment of customers within those segments. The NGEIR panel clearly decided that ex-franchise customers of both Union and Enbridge had access to a competitive natural gas storage market. Further, the decision goes on to make clear on page 61, that Enbridge as a utility is ex-franchise to Union and therefore should be subject to market prices. The NGEIR Decision differentiates between the competitive position of a utility (e.g. Enbridge) and the competitive position of that utility's in-franchise customers. For example, the Decision is clear that the in-franchise customers of Enbridge will pay cost-based rates which will continue to be regulated by the Board and are based on EGD's costs of storage service owned by the utility and the costs that EGD pays for procuring these services in the competitive market.

A key issue the parties raise is that the bifurcated market brings about unfair and inconsistent treatment, and therefore constitutes a misapplication of the Board's mandate to protect the public interest. However, on this point, the grounds that the moving parties raised to support a review are in fact the very points used by the NGEIR panel to protect consumers as a natural consequence of the decision to refrain from storage regulation of the ex-franchise market. It is clear that the NGEIR panel took into account the protection of the public interest in its decision to provide transition mechanisms to protect consumers.

With respect to the allegation of a windfall benefit for shareholders of the utilities with no corresponding benefit to ratepayers, the Board is of the view that this is related to the question of earnings sharing. This issue is more fully addressed in Section K of this Decision. It is important to note here, however, that the NGEIR panel's decisions with respect to the profit or earnings sharing mechanism were based on the evidence presented by all parties and flowed from the broader decisions with respect to the competitiveness of the gas storage market. Chapter 7 of the NGEIR Decision clearly described the NGEIR panel's considerations with respect to and its reasoning for changing the earnings sharing mechanism. In the Board's view, the changes related to the earnings sharing mechanism necessarily arise from a recognition by the Board of

the implications of its findings under Section 29 that there is a workably competitive market for storage in the ex-franchise market.

Section J: Union's 100 PJ Cap

In their factum, CCC and VECC allege that, on the one hand the Board in its NGEIR Decision said that a substantial portion of the storage market requires regulatory protection because there is insufficient competition to protect the public interest while on the other hand the Board exposed this same group to the effects of competition from the unregulated market.

Kitchener has also specifically sought the Board's review of an aspect of the NGEIR Decision related to the Board's placement of a "cap" on the amount of Union's storage space that is reserved for in-franchise customers at cost-based rates.

The Board determined at page 83 of the NGEIR Decision that Union should reserve 100 PJ of storage space at cost-based rates for its in-franchise customers. The Decision reads as follows (page 83):

> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs. The Board has determined that Union should be required to reserve 100 PJ (approximately 95 Bcf) of space at cost-based rates for in-franchise customers. This compares with Union's estimate of 2007 in-franchise needs of 92 PJ (87 Bcf). At an annual growth rate of 0.5% each year, which Union claims is the growth rate since 2000, in-franchise needs would not reach 100 PJ until 2024. The limit would be reached in 2016 if the annual growth is 1%; at a very annual high growth rate of 2% per annum, the 100 PJ limit would be reached in 2012.
>
> The 100 PJ (95 Bcf) amount is the capacity that Union must ensure is available to in-franchise customers if they need it. Union should continue to charge in-franchise customers based on the amount of space required in any year. If Union's in-franchise customers require less than 95 Bcf in any year, as measured by Union's standard allocation methodology, the

> cost-based rates should be based on that amount, not on the full 95 Bcf reserved for their future use. Union will have the flexibility to market the difference between the total amount needed and the 95 Bcf reserve amount.

The Board acknowledged that the cap might be reached at any time between 2012 and 2024, depending on what growth rate assumptions are used. At the current rate of growth (0.5% each year), the cap would not be met until 2024.

In Kitchener's oral submissions (page 187, Volume 1), Mr. Ryder on behalf of Kitchener makes the following comments:

> And while the cap of 100 pJs allows for some growth so it won't immediately affect the Ontario consumer, the cap will be reached between 2012 and 2024. That's between 5 and 17 years from now.
>
> Now, that's not far off, and if the public interest requires a margin for growth today in 2007, then the public interest will surely require it in five to 17 years from now when the cap is reached.
>
> And when it is reached, it is my submission that the Board will have wished it had reviewed the decision in 2007, because, when the cap is reached, this decision will be responsible for adding significantly to the costs of energy in Ontario, to the detriment of the Ontario consumer.

Page 7 of the CCC/VECC factum states:

> The Board made no finding, however, that at the end of the operation of those transitional measures, the public interest, as represented by in-franchise customers of Union and EGD, would be protected. The moving parties submit that Section 29 required the Board, before making an order to forbear from regulation under Section 29, to find on the evidence that,

> at the end of the transitional measures, there would be sufficient competition to protect the public interest. The moving parties submit that, in failing to make that finding, the Board erred.

Findings

On page 57 of the NGEIR decision, in reference to the in-franchise customers of Union the NGEIR panel makes the following statement:

> The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there reasonable prospect that they will be at some future time.

Later in the decision at page 82, the decision states:

> The Board panel concludes that its determination that the storage market is competitive requires it to clearly delineate the portion of Union's storage business that will be exempt from rate regulation. Retaining a perpetual call on all of Union's current capacity for future in-franchise needs is not consistent with forbearance. As evidenced by the arguments from GMi and Nexen, two major participants in the ex-franchise market, retaining such a call is likely to create uncertainty in the ex-franchise market that is not conducive to the continued growth and development of Dawn as a major market centre.
>
> The Board concludes that it would be inappropriate, however, to freeze the in-franchise allocation at the level proposed by Union. Union's proposal implies that a distributor with an obligation to serve would be prepared to own, or to have under contract, only the amount of storage needed to serve in-franchise customers for just the next year. In the Board's view, it is appropriate to allow for some additional growth in in-

> franchise needs when determining the "utility asset" portion of Union's current capacity.
>
> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs."

The NGEIR panel then goes on to provide its decision on the methodology which was used to determine the cap and says at page 83 of the decision:

> The 100 PJ (95 BCF) amount is the capacity that Union must ensure is available to in-franchise customers if they need it.

The NGEIR panel then makes a finding with respect to how the excess capacity should be treated if the in-franchise customers require less than 100 PJ in a given year. The NGEIR panel is silent on the outcome if in-franchise customers require more than 100 PJ of storage per year. Although the NGEIR panel is clear that it does not expect this circumstance to occur for many years, the decision nevertheless appears to raise the possibility that in-franchise customers may, at some point, be subject to unregulated prices.

The Board finds that on this issue the moving parties have raised a question as to the correctness of the order or decision and that a review based on the issue could result in the Board deciding that the decision or order should be varied, cancelled or suspended.

In particular, in this instance, there are unanswered questions that are raised by the NGEIR Decision on the 100 PJ cap issue. Since the NGEIR Decision clearly stated that the in-franchise customers did not have and were not likely to have access to competition in the foreseeable future, a decision that forbears from the regulation of pricing for these customers at some time in the future does not appear to this panel to be consistent. The Board finds that the following questions should have been addressed by the NGEIR panel:

(a) If the cap of 100 PJ of storage for in-franchise Union customers remain in place in perpetuity, what is the basis for forbearance (under Section 29) of required storage above 100 PJ for in-franchise customers?

(b) If the cap of 100 PJ of storage for in-franchise Union customers does not remain in place in perpetuity, what mechanism should the Board use to monitor the likelihood of the cap being exceeded?

(c) If the cap of 100 PJ of storage for in-franchise Union customers is likely to be exceeded, what, if any, remedy is available to in-franchise customers?

The Board therefore finds that the NGEIR panel either failed to address a material issue or made inconsistent findings, that the alleged error is material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected, the reviewing panel could change the outcome of the decision.

The Board therefore finds that this is a reviewable matter.

Section K: Earnings Sharing

Certain parties, led by VECC, allege that the NGEIR panel erred because one of the effects of the NGEIR Decision on the in-franchise customers of Union is that these customers will lose the benefit of their share of the premium obtained by Union through the sale of storage to ex-franchise customers. The parties stated that the NGEIR Decision will result in a material increase in revenue to the shareholder of Union and, to a lesser extent, an increase in the revenue to EGD's shareholder. They also indicated that at the same time, there will be no corresponding benefit to the ratepayers of either Union or EGD. In fact the moving parties argued that the ratepayers of Union and EGD will suffer adverse impacts, in both the short and the long term. The moving parties maintained that the NGEIR Decision upsets the balance between the interests of ratepayers and shareholders which the regulatory system is supposed to maintain and that the NGEIR Decision is, therefore, contrary to public and regulatory policy.

It was also stated by the moving parties that section 29 of the OEB Act does not permit the Board to re-allocate rate-based storage assets. The effect of the NGEIR Decision was to allocate rate-based storage assets between in-franchise and ex-franchise customers and to allow for a new shareholder business within each utility. The moving parties stated that the Board exceeded its jurisdiction by moving assets out of rate base with no credit to the ratepayer.

It was further asserted that rather than requiring utility shareholders to share the premiums derived from the sale of storage to ex-franchise customers, there will now be a separation of utility and non-utility assets and revenues and costs associated therewith. The moving parties stated that this will raise cross-subsidization and other issues pertaining to the performance of utility and non-utility services; a result which they say contravenes the spirit and intent of the pure utility policy adopted by the Ontario government years ago.

Further, the parties allege that the Board erred in concluding that it has the power to forbear under Section 29 of the *OEB Act* when an exercise of the power results in a

windfall benefit to utility shareholders and consequential harm to ratepayers. The parties asserted that changes to the allocation between ratepayers and utility shareholders of financial benefits and burdens produced by a particular regulatory regime must take place under the auspices of regulation.

Findings

The Board notes that the NGEIR Decision deals extensively with the issue of the allocation/sharing of margins (also called premiums, revenues or earnings) associated with the sale of natural gas storage on both a short-term (transactional services) and long-term contractual basis. The Decision canvasses both the status quo (prior to the implementation of the changes required by the NGEIR Decision) and provides an explanation of the rationale for changing the earnings sharing structure, the new mechanisms for earnings sharing and the transitional implementation (where applicable) of those mechanisms.

In particular, chapter 2 of the NGEIR Decision provides, among other things, a description of the current types and volumes of sales of natural gas storage by Union to ex-franchise customers and canvasses the current regulatory treatment of ex-franchise sales, including the rate treatment of margins on storage sales. In Chapter 7, the NGEIR panel goes into greater detail regarding the extent of margin sharing and the regulatory history that underlines premium sharing for both short-term (for both Union and Enbridge) and long-term (for Union only) sales of storage.

Chapter 7 goes on to provide the Board's findings on for the sharing of margins for both short-term and long-term transactions and to describe a transition mechanism related to long-term margins.

The record that the NGEIR panel relied upon included extensive evidence and argument of many parties, including the moving parties to this proceeding and the utilities. The NGEIR Decision refers to various parties' submissions on the issue of premium sharing and the Board reiterated some of the historical evidence with respect

to the margin sharing in its Decision. The NGEIR Decision indicates that the NGEIR panel heard and considered the evidence and submissions before it in making its determinations with respect to this issue.

Importantly, the NGEIR panel's findings relate back to and to a certain extent flow from its broader decision to refrain, in part, from regulating rates for storage services. The Board does not accept the suggestion that the Board exceeded its jurisdiction by moving assets (in the case of Union) out of rate-base and by altering the status quo margin sharing mechanism. On the contrary, the NGEIR Decision clearly articulates that the changes to margin sharing flow necessarily and logically from the decision to refrain, in part, from regulated rates for storage services.

The determinations of the NGEIR panel are also consistent with its determination to distinguish between "utility assets" and "non-utility assets". The Decision clearly indicates that the NGEIR panel canvassed past decisions of the Board on this issue and considered the implications of its findings on both the utilities and ratepayers. Part of this consideration is evidenced in the development by the panel of a transition mechanism related to the implementation of the Board's finding that profits from new long-term transactions should accrue entirely to the utility (Union) as opposed to ratepayers. The threshold panel does not accept the argument that this transitional implementation is a form of implicit acknowledgement that the finding is inappropriate. The NGEIR panel exemplified Board precedent for the use of a phase-out mechanism and, in its finding, indicated that it had considered other options for a transitional mechanism.

The Board finds that the NGEIR panel's determinations on the treatment of the premium on market-based storage transactions are not reviewable. The record of the NGEIR proceeding clearly demonstrates that the NGEIR panel considered the evidence, the regulatory history with respect to the issue of premium sharing and parties' submissions and made its determination on the basis of that evidence and those submissions. There is nothing in the moving parties' evidence or arguments that demonstrate to the Board that the NGEIR panel made a reviewable error. For this

reason, the Board has determined that the threshold test has not been met and it will not order a review of the NGEIR Decision as it pertains to the issue of the division of the utilities assets or the sharing of the margin realized from the sale of natural gas storage to ex-franchise customers.

Section L: Additional Storage for Generators and Enbridge's Rate 316

Many of the issues which existed between Union and Enbridge and their generator customers were resolved in the Settlement Proposals which were filed and accepted by the Board in the NGEIR proceeding. These settlements deal with storage space parameters, increased deliverability for that space, and access to that enhanced space to balance on an intra-day basis. What remained unresolved was the pricing for the new high deliverability storage services for in-franchise generators.

The utilities had proposed in the NGEIR proceeding to offer these services at market-based rates and proposed that the Board refrain from regulating the rates for these services. The power generators took the position that storage services provided to them should be regulated at cost-based rates.

In the NGEIR Decision, APPrO's position was described as follows:

> The Association of Power Producers of Ontario (APPrO) argued that the product it is more interested in – high deliverability storage – is not currently available in Ontario. APPrO argued that competition cannot exist for a product that is not yet introduced and pointed out that when it is introduced it will be available only from Ontario utilities as ex-Ontario suppliers will be constrained by the nomination windows specified by the North American Energy Standards Board (NAESB).

The NGEIR Decision stated:

> With respect to APPrO's position, the Board is not convinced that high deliverability storage service is a different product. High deliverability storage may be a new service, but it is a particular way of using physical storage, which still depends upon the physical parameters of working capacity and deliverability.

In the Motions proceeding, APPrO stated that its position was and continues to be narrower than what was described by the NGEIR panel. APPrO was not seeking high deliverability storage. Rather, it was seeking services that would allow generators to manage their gas supply on an intra-day basis. It is not operationally possible for the generator to increase the rate at which gas can be delivered in and out of the storage space with deliverability from a supplier other than Union. Moreover, APPrO asserted that the frequent nominations windows required for such service are only available in Ontario from the utilities. Since this is a monopoly service, then it should be offered at cost.

Union argued that APPrO has not brought forward any new facts or changes in circumstance, nor has it demonstrated any error in the Board's original decision. It also stated that APPrO's assertion that high-deliverability storage is only available from the utility is demonstrably wrong and that there was sufficient evidence that high deliverability storage is available from others. Union disagreed with APPrO's position that deliverability could not be separated from storage space. Although this is correct in the physical context, Union submitted that there were substitutes for deliverability and storage space and gas-fired power generators could acquire their intra-day balancing needs from sources other than the utilities. This according to Union was clearly addressed in the original proceeding and considered by the Board in its decision and APPrO was simply seeking to re-argue its position that had already been fully canvassed.

Enbridge pointed out that any de-linking of storage and deliverability that occurred was as a result of the settlement agreed to by APPrO and the power generators with Enbridge. The settlement states that the allocation methodology for gas-fired generators' intra-day balancing needs is based on the assumption that high deliverability storage is available to those customers in the market.

APPrO has also raised an issue with some aspects of Rate 316 offered by Enbridge. Rate 316 was part of a proposal submitted by Enbridge during the NGEIR proceeding in response to generators' need for high deliverability storage service. As a result of the

Settlement Proposal, Enbridge's Rate 316 provides an allocation of base level deliverability storage at rolled in cost along with high deliverability storage at incremental cost to in-franchise gas fired generators. Section 1.5 of the Settlement Proposal indicates that generators are entitled to an allocation of 1.2% deliverability storage at rolled-in cost based rates.

Findings

In the Board's view, it is unclear from the NGEIR Decision whether the NGEIR panel took the implications of the Union settlement agreement into consideration. The NGEIR Decision does not provide sufficient clarity regarding the issues raised by APPrO. It appears that there are some practical limitations faced by gas-fired generators in that presently they can only access certain services from the utility. Although Union asserted that it is demonstrably wrong to suggest, as APPrO has, that "high-deliverability storage is only available from the utility" and that "there was sufficient evidence that high deliverability storage is available from others" this was not the finding expressed in the NGEIR Decision. In fact, at page 69 of the NGEIR Decision, the NGEIR Panel acknowledged this by stating that: "These services are not currently offered, indeed they need to be developed, and investments must be made in order to offer them." On the other hand, APPrO asserted that only TCPL offers some intra-day services but only in some parts of Ontario through a utility connection or a direct connection with TCPL. To the extent that APPrO's facts may be correct, there is sufficient question whether the NGEIR Decision erred by requiring that monopoly services be priced at market.

For these reasons, and given the potential material impact on power generators, the Board finds that the alleged errors raised by APPrO with respect to Union are material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected this could change the outcome of the decision. The Board will therefore pass this matter to a reviewing panel of the Board to investigate and make findings as it sees fit.

With respect to the Rate 316 issue, on page 70 of the NGEIR Decision, the Board stated:

> The Board notes that Enbridge committed to offer Rate 316, whether or not the Tecumseh enhancement project goes ahead, and to price it on cost pass-through basis. The Board expects Enbridge to fulfill this commitment.

The Board further noted:

> The Board will refrain from regulating the rates for new storage services, including Enbridge's high deliverability service from the Tecumseh storage enhancement and Rate 316, and Union's high deliverability storage, F24-S, UPBS and DPBS services.

At the motion hearing, APPrO indicated that it wanted the Board to issue an order requiring Enbridge to do what the Board has asked them to do, that is, to offer Rate 316 on a cost pass-through basis. Enbridge has already committed to offering this service in the Settlement Proposal and the Board has already noted this commitment in this decision. This panel does not see any further value to issuing an order stating the same.

However, there is some ambiguity with respect to Rate 316. The NGEIR decision seems to indicate that the Board will refrain from regulating Rate 316. Even so, the Enbridge NGEIR Rate Order has a tariff sheet for Rate 316 with storage rates for maximum deliverability of 1.2% of contracted storage space. This seems to indicate that Rate 316 is regulated for 1.2% deliverability storage and the Board has refrained from regulating rates for deliverability higher than 1.2%. It is difficult to recognize this distinction from the NGEIR Decision.

For these reasons, the Board finds that APPrO has raised a question as to the correctness of the order or decision in respect of the Rate 316 issue and that a review

panel of the Board could decide that the decision or order should be varied (by way of clarification or otherwise), cancelled or suspended.

Section M: Aggregate Excess Method of Allocating Storage

In the NGEIR proceeding, Union had proposed the "aggregate excess" method in allocating storage to its customers. The aggregate excess method is the difference between the amount of gas a customer is expected to use in the 151-day winter period and the amount that would be consumed in that period based on the customer's average daily consumption over the entire year. Kitchener had proposed two alternative methodologies. The NGEIR Decision approved Union's proposal.

Kitchener argued that the NGEIR Decision failed to take into account that the aggregate excess methodology, because it uses normal weather to estimate a customer's storage allocation, unnecessarily increases utility rates and therefore offends the requirement of just and reasonable rates under sections 2 and 36 of the Act. Kitchener also argued that there is no evidence to support the Board's conclusion that aggregate excess meets the reasonable load balancing requirements of the Kitchener utility.

Union argued that these issues were fully considered by the Board in its NGEIR Decision and that Kitchener has not brought forward any new evidence or any new circumstances; it is simply attempting to reargue its case.

Findings

With respect to Kitchener's allegation that the NGEIR panel did not consider the impact on rates, the Board notes that the record in the NGEIR proceeding indicates that the impact on utility rates was examined extensively. The issue was raised in Kitchener's pre-filed evidence at page 5 and again at page 14. The transcript from the proceeding also indicates that there was extensive discussion on costs (Volume 12, pages 39-133) during cross examination and additional undertakings were filed on the topic. The record also indicates that the previous Panel questioned the witnesses specifically with respect to the costs and a utility's exposure to winter spot purchases (Volume 12, pages 183-184). The issue was again raised by Kitchener in argument (Volume 17, page 153)

and once again questions were posed to Kitchener's counsel by the NGEIR panel (Volume 17, pages 159-164).

The NGEIR Decision (pages 93 to 95) refers to Kitchener's alternatives and arguments and deals with that issue squarely when it finds that:

> The Board does not agree that the allocation of cost based storage should be determined assuming colder than normal weather or that it should be designed to provide protection against a cold snap in April. To do so would result in in-franchise customers as a group being allocated more cost-based storage than they are expected to use in most winters. As noted in 6.2.2, the Board concludes that the objective of the allocation of cost-based storage space is to assign an amount that is reasonably in line with what a customer is likely to require. In the Board's view, that supports continuing the assumption of normal weather.

In the Board's view, the record clearly indicates that this issue was thoroughly examined in the NGEIR proceeding. The Board believes that Kitchener's claim that the NGEIR panel failed to account for the fact the aggregate excess methodology increases utility rates is without merit. Kitchener presented no new evidence or new circumstances which would convince the Board that this issue is reviewable.

To support its second claim (i.e. the Board erred because there is no evidence to support the Board's conclusion that the aggregate excess method meets the reasonable load balancing requirements of the Kitchener utility), Kitchener argues that the Board ignored the evidence which suggests that the actual allocation to Kitchener over the past 6 years has been at a contractual level which is 10.6% higher than aggregate excess.

The Board disagrees. Contrary to Kitchener's assertions, the NGEIR Decision clearly considers the fact that Kitchener's aggregate excess amount is 10.6% lower than its current contracted amount. Specifically, the NGEIR Decision states:

> The current contract expires March 31, 2007 and Kitchener is seeking a long-term storage contract with Union effective April 1, 2007. It is concerned that its allocation of cost-based storage in a new contract will be restricted to the amount calculated under the aggregate excess method. Kitchener's current aggregate excess amount is 3.01 million GJ, 10.6% lower than the amount of cost-based storage in its current contract.

The NGEIR Decision also states:

> The issue is whether Kitchener has made a compelling case that its use of storage is so different from the assumed use underlying the aggregate excess method that Union should be required to develop an allocation method just for Kitchener. The Board finds Kitchener has not successfully made that argument.

In view of the above, the Board is convinced that the NGEIR panel considered the evidence before it. The claim by Kitchener that the Board ignored the evidence in question and based its decision only on the evidence provided by Union is demonstrably incorrect.

Kitchener also claims that the Board committed an error in fact by stating (at page 85 of the NGEIR Decision), that Enbridge uses a methodology similar to that of Union's. In the Boards' view, this reference is simply to provide context and is clearly referring to the mathematical formula used to calculate the storage allocation. It is certainly not a matter capable of altering the decision on this point.

In conclusion, the Board finds that the matters raised by Kitchener are not reviewable.

Section N: Orders

Having made its determinations on the Motions, the Board considers it appropriate to make the following Orders.

The Board Orders That:

The Motions for Review are hereby dismissed without further hearing, with the following exceptions. The Board's findings on Union's 100 PJ cap on cost-based storage for in-franchise customers and the additional storage requirements for in-franchise gas-fired generators are reviewable for the purposes set out in this Decision.

Section O: Cost Awards

The eligible parties shall submit their cost claims by June 5, 2007. A copy of the cost claim must be filed with the Board and one copy is to be served on both Union and Enbridge. The cost claims must be done in accordance with section 10 of the Board's Practice Direction on Cost Awards.

Union and Enbridge will have until June 19, 2007 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

The party whose cost claim was objected to will have until June 26, 2007 to make a reply submission as to why their cost claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on both Union and Enbridge.

DATED at Toronto, May 22, 2007

Original signed by

_____

Pamela Nowina
Presiding Member and Vice Chair

Original signed by

_____

Paul Vlahos
Member

Original signed by

_____

Cathy Spoel
Member

TAB 3

2007 WL 5095121 (Ont. Energy Bd.), 2007 CarswellOnt 9174

2007 CarswellOnt 9174

Hydro One Networks Inc., Re

In the Matter of the Ontario Energy Board Act, 1998, S.O. 1998, c.15 (Schedule B)

In the Matter of an application by Hydro One Networks Inc. for the review and approval of connection procedures

In the Matter of an application by Great Lakes Power Limited for the review and approval of connection procedures

In the Matter of Rules 42, 44.01 and 45.01 of the Board's Rules of Practice and Procedure

Ontario Energy Board

K. Quesnelle Member, P. Nowina V-Chair, P. Sommerville Member

Judgment: November 26, 2007
Docket: EB-2007-0797

Counsel: None given

Subject: Public; Civil Practice and Procedure

Public law --- Public utilities -- Operation of utility -- Equipment -- Construction and alteration of supply lines.

Public law --- Public utilities -- Regulatory boards -- Practice and procedure -- Miscellaneous.

Statutes considered:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

s. 1 -- referred to

s. 56 -- referred to

s. 71 -- considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 7.03 -- referred to

R. 43 -- referred to

R. 43.01 -- referred to

R. 44 -- referred to

R. 44.01 -- referred to

R. 45.01 -- considered

Decision of the Board:

Introduction

1 On September 6, 2007, the Board (the "Connection Procedures panel") issued its Decision and Order in relation to applications by Hydro One Networks Inc. ("Hydro One") and Great Lakes Power Limited ("GLPL") under section 6.1.5 of the Transmission System Code (the "Code") for the review and approval of their respective connection procedures (the "Connection Procedures Decision"). The file number assigned to Hydro One's application was EB-2006-0189 and the file number assigned to the application by Great Lakes Power Limited was EB-2006-0200. The applications were dealt with together in a combined proceeding (the "Combined Proceeding").

2 On October 9, 2007, Hydro One filed with the Board a Notice of Motion for the review of two of elements of the Connection Procedures Decision; namely:

i. section 3.3 of the Connection Procedures Decision, which deals with the issue of contestability and more specifically with the issue of activities that a transmitter is prohibited by section 71 of the *Ontario Energy Board Act, 1998* (the "Act") from undertaking in relation to customer-owned facilities (the "Section 71 Issue"); and

ii. section 3.5 of the Connection Procedures Decision, which deals with provisions of the Code that address transmission plans and cost responsibility for connection facilities (the "Code Issue").

3 The relief sought by Hydro One in its Notice of Motion is:

i. an order that Hydro One may enter into, and honour, contracts with third parties wherein Hydro One provides to those third parties services ancillary to or related to transmission and distribution; and

ii. an order that there be no capital contribution responsibility on the part of transmission customers whenever Hydro One is constructing a line connection facility serving multiple transmission customers.

4 Hydro One's Notice of Motion also requested the following additional relief:

> i. an order staying the implementation and effects of sections 3.3 and 3.5 of the Connection Procedures Decision until a reasonable time after a decision is rendered in respect of its Motion; and
>
> ii. an order extending the October 12, 2007 deadline by which it must file new connection procedures concerning matters affected by sections 3.3 and 3.5 of the Connection Procedures Decision.

Notice of Hearing and Procedural Order No. 1

5 On October 26, 2007, a Notice of Hearing and Procedural Order No. 1 (the "Notice and PO") was issued indicating that the following four preliminary issues arising from Hydro One's Notice of Motion (the "Preliminary Issues") would be heard:

> i. the request by Hydro One to waive the deadline for filing of its Notice of Motion;
>
> ii. the threshold question, under Rule 45.01 of the *Rules of Practice of Procedure* (the "Rules"), of whether sections 3.3 and 3.5 of the Connection Procedures Decision should be reviewed;
>
> iii. Hydro One's request for an order staying the implementation and effects of sections 3.3 and 3.5 of the Connection Procedures Decision; and
>
> iv. Hydro One's request for an order extending the deadline by which it must file new connection procedures concerning matters affected by sections 3.3 and 3.5 of the Connection Procedures Decision.

6 The Notice and PO indicated that all parties of record to the Combined Proceeding would be adopted as intervenors in this proceeding as would the following other persons: Bruce Power L.P., further to the letter filed by it with the Board on October 16, 2007 indicating an intention to intervene in the hearing of Hydro One's Motion; all parties to Hydro One's most recent transmission rates case (proceeding EB-2006-0501); and all licensed transmitters. The Notice and PO was served by the Board Secretary accordingly.

7 The Notice and PO established a schedule for the filing of a summary of submissions on the Preliminary Issues by Hydro One, Board staff and intervenors, and an oral hearing date for the hearing of the Preliminary Issues. A summary of submissions was filed by Hydro One on November 1, 2007. On November 7, 2007, summaries of submissions were filed by the following: the Ontario Power Authority ("OPA"), the Independent Electricity System Operator ("IESO"), the Power Workers' Union ("PWU"), Bruce Power L.P. ("Bruce Power"), Ontario Power Generation Inc. ("OPG"), the Electricity Distributors Association ("EDA"), the Electrical Contractors Association of Ontario ("ECAO") and Board staff. The following other parties filed letters with the Board indicating their intention to participate in the review proceeding, but did not file summaries of submissions or appear at the oral hearing on the Preliminary Issues: GLPL, the Association of Major Power Consumers in Ontario ("AMPCO"); Five Nations Energy Inc.; Cambridge & North Dumfries Hydro; Kitchener-Wilmot Hydro Inc.; and Waterloo North Hydro Inc.

8 This panel of the Board heard oral submissions on the Preliminary Issues on November 9, 2007. In addition to Board staff and the parties that filed summaries of submissions, a representative of PowerStream Inc. also appeared at the hearing on behalf of the Coalition of Large Distributors ("CLD") and indicated the CLD's support for Hydro One's Motion to review and for the EDA's submissions. The CLD is comprised of the following electricity distributors: PowerStream Inc., Enersource Hydro Mississauga Inc., Horizon Utilities Corporation, Hydro Ottawa Limited, Toronto Hydro-Electric System Limited and Veridian Connections Inc.

The Combined Proceeding

9 Section 6.1.5 of the Code contains a requirement that all licensed transmitters in Ontario file their respective connection procedures for Board approval. Connection procedures describe how a transmitter will process requests to connect to its transmission system and requests to modify existing connections. Section 6.1.4 of the Code identifies a number of matters that must be addressed in a transmitter's connection procedures, including security deposits, economic evaluations, contestability and dispute resolution. In accordance with section 6.1.3 of the Code, a transmitter's connection procedures must be consistent with the Code.

10 Once approved by the Board, the connection procedures (together with applicable provisions of the Code) govern the relationship between the transmitter and a customer during the period leading to connection of the customer's facilities.

11 At issue in the Combined Proceeding were the connection procedures of Hydro One and GLPL.

12 The procedural history of the Combined Proceeding is described in detail in the Connection Procedures Decision and will not be repeated here. For present purposes, it is sufficient to note the following:

> • Of the active parties to this proceeding, the following were intervenors in the Combined Proceeding from the outset: ECAO, the IESO, OPG and PWU. Board staff was also an active participant in the Combined Proceeding.
>
> • On June 7, 2006, Procedural Order No. 3 was issued inviting submissions on what is referred to here as the Code Issue. The invitation was extended to a number of potentially interested parties beyond those that were already parties of record to the Combined Proceeding. Of the active parties to this proceeding, Hydro One and the following intervenors filed submissions in response to Procedural Order No. 3: CLD, the EDA, the OPA and PWU. Board staff also filed a submission. The following parties that confirmed their interest in, but did not actively participate in, this proceeding also filed submissions on the Code Issue during the Combined Proceeding: GLPL, AMPCO, Five Nations Energy Inc., Cambridge and North Dumfries Inc., Kitchener-Wilmot Hydro Inc. and Waterloo North Hydro Inc. (the latter three in a joint letter with Guelph Hydro Electric Systems Inc. that pre-dated but was received by the Board after the date of issuance of Procedural Order No. 3).

13 The Connection Procedures Decision addressed a variety of issues associated with the connection procedures of the two transmitters. Among those were the Section 71 Issue and the Code Issue.

14 With respect to the Section 71 Issue, the Connection Procedures panel concluded that section 71 of the Act acts as a bar to the performance of certain activities by a transmitter. As discussed below, divergent views have been expressed as to the scope of the Connection Procedures Decision in this regard. That aside, the Connection Procedures panel noted in the Connection Procedures Decision that ownership of facilities was a "critical distinction". While the construction of transmitter-owned connection facilities is an integral component of the transmission of electricity, the construction of customer-owned connection facilities cannot be seen in the same light. The construction of customer-owned projects should be seen as independent undertakings by customers, the design and placement of which may be informed by the transmitter but which are fundamentally private in nature. The Connection Procedures Decision also noted that the effect of a transmitter competing in the marketplace for the construction of customer-owned connection facilities is to raise the spectre of potential cross-subsidization of unregulated activities by the regulated transmission revenue requirement.

15 The findings of the Connection Procedures panel with respect to the Code Issue are more complex. The Code Issue relates to the interpretation of the Code, and more specifically to section 6.3.6 of the Code, to the nature of the

transmission plans referred to in that section, and to the implications for cost responsibility. To place the matter into context, at issue was Hydro One's interpretation of the Code to the effect that a capital contribution is not required for the construction or reinforcement of connection facilities which Hydro One characterizes as being for "Local Area Supply" or "LAS", except for advancement costs. An LAS connection facility is defined by Hydro One as a radial line (or line connection facility) that serves more than a single customer. It follows that any plan regarding a connection facility that is required to meet the needs of more than one customer would, under Hydro One's approach, be a transmission plan within the meaning of section 6.3.6 of the Code, and a capital contribution would therefore not be required.

16 The key findings in the Connection Procedures Decision in relation to the Code Issue can be summarized as follows:

> i. taken as a whole, section 6.3 of the Code provides that a capital contribution will be required in almost all cases where a transmitter is enhancing its equipment to accommodate the needs of a line connection;
>
> ii. section 6.3.6 of the Code provides a qualified exception that allows a customer to avoid a capital contribution where an enhancement has been "otherwise planned" by a transmitter to address system needs; and
>
> iii. whether a plan meets the criteria giving rise to the exception in section 6.3.6 of the Code is a matter of evidence to be considered by the Board on a case-by-case basis. The key feature of a plan giving rise to the exception is the extent to which it addresses system reliability and integrity concerns which arise from the transmitter's assessment of projected load growth and not the requirements of a specific customer or customers within a local area. It cannot be a "plan" that is created primarily at the request of a connecting customer. Where planning involves joint studies between Hydro One and one or more distributors to meet different timing and supply needs such as load growth, such plans are viewed as customer-driven where a capital contribution would be required.

17 The Connection Procedures Decision also discussed two further matters that have been raised by parties to this proceeding. The first is the regulatory treatment of capital contributions paid by distributors to transmitters. The second is adjustments to cost responsibility that can and should be made where a transmitter's plans call for the installation of unique system elements as part of the proposed reinforcement of connection facilities.

The Threshold Question

1. Scope of the Power to Review

18 Under Rule 45.01 of the Rules, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

19 The Notice and PO provided guidance in relation to this threshold question, based in part on the Board's May 22, 2007 Decision with Reasons on the NGEIR Motions (proceeding EB-2006-0322/EB-2006-0338/EB-2006-0340) (the "NGEIR Motions Decision"). Specifically, the Notice and PO indicated that the Board would wish to be satisfied that Hydro One's Motion to review raises a question as to the correctness of the Connection Procedures Decision, and is not being used as an opportunity to reargue the case.

20 The moving party must also satisfy the Board of the following:

- To the extent that an error in the Connection Procedures Decision is alleged:

- that the error is identifiable, material and relevant to the outcome of the Connection Procedures Decision and that, if the error is corrected, the reviewing panel could change the outcome of the Connection Procedures Decision (in other words, there is enough substance to the issues raised that a review based on those issues could result in the reviewing panel deciding that the Connection Procedures Decision should be varied, cancelled or suspended); and

- that the findings of the Connection Procedures panel are contrary to the evidence that was before that panel, the panel failed to address a material issue, the panel made inconsistent findings, or another error of a similar nature was made by the panel.

- To the extent that the incompleteness of evidence is raised as a ground for review:

  - that the facts now sought to be brought to the attention of the Board could not have been discovered by reasonable diligence at the time; and

  - that those facts are material and relevant to the outcome of the Connection Procedures Decision and that, if considered by the reviewing panel, could change the outcome of the Connection Procedures Decision (in other words, the facts are such that a review based on a consideration of those facts could result in the reviewing panel deciding that the Connection Procedures Decision should be varied, cancelled or suspended).

21 With one exception, the parties did not expressly take issue with the threshold test as articulated above. In its written summary of submissions and at the oral hearing, the EDA argued that the Board cannot limit its substantive jurisdiction through its procedural rules, and that the issue of whether there is a "question as to the correctness of the order or decision" goes beyond whether there was a simple error. If the implications of a decision were not matters before the Board at the relevant time, and have only emerged subsequently, it is in the EDA's view appropriate for the Board to reconsider the conclusions that were reached in the decision.

22 During the oral hearing, the OPA submitted that while reviews initiated by motion are subject to the constraints identified in Rule 44 of the Rules, the Board has a broader power to review under Rule 43.01. That broader power can be exercised even if the Board finds that the moving party has not made a case for review under Rule 44.

23 During the oral hearing, Board staff agreed that the Board has wide latitude in relation to reviews, under both Rule 43 and Rule 44. However, in the case of an applicant-driven motion to review, it is not sufficient to simply reargue the case, or to argue that a different outcome might have been preferred. The moving party must show that the decision at issue is incorrect in an identifiable, relevant and material way.

24 This panel acknowledges that the scope of the Board's power to review is broad, but remains of the view that a motion to review must raise a question as to the correctness of the decision at issue. The Board has previously indicated, in the NGEIR Motions Decision and in the Notice and PO, that the grounds for review set out in **Rule 44.01** are not exhaustive. It may be that the emergence of previously unknown or unforeseen implications of a decision could be considered a ground for review. However, in the circumstances of this case this panel does not need to decide that issue given the findings below.

2. The Section 71 Issue

a. Introduction

25 Hydro One's Notice of Motion raised the following grounds for review in relation to the Section 71 Issue:

i. the Connection Procedures panel erred in that there was incomplete evidence and information, which evidence and information could not have been discovered by reasonable diligence at the time or which were otherwise not brought to the attention of the Connection Procedures panel, thereby raising a question as to the correctness of the Connection Procedures Decision;

ii. the Connection Procedures panel erred in that, because of the absence of evidence and information referred to in (i), the Connection Procedures panel failed to protect the interests of consumers (third parties to whom Hydro One provides services and Hydro One's ratepayers), thereby raising a question as to the correctness of the Connection Procedures Decision; and

iii. the Connection Procedures panel's interpretation of section 71 of the Act occurred in the absence of relevant evidence before it, thereby raising a question as to the correctness of the Connection Procedures Decision.

26 Hydro One's Motion in relation to the Section 71 Issue was supported by OPG, Bruce Power, the OPA, PWU, the EDA, CLD and the IESO. ECAO and Board staff submitted that the threshold for review has not been met on the Section 71 Issue.

27 During the course of this proceeding, it became clear that there were in fact two facets to the Section 71 Issue, one relating to the scope or reach of section 3.3 of the Connection Procedures Decision and the other to the substance of it.

b. Scope of the Connection Procedures Decision

28 A focus of Hydro One's Notice of Motion and the principal focus of the written and oral submissions of certain other parties was the implications of section 3.3 of the Connection Procedures Decision for the ability of Hydro One to perform a variety of services related to customer-owned facilities. Specific examples cited were metering, maintenance and repair, protection and control and emergency services provided to other utilities.

29 In the written summary of its submissions, Board staff submitted that section 3.3 of the Connection Procedures Decision stands only for the proposition that section 71 of the Act prohibits a transmitter from constructing, or acting as contractor in relation to the construction of, connection facilities in circumstances where the customer has elected not to require the transmitter to construct and own the connection facilities.

30 During the oral hearing, Hydro One asserted that the Connection Procedures Decision is not susceptible of being given the narrower meaning proposed by Board staff. ECAO, on the other hand, confirmed that, from its perspective, the Connection Procedures Decision deals only with this narrower issue, although it did add that section 71 of the Act would in ECAO's view similarly affect some of the other services identified by Hydro One and other parties.

31 At the end of the oral hearing, this panel provided some direction on this issue; namely, that pending a determination of the threshold question, the parties should proceed on the basis that the Connection Procedures Decision "made no determination on section 71 for services other than the construction of new connection facilities owned by customers".

32 This panel finds that the Connection Procedures Decision addresses only the narrower issue of the impact of section 71 of the Act on the ability of a transmitter to construct new connection facilities in circumstances where the customer has elected not to require the transmitter to construct and own the connection facilities (what is described in Hydro One's connection procedures as "Option 3 - Customer Builds and Owns the Connection Facility", where

the customer has elected to decline "Option 1 -- Hydro One Builds and Owns the Connection Facility"). This, in the panel's view, is the obvious conclusion from the purpose and record of the Combined Proceeding and of section 3.3 of the Connection Procedures Decision itself. As noted by ECAO during the hearing, the word "construct", "construction" or "build" is used no less than eleven times on the two pages of the Connection Procedures Decision that comprise section 3.3. This panel acknowledges that there is one sentence in the Connection Procedures Decision that does not contain one of those words, or a word of similar import. That sentence states that "[T]he Board therefore concludes that section 71 of the Act prohibits Hydro One from acting as a contractor on behalf of the customer in relation to customer-owned facilities". It appears to be the principal basis for the broader interpretation taken or assumed by a number of parties. That sentence must be read in context and, when read in context, is not understood by this panel as expanding the scope of section 3.3 of the Connection Procedures Decision beyond the issue of the construction of customer-owned connection facilities as described above.

33 Given this finding, it is not necessary for this panel to further consider the arguments of the parties in relation to the correctness of the Connection Procedures Decision as it relates to services other than the construction of new customer-owned connection facilities. This should not be misunderstood as an expression of this panel's views as to the status of those other services in relation to section 71 of the Act one way or another. The status of those services was not determined by the Connection Procedures panel, and it is not determined by this panel now.

c. The Threshold Question Relative to the Narrower Scope

34 The question remains as to whether a case has been made for review of section 3.3 of the Connection Procedures Decision, when considered relative to the narrower scope attributed to that Decision above.

35 It is not altogether clear from the submissions of some of the parties whether the arguments supporting a review on the Section 71 Issue apply, or apply with equal force, regardless of the scope attributed to that aspect of the Connection Procedures Decision. This is perhaps most acute in relation to the submissions of Hydro One. During the oral hearing, it did become clear that the immediate concerns of OPG and Bruce Power were related to services other than the construction of customer-owned connection facilities. The IESO, for its part, voiced a remaining concern regarding the potential for the Connection Procedures Decision to have an adverse effect on the timeliness of the construction of facilities. This panel prefers to be over-inclusive in this regard, and the discussion below therefore summarizes all of the principal arguments made by the parties other than those that appear to the panel to clearly and exclusively relate to services other than the construction of customer-owned facilities.

36 The arguments made by the parties can be classified along the following lines: (i) arguments relating to the adequacy of the notice given in the Combined Proceeding in relation to section 71 of the Act; and (ii) arguments relating to the factors considered by the Connection Procedures panel and, in particular, that panel's reliance on ownership of the facilities as the basis for the finding that a transmitter cannot construct connection facilities where the customer has elected not to require the transmitter to construct and own the connection facilities. In relation to each category of argument, Hydro One and parties supporting its Motion to review asserted that there are identifiable errors of fact, law or mixed fact and law, and that those errors are relevant and material.

i. Positions of the Parties on Adequacy of Notice

37 This argument was perhaps made most forcefully by PWU. PWU submitted that the Board failed to give adequate notice that the interpretation of section 71 of the Act was to be an issue in the Combined Proceeding and that this defect constitutes a failure of natural justice for which the only remedy is a new hearing. In support of its argument, PWU noted the following: that the Notice of Hearing issued in relation to the Combined Proceeding made no reference to section 71 of the Act nor to the fact that the statutory limits on the activities of transmitters was to be the subject of review in the Combined Proceeding; that the Connection Procedures panel did not promulgate an issues list of any kind and, in particular, no issues list identifying the section 71 issues as an issue for decision in the Com-

bined Proceeding; that interrogatories and responses to interrogatories cannot determine or alter the scope of a proceeding; and that all intervenors in the Combined Proceeding were directed to file their written submissions at the same time and therefore had no opportunity to respond to the written submissions of other intervenors on the issue.

38 Hydro One submitted that the interpretation of section 71 of the Act was not an issue in the Combined Proceeding or was at best tangential and that, as a result, evidence was lacking on the matter even if the issue is narrowly construed. Hydro One also echoed the submission of PWU to the effect that the scope of a hearing cannot be enlarged simply by the asking of an interrogatory.

39 The IESO noted that neither the Notice of Application nor any of the procedural orders issued in the Combined Proceeding identified the interpretation of section 71 of the Act as an issue. The IESO also noted that the substantive position of Board staff and the ECAO was only made known on the last day for written submissions in the Combined Proceeding, and stated that intervenors where caught unaware. The IESO further noted that no extension of time was given for further submissions on the issue.

40 Bruce Power stated that it was not aware that the issues to be decided in the Combined Proceeding could lead to the Connection Procedures panel interpreting section 71 of the Act in a manner that severely adversely affects Bruce Power. Bruce Power also stated that, had it been aware that the Connection Procedures panel would make the decision that it did, it would have participated in the Combined Proceeding. In Bruce Power's view the outcome of the Combined Proceeding would have been different had the Connection Procedures panel had additional facts before it in relation to the implications of its interpretation of section 71 of the Act.

41 Both ECAO and Board staff submitted that notice of the Section 71 Issue was not lacking in the Combined Proceeding. It was noted by Board staff that the Notice issued in relation to the Combined Proceeding referred interested parties to Hydro One's application. Both Board staff and ECAO also noted that Hydro One's application included Hydro One's proposed connection procedures, and that those connection procedures expressly contemplated that Hydro One may be part of the bidding process to act as a contractor to the connecting customer if hired by the customer in relation to connection facilities that will be built and owned by the customer. Board staff and the ECAO also stated that each filed interrogatories on that statement in the early stages of the Combined Proceeding, specifically questioning whether section 71 of the Act allows Hydro One to construct customer-owned connection facilities. Board staff further noted that its interrogatory went further to express the view that this activity by Hydro One is not permitted by section 71 of the Act. ECAO and Board staff also stated that parties to the Combined Proceeding had an opportunity to make submissions, and noted that Board staff and ECAO made submissions on this issue, as did Hydro One in reply.

ii. Positions of the Parties on Factors Considered by the Connection Procedures Panel

42 As noted above, section 3.3 of the Connection Procedures Decision identifies ownership of facilities as a "critical distinction", and also expresses concerns regarding cross-subsidization.

43 Hydro One submitted that while ownership is relevant to the interpretation of section 6.6 of the Code, it is not the test to be used in interpreting section 71 of the Act. Hydro One noted that section 6.6 of the Code does not take any rights away from a transmitter but rather provides for customer choice, whether that choice is exercised initially or as a result of a competitive bidding process. Hydro One also noted that ownership is not referred to in section 71 of the Act. Further, had the Connection Procedures panel had before it additional evidence on the issue of the interpretation of section 71 of the Act during the Combined Proceeding, it would in Hydro One's view have been clear that the test of who owns the assets is not appropriate even on the narrower issue of the construction of customer-owned connection facilities. Hydro One stated that the evidence would have shown that the services provided by Hydro One are ancillary to, or related to, transmission and distribution and therefore not prohibited by section 71 of the Act.

44 Hydro One also submitted that the Board erred in fact and law by not considering the following: the harm caused to third parties and to the marketplace by forbidding Hydro One to perform work when the customer specifically chooses Hydro One from the available list of service providers; the fact that Hydro One's provision of services actually reduces rates; and the fact that Hydro One's ability to provide external transmission services improves efficiency and resource utilization.

45 As to the matter of cross-subsidization, Hydro One submitted that the Board erred in its concern in that regard. Hydro One stated that it prices all of its external work using transparent, fully-allocated costs. Hydro One also noted that ample safeguards are already in place to prevent cross-subsidization from occurring.

46 PWU submitted that the ownership "bright line" is both arbitrary and irrelevant to whether the work is "transmission" work for the purposes of section 71 of the Act. In PWU's view, the distinction required by section 71 between what is or is not transmission work must be one of substance (i.e., the nature and function of the assets in question) and not of form (i.e., ownership). If the assets in question are "transmission assets", then in PWU's submission their construction and maintenance is a "transmission" function.

47 PWU also submitted that the Connection Procedures Decision places reliance on the potential for cross-subsidization, yet no evidence that this phenomenon has actually occurred is referred to in the Connection Procedures Decision. PWU stated that the evidence from Hydro One is precisely to the contrary, and to the effect that ratepayers financially benefit from the construction activity. PWU also asserted that the Connection Procedures Decision is incompatible with the Code and has the effect of amending the Code. Finally, PWU submitted that the Connection Procedures panel's interpretation of section 71 is inconsistent with the objectives set out in section 1 of the Act because it deprives customers of having the alternative of contracting with a transmitter to provide these services in cases where the customer considers it to be in its interests to do so.

48 The IESO agreed with and adopted Hydro One's submissions on the question of ownership as a critical distinction, and submitted that this is in error as it is inconsistent with the interpretation and definition under section 56 of the Act. The IESO stated that section 56 of the Act defines the term "transmit", and has as its focus the operation of the integrated transmission system and not the ownership of the assets. In the IESO's view, the Connection Procedures Decision introduced what amounted to a significant change in the interpretation of section 71 of the Act, with significant adverse impacts on consumer interests with respect to the adequacy, reliability and quality of electricity service.

49 The IESO also submitted that the record of the Combined Proceeding is incomplete and does not address: the impact of the prohibition on customers of Hydro One; the cost implications for consumers; and whether customer-owned transmission facilities are, in fact, integral to the business activity of transmitting electricity.

50 The OPA submitted that the Board's conclusion that permissible construction work should be determined solely on the basis of whether the assets are included in rate base is problematic from both a policy and legal perspective. The OPA stated that it is legally questionable whether asset ownership should be treated as determinative for purposes of section 71 of the Act. The OPA further stated that the Connection Procedures Decision is inconsistent with previous Board decisions and the governing legislation. In particular, the OPA referred to the Board's decision in proceeding RP-1999-0044 where the Board indicated that it would be guided by practical considerations in relation to the issue of what constitutes a distribution or transmission activity, and concluded that it would be premature to consider directing Hydro One to exit the connection construction market until the Board has evidence before it on the competitiveness of that market. This panel notes that the same decision was cited for the same purpose by the IESO in its submissions.

51 In terms of policy, the OPA submitted that the Connection Procedures panel's conclusion does not allow for

the flexibility and innovation that will be required to enable the province to undertake a necessary review of its policy towards transmission expansion to meet renewable supply. Particularly given Ontario's current situation, it is in the OPA's view a mistake to constrain the approach to who builds transmission by reference to categorical legal conclusions based on property rights or legal ownership.

52 OPG submitted that while ownership of assets is a factor to be considered in determining whether services performed by Hydro One are part of the transmission of electricity under section 71 of the Act, it is not the only factor. Other relevant factors identified by OPG include, for example, the nature of the particular services performed by Hydro One, the extent to which the performance of the services is ancillary to Hydro One's responsibilities as a transmitter and the extent to which the customer-owned facilities are integral to the transmission system. OPG submitted that the Board should therefore re-examine the proposition that ownership is a "critical distinction" and undertake a full examination of all of the factors that would properly bear on the scope of section 71 of the Act.

53 The EDA submitted that the provisions of the Code regarding contestability were intended to allow for competition in the construction of connection facilities as a means of bringing down the overall cost that will ultimately be charged either to ratepayers or to connecting customers. In that regard, the Connection Procedures Decision appears in the EDA's view to lead to a perverse result in that it excludes from the competitive market one of the competitors. The EDA stated that this, in turn, seems on its face at least to be contrary to the normal principles of competition. While controlling cross-subsidization is important, in the EDA's view it is not properly controlled through an interpretation of section 71 of the Act. Moreover, the EDA noted that there are already rules in place to address cross-subsidization. The EDA submitted that the Board needs to consider a wider range of principles and a wider range of implications in relation to the interpretation of section 71 of the Act, whether as a continuation of Hydro One's Motion to review or in a separate process. The EDA noted in this regard that it is not clear that the Connection Procedures panel had the kind of record before it in the Combined Proceeding necessary to take a fully purposive approach to the question of how to interpret section 71 of the Act. The EDA also submitted that the Connection Procedures Decision does not address the issue of economic efficiency and the ratepayer benefits that flow from these activities.

54 ECAO submitted that Hydro One's connection procedures themselves make reference to ownership, and the Code has distinctions as to ownership. It is therefore reasonable that ownership be used as a basis for determining Hydro One's ability to perform competitive connection work. ECAO also noted that, in its view, the Connection Procedures Decision is not inconsistent with the Code.

55 ECAO also submitted that, contrary to Hydro One's assertion, the Connection Procedures panel did consider the benefits of providing choice in the marketplace in the Connection Procedures Decision. In this regard, ECAO noted its evidence in the Combined Proceeding regarding competition in the connection work market, and also noted that section 71 of the Act would not preclude an affiliate of a transmitter from carrying out customer connection work. ECAO also submitted that the facts referred to in Hydro One's submissions were reasonably discoverable at the time of the Combined Proceeding. In ECAO's view, the evidence referred to by Hydro One is not new, and could have been put forward during the Combined Proceeding had Hydro One acted with reasonable diligence. ECAO also noted that at no time after receiving the interrogatories or at any other time during the Combined Proceeding did Hydro One take the position that additional evidence was required or that there was any reason why Hydro One could not respond in a satisfactory manner to the Section 71 Issue. Finally, ECAO submitted that the facts which Hydro One now seeks to introduce would have no impact on the decision of the reviewing panel.

56 Board staff shared ECAO's view that Hydro One had ample and fair opportunity to make its case during the Combined Proceeding and did not, at the time, assert that it was unable to do so. Board staff also submitted that the facts now sought to be brought forward by Hydro One are not material or relevant to the outcome of the Connection Procedures Decision on the Section 71 Issue, as they are not such as could result in the Board deciding that a transmitter is not prohibited by section 71 of the Act from constructing, or acting as a contractor in relation to the construction of, customer-owned connection facilities. With respect to the issue of ownership, Board staff expressed the

view that the arguments against the relevance of ownership as factor in relation to section 71 of the Act in the context of the construction of customer-owned facilities were not compelling.

iii. Board Findings

57 This panel finds that there is no reviewable error in section 3.3 of the Connection Procedures Decision.

58 This panel does not find the arguments relating to inadequacy of notice to be persuasive, nor do we agree with Hydro One's characterization of the issue as tangential to the review of its connection procedures. Interested parties had notice of Hydro One's connection procedures from the outset. The issue of Hydro One bidding to construct customer-owned connection facilities was squarely raised by Hydro One's connection procedures. Board staff and ECAO identified that this in turn raised an issue relative to section 71 of the Act, and other interested parties would no doubt have been capable of doing the same based on a review of Hydro One's connection procedures. The issue was canvassed by a number of parties to the Combined Proceeding. Based on the record of the Combined Proceeding, it was not argued at the time that the issue was out of scope, that adequate notice of the issue was lacking or that sufficient opportunity was not given to allow parties to make their case on the issue. This panel finds that there was no failure to give adequate notice in the circumstances of the Combined Proceeding.

59 With respect to the issue of the factors considered by the Board in relation to section 71 of the Act, this panel finds that a case has not been made that the Connection Procedures Decision is incorrect in that regard. Whatever might be the relevance of the ownership of facilities in relation to other services provided or business activities performed by a transmitter, in this panel's view it was a proper factor to consider in the circumstances of the Combined Proceeding and in relation to the narrow issue of the construction of customer-owned connection facilities that was before the Connection Procedures panel as described above.

60 This panel notes, without deciding the relevance of the evidence one way or another, that there was evidence before the Connection Procedures panel regarding the state of competition in the connection construction market. This panel does not believe that any of the other additional facts identified as being lacking in the Combined Proceeding are such as would lead us to decide that the Connection Procedures Decision should be varied, cancelled or suspended.

61 For the reasons noted earlier, this panel understands the scope of the Connection Procedures Decision to be limited to the narrower question of the impact of section 71 of the Act on the ability of a transmitter to construct new connection facilities in circumstances where the customer has decided not to require the transmitter to construct and own the connection facilities. This panel does not believe that this review proceeding should become a forum in which to determine the status of other services in relation to section 71 of the Act for the first time. Accordingly, this panel will not, for that purpose, review the Connection Procedures Decision on its own motion in the absence of a reviewable error.

62 This panel does wish to address a further related issue that was raised by a number of parties during this proceeding. Specifically, Hydro One, OPG, the EDA and PWU each argued that, even were the Connection Procedures Decision to be given the narrower scope suggested by Board staff, the Connection Procedures panel's analysis of or approach to section 71 of the Act in that Decision, and in particular its reliance on ownership as a critical distinction, would per force apply to any other services performed by a transmitter in relation to customer-owned assets. In other words, the Connection Procedures Decision establishes the analytical framework by which the Board will be governed in determining whether other services are or are not permitted by section 71 of the Act.

63 In this panel's view, it does not follow from our conclusion (that there was no reviewable error in section 3.3 of the Connection Procedures Decision) that the findings in the Connection Procedures Decision are determinative of the factors that could be considered by the Board were it to be called upon to consider other services in the future.

3. The Code Issue

a. Introduction

64 Hydro One's Notice of Motion raised the following grounds for review in relation to the Code Issue:

> i. the Connections Procedures panel erred by not considering a Code-based conclusion that could have been reached and instead based its conclusions on principles and definitions not found in the Code; and
>
> ii. the Connection Procedures Decision failed to protect the interests of consumers and was contrary to regulatory principles, thereby raising a question as to the correctness of the Connection Procedures Decision.

65 Hydro One's Motion in relation to the Code Issue was supported by the OPA, the EDA, CLD and the IESO. Board staff submitted that the threshold for review has not been met on the Code Issue. OPG, Bruce Power, PWU and ECAO made no submissions on the Code Issue.

b. Positions of the Parties

66 Hydro One submitted that the Board erred in fact and law by making a finding in the Connection Procedures Decision that was contrary to the evidence. In particular, the Board did not consider or reach a Code-based conclusion that could have been reached and instead based its conclusion on principles and definitions not found in the Code.

67 Hydro One asserted that its Local Area Supply plans are plans within the meaning of section 6.3.6 of the Code, and referred to the Board's July 25, 2005 "Synopsis of Changes to the Transmission System Code" as confirming both the intention underlying the Code and the consistency of Hydro One's approach with that intention. Hydro One noted that, by contrast, the Connection Procedures Decision states that the only exemptions from the requirement for a capital contribution are the cost responsibility exemptions associated with "unique system requirements" and "system reliability-only plans", neither of which concepts have a basis in the Code. According to Hydro One, the Code rightly does not refer to "system reliability-only" plans because, as the Connection Procedures Decision itself acknowledges, there can be ambiguity between system reliability and customer-driven plans. Hydro One submitted that transmission planning is an integrated exercise, that plans to address reliability and load growth are inexorably intertwined and that the Connection Procedures Decision fails to adequately address the issue. Hydro One noted that the Connection Procedures Decision treats section 6.3.6 of the Code as an exception to other cost responsibility provisions contained in the Code. In Hydro One's view, however, section 6.3.6 is the rule and not the exception.

68 Hydro One also submitted that the Connection Procedures Decision can result in outcomes that are inconsistent and unfair. Hydro One stated that the fact that the consequences of the Connection Procedures Decision implicitly assigns cost responsibility in identical circumstances based on the mechanics of the process by which the plan was developed, rather than based on who benefits, results in inconsistency. Hydro One submitted that the Code was, however, intended to assign cost responsibility based on benefits, and not on "who spoke to whom". In Hydro One's submission, this also calls into question the correctness of the Connection Procedures Decision.

69 Hydro One further submitted that the Connection Procedures Decision fails to recognize or adequately address the fact that Local Area Supply facilities are primarily for the benefit of the pool, and that that benefit is directly related to system reliability and integrity. Hydro One also stated that the Connection Procedures Decision also fails to recognize or adequately address the risk that properly planned Local Area Supply facilities will not be placed in service because of one or more customers' inability to raise the capital for contributions. In so doing, the Connection

Procedures Decision in Hydro One's submission fails to protect the interests of consumers.

70 Finally, Hydro One submitted that, in adopting a case-by-case approach to determining whether a plan meets the criteria giving rise to the exception in section 6.3.6 of the Code, the Connection Procedures Decision has created an unmanageable level of regulatory uncertainty and financial risk and therefore fails to protect the interests of consumers in this respect as well. Hydro One stated that customers will not know with any certainty whether a capital contribution is required, or the amount of that contribution, and Hydro One would need to incur delays in the development of leave to construct applications to seek clarity in advance for each project on the capital contribution issue. In Hydro One's submission, the approach embodied in the Connection Procedures Decision can lead to inconsistent and unfair outcomes, and is unworkable and impractical.

71 The IESO adopted and supported Hydro One's submissions on the Code Issue, and submitted that a review of the Connection Procedures Decision is required to ensure that the interests of consumers in relation to the reliable operation of the IESO-controlled grid are protected. The IESO also submitted that the Connection Procedures Decision creates uncertainty regarding cost responsibility, and may impede the efficient and timely study, planning, approval and implementation of transmission projects required for system reliability.

72 The OPA submitted that the mandate of the Connection Procedures panel in reviewing Hydro One's connection procedures was to determine if the procedures were consistent with the Code. The OPA stated that consistency, in this context, means logically compatible. The OPA further submitted that Hydro One's Local Area Supply plan approach is logically compatible with the Code, and achieves an appropriate balance between two somewhat conflicting concepts; namely, the responsibility of a transmitter to meet the needs of load growth and the responsibility of load customers to meet their own load growth needs. In the OPA's submission, the Connection Procedures panel erred in applying a higher standard, and in not accepting Hydro One's approach without a demonstration that the approach is inconsistent with the Code. Moreover, the OPA stated that the Connection Procedures Decision effectively replaces Hydro One's transmission planning practice by a new, and less workable, planning practice put forward by the the Connection Procedures panel. In the OPA's view, Hydro One's approach is more workable than the approach reflected in the Connection Procedures Decision because it is more predictable. The OPA further asserted that the approach in the Connection Procedures Decision also creates the risk that customers may become reluctant to communicate with transmitters about their supply needs because of fear that the communication will trigger a requirement that the customer pay for an upgrade. The OPA submitted that this would not constitute good planning practice, and raises regulatory risk. Finally, in the OPA's view, the Connection Procedures Decision creates incentives for distortions between connection and network assets.

73 The focus of the EDA's submissions on the Code Issue was in relation to the statements contained in the Connection Procedures Decision regarding the regulatory treatment of capital contributions made by distributors to transmitters. In particular, the EDA referred to the statement in the Connection Procedures Decision that such capital contributions are a current expense. The EDA noted, however, that in the past such capital contributions, which can be very large, have been treated as being appropriately added to rate base as opposed to being a current expense. The EDA submitted that the Connection Procedures Decision therefore creates the potential for inconsistency between the approach used earlier by the Board, for example in the 2006 electricity distribution rate process, and the current state of affairs. The EDA also noted that the treatment of such capital contributions is of significant importance to distributors, and in the EDA's view needs to be addressed further.

74 Board staff submitted that there was no error in the Connection Procedures Decision in relation to the Code Issue. The Connection Procedures Decision reflects and is consistent with the cost responsibility policy of the Board as developed during the consultations that lead to the revisions to the Code and as ultimately embedded in the Code. That policy has three prongs; first, that cost responsibility for customer-driven connection facilities should rest with the customer; second, that this should also be the case where the facilities are triggered by the needs of more than one customer; and third, that there is an exception that applies when a connection facility was otherwise planned by the transmitter. Board staff also submitted that the implications of the Connection Procedures Decision raised by

parties to this proceeding were largely before and considered by the Connection Procedures panel in the Combined Proceeding.

c. Board Findings

75 This panel finds that there is no reviewable error in section 3.5 of the Connection Procedures Decision.

76 The Connection Procedures Decision interprets and applies the Code in a manner that this panel believes to be consistent with the terms of the Code itself and with the cost responsibility policy that currently underlies the Code. Sections 6.3.1, 6.3.2 and 6.3.4 of the Code reflect the principle that a customer that requires new or upgraded connection facilities to meet its needs must bear the associated costs. Other sections of the Code speak more specifically to the principle that cost responsibility remains with the customer even where the work is triggered by more than one customer (sections 6.3.14 to 6.3.16 of the Code) or where the work avails to the benefit of more than one customer (sections 6.2.24, 6.2.25, 6.3.9 and 6.3.17 of the Code). The Connection Procedures panel's findings reflect the view that these sections articulate the general rule, and that section 6.3.6 of the Code must operate as an exception to them. While the balance achieved by the Connection Procedures panel may differ from the balance proposed by Hydro One and other parties, it is not for that reason incorrect.

77 By and large, the implications of the Connection Procedures Decision that have been raised in this proceeding were before the Connection Procedures panel at the relevant time. That this is the case is reflected in the Connection Procedures Decision itself, which describes in some considerable detail the positions of the parties to the Combined Proceeding on the matter.

78 This panel does acknowledge that the issue of the regulatory treatment of capital contributions made by distributors was not a matter addressed by the parties to the Connection Procedures Decision. However, even were we to agree that the Connection Procedures Decision was in error in relation to that particular finding, such error would not be considered by this panel as relevant to the outcome of the Connection Procedures Decision in relation to section 6.3.6 of the Code and the related issue of cost responsibility. The issue raised by the EDA is fundamentally a rates issue, and this panel believes that it is best addressed in future rates cases or through a process aimed at resolving the issue on a more generic basis.

79 This panel also acknowledges that the Connection Procedures Decision has not eliminated all uncertainty with respect to the application of section 6.3.6 of the Code.

80 However, the Connection Procedures Decision does provide parameters around what the Board might consider to be a transmission plan for purposes of that section of the Code and, in that regard, provides guidance where none existed before. In addition, the issue of cost responsibility remains subject to Board oversight in the context of leave to construct applications or rate applications, as the case may be depending on the nature of the facilities in question. Absent more prescriptive rules in the Code, certainty is not obtained until those processes have been completed.

81 This panel will also not on its own motion review section 3.5 of the Connection Procedures Decision in the absence of a reviewable error. The parties to this proceeding have raised, both now and during the Combined Proceeding, questions of transmission policy that are better addressed in a policy process than they are in a review hearing. The Board as a whole is aware of the issues, and it remains open to the Board to initiate such a process if it considers that to be necessary or desirable at this time.

The Other Preliminary Issues

1. The Request for a Stay

82 Given this panel's findings above on the threshold question, Hydro One's request for a stay has become moot and need not be considered further.

2. The Delay in Filing

83 In accordance with Rule 42.03 of the Rules, the deadline for filing a motion to review the Connection Procedures Decision expired on September 26, 2007. Hydro One's Notice of Motion was filed on October 9, 2007. In the covering letter accompanying the Notice of Motion, Hydro One indicated that it was unable to submit its Notice of Motion within the prescribed time period, and requested that the Board accept the Notice of Motion for filing and for review.

84 In its written submissions, Hydro One identified the following as reasons for its inability to meet the 20-day filing deadline: that Hydro One required time to weigh the significance and scope of the Connection Procedures Decision and the options available to it and to other parties that would be harmed by the Decision; that Hydro One required sufficient time to inform its Board of Directors of the level of concern and allow time for seeking direction on whether to ask the Board to review the Connection Procedures Decision; that during that time a growing number of customers and other parties continued to raise concerns about the implications of the Connection Procedures Decision; and that Hydro One consulted with the Board's Chief Compliance Officer and customers to arrange a meeting to discuss the implications of the Connection Procedures Decision, but that it became apparent that a formal review by the Board would be more effective. During the oral hearing, Hydro One acknowledged that it should, prior to expiry of the 20-day deadline, have notified the Board of its inability to meet that deadline as required by Rule 7.03 of the Rules.

85 Parties that supported Hydro One's Motion to review also supported Hydro One's request to waive or extend the deadline for filing the Notice of Motion given the importance of the issues at hand. ECAO submitted that Hydro One's request should be denied. Board staff took no position on the issue.

86 Given this panel's findings above on the threshold question, Hydro One's request to waive or extend the deadline for filing of the Notice of Motion has also largely become moot, but for its request to extend the time in which to file revisions to those portions of its connection procedures that are affected by sections 3.3 and 3.5 of the Connection Procedures Decision.

87 While this panel does not find Hydro One's reasons for the delay in filing to be particularly persuasive, it is nonetheless prepared to exercise its discretion and accept the late filing. This panel does wish to remind the parties that adherence to the Board's deadlines is not a matter to be treated lightly, and that the inability to comply should be brought to the attention of the Board promptly.

3. Extending the Time to File Revised Connection Procedures

88 Under the terms of the Connection Procedures Decision, Hydro One was required to file revised connection procedures by October 12, 2007. Hydro One has complied with this direction, except for those portions of its connection procedures that are affected by sections 3.3 and 3.5 of the Connection Procedures Decision.

89 Parties that supported Hydro One's Motion to review and that spoke to Hydro One's request to extend the deadline for filing portions of its revised connection procedures also supported that request. ECAO submitted that Hydro One's request should be denied. Board staff submitted that it did not oppose the request.

90 As a practical matter, the deadline for filing has now expired. This panel does not believe that any public interest would be served in denying Hydro One's request.

Cost Awards

91 The Notice and PO indicated that the Board may order costs in this proceeding. The Notice and PO also indicated that any party that was determined by the Connection Procedures panel to be eligible for costs in the Combined Proceeding and any party other than the EDA that was determined by the Board to be eligible for costs in the Hydro One transmission rates case (proceeding EB-2006-0501) would also be eligible for costs in this proceeding.

92 This panel has determined that cost awards will be available in this proceeding, and that costs awarded will be recovered from Hydro One.

93 Two parties to this proceeding have the benefit of automatic eligibility for costs under the terms of the Notice and PO; namely, ECAO and AMPCO. ECAO has actively participated in this proceeding. By letter dated November 1, 2007, AMPCO noted its interest in participating in the review of Hydro One's Motion to review should the Board decide to proceed with a substantive review of the issues, and indicated that it would be seeking costs for the review proceeding. AMPCO did not file a written summary of submissions, nor did it appear at the oral hearing on the Preliminary Issues. On the basis of the foregoing, it is not expected that AMPCO will file a cost claim.

94 By letter dated November 1, 2007, the EDA requested that it be found eligible for an award of costs in this proceeding, on the basis that it represents a distinct group of transmission customers whose interests are not otherwise represented before the Board and that it is in a position to add further perspective to the record that will contribute to the Board's process. As reflected in the Notice and PO, this panel previously determined that the EDA is not eligible for cost awards in this proceeding notwithstanding that it was eligible for an award of costs in the Hydro One transmission rates case. This panel notes that the EDA is not eligible for cost awards based on the criteria set out in section 3 of the Board's *Practice Direction on Cost Awards*, and remains of the view that no special circumstances exist that would persuade us to deviate from the Board's normal practice.

95 *THE BOARD THEREFORE ORDERS THAT:*

1. Hydro One Networks Inc. shall revise those portions of its "Transmission Connection Procedures" and of its Connection and Cost Recovery Agreement that are affected by sections 3.3 and 3.5 of the Connection Procedures Decision in accordance with the findings of the Board as set out in the Connection Procedures Decision. The revised "Transmission Connection Procedures" and Connection and Cost Recovery Agreement shall be filed with the Board for review and approval, and delivered to all intervenors in the Combined Proceeding, no later than *December 10, 2007*.

2. The Electrical Contractors Association of Ontario shall submit its cost claim by *December 10, 2007*. A copy of the cost claim must be filed with the Board and one copy is to be served on Hydro One Networks Inc. The cost claims must be completed in accordance with section 10 of the Board's *Practice Direction on Cost Awards*. In accordance with the Board's letter of November 16, 2007, cost claims for work performed prior to that date must be based on the tariff as it existed prior to the changes to the tariff that were announced on November 16, 2007.

3. Hydro One Networks Inc. will have until *December 28, 2007* to object to any aspect of the costs claimed by the Electrical Contractors Association of Ontario. A copy of the objection must be filed with the Board and one copy must be served on the Electrical Contractors Association of Ontario.

4. The Electrical Contractors Association of Ontario will have until *January 7, 2008* to make a reply submission as to why the cost claim should be allowed. A copy of the reply submission must be filed with the Board and one copy is to be served on Hydro One Networks Inc.

96 The Board will then issue its decision on cost awards. The Board's costs may also be dealt with in the cost awards decision. Service of cost claims, objections and reply submissions on parties may be effected by courier, registered mail, facsimile or e-mail.

END OF DOCUMENT

TAB 4

In the Court of Appeal of Alberta

Citation: International Association of Machinists and Aerospace Workers, Local Lodge No. 99 v. Finning International Inc., 2007 ABCA 319

Date: 20071017
Docket: 0603-0123-AC
Registry: Edmonton

Between:

International Association of Machinists and Aerospace Workers, Local Lodge No. 99

Appellant (Applicant)

- and -

Finning International Inc.,
Finning (Canada)
Division of Finning International Inc., and
O.E.M. Remanufacturing Company Inc.

Respondents (Respondents)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice June Ross

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 22nd day of December, 2005
Filed on the 25th day of April, 2006
(Q.B. Docket: 0503-10391)

Memorandum of Judgment

The Court:

[1] The Alberta Labour Relations Board ("Board"), in a reconsideration of its earlier decision, denied the application of International Association of Machinists and Aerospace Workers, Local Lodge No. 99 (the "Union") for successorship and common employer declarations following the reorganization of certain operations of Finning International Inc. ("Finning"). The judicial review application was dismissed, and the Union appeals that determination.

[2] We allow the appeal based on the errors of the Board in the application of its reconsideration power in this instance, and the errors in its analysis on the successorship issues. As that is sufficient to overturn the Board's reconsideration decision, it is unnecessary to comment on the common employer issues raised by the Union on this appeal.

FACTS

[3] The Union is the certified bargaining agent for a unit of Finning employees, described on the Board certificate as "[a]ll employees of Finning (Canada) Division ["Finning Canada"] except office, clerical, sales and security personnel". 445 of Finning's 1058 Edmonton employees belonged to the Union's bargaining unit. The collective bargaining agreement was effective from May 1, 2002 to April 30, 2005.

[4] Finning is the authorized dealer for Caterpillar equipment in Alberta, British Columbia, Yukon and part of the Northwest Territories. Finning Canada, an unincorporated division of Finning, repaired and overhauled a variety of Caterpillar heavy equipment components that originated from Finning operations. Its Edmonton operations included a Component Rebuild Centre ("CRC"), a parts distribution centre, a used equipment facility, a used parts facility, Pacific Fluid Power (which remanufactures and chromes hydraulic cylinders), an Agricultural Branch, a Rentals operation, Power Systems, and the West Edmonton Branch and Head Office. Approximately 160 bargaining unit members were employed at the CRC as of June 2004, which constituted approximately seven per cent of Finning Canada's 2554 employees. The CRC was the source of roughly four per cent of Finning Canada's annual revenue (approximately $55M).

[5] By 2001, the CRC was nearing obsolescence and Finning considered constructing a new CRC. A feasibility study dated October 22, 2001 was prepared to "complete a functional program and prepare a cost estimate and schedule for a proposed new facility" to house the CRC operations. That report suggested that minimal renovations to the existing CRC, estimated at $19.8 - $24.5M, would cost significantly less than investing in a new facility, which itself was estimated to cost somewhere in the range of $28 - 38M (using October 2001 dollars and excluding GST and land costs). Finning engaged the Union in lengthy discussions about changes to the collective agreement that might attend a new CRC facility, although no agreement was reached.

[6] Gerald McLaughlan ("McLaughlan") became aware of Finning's interest in building a new CRC and approached Finning representatives around January 2003. He proposed adopting a business model that had previously proven successful in McLaughlan's other ventures, and would involve the creation of a new company that would have Finning as its major customer. McLaughlan's proposal led to a second meeting, where it was suggested that Finning finance the construction of a new CRC facility and supply the new company with its rebuilding work as the CRC's primary customer. The new company would also retain the opportunity to develop similar work from other sources. The proposal evolved, with Finning's involvement kept "highly secret." At an early stage of negotiations, Finning's labour relations counsel attended meetings in order to provide advice on how to avoid successorship and common employer declarations.

[7] At some point, the arrangement culminated in a decision to reorganize Finning's CRC operations. The reorganization was carried out through a complex series of transactions, most of which occurred in the winter of 2003-2004. The fundamental elements involved a restructuring of various related corporate entities; the execution by those corporate entities of a joint venture agreement ("JVA"); the investment by Finning of approximately $87M to capitalize the joint venture, which was secured through promissory notes, debentures and guarantees of the related entities; and the execution of a customer service agreement to contract out the work previously carried out by Finning Canada at the CRC.

Corporate Transactions

[8] O.E.M. Remanufacturing Company Inc. ("OEM") was created by the amalgamation of three related companies on January 1, 2004. Following that amalgamation, Matrix Ventures Ltd. ("Matrix"), a company initially owned by McLaughlan, became the sole owner of OEM. Matrix's share structure consisted of Class "A" common shares and Class "B" preferred shares. McLaughlan held the Class "A" common shares in trust for Rebuilding Enterprises Inc. ("Rebuilding"), a wholly owned subsidiary of Finning. This ensured that Finning would not be publicly disclosed as the registered shareholder. The Class "B" shares were owned by a wholly owned company (Reman Ventures Inc., or "Reman") that belonged to McLaughlan. The Class "B" shares had limited rights attached to them, such as:

1. they could not be owned by anyone not party to the JVA;

2. they had limited voting rights, which did not include voting on the election of directors or on operational decisions;

3. they included a right to dividends, so long as the operational and financial performance targets were met by the holder for that year;

4. they were not entitled to share in capital distribution, other than to recover the redemption price and any declared dividends;

5. they were redeemable at the option of Rebuilding upon termination of the joint venture.

Joint Venture Agreement

[9] The JVA, dated June 1, 2003, named Rebuilding, Reman, Matrix and OEM as parties. It provided that the business was to be owned and carried on by Matrix and OEM, with Rebuilding and Reman to hold shares in these companies commensurate with their respective contributions to the business. Rebuilding's contribution involved the provision of capital and financing to permit the development, establishment and operation of a "world class" component remanufacturing business, including a component remanufacturing facility. Reman was to contribute the operating experience and expertise, and would be paid an annual management fee.

[10] The JVA contained strict controls over Reman and imposed regular reporting and meeting obligations. It also contained certain restrictive covenants and non-compete provisions against both Reman and McLaughlan. The board of directors for both OEM and Matrix would be comprised of McLaughlan and Lynn Patrick, a Finning nominee. All joint venture decisions would require unanimous resolution by the boards, though day-to-day authority was delegated to Reman to be exercised in a manner consistent with the best interests of the joint venture. Rebuilding was given the option to terminate the JVA immediately upon breach of the JVA.

Customer Services Agreement

[11] Finning Canada contracted out its remanufacturing work to OEM by virtue of the Customer Services Agreement, dated January 1, 2004. OEM was to be the exclusive supplier within the Finning territory for certain re-manufacturing services, but retained the right to provide re-manufacturing services to other industry customers, including Finning's competitors. The Customer Services Agreement was to be in place for a ten-year term, renewable in five year increments. It was anticipated that revenue from Finning's outsourcing contract would provide approximately $65M in annual revenue to OEM, which was estimated as being almost ninety per cent of OEM's forecast revenues.

Press Release

[12] On June 23, 2004, Finning advised the Union and the CRC employees that Finning was closing the CRC in March 2005 and would lay off the CRC employees. Also on that date, Finning issued a press release containing the following announcements:

1. Finning was closing its CRC;

2. Finning was investing, through a wholly owned subsidiary, in a component rebuilding facility, which would be built and independently operated by OEM;

3. OEM would take over all component rebuilding work that Finning Canada was currently undertaking by virtue of a customer services agreement;

4. As a result of this restructuring, Finning Canada would "for all intents and purposes ... no longer be in the component rebuilding business" but Finning would "move into component rebuilding business on a much larger scale."

[13] At that time, McLaughlan and Finning anticipated that the land, building and equipment for the new facility would have an aggregate cost of approximately $65M, and expected it to be ready for occupancy by March 2005.

Other Considerations

[14] In addition to considering and analyzing these agreements, the panel convened by the Board ("Original Panel") found that while there was ongoing contact between Finning and OEM in the development of the physical plant and workflow planning, little was borrowed from the CRC's plant design. Finning provided little equipment to the new CRC (only $300,000 of the approximate $18M spent on equipment derived from the original CRC). Finning also did not assign to OEM any existing contracts for re-manufacturing services, nor did OEM acquire any of Finning's goodwill. With respect to employees, only 49 of OEM's 180 employees came from Finning Canada's CRC, including some mid-level management personnel. Though OEM did not make blanket offers of employment to the CRC employees, it sponsored a job fair for Finning candidates and solicited Finning's opinions about some of the CRC employees.

DECISIONS BELOW

[15] The Original Panel determined that Finning was not a mere financier of the project, but an equity participant whose rights and interests did not come to an end upon repayment. Based on the terms of the JVA, Finning bore responsibility for the costs of the operations and the risks of failure. Additionally, as the sole beneficial owner of the common shares, Finning was entitled to capture most of the profits from the fruits of the project. McLaughlin's interest, on the other hand, came from the preferential shares, which he could be forced to divest at any time. His compensation consisted of his right to dividends and the management fee paid to Reman.

[16] The Original Panel considered Finning's dealings with OEM to consist of a minor infusion of Finning's "know how", the exchange of a small amount of relatively unimportant equipment, and

the transfer of some employees. On the surface, the Original Panel considered that the reorganization appeared to simply be an outsourcing of work that typically would not lead to a finding of successorship. However, due to the non-arm's length relationship, a more thorough analysis was required. Upon closer scrutiny, which took into account the $87M capital infusion to the OEM operations, the Original Panel concluded that the evidence justified a successorship declaration.

[17] The Original Panel also concluded that the degree of control warranted a declaration that OEM, Rebuilding and Finning were common employers. Finning possessed high level, strategic control over the joint venture due to the appointment of a nominee on the boards of Matrix and OEM (whose approval is necessary) and through regular reporting by McLaughlan to Finning.

[18] At the request of Finning, Finning Canada and OEM, the Board convened a new, five member panel ("Reconsideration Panel") to reconsider the Original Panel's decision. In light of the Board's practice not to record its proceedings, the Reconsideration Panel had access to those Exhibits submitted to the Original Panel but not the testimonial evidence. In these circumstances, the reconsideration proceeded based on the factual findings made by the Original Panel and the assertions made by the parties in their written and oral submissions.

[19] Following its review, the Reconsideration Panel considered the Original Panel to have "made a number of errors of law in its analysis." In analyzing the successorship issues, the Reconsideration Panel determined that the Original Panel failed to distinguish between Finning "and the part of the business alleged to have been transferred, namely the CRC." Because the capital contribution did not come from the CRC, the Original Panel was considered to have erred by factoring it into the successorship analysis. The Reconsideration Panel also questioned the relative importance given by the Original Panel to McLaughlan's managerial expertise in the establishment and operation of OEM. The Reconsideration Panel concluded that OEM was not a successor to Finning in these circumstances. The Reconsideration Panel also determined that the failure of Finning to exercise day-to-day control precluded a common employer declaration in these circumstances.

[20] The Union filed a judicial review application. The chambers judge adopted the patently unreasonable standard of review, but also considered the Union's arguments on the reasonableness standard. Under either standard, the chambers judge upheld the Reconsideration Panel's decision.

LEGISLATION

[21] The provisions of the ***Labour Relations Code***, R.S.A. 2000, c. L-1 ("***Code***") relevant to this appeal are:

> 12(4) The Board has exclusive jurisdiction to exercise the powers conferred on it by or under this Act and to determine all questions of fact or law that arise in any matter before it and the action or decision of the Board on them is final and conclusive for all purposes, but the

Board may, at any time, whether or not an application has commenced under section 19(2), reconsider any decision, order, directive, declaration or ruling made by it and vary, revoke or affirm the decision, order, directive, declaration or ruling.

...

19(1) Subject to subsection (2), no decision, order, directive, declaration, ruling or proceeding of the Board shall be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered or proceedings taken in any court, whether by way of injunction, declaratory judgment, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

(2) A decision, order, directive, declaration, ruling or proceeding of the Board may be questioned or reviewed by way of an application for judicial review seeking an order in the nature of certiorari or mandamus if the originating notice is filed with the Court and served on the Board no later than 30 days after the date of the decision, order, directive, declaration, ruling or proceeding, or reasons in respect of it, whichever is later.

...

46 (1) When a business or undertaking or part of it is sold, leased, transferred or merged with another business or undertaking or part of it, or otherwise disposed of so that the control, management or supervision of it passes to the purchaser, lessee, transferee or person acquiring it, that purchaser, lessee, transferee or person is, where there have been proceedings under this Act, bound by those proceedings and the proceedings shall continue as if no change had occurred, and

(a) if a trade union is certified, the certification remains in effect and applies to the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it, and

(b) if a collective agreement is in force, the collective agreement binds the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it as if the collective agreement had been signed by that person.

...

> 47(1) On the application of an employer or a trade union affected, when, in the opinion of the Board, associated or related activities or businesses, undertakings or other activities are carried on under common control or direction by or through more than one corporation, partnership, person or association of persons, the Board may declare the corporations, partnerships, persons or associations of persons to be one employer for the purposes of this Act.
>
> (2) If, in an application under subsection (1), the Board considers that activities or businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, person or association of persons in order to avoid a collective bargaining relationship, the Board shall make a declaration under subsection (1) with respect to those corporations, partnerships, persons or associations and the Board may grant any relief, by way of declaration or otherwise, that it considers appropriate, effective as of the date on which the application was made or any subsequent date.

ISSUES

[22] The following issues need to be addressed in this appeal:

(1) What is the correct standard of review of the Board's decision?

(2) What deference, if any, is owed by the Reconsideration Panel to the Original Panel's findings?

(3) Did the reviewing judge correctly apply the standard of review when reviewing the Board's reconsideration of the successorship application?

Standard of Review

[23] There are two fundamental issues in this appeal. The first involves the interpretation and application of the successorship provisions of the ***Code***, while the second issue pertains to the Board's reconsideration power. The Union argues that the successorship issue raises questions of law, since the Reconsideration Panel's decision incorporates a new twist on the applicable tests. Alternatively, the Union posits that if the Reconsideration Panel identified the appropriate tests, it erred in the application of those tests in these circumstances. The second issue pertains to the

Board's use of its reconsideration powers in these circumstances, specifically whether appropriate deference was given to the findings of the Original Panel.

[24] The chambers judge must correctly identify and apply the appropriate standard of review: ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at para. 43, [2003] 1 S.C.R. 226 ("***Dr. Q***"). The purpose of undertaking a standard of review analysis is to determine "the legislative intent of the statute creating the tribunal whose decision is being reviewed": ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 at para. 26 ("***Pushpanathan***"); ***Dr. Q*** at para. 21. This is assessed using the pragmatic and functional approach, which considers the following four factors:

(1) the presence or absence of a privative clause;

(2) the nature of the problem;

(3) the relative expertise of the tribunal on the particular question or issue;

(4) the purpose of the act as a whole, and the provision in particular.

[25] While no single factor is determinative, these factors are assessed as a whole to determine the standard of review. Where these factors suggest that little or no deference should be accorded to the tribunal's decision, the correctness standard applies. If considerable deference is called for, the standard of patent unreasonableness will be applicable. This will arise only in rare instances: ***Voice Construction Ltd. v. Construction & General Workers' Union, Local 92***, 2004 SCC 23, [2004] 1 S.C.R. 609 at para. 18 ("***Voice Construction***"). Where some deference is owed to the tribunal's decision, the appropriate standard will be reasonableness.

Privative Clause

[26] A "full" privative clause is one that declares the tribunal's decisions to be final and binding, and in the absence of a contrary intention otherwise appearing in the privative clause itself, it signals that the tribunal's decision should be accorded deference: ***Pushpanathan***, para. 30. In this appeal, s.12(4) provides the Board with exclusive jurisdiction to determine questions of fact and law and its decisions are "final and conclusive," subject to the Board's ability to reconsider its decision and to judicial review applications initiated pursuant to s.19(2). This Court has previously construed the privative clause as not being "airtight" but nonetheless indicative of a legislative intent that the Board's determinations be subject to deference: ***Alberta Union of Provincial Employees v. Alberta (Provincial Health Authorities)***, 2006 ABCA 356, para 11, 67 Alta. L.R. (4th) 203, leave to appeal to S.C.C. refused, 31823 (May 10, 2007)("***AUPE***"). In ***AUPE v. Alberta (Labour Relations Board)***, 2001 ABCA 299, 293 A.R. 251 at para. 56 ("***Birch Hills***"), Hunt J.A. described this privative clause as strong but not impenetrable.

[27] This factor suggests deference be granted to the Board's decision.

Nature of the Question

[28] Questions of law and jurisdiction are typically accorded less deference, while questions of fact are given greater deference. Where the question is one of mixed fact and law, more deference will be called for if the question is fact-intensive and less deference if it is law-intensive*:* ***Alberta (Workers' Compensation Board) v. Appeals Commission***, 2005 ABCA 276 at para. 30, 371 A.R. 318 ("***Davick***").

[29] The chambers judge characterized most of the Union's arguments relating to the successorship provisions as questions of mixed fact and law, while others (such as the role played by McLaughlan) were strictly issues of fact. This suggested that "significant" deference be given to the Reconsideration Panel's determination on the successorship issues, though not necessarily the highest degree of deference.

[30] The Union also argues for a more probing standard of review on the basis that the Board's decision will have significant precedential impact. As stated by this court in ***Davick*** at para 21: "[a] general proposition with precedential value might qualify as a principle of law, but not its application to particular facts or circumstances." In ***Alberta Union of Provincial Employees v. Lethbridge Community College***, 2004 SCC 28 at para. 19, [2004] 1 S.C.R. 727, the Supreme Court stated that greater deference should be accorded to a decision where there is conflicting jurisprudence on an issue of widespread application.

[31] The characterization of this appeal as involving precedential value should not accord greater deference. On the one hand, the precedential value of this appeal is questionable. Successorship findings are typically based on the unique facts of each case. This is reflected by the Board's Information Bulletin #21 (entitled "Successor Employers"), which provides that each successorship declaration will turn on its own facts. In any event, to the extent that the Reconsideration Panel's decision involves questions of law, the Reconsideration Panel's decision may be subject to a more probing review.

[32] The third issue raised by the Union addresses the standard of review applied by the Reconsideration Panel. While this is a question of law, it falls within the Board's jurisdiction and expertise and is deserving of deference: ***Public Service Alliance of Canada v. Canadian Corp. of Commissionaires (Southern Alberta)***, 2004 ABQB 529 at para. 60, 374 A.R. 252 ("***PSAC***").

Expertise of the Board

[33] A tribunal's expertise has been described as the most important factor in establishing the standard of review: ***Pushpanathan***, para. 32. The relative expertise of the Board is weighed against that of the court, taking into account the nature of the question.

[34] The Board's expertise lies in its "unique insight and expertise in the complex area of labour relations, and in particular, the collective bargaining regime": ***AUPE***, para. 15. See also ***International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.***, [1996] 2 S.C.R. 432 at para. 24 ("***ILWU***").

[35] Here, the fundamental issues relate to the successorship provisions of the ***Code***. The Union argues that this raises questions of statutory interpretation and complex corporate and commercial law matters that fall outside the Board's expertise, and that less deference is warranted. However, successorship issues are unique to collective bargaining regimes and the Board has developed its own expertise in the interpretation of these provisions. See, for example, ***Canadian Union of Public Employees, Local 38 v. Calgary (City)***, 2002 ABQB 587, aff'd at ***Enmax Corporation v. CUPE (Local 38)***, 2003 ABCA 100 ("***Enmax***"), ***Alberta Union of Provincial Employees v. Tri-Municipal Family Leisure Centre Corp.***, 2003 ABQB 511 at para. 12, 344 A.R. 267 ("***Tri-Municipal***").

[36] Further, the circumstances justifying use of the Board's reconsideration power has been considered to fall within the Board's expertise: ***PSAC*** at para. 69.

[37] This factor also suggests that deference be granted to the Board's decision.

Purpose of the Act

[38] The ***Code***'s preamble provides that its purpose is to "facilitate 'mutually effective relationship[s] between employees and employers', including 'fair and equitable resolution of matters' with 'open and honest communication between affected parties', all through a statutory collective bargaining regime": ***AUPE*** para. 16. This regime is administered by the Board, and labour board decisions are often found to be deserving of deference: ***ILWU***.

[39] More importantly, the provincial legislative schemes generally provide that successorship determinations fall within the exclusive jurisdiction of the provincial labour boards: ***GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.***, 2006 SCC 35 at para. 78, [2006] 2 S.C.R. 123 ("***GMAC***"). Courts have routinely applied a standard of patent unreasonableness to successorship determinations made by labour boards, including ***W.W. Lester (1978) Ltd. v. United Association of Journey and Apprentices of the Plumbing and Pipefitting Industry, Local 740***, [1990] 3 S.C.R. 644 at para. 51, 76 D.L.R. (4th) 389 ("***Lester***"), ***Ivanhoe Inc. v. UFCW, Local 500***, 2001 SCC 47, [2001] 2 S.C.R. 565 at para. 24, ***Birch Hills*** at para. 68, ***Enmax*** at para. 16 [cited to Court of Appeal].

[40] With respect to the reconsideration provisions, the ***Code*** provides the Board with broad reconsideration powers that have been described as "a plenary independent power": ***United Brotherhood of Carpenters and Joiners of America, Local 1460 v. Board of Industrial Relations of Alberta***, [1971] 2 W.W.R. 105, 17 D.L.R. (3d) 302 (Alta. S.C.A.D.). It has also been stated that "[t]here is no statutory limitation placed upon the Board's power to reconsider": ***Loutan v. AUPE***, 2002 ABQB 272 at para 16, [2002] A.J. No. 336.

[41] The Union acknowledges that this factor suggests that deference is warranted.

Conclusion on Standard of Review

[42] Balancing the four factors suggests that considerable deference be given to the Reconsideration Panel's decision. We conclude that the standard of review is that of patent unreasonableness on the issues presented on this appeal.

[43] The patently unreasonable standard has been described as one that requires the decision to be "clearly irrational" or "where the result must almost border on the absurd": ***Voice Construction***, para. 18. As stated by the Supreme Court in ***Law Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247, 2003 SCC 20 at para. 52: "a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. ... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand."

ANALYSIS

Reconsideration

[44] We will deal with this issue next, since the degree of deference owed by the Reconsideration Panel to the Original Panel potentially affects the outcome of the other issues.

[45] The Reconsideration Panel in this matter did not expressly identify the basis upon which it chose to reconsider. Nonetheless, all indicators suggest that the Board proceeded on the basis that "correction of substantial errors of fact or errors of law is necessary." It was on this basis that the Board was asked to reconsider the earlier decision. Also telling is the fact that the Reconsideration Panel proceeded based on the Original Panel's findings of fact, did not receive any new evidence and did not have much of the evidence that was considered by the Original Panel. In this context, the Reconsideration Panel should be hesitant to substitute its own appreciation of the facts for that of the Original Panel unless the purported errors are "substantial": ***Thompson, Jon v. Burnco Rock Products Ltd.***, [2003] Alta.L.R.B.R. LD-069 at para. 6 ("***Thompson***"); see also ***Williams v. Teamsters, Local Union 938***, 2005 FCA 302 at para. 7.

[46] This is so for a number of reasons. As established by the Supreme Court, factual findings are given deference on appeal so as to limit the number of appeals and their associated costs, to promote the autonomy and integrity of the trial process, and to respect the advantageous position of the original trier of fact: ***Housen v. Nikolaisen***, 2002 SCC 33 at paras. 16 - 18, [2002] 2 S.C.R. 235. These rationales are no different for reconsideration proceedings before the Board. The number of reconsideration motions, and the associated costs, would skyrocket if every finding of fact were subject to review. Furthermore, deferring to the factual findings of the Original Panel protects the integrity of the process; the Original Panel has to be assumed to have commensurate ability to the Reconsideration Panel since the panel members are equally members of the Board. Finally, the Original Panel has the advantage of actually hearing the evidence and seeing the witnesses. The Reconsideration Panel never had access to much of the evidence before the Original Panel.

[47] These policy reasons have previously been recognized by the Board as an indication that deference should be given to the factual findings of an original panel, particularly where the reconsideration is based on the "correction of substantial errors of fact or errors of law":

> The Board's Information Bulletin #6 sets out the most common grounds upon which it may reconsider a prior decision. The only ground arguably applicable to this case is that "correction of substantial errors of fact or errors of law is necessary". Two limitations upon this ground of reconsideration must be kept in mind. First, the alleged errors must be "substantial", meaning capable of affecting the ultimate result of the case: *Ziedler Forest Industries Ltd. v. IWA, Loc. 1-207* [1987] Alta.L.R.B.R. 257. Second, a reconsideration panel lacks the hearing panel's advantage of having heard and evaluated the evidence. The reconsideration panel should therefore be reluctant to embark on reconsideration where the application is substantially an invitation to re-weigh the evidence and reach a different conclusion. An application for reconsideration based on the hearing panel's handling of factual issues should generally proceed only where there is a plausible allegation that the hearing panel totally misapprehended a key piece of evidence or committed errors in the reception of evidence that may have caused it to come to a wrong conclusion on a fundamental point. Any less stringent standard invites routine re-litigation of factual matters, a result inconsistent with the pressing need for expedition and finality in most labour relations matters.
>
> In assessing whether a hearing panel may have committed an error worthy of reconsideration, an allegation that the Board "considered irrelevant matters" or "failed to take relevant matters into account" is usually unhelpful. Such language mimics the language of judicial

> review of administrative actions before the advent of the "patently unreasonable" test in the 1980s. It obscures the fact that any such allegations depend for their force upon a value judgment that the "matter" - usually a legal argument or a piece of evidence - is indeed relevant or not relevant. Implicit in the assertion that the matter is or is not relevant is an invitation to the reconsideration panel to reach a conclusion on that point without having the benefit of the full evidentiary context that the hearing panel did. Worse, "relevance" is often confused with the weight of evidence or the logical force of argument; so that more often than not, the allegation that irrelevant matters were considered or relevant matters were ignored boils down to an argument that the hearing panel gave too much weight to one side's evidence or legal point or too little weight to the other side's. That is precisely the kind of re-weighing of the evidence or second-guessing of reasonable judgment calls in the application of the law to the facts that a reconsideration panel should be slow to engage in. [***Thompson*** at paras. 6-7]

[48] The Reconsideration Panel considered that it was correcting errors of law on this reconsideration application. Its reasons indicate that the Original Panel "made a number of errors of law", and it failed to identify any purported errors of fact, whether "substantial" or otherwise. The chambers judge, however, took a different view and characterized the issues as questions of fact or of mixed fact and law.

[49] We agree with the chambers judge's view. In this instance, much of the Reconsideration Panel's analysis reassesses the factual inferences and findings made by the Original Panel. For instance, the Reconsideration Panel questioned the Original Panel's analysis in relation to McLaughlan's managerial expertise and its impact on OEM's ability to start up operations. The Reconsideration Panel held that this management expertise was a fundamental and necessary component to OEM's business, and seemingly characterized the Original Panel's conclusion on this point as an error of law. However, the Original Panel's reasons clearly indicate that it too considered McLaughlan to have played a "pivotal role" in the development of OEM's business. Nonetheless, a review of all of the factors resulted in the Original Panel concluding that the test for a successorship declaration had been met.

[50] This leads one to inquire as to the distinction between a question of law and one of mixed fact and law. As explained by the Supreme Court in ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748 at para 39:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A,

> B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

[51] Had the Original Panel failed to take into account McLaughlan's experience, it may have committed an error of law. However, it is clear from the Original Panel's extensive reasons that McLaughlan's managerial experience was factored into the analysis. The issue is one of mixed fact and law.

[52] Despite the mischaracterization of the issues, the chambers judge upheld the Reconsideration Panel's decision as "this was a reconsideration process and the Reconsideration Panel was entitled in the course of making their decision to review all existing and any new evidence and to assign whatever weight it deemed appropriate in coming to its conclusion." No authority was cited to support this proposition. We hasten to point out that no "new evidence" was admitted by the Reconsideration Panel. In our view, the chambers judge was correct in characterizing the issues as questions of fact or mixed fact and law but erred in overlooking the Reconsideration Panel's mischaracterization, particularly where, as here, the characterization of the issue potentially affects the extent to which a Reconsideration Panel should defer to the findings of the Original Panel. In our view, the Reconsideration Panel's mischaracterization of the issue relating to the impact of McLaughlan's experience was so flawed as to be patently unreasonable. There is no explanation in the Reconsideration Panel's decision as to why this should be treated as an error of law. It is patently unreasonable for the Reconsideration Panel to treat a purported error as one of law, without setting out any basis for this characterization, in circumstances where there are obvious factual components to the issue.

Successorship

[53] The chambers judge upheld the Reconsideration Panel's analysis of the successorship applications, finding that the Reconsideration Panel's interpretation of the case law that "the elements of the business that have to be transferred must come from the business alleged to have been transferred" was not unreasonable. This approach, however, is premised on an unduly restrictive successorship analysis that is inconsistent with the expansive and purposive approach mandated by the Supreme Court.

[54] The Supreme Court's decision in ***Lester*** is the leading case in establishing the appropriate successorship analysis. McLachlin J. (as she then was), on behalf of the majority, considered the underlying purpose of the successorship provisions to be the protection of union bargaining rights and arises in situations where a business subject to bargaining obligations has been sold or transferred or when the corporate structure of the business has been changed: ***Lester***, para. 56. The successorship provisions are to be given a broad and expansive interpretation that overlooks the strict legal form of a business transaction: ***Lester*** at para. 64 - 65; see also George Adams, *Canadian Labour Law* 2d ed., (Aurora: Canada Law Book, 2007) at 8 - 4, para. 8.60. Such an approach reflects a labour law trend that points toward greater protection of bargaining rights:

> Little reliance is placed upon the legal form which a business disposition happens to take as between the old employer and its successor. The important factors, as far as collective bargaining law is concerned, is the relationship between the successor, the employees and the undertaking. Common law or commercial law analogies are of limited usefulness. It was the extension of these principles into the realm of collective bargaining law which gave rise to the successor rights problem in the first place and made remedial legislation necessary. [***C.U.P.E. v. Metropolitan Parking Inc.***, [1980] 1 Can. L.R.B.R. 197 ("***Metropolitan***"), p. 207]

[55] Moreover, successorship provisions are remedial and require a purposive interpretation in assessing whether a transfer or disposition has occurred. The focus should be on the realities of the collective bargaining framework and the true effect of the overall transaction. The complexity of modern business transactions warrants such an inquiry, and labour tribunals must be wary of creative corporate restructuring or reorganizations that undermine collective bargaining rights.

[56] Even with a broad and expansive approach to the interpretation of the successorship provisions, the end result must be that "in some way the first company no longer has the business or part of the business, which has been conveyed to the second company": ***Lester*** at para. 67. The test is "whether the transferee has acquired from the transferor a functional economic vehicle": ***Lester*** at para. 70. This requires an examination and comparison of the nature of the predecessor business and that of the successor business. This will typically be done by considering various factors, such as the work covered by the terms of the collective agreement, the type of assets that have been transferred, whether goodwill has been transferred, whether employees are transferred, whether the business is operating in the same location, whether there is continuity of management, and whether there is continuity of the work performed. No single factor is determinative, particularly given the invariable nature of the industries to which a successorship application may arise. In other words, the analysis is necessarily "a fact-driven determination": ***Lester*** at para. 70, ***Construction Workers Union (CLAC) Local 63 & 65 v. Hartland Pipeline Services Ltd.***, [2001] Alta. L.R.B.R. 296 at para. 59.

[57] This approach has been routinely adopted in subsequent Supreme Court and Alberta decisions: see ***GMAC***, ***Ivanhoe Inc. v. UFCW, Local 500***, 2001 SCC 47, [2001] 2 S.C.R. 565, ***Alberta v. Alberta Union of Provincial Employees***, 1998 ABCA 304. It has also been incorporated into the Board's jurisprudence in this area, as reflected by the Board's Information Bulletin #21.

[58] In keeping with this broad and purposive approach, dealings between related entities must be closely scrutinized: ***Lester*** at para. 77, ***Leisure Centre***, paras. 23 - 24. As explained in ***Metropolitan*** at 212:

> In assessing the facts from which a transfer of a business may be inferred, the Board has always been especially sensitive to any pre-existing corporate, commercial or familial relationship between the predecessor and the alleged successor; or between the predecessor, the alleged successor and a third party. Transactions in these circumstances require a more careful examination of the business realities than do transfers between two previously unrelated business entities. The presence of a pre-existing relationship may suggest an artificial transaction designed to avoid bargaining obligations; or (more commonly) there may be a transaction in the nature of a business re-organization which does not alter the essential attributes of the employer-employee relationship, and which should not, having regard to the purpose of section 55, disturb the collectively bargained framework for that relationship. A business may have created a new legal vehicle to carry on all or part of its activities, or it may have redistributed those activities among its existing legal components without changing its essential character or the identity of its real principals or proprietors. The separate legal identity of the components may be superfluous from an economic viewpoint, and there may be an *actual* transfer of business activity from one to the other, even though there is little evidence of a transfer of tangible assets, goodwill, etc. In reality, the employer's business may not be exclusively "his" to transfer, for a common principal, shareholder or corporate parent may have the effective power to extinguish an apparently independent business and transfer the economic functions of another. [emphasis in original]

[59] The creation of myriads of holding companies, corporate divisions, and other ownership structures should not be a factor against a successorship finding in the face of the underlying commercial realities at play.

[60] Situations involving a contracting-out scenario, as is the case here, are particularly challenging, since there will invariably be a close relationship between the contracting parties. A contracting-out scenario will not necessarily result in a finding of a transfer of a part of the business, since the contracting-out of work alone is an insufficient basis upon which to determine that successorship has occurred: ***HCEU v. Danfield Security Services Ltd.***, [1996] Alta.L.R.B.R. 27, ***General Teamsters, Local 362 v. Aspen View Regional Division No. 19***, [2000] Alta.L.R.B.R. 535. Nonetheless, where other factors are present, a successorship finding may result: ***HSAA v. Dynacare Kasper Medical Laboratories***, [1997] Alta.L.R.B.R. 57. The analysis should take into consideration any assistance provided by the party that is contracting out its work (including any capital contributions) to determine if more than just the work is being transferred. We find the Ontario Labour Relations Board's discussion in ***Metropolitan*** at 213-14 to be compelling:

> Work or services performed by A's employees within A's own organization are "contracted out" to B, and B uses his own managerial skills, plant, equipment and "know how" to supply to A, for a price, the product, services, facilities or components formerly produced by A's employees. A, therefore, is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand, or market, for B's product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind of symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part, of a business. *If it is clear on the evidence, however, that B is unable to fulfill A's requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transactions no longer looks like a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B ... or merely permitting B to make use of his (A's) organization while retaining control and direction of the related economic activity.* Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors equivocally demonstrates or forecloses the application of section 55 (or section 1(4)). *If, however, "but for" the transfer of such assets, licences, know how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A's business - albeit a part which A no longer wishes to operate itself.* [emphasis added]

[61] In the Reconsideration Panel's analysis, all elements to be taken into account had to originate "from the business." This approach ignores the commercial realities of the closely related entities, and eliminated from the Reconsideration Panel's consideration Finning's $87M capital infusion, which was perhaps the most critical aspect to the establishment of OEM as a viable, ongoing business operation.

[62] The respondents here argue that the transfer of capital should not be considered in this case because it did not derive from the CRC operations, and that the Reconsideration Panel recognized that modern multi-national corporate enterprises operate by division. In this context, it was argued that the transfer of assets from an unrelated part of the multi-national corporation does not necessarily constitute transfer of the business to a new venture.

[63] We agree, and had Finning transferred equipment from an unrelated plant, that would, at most, be a small factor supporting a successorship finding. However, the transfer of equipment from some unrelated plant is not what is at issue here. Rather, the question relates to the transfer of capital from Finning to OEM. Finning acknowledges that it initially considered investing its resources into constructing a new CRC facility. Had it done so using a new corporate vehicle to set up the new CRC, the transfer of capital would certainly have been a factor favouring a successorship finding. Transfer of capital to OEM towards the construction of a new facility located only a few blocks away from the CRC does not change this reality.

[64] Furthermore, the characterization of the capital contribution as being unrelated to the CRC or its operations simply ignores the underlying reality of the reorganization. The Original Panel recognized that it was unlikely that equipment from the CRC would be transferred, since Finning had allowed it to become obsolete. It regarded the transfer of capital as being in lieu of transfer of equipment. The Original Panel's concluded (at para 71):

> ...we fail to see any meaningful difference between a predecessor that sells land, buildings, equipment and other assets to a successor, and one that provides money to the successor so it can go and buy its own assets.

[65] The logic of this determination is readily apparent. An industrial enterprise can either reinvest its revenues in the enterprise by periodically replacing or updating equipment or it can maximize short-term profitability and allow its equipment to become obsolete. This latter choice will result in the need, at some point, to use the resources of the entire corporation to fund the update if it later becomes necessary.

[66] Here, Finning reached the stage where the CRC was obsolete and considered whether it would re-invest to upgrade the CRC or simply replace it. Regardless of the option chosen, Finning would contribute its capital to the project. Given the liquidity of capital, exact tracing of revenues will be impossible. Had Finning raised the capital by borrowing, or a new share issue, it would nevertheless still be a transfer of capital intended to replace or refurbish the CRC.

[67] We reject the argument that capital contribution ought not to be considered because bargaining rights only attach to the business, and we do not read ***Lester*** as support for that proposition. The Board often considers factors not tied to bargaining rights. For example, the transfer of work is often an important factor in the analysis, despite the notion that bargaining rights do not attach to the "work" alone. Nonetheless, that does not prevent it from being taken into account as a factor in the analysis. The same can be said of a transfer of capital.

[68] The Board has also considered factors that involve contributions from related parties not directly involved in the transfer or disposition. One factor that has often been considered is the presence of any restrictive covenants/non-competition provisions between the related parties. These

covenants often include those given by parties related to the transaction, though not directly involved in the "transfer": see ***USWAA Local 5220 v. GenAlta Recycling, AltaSteel Ltd. and James Metals***, [2001] Alta. L.R.B.R. 376 at para. 59, aff'd at ***GenAlta Recycling Inc. v U.S.W.A.***, Local 5220, [2001] Alta. L.R.B.R. 466, 2001 CarswellAlta 1954 (Q.B.). Similarly, a factor taken into account in ***Carpenters 1325 v. Bay Acrylics and Thiele Drywall***, [1991] Alta. L.R.B.R. 97 was the involvement of an independent, intermediary company that leased the premises of the predecessor company and subletted those same premises to the successor. This was considered to be an alternative form of financing, since it permitted the successor to take over the premises of the predecessor company. These decisions support the notion that a proper successorship analysis must be determined based on the particular facts in each case, using a broad and expansive approach that takes into account the realities of the transaction.

[69] The respondents also argue that the Reconsideration Panel's decision accords with earlier decisions of the Board, particularly the decisions in ***United Food and Commercial Workers International Union Local 280-P v. Canada Packers Inc. And Prairie Margarine***, [1986] Alta.L.R.B.R. 417 ("***Canada Packers***") and ***Tri-Municipal***. Both these decisions may be distinguished on their facts. In ***Canada Packers***, the parent company invested as a fifty per cent shareholder in a new company that engaged in a new business in which ninety per cent of the production was unrelated to what had been done in the phased out operation. In this case, ninety per cent of the production duplicates the work done at the CRC and the parent company provided one hundred percent of the capital for the new plant after it had already designated much of the same money to rebuild the CRC.

[70] In ***Tri-Municipal***, three municipalities built a facility together. One of the three municipalities owned and operated a similar facility, and the union representing the employees who previously worked at that facility unsuccessfully sought a successorship ruling. In that case, only one third of the funding came from the predecessor. Furthermore, the predecessor was not in a position to guarantee any level of business, in contrast to the substantial business that is being conveyed to OEM in this case. Both ***Canada Packers*** and ***Tri-Municipal*** demonstrate that successorship decisions are fact specific in which multiple factors need to be considered in arriving at a result.

[71] We conclude that the Reconsideration Panel was patently unreasonable in failing to adopt the standard analytical approach that requires a broad, expansive and purposive interpretation of the legislative provisions, particularly where related parties are involved. The Reconsideration Panel's test, which strictly limits the analysis by asking what fundamental components have been transferred from the business or part of the business to the new enterprise, was not taken from prior Board jurisprudence or from Information Bulletin #21. In consequence, the Reconsideration Panel's determination against successorship is set aside. Practically, that leaves the Original Panel's decision in place.

Common Control

[72] The Union also raised arguments in relation to the common control provisions of the ***Code***. As discussed earlier, we do not find it necessary to address the Union's arguments on this point in light of its success on the other issues.

Appeal heard on May 01, 2007

Memorandum filed at Edmonton, Alberta
this 17th day of October, 2007

Authorized to sign for: Conrad J.A.

Ritter J.A.

Ross J.

Appearances:

J.R. Carpenter, P.G. Nugent and J.R. Kolmes
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S.W. McLeod
for the Respondent - Alberta Labour Relations Board

TAB 5

SUPREME COURT OF CANADA

CITATION: Dunsmuir *v.* New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9

DATE: 20080307
DOCKET: 31459

BETWEEN:

David Dunsmuir
Appellant
v.
Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management
Respondent

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 118)	Bastarache and LeBel JJ. (McLachlin C.J. and Fish and Abella JJ. concurring)
CONCURRING REASONS: (paras. 119 to 157)	Binnie J.
CONCURRING REASONS: (paras. 158 to 173)	Deschamps J. (Charron and Rothstein JJ. concurring)

Dunsmuir *v*. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9

David Dunsmuir *Appellant*

v.

Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management *Respondent*

Indexed as: Dunsmuir *v*. New Brunswick

Neutral citation: 2008 SCC 9.

File No.: 31459.

2007: May 15; 2008: March 7.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for new brunswick

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decision makers — Whether judicial review should include only

two standards: correctness and reasonableness.

Administrative law — Judicial review — Standard of review — Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of notice — Adjudicator interpreting enabling statute as conferring jurisdiction to determine whether discharge was in fact for cause — Adjudicator holding employer breached duty of procedural fairness and ordering reinstatement — Whether standard of reasonableness applicable to adjudicator's decision on statutory interpretation issue — Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, ss. 97(2.1), 100.1(5) — Civil Service Act, S.N.B. 1984, c. C-5.1, s. 20.

Administrative law — Natural justice — Procedural fairness — Dismissal of public office holders — Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of notice — Employee not informed of reasons for termination or provided with opportunity to respond — Whether employee entitled to procedural fairness — Proper approach to dismissal of public employees.

D was employed by the Department of Justice for the Province of New Brunswick. He held a position under the *Civil Service Act* and was an office holder "at pleasure". His probationary period was extended twice and the employer reprimanded him on three separate occasions during the course of his employment. On the third occasion, a formal letter of reprimand was sent to D warning him that his failure to improve his performance would result in further disciplinary action up to and including dismissal. While preparing for a meeting to discuss D's performance review the employer concluded that D was not right for the job. A formal letter of termination was delivered

to D's lawyer the next day. Cause for the termination was explicitly not alleged and D was given four months' pay in lieu of notice.

D commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act* ("*PSLRA*"), alleging that the reasons for the employer's dissatisfaction were not made known, that he did not receive a reasonable opportunity to respond to the concerns, that the employer's actions in terminating him were without notice, due process or procedural fairness, and that the length of the notice period was inadequate. The grievance was denied and then referred to adjudication. A preliminary issue of statutory interpretation arose as to whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to determine the reasons underlying the province's decision to terminate. The adjudicator held that the referential incorporation of s. 97(2.1) of the *PSLRA* into s. 100.1(5) of that Act meant that he could determine whether D had been discharged or otherwise disciplined for cause. Ultimately, the adjudicator made no finding as to whether the discharge was or was not for cause. In his decision on the merits, he found that the termination letter effected termination with pay in lieu of notice and that the termination was not disciplinary. As D's employment was hybrid in character, the adjudicator held that D was entitled to and did not receive procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered D reinstated as of the date of dismissal, adding that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

On judicial review, the Court of Queen's Bench applied the correctness standard and quashed the adjudicator's preliminary decision, concluding that the adjudicator did not have

jurisdiction to inquire into the reasons for the termination, and that his authority was limited to determining whether the notice period was reasonable. On the merits, the court found that D had received procedural fairness by virtue of the grievance hearing before the adjudicator. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the court quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice. The Court of Appeal held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter*, not correctness, and that the adjudicator's decision was unreasonable. It found that where the employer elects to dismiss with notice or pay in lieu of notice, s. 97(2.1) of the *PSLRA* does not apply and the employee may only grieve the length of the notice period. It agreed with the reviewing judge that D's right to procedural fairness had not been breached.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ.: Despite its clear, stable constitutional foundations, the system of judicial review in Canada has proven to be difficult to implement. It is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. Notwithstanding the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, any actual difference between them in terms of their operation appears to be illusory. There ought to be only two standards of review: correctness and reasonableness. [32] [34] [41]

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system. [47-50]

An exhaustive analysis is not required in every case to determine the proper standard of review. Courts must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision maker with regard to a particular category of question. If the inquiry proves unfruitful, courts must analyze the factors making it possible to identify the proper standard of review. The existence of a privative clause is a strong indication of review pursuant to the reasonableness standard, since it is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. It is not, however, determinative. Where the question is one of fact, discretion or policy, or where the legal issue is intertwined with and cannot be readily separated from the factual issue, deference will usually apply automatically.

Deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. While deference may also be warranted where an administrative decision maker has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context, a question of law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. So will a true question of *vires*, a question regarding the jurisdictional lines between two or more competing specialized tribunals, and a constitutional question regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*. [52-62]

The standard of reasonableness applied on the issue of statutory interpretation. While the question of whether the combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice is a question of law, it is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator, who was in fact interpreting his enabling statute. Furthermore, s. 101(1) of the *PSLRA* includes a full privative clause, and the nature of the regime favours the standard of reasonableness. Here, the adjudicator's interpretation of the law was unreasonable and his decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law. The employment relationship between the parties in this case was governed by private law. The combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* cannot, on any reasonable interpretation, remove the employer's right, under the ordinary rules of contract, to discharge an employee with reasonable notice or pay in lieu thereof without asserting

cause. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. [66-75]

On the merits, D was not entitled to procedural fairness. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. Where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness. The principles expressed in *Knight v. Indian Head School Division No. 19* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that *Knight* ignored the important effect of a contract of employment, it should not be followed. In the case at bar, D was a contractual employee in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that as a civil servant he could only be dismissed in accordance with the ordinary rules of contract. To consider a public law duty of fairness issue where such a duty exists falls squarely within the adjudicator's task to resolve a grievance. Where, as here, the relationship is contractual, it was unnecessary to consider any public law duty of procedural fairness. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of D, the adjudicator erred and his decision was therefore correctly struck down. [76-78] [81] [84] [106] [114] [117]

Per Binnie J.: The majority reasons for setting aside the adjudicator ruling were generally agreed with, however the call of the majority to re-evaluate the pragmatic and functional test and to re-assess "the structure and characteristics of the system of judicial review as a whole" and to develop a principled framework that is "more coherent and workable" invites a broader reappraisal. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. Litigants find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. The Court should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case. [119-122] [133] [145]

The distinction between "patent unreasonableness" and reasonableness *simpliciter* is now to be abandoned. The repeated attempts to explain the difference between the two, was in hindsight, unproductive and distracting. However, a broad reappraisal of the system of judicial review should explicitly address not only administrative tribunals but issues related to other types of administrative bodies and statutory decision makers including mid-level bureaucrats and, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. [121-123] [134-135] [140]

It should be presumed that the standard of review of an administrative outcome on grounds of substance is reasonableness. In accordance with the ordinary rules of litigation, it should also be presumed that the decision under review is reasonable until the

applicant shows otherwise. An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision rests on an error in the determination of a legal issue not confided (or which constitutionally could not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. Questions of law outside the administrative decision maker's home statute and closely related rules or statutes which require his or her expertise should also be reviewable on a "correctness" standard whether or not it meets the majority's additional requirement that it be "of central importance to the legal system as a whole". The standard of correctness should also apply to the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. [127-129] [146-147]

On the other hand when the application for judicial review challenges the substantive outcome of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is

otherwise indicated in the conferring legislation that a "correctness" standard is intended. [130]

Abandonment of the distinction between reasonableness *simpliciter* and patent unreasonableness has important implications. The two different standards addressed not merely "the magnitude or the immediacy of the defect" in the administrative decision but recognized that different administrative decisions command different degrees of deference, depending on who is deciding what. [135]

"Contextualizing" a single standard of "reasonableness" review will shift the courtroom debate from choosing between two standards of reasonableness that each represented a different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference. [139]

Thus a single "reasonableness" standard will now necessarily incorporate both the degree of deference owed to the decision maker formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, and an assessment of the range of options reasonably open to the decision maker in the circumstances. The judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose. [141] [149]

A single "reasonableness" standard is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative

decision making. "Contextualizing" the reasonableness standard will require a reviewing court to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred. In some cases the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case careful consideration will have to be given to the reasons given for the decision. This list of "contextual" considerations is non-exhaustive. A reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the administrative outcome is an issue given to another forum to decide. [144] [151-155]

Per Deschamps, Charron and Rothstein JJ.: Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. In the adjudicative context, decisions on questions of fact, whether undergoing appellate review or administrative law review, always attract deference. When there is a privative clause, deference is owed to the administrative body that interprets the legal rules it was created to interpret and apply. If the body oversteps its delegated powers, if it is asked to interpret laws in respect of which it does not have expertise or if Parliament or a legislature has provided for a statutory right of review, deference is not owed to the decision maker. Finally, when considering a question of mixed fact and law, a reviewing

court should show an adjudicator the same deference as an appeal court would show a lower court. [158-164]

Here, the employer's common law right to dismiss without cause was the starting point of the analysis. Since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court can proceed to its own interpretation of the applicable rules and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is essential if s. 97(2.1) of the *PSLRA* is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5) of the *PSLRA*. The adjudicator's failure to inform himself of this crucial difference led him to look for a cause for the dismissal, which was not relevant. Even if deference had been owed to the adjudicator, his interpretation could not have stood. Employment security is so fundamental to an employment relationship that it could not have been granted by the legislature by providing only that the *PSLRA* was to apply *mutatis mutandis* to non-unionized employees. [168-171]

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APPEAL from a judgment of the New Brunswick Court of Appeal (Turnbull, Daigle and Robertson JJ.A.) (2006), 297 N.B.R. (2d) 151, 265 D.L.R. (4th) 609, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 2006 CLLC ¶220-030, [2006] N.B.J. No. 118 (QL), 2006 CarswellNB 155, 2006 NBCA 27, affirming a judgment of Rideout J. (2005), 293 N.B.R. (2d) 5, 43 C.C.E.L. (3d) 205, [2005] N.B.J. No. 327 (QL), 2005 CarswellNB 444, 2005 NBQB 270, quashing a preliminary ruling and quashing in part an award made by an adjudicator. Appeal dismissed.

J. Gordon Petrie, Q.C., and *Clarence L. Bennett*, for the appellant.

C. Clyde Spinney, Q.C., and *Keith P. Mullin*, for the respondent.

The judgment of McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ. was

delivered by

BASTARACHE AND LEBEL JJ. —

I. Introduction

[1] This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.

A. *Facts*

[2] The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

[3] The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

[4] The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

[5] A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously

into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal."

[6] Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

[7] A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff

but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

> I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will terminate on December 31, 2004. Cause for termination is not alleged.
>
> To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.
>
> . . .
>
> In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession . . . .

[8] On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

[9] The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge, suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board.

[10] The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate. Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. *Decisions of the Adjudicator*

(1) Preliminary Ruling (January 10, 2005)

[11] The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Chalmers (Dr. Everett) Hospital v. Mills* (1989), 102 N.B.R. (2d) 1.

[12] Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make

such a determination.

(2) Ruling on the Merits (February 16, 2005)

[13] In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

[14] The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

[15] The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) — he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" — the adjudicator held that the appellant was entitled

to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

[16] The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. *Judicial History*

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270

[17] The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

[18] The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not

show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

[19] Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

[20] With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions of mixed fact

and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months — that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

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[21] The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *Alberta Union of Provincial Employees v. Lethbridge*

Community College, [2004] 1 S.C.R. 727, 2004 SCC 28. However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

[22] Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A. reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

[23] On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

[24] At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

[25] The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

[26] The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's Statutory Interpretation Determination

A. *Judicial Review*

[27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which

explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional

duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

[30] In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

[31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward*

Estate v. Minister of Finance, [1973] S.C.R. 120, at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*:

> Where . . . questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review. [pp. 237-38]

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

[32] Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine

the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

[33] Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. *Reconsidering the Standards of Judicial Review*

[34] The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to

determine which standard applies in a given situation. We conclude that there ought to be two standards of review — correctness and reasonableness.

[35] The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*"), Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

[36] *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and . . . such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

[37] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, a third standard of review was introduced into Canadian administrative law. The legislative context of that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not

supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

[38] The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

[39] The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

[40] The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard

of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" . . . . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

[41] As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E.*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15, at paras. 101-3). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see

C.U.P.E. v. Ontario (Minister of Labour)). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

[42] Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E.*, at para. 108:

> In the end, the essential question remains the same under both standards:

> was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness . . . .

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at paras. 40-41, *per* LeBel J.

C. *Two Standards of Review*

[43] The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

[44] As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 *U.T.L.J.* 581). However, the analytical

problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

[45] We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

[46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that

come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that

the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

[49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision

maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

[51] Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[52] The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative

clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

[53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[55] A consideration of the following factors will lead to the conclusion that the

decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

- The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[57] An exhaustive review is not required in every case to determine the proper

standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

[58] For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60.

[59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found

to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[60] As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

[61] Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC

14; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39.

[62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[63] The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

[64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. *Application*

[65] Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

[66] The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

[67] The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of . . . an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of

injunction, judicial review, or otherwise, to question, review, prohibit or restrain . . . an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

[68] The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *Alberta Union of Provincial Employees v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

[69] The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding settlements of disputes also imply that a reasonableness review is

appropriate.

[70] Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

[71] Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

[72] While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

[73] The adjudicator considered the New Brunswick Court of Appeal decision in *Chalmers (Dr. Everett) Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to . . . disciplinary action resulting in discharge, suspension or a financial penalty"

(s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), by simply stating that cause is not alleged" (*ibid.* (emphasis added)). The adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

[74] The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was

fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

[75] The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. The employees subject to the *PSLRA* are usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

[76] The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set

aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue — whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

[77] Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, in his view, lack of due process and a breach of procedural fairness.

[78] The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural

fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. *Duty of Fairness*

[79] Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

[80] This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

[81] We are of the view that the principles established in *Knight* relating to the

applicability of a duty of fairness in the context of public employment merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

[82] This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

[83] In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law.

As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

[84] Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* to consider procedural fairness. The respondent argues that allowing adjudicators to consider procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

[85] In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66, a case which involved the summary dismissal of the chief constable of Brighton. The

House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

[86] The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

[87] Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735). In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual . . . . [p. 653]

(See also *Baker*, at para. 20.)

[88] In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Director of Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

[89] The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months'

notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'" and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

[90] From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

[91] *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to

procedural fairness depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural protections depending on the characterization of the public employee's legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790; *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151; *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83; *Hanis v. Teevan* (1998), 111 O.A.C. 91; *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (C.A.)).

[92] In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes such a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.
>
> (Wade and Forsyth, at pp. 532-33)

[93] Lord Wilberforce noted that attempting to separate office holders from

contractual employees

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.
>
> (*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (H.L.), at p. 1294)

[94] There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (Q.B.), aff'd (1991), 118 N.B.R. (2d) 306 (C.A.)). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40).

[95] Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and

could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.

[96] *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

[97] The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

[98] If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

[99] First, historically, offices were viewed as a form of property, and thus could be recovered by the office holder who was removed contrary to the principles of natural justice. Employees who were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

[100] A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675;

Malloch, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

[101] A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. 2004), at p. 1192 "pleasure appointment"). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

[102] In our view, the existence of a contract of employment, not the public employee's status as an office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

[103] Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's

position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment. [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

[104] Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example,

in the context of collective agreements: *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 94 L.A.C. (4th) 56). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

[105] In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 95. But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

[106] Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract

out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

[107] Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

[108] It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v.*

Baldwin, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

[109] In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

[110] In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

[111] It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

[112] In our view, the distinction between office holder and contractual employee for the purposes of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

[113] The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. Following *Wells*, it is assumed that

most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

[114] The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

[115] The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g.

New Brunswick *Interpretation Act*, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

[116] A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. *Conclusion*

[117] In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four

months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

[118] We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

The following are the reasons delivered by

[119] BINNIE J. — I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

[120] However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole.
>
> . . .
>
> . . . The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

[121] The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although now it is to be called the "standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

> What's in a name? that which we call a rose
> By any other name would smell as sweet;
>
> (*Romeo and Juliet*, Act II, Scene ii)

[122] I am emboldened by my colleagues' insistence that "a holistic approach is

needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by practical considerations: for example, a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

[123] Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

[124] On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 14:2210.

[125] Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion "has the right to be wrong". This reflects an unduly court-centred view of the universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. *Limits on the Allocation of Decision Making*

[126] It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

[127] Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not

independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

[128] Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers . This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

> where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of

general law should be left to judges.

[129] Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. Hansard is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52.

B. *Reasonableness of Outcome*

[130] At this point, judicial review shifts gears. When the applicant for judicial review

challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

[131] In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087 (emphasis deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*. ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation . . . ?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (para. 53), and *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. *The Need to Reappraise the Approach to Judicial Review*

[132] The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making. The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

[133] People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost

to the applicant. If the challenge is unsuccessful, the unhappy applicant may also face a substantial bill of costs from the successful government agency. A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D. *Standards of Review*

[134] My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is

incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has been declared by the Court to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. *Degrees of Deference*

[135] The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

[136] A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision-making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in

the administrative decision. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, or policy decisions arising out of decisions of major administrative tribunals, as in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

[137] Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a professional body, given the task of determining an appropriate sanction for a member's misconduct (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20).

[138] In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

[139] The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense.

[140] That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

[141] Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially

underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. *Multiple Aspects of Administrative Decisions*

[142] Mention should be made of a further feature that also reflects the complexity of the subject matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on

which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11). In the jargon of the judicial review bar, this is known as "segmentation".

G. *The Existence of a Privative Clause*

[143] The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of

outcome on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. *A Broader Reappraisal*

[144] "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

[145] The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

[146] The going-in presumption should be that the standard of review of any

administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

[147] An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

[148] When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test of *irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the

Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

[149] Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, *and* an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.

I. *Judging "Reasonableness"*

[150] I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

[151] This, of course, is the nub of the difficulty. My colleagues write:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making

> process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate": *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public

purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

[152] Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Law Society of New Brunswick v. Ryan*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

[153] The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

[154] It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

[155] That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. *Application to This Case*

[156] Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the

legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's interpretation of his "home turf" statutory framework.

[157] Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

The reasons of Deschamps, Charron and Rothstein JJ. were delivered by

[158] DESCHAMPS J. — The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

[159] By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

[160] The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

[161] Questions before the courts have consistently been identified as either questions

of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology — "palpable and overriding error" versus "unreasonable decision" — does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

[162] Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, and the particular context of administrative decision making can make judicial review different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

[163] However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to overstep its delegated powers. Moreover, if such a body is asked to interpret laws

in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

[164] The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

[165] In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

[166] In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an

appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

[167] I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying intervention should not be more complex in the administrative law context than in the criminal and civil law contexts.

[168] In the case at bar, the adjudicator was asked to adjudicate the grievance of a

non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

[169] It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said:

> An employee to whom section 20 of the *Civil Service Act* and section 100.1 of the *PSLR Act* apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons. [p. 5]

[170] The employer's common law right to dismiss without cause is not alluded to in

this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

[171] This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

[172] In this case, the Court has been given both an opportunity and the responsibility

to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

[173] On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1

> **20** Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

> **92**(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

(*a*) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or

(*b*) disciplinary action resulting in discharge, suspension or a financial penalty,

and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended

97(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.

. . .

100.1(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a grievance with respect to discharge, suspension or a financial penalty.

100.1(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.

. . .

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

. . .

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Appeal dismissed.

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