EB-2009-0308

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited.

COMPLIANCE COUNSEL AUTHORITIES

January 7, 2010

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street, P.O. Box 85
Toronto, Ontario M5L 1B9

Glenn Zacher (43623P)
Tel: (416) 869-5688

Patrick G. Duffy (50187S)
Tel: (416) 869-5257
Fax: (416) 861-0445

ONTARIO ENERGY BOARD
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Maureen Helt
Tel: (416) 440-7672

Compliance Counsel

TO: **ONTARIO ENERGY BOARD**
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

AND TO: **MCCARTHY TETRAULT LLP**
Barristers and Solicitors
Suite 5300, TD Bank Tower
Toronto Dominion Centre
Toronto ON M5K 1E6

George Vegh
Tel: (416) 601-7709
Fax: (416) 868-0673

Counsel for Toronto Hydro-Electric System Limited

I N D E X

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5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Glenn Zacher (43623P)
Tel: (416) 869-5688

Patrick G. Duffy (50187S)
Tel: (416) 869-5257
Fax: (416) 861-0445

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor

Maureen Helt

Compliance Counsel

PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 2

by

ROBERT W. MACAULAY, Q.C.

and

JAMES L.H. SPRAGUE, B.A., LL.B.

Contributors

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

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To the extent that most proceedings before administrative agencies are civil (as opposed to criminal) in nature, the burden of proof is the civil burden of "balance of probabilities" (as opposed to the criminal standard).[20]

This is true even if the agency is attempting to establish a fact that relates to, or establishes a crime.[21] For example, criminal injury compensation agencies generally have to establish, as part of their mandate, that a crime was committed. Notwithstanding the necessity of proving the commission of a crime, the existence

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> In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between these two standards. The additional instructions to the jury set out in Lifchus as to the meaning and appropriate manner of determining the existence of a reasonable doubt serve to define the space between absolute certainty and proof beyond a reasonable doubt.

Earlier, in *R. v. Lifchus* (1997), 150 D.L.R. (4 th) 733, 118 C.C.C. 1 (S.C.C.) the Supreme Court of Canada had laid down the following guidelines as to what a trial judge should instruct a jury on the meaning of "reasonable doubt":

> Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
>
> the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence; the burden of proof rests on the prosecution throughout the trial and never shifts to the accused; a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense; it is logically connected to the evidence or absence of evidence; it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and more is required than proof that the accused is probably guilty — a jury which concludes only that the accused is probably guilty must acquit.

20 See, in illustration, *Sihota v. British Columbia (Superintendent of Motor Vehicles)*, 2008 CarswellBC 608, 2008 BCSC 311 (B.C.S.C.). In that case an Adjudicator, acting under the Motor Vehicle Act, was reviewing an "Administrative Driving Prohibition" issued by a police officer against a person for driving with a blood alcohol concentration over .08. The applicable standard of proof was the civil standard. "The adjudicator must be satisfied that it is more probable than not that the person driving the vehicle had a level of alcohol in his blood in excess of 80 milligrams per 100 milligrams."

Contempt may be an exception to this general rule. Because of the serious consequences on a finding of contempt, whether the contempt is civil or criminal in nature, the standard of proof is the criminal standard (*Vidéotron Ltée v. Industries Microlec Produits Electroniques Inc.* (1992), 96 D.L.R. (4 th) 377 (S.C.C.) I only say "may" be an exception here, because, except where legislatively altered (as in Ontario) imprisonment is a possible penalty which can be imposed on a finding of contempt, even on a finding of contempt by an agency. This would make even civil contempt criminal in nature.

21 *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559 (S.C.C.).

Case Name:

F.H. v. McDougall

F.H., Appellant;
v.
Ian Hugh McDougall, Respondent.
And between
F.H., Appellant;
v.
The Order of the Oblates of Mary Immaculate in the Province of British Columbia, Respondent.
And between
F.H., Appellant;
v.
Her Majesty The Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Respondent.

[2008] S.C.J. No. 54

2008 SCC 53

[2008] 3 S.C.R. 41

[2008] 3 R.C.S. 41

61 C.R. (6th) 1

61 C.P.C. (6th) 1

297 D.L.R. (4th) 193

83 B.C.L.R. (4th) 1

[2008] 11 W.W.R. 414

260 B.C.A.C. 74

EYB 2008-148155

J.E. 2008-1864

60 C.C.L.T. (3d) 1

380 N.R. 82

2008 CarswellBC 2041

169 A.C.W.S. (3d) 346

EYB 2008-148155

File No.: 32085.

Supreme Court of Canada

Heard: May 15, 2008;
Judgment: October 2, 2008.

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

(102 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil evidence -- Burden and standard of proof -- Standard of proof -- Balance of probabilities -- Civil and criminal standards -- Appeal by H from decision by British Columbia Court of appeal overturning a decision finding that McDougall had sexually assaulted him during the 1968-1969 school year while he was a student resident of the Sechelt Indian Residential School in British Columbia, allowed -- There was only one standard of proof in a civil case and that was proof on a balance of probabilities -- In this case, the Court of Appeal erred in holding the trial judge to a higher standard of proof and also incorrectly substituted its credibility assessment for that of the trial judge.

Appeal by H from a decision by the British Columbia Court of appeal overturning a decision finding that McDougall had sexually assaulted him during the 1968-1969 school year while he was a student resident of the Sechelt Indian Residential School in British Columbia. H claimed that McDougall sexually assaulted him in the supervisors' washroom when he was approximately ten years old. H did not tell anyone about the assaults until 2000, when he told his wife and commenced

an action against the respondents. The trial judge concluded that he had been sexually abused by McDougall on four occasions. The trial judge determined that H was a credible witness despite inconsistencies in his testimony regarding the frequency of the sexual assaults. The Court of Appeal overturned the trial judge's decision on the grounds that she failed to consider the serious inconsistencies in the evidence of H in determining whether the alleged sexual assaults had been proven to the standard of proof that was commensurate with the allegation. The Court of Appeal found that the trial judge did not scrutinize the evidence in the manner required and thereby erred in law.

HELD: Appeal allowed. The only standard of proof in a civil case is proof on a balance of probabilities. It was inappropriate to say that there were legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. In determining whether the correct standard had been applied, the appellate court had to take care not to substitute its own view of the facts for that of the trial judge. If a responsible judge found for the plaintiff, it had to be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. In this case, the Court of Appeal erred in holding the trial judge to a higher standard of proof. Further, the Court of Appeal incorrectly substituted its credibility assessment for that of the trial judge. Where a trial judge demonstrated that she was alive to the inconsistencies but still concluded that the witness was nonetheless credible, in the absence of palpable and overriding error, there was no basis for interference by the appellate court. There was no requirement that allegations of sexual assault be corroborated in order to lead to a conviction. The reasons of the trial judge were adequate.

Statutes, Regulations and Rules Cited:

Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125.,

Criminal Code, R.S.C. 1970, c. C-34, s. 139(1)

Criminal Code, R.S.C. 1985, c. C-46, s. 274

Limitation Act, RSBC 1996, CHAPTER 266, s. 3(4)(1)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Evidence -- Standard of proof -- Allegations of sexual assault in a civil case -- Inconsistencies in complainant's testimony -- Whether Court of Appeal erred in holding trial judge to standard of proof higher than balance of probabilities.

Evidence -- Corroborative evidence -- Allegations of sexual assault in a civil case -- Whether victim must provide independent corroborating evidence.

Appeals -- Standard of review -- Applicable standard of appellate review on questions of fact and credibility.

Court Summary:

From 1966 to 1974, H was a resident of the Sechelt Indian Residential School in British Columbia, an institution operated by the Oblates of Mary Immaculate and funded by the Canadian government. M was an Oblate Brother at the school and also the junior and intermediate boys' supervisor from 1965 to 1969. H claimed to have been sexually assaulted by M in the supervisors' washroom when he was approximately ten years of age. These assaults were alleged to have occurred when the children were lined up and brought, one by one, into the washroom to be inspected by the supervisors for cleanliness. H told no one about the assaults until 2000, when he confided in his wife. He then commenced this action against the respondents. Despite inconsistencies in his testimony as to the frequency and gravity of the sexual assaults, the trial judge found that H was a credible witness and concluded that he had been anally raped by M on four occasions during the 1968-69 school year. In addition, she found that M had physically assaulted H by strapping him on numerous occasions. A majority of the Court of Appeal overturned the decision with respect to the sexual assaults on the grounds that the trial judge had failed to consider the serious inconsistencies in H's testimony in determining whether the alleged sexual assaults had been proven to the standard of proof that was "commensurate with the allegation," and had failed to scrutinize the evidence in the manner required.

Held: The appeal should be allowed and the trial judge's decision restored.

There is only one standard of proof in a civil case and that is proof on a balance of probabilities. Although there has been some suggestion in the case law that the criminal burden applies or that there is a shifting standard of proof, where, as here, criminal or morally blameworthy conduct is alleged, in Canada, there are no degrees of probability within that civil standard. If a trial judge expressly states the correct standard of proof, or does not express one at all, it will be presumed that the correct standard was applied unless it can be demonstrated that an incorrect standard was applied. Further, the appellate court must ensure that it does not substitute its own view of the facts with that of the trial judge in determining whether the correct standard was applied. In every civil case, a judge should be mindful of, and, depending on the circumstances, may take into account, the seriousness of the allegations or consequences or inherent improbabilities, but these considerations do not alter the standard of proof. One legal rule applies in all cases and that is that the evidence must be scrutinized with care by the trial judge in deciding whether it is more likely than not that an alleged event has occurred. Further, the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test. In serious cases such as this one, where there is little other evidence than that of the plaintiff and the defendant, and the alleged events took place long ago, the judge is required to make a decision, even though this may be difficult. Appellate courts must accept that if a responsible trial judge finds for the plaintiff, the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. In this case, the Court of Appeal erred in holding the trial judge to a higher standard of proof. This is sufficient to decide the appeal. [paras. 26-27] [para. 30] [para. 40] [paras. 44-46] [paras. 48-49] [paras. 53-54]

In finding that the trial judge failed to scrutinize H's evidence in the manner required by law, in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances, the Court of Appeal also incorrectly substituted its credibility assessment for that of the trial judge. Assessing credibility is clearly in the bailiwick of the trial judge for which he or she must be accorded a heightened degree of deference. Where proof is on a balance of probabilities, there is no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge must not consider the plaintiff's evidence in isolation, but should consider the totality of the evidence in the case, and assess the im-

pact of any inconsistencies on questions of credibility and reliability pertaining to the core issue in the case. It is apparent from her reasons that the trial judge recognized this obligation upon her, and while she did not deal with every inconsistency, she did address in a general way the arguments put forward by the defence. Despite significant inconsistencies in his testimony concerning the frequency and severity of the sexual assaults, and the differences between his trial evidence and answers on previous occasions, the trial judge found that F.H. was nevertheless a credible witness. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court. Here, the Court of Appeal identified no such error. [paras. 58-59] [para. 70] [paras. 72-73] [paras. 75-76]

In addition, while it is helpful and strengthens the evidence of the party relying on it, as a matter of law, in cases of oath against oath, there is no requirement that a sexual assault victim must provide independent corroborating evidence. Such evidence may not be available, especially where the alleged incidents took place decades earlier. Also, incidents of sexual assault normally occur in private. Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration. In civil cases in which there is conflicting testimony, the judge must decide whether a fact occurred on a balance of probabilities, and provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result on an important issue because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on an important issue. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant, as in this case. Here, the Court of Appeal was correct in finding that the trial judge did not ignore M's evidence or marginalize him, but simply believed H on essential matters rather than M. [77] [80-81] [86] [93] [95] Finally, an unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at, but that does not make the reasons inadequate. Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been. The Court of Appeal found that the trial judge's reasons showed why she arrived at her conclusion that H had been sexually assaulted by M. Its conclusion that the trial judge's reasons were adequate should not be disturbed. [paras. 100-101]

Cases cited

Applied: *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34; *R. v. R.E.M.*, 2008 SCC 51; **referred to**: *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325; *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *Bater v. Bater*, [1950] 2 All E.R. 458; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304; *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C.

787, [2002] UKHL 39; *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563; *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35; *R. v. Burns*, [1994] 1 S.C.R. 656; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *R. v. R.W.B.* (1993), 24 B.C.C.A. 1; *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30; *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

Statutes and Regulations Cited

Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125.

Criminel Code, R.S.C. 1970, c. C-34, s. 139(1).

Criminal Code, R.S.C. 1985, c. C-46, s. 274.

Limitation Act, R.S.B.C. 1996, c. 266, s. 3(4)(l).

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Rothstein, Linda R., Robert A Centa and Eric Adams. "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof", in *Special Lectures of the Law Wociety of Upper Canada 2003: The Law of Evidence*. Toronto: Irwin Law, 2004, 455.

Sopinka, John, Sidney N. Lederman, and Alan W. Bryant. *The Law of Evidence*, 2nd ed. Toronto: Butterworths, 1999.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Southin, Rowles and Ryan JJ.) (2007), 68 B.C.L.R. (4th) 203 (*sub. nom. C. (R.) v. McDougall*), [2007] 9 W.W.R. 256, 41 C.P.C. (6th) 213, 239 B.C.A.C. 222, 396 W.A.C. 222, [2007] B.C.J. No. 721 (QL), 2007 CarswellBC 723, 2007 BCCA 212, allowing the appeal against Gill J.'s decision in the case of sexual assault but dismissing the appeal from her finding of physical assault, [2005] B.C.J. No. 2358 (QL), 2005 Carswell BC 2578, 2005 BCSC 1518. Appeal allowed.

Counsel:

Allan Donovan, Karim Ramji and *Niki Sharma*, for the appellant.

Bronson Toy, for the respondent Ian Hugh McDougall.

F. Mark Rowan, for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia.

Peter Southey, Christine Mohr and *Andrea Bourke*, for the respondent Her Majesty The Queen.

[Editor's note: A corrigendum was published by the Court November 4, 2008. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of the Court was delivered by

1 ROTHSTEIN J.:-- The Supreme Court of British Columbia found in a civil action that the respondent, Ian Hugh McDougall, a supervisor at the Sechelt Indian Residential School, had sexually assaulted the appellant, F.H., while he was a student during the 1968-69 school year. A majority of the British Columbia Court of Appeal allowed the respondent's appeal in part, and reversed the decision of the trial judge. I would allow the appeal to this Court and restore the judgment of the trial judge.

I. Facts

2 The Sechelt Indian Residential School was established in 1904 in British Columbia. It was funded by the Canadian government and operated by the Oblates of Mary Immaculate. F.H. was a resident student at the school from September 1966 to March 1967 and again from September 1968 to June 1974. Ian Hugh McDougall was an Oblate Brother until 1970 and was the junior and intermediate boys' supervisor at the school from 1965 to 1969.

3 The school building had three stories. Dormitories for junior and senior boys were located on the top floor. A supervisors' washroom was also located on the top floor and was accessible through a washroom for the boys. The intermediate boys' dormitory was on the second floor. McDougall had a room in the corner of that dormitory.

4 F.H. claims to have been sexually assaulted by McDougall in the supervisors' washroom when he was approximately ten years of age. At trial, he testified that McDougall sexually abused him on four occasions. The trial judge set out his evidence of these incidents at paras. 34-38 of her reasons:

> As to the first occasion, F.H. had been in the dormitory with others. The defendant asked four boys to go upstairs to the main washroom where they were to wait before going to the supervisors' washroom for an examination. F.H. was the last to go into the washroom to be examined. When he went in, he was asked to remove his pyjamas and while facing the defendant, he was checked from head to toe. His penis was fondled. The defendant then turned him around, asked him to bend over and put his finger in his anus. He removed his clothing, grabbed F.H. around the waist, pulled him onto his lap and raped him. The defendant had put the cover of the toilet down and was using it as a seat. After the defendant ejaculated, he told the plaintiff to put on his pyjamas and leave the room.
>
> F.H. was shocked. He did not cry or scream, nor did he say anything. When he went to the main communal washroom, he could see that he was bleeding. The next morning, he noticed blood in his pyjamas. He went downstairs to the boys' washroom and changed. The bloody pyjamas were rinsed and placed in his locker.
>
> The second incident was approximately two weeks after the first. F.H. was in the dormitory getting ready for bed when the defendant asked him to go to the supervisors' washroom so he could do an examination. There were no other boys present. F.H. was asked to remove his pyjamas and again, he was raped. He went to the communal washroom to clean himself up. In the morning, he realized that

> his pyjamas were bloody. As it was laundry day, he threw his pyjamas in the laundry bin with the sheets.
>
> The third incident occurred approximately one month later. F.H. testified that once again he was asked to go to the supervisors' washroom, remove his pyjamas and turn around. Again, the defendant grabbed him by the waist and raped him. He was bleeding, but could not recall whether there was blood on his pyjamas.
>
> The fourth incident occurred approximately one month after the third. As he was getting ready for bed, the defendant grabbed him by the shoulder and took him upstairs to the supervisors' washroom. Another rape occurred.

([2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518)

5 F.H. did not tell anyone about the assaults until approximately the year 2000. He and his wife were having marital difficulties. She had learned of his extra-marital affair. He testified that because of the problems in his marriage he felt he had to tell his wife about his childhood experience. At his wife's recommendation, he sought counselling.

6 F.H. commenced his action against the respondents on December 7, 2000, approximately 31 years after the alleged sexual assaults. In British Columbia there is no limitation period applicable to a cause of action based on sexual assault and the action may be brought at any time (see *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(4)(l)).

II. Judgments Below

A. *British Columbia Supreme Court*, [2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518

7 F.H.'s action was joined with the action of R.C., another former resident of the school who made similar claims against the same parties. The parties agreed to have a trial on the following discrete issues of fact (para. 1):

> 1) Was either plaintiff physically or sexually abused while he attended the school?
> 2) If the plaintiff was abused
>
> a) by whom was he abused?
> b) when did the abuse occur? and
> c) what are the particulars of the abuse?

8 The trial judge, Gill J., began her reasons by noting that the answer to the questions agreed to by the parties depended on findings as to credibility and reliability. Few issues of law were raised. She referred to *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325, in which the court stated that in cases involving serious allegations and grave consequences, the civil standard of proof that is "commensurate with the occasion" applied (para. 4).

9 The trial judge then went on to review the testimony of each plaintiff, McDougall and others who worked at the school or were former students. McDougall denied the allegations of sexual

abuse and testified that he could not recall ever strapping F.H. He also denied ever conducting physical examinations of the boys and gave evidence that boys were not taken into the supervisors' washroom.

10 In determining whether F.H. was sexually assaulted, the trial judge dealt with the arguments of the defense that F.H.'s evidence was neither reliable nor credible. Gill J. rejected the defense position that F.H.'s inability to respond to certain questions should lead to an adverse conclusion regarding the reliability of his evidence. She found F.H.'s testimony credible while acknowledging that the commission of the assaults in the manner described by F.H. would have carried with it a risk of detection. Gill J. also rejected the contention of defense counsel that F.H.'s motive to lie must weigh heavily against his credibility. Rather she agreed with counsel for F.H. that the circumstances surrounding his disclosure were not suggestive of concoction.

11 The trial judge pointed out areas of consistency and inconsistency between F.H.'s testimony and that of the other students at the school. She also noted that there were significant discrepancies in the evidence given by F.H. as to the frequency of the abuse. At trial, F.H. said there were four incidents. On previous occasions, he said the abuse occurred every two weeks or ten days. Despite these inconsistencies, the trial judge concluded F.H. was a credible witness and stated that his evidence about "the nature of the assaults, the location and the times they occurred" had been consistent (para. 112). She concluded that F.H. had been sexually abused by McDougall, the sexual assaults being four incidents of anal intercourse committed during the 1968-69 school year.

12 In relation to the issue of physical abuse, the trial judge limited herself to deciding whether the plaintiffs had proved that they were strapped while at school. To answer this question, the trial judge reviewed the evidence of McDougall and the testimony of another Brother employed at the school as well as the testimony of several of F.H.'s fellow students. She concluded that strapping was a common form of discipline and that it was not used only in response to serious infractions. She concluded that F.H. was strapped by McDougall an undetermined number of times while at the school.

13 With respect to the claims made by R.C., the trial judge found that he had not proven that he had been sexually assaulted, but found that he had been strapped by a person other than McDougall.

B. *British Columbia Court of Appeal* (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212

14 The decision of the Court of Appeal was delivered by Rowles J.A., with Southin J.A. concurring. Ryan J.A. dissented.

(1) Reasons of Rowles J.A.

15 Rowles J.A. concluded that McDougall's appeal from that part of the order finding that he had sexually assaulted F.H. should be allowed; however his appeal from that part of the order finding that he had strapped F.H. should be dismissed.

16 Rowles J.A. found that it was obvious that the trial judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made, i.e. proof that is "commensurate with the occasion". However, in her view, the trial judge was bound to consider the serious inconsistencies in the evidence of F.H. in determining whether the alleged sexual assaults had been proven to the standard "com-

mensurate with the allegation". She found that the trial judge did not scrutinize the evidence in the manner required and thereby erred in law.

17 In allowing the appeal in respect of the sexual assaults alleged by F.H., Rowles J.A. was of the opinion that in view of the state of the evidence on that issue, no practical purpose would be served by ordering a new trial.

(2) Concurring Reasons of Southin J.A.

18 In her concurring reasons, Southin J.A. discussed the "troubling aspect" of the case - "how, in a civil case, is the evidence to be evaluated when it is oath against oath, and what is the relationship of the evaluation of the evidence to the burden of proof?" (para. 84).

19 Southin J.A. held that it was of central importance that the gravity of the allegations be forefront in the trier of fact's approach to the evidence. It was not enough, in her view, to choose the testimony of the plaintiff over that of the defendant. Instead, "[t]o choose one over the other ... requires ... an articulated reason founded in evidence other than that of the plaintiff" (para. 106). Moreover, Southin J.A. found that Cory J.'s rejection in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, of the "either/or" approach to evaluating evidence of the Crown and the accused as to the conduct of the accused in criminal cases also applied to civil cases.

20 In the end, she could not find in the trial judge's reasons a "legally acceptable articulated reason for accepting the plaintiff's evidence and rejecting the defendants' evidence" (para. 112).

(3) Dissenting Reasons of Ryan J.A.

21 While sharing the concerns of the majority about "the perils of assigning liability in cases where the events have occurred so long ago", Ryan J.A. disagreed with the conclusion that the trial judge did not apply the proper standard of proof to her assessment of the evidence (para. 115).

22 Ryan J.A. noted that the trial judge set out the test - a standard of proof commensurate with the occasion - early in her reasons. "Having set out the proper test, we must assume that she properly applied it, unless her reasons demonstrate otherwise" (para. 116).

23 In the view of Ryan J.A., alleging that the trial judge misapplied the standard of proof to her assessment of the evidence was to say that the trial judge erred in her findings of fact. To overturn the trial judge's findings of fact, the appellate court must find that the trial judge made a manifest error, ignored conclusive or relevant evidence or drew unreasonable conclusions from it.

24 Ryan J.A. was of the view that the trial judge had made no such error. The trial judge had acknowledged the most troubling aspect of F.H.'s testimony - that it was not consistent with earlier descriptions of the abuse - and decided that at its core, the testimony was consistent and truthful. The inconsistencies were not overlooked by the trial judge.

25 Having found no error in the reasons for judgment, Ryan J.A. was of the view that the Court of Appeal should have deferred to the conclusions of the trial judge. Accordingly, she would have dismissed the appeal.

III. Analysis

A. *The Standard of Proof*

(1) Canadian Jurisprudence

26 Much has been written as judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a defendant are particularly grave. Such cases include allegations of fraud, professional misconduct, and criminal conduct, particularly sexual assault against minors. As explained by L. R. Rothstein, R. A. Centa, and E. Adams, in "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof" in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2003), 455, at p. 456:

> ...These types of allegations are considered unique because they carry a moral stigma that will continue to have an impact on the individual after the completion of the civil case.

27 Courts in British Columbia have tended to follow the approach of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.). Lord Denning was of the view that within the civil standard of proof on a balance of probabilities "there may be degrees of probability within that standard"(p. 459), depending upon the subject matter. He stated at p. 459:

> It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

28 In the present case the trial judge referred to *H.F. v. Canada (Attorney General)*, at para. 154, in which Neilson J. stated:

> The court is justified in imposing a higher degree of probability which is "commensurate with the occasion" ... .

29 In the constitutional context, Dickson C.J. adopted the *Bater* approach in *R. v. Oakes*, [1986] 1 S.C.R. 103. In his view a "very high degree of probability" required that the evidence be cogent and persuasive and make clear the consequences of the decision one way or the other. He wrote at p. 138:

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

30 However, a "shifting standard" of probability has not been universally accepted. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, Laskin C.J. rejected a "shifting standard". Rather, to take account of the seriousness of the allegation, he was of the view that a trial judge should scrutinize the evidence with "greater care". At pp. 169-71 he stated:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities... .
>
> ...
>
> There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered.
>
> ...
>
> I do not regard such an approach (the *Bater* approach) as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

31 In Ontario Professional Discipline cases, the balance of probabilities requires that proof be "clear and convincing and based upon cogent evidence" (see *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (Ont. Ct. (Gen. Div.)), at para. 53).

(2) Recent United Kingdom Jurisprudence

32 In the United Kingdom some decisions have indicated that depending upon the seriousness of the matters involved, even in civil cases, the criminal standard of proof should apply. In *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39, Lord Steyn said at para. 37:

> ... I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: *In re H (Minors) (Sexual Abuse: Standard of Proof)*, [1996] AC 563, 586 D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard.

33 Yet another consideration, that of "inherent probability or improbability of an event" was discussed by Lord Nicholls in *In re H (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563 (H.L.), at p. 586:

> ... the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be

> the evidence that it did occur before, on the balance of probability, its occurrence will be established.

34 Most recently in *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, a June 11, 2008 decision, the U.K. House of Lords again canvassed the issue of standard of proof. Subsequent to the hearing of the appeal, Mr. Southey, counsel for the Attorney General of Canada, with no objection from other counsel, brought this case to the attention of the Court.

35 Lord Hoffman addressed the "confusion" in the United Kingdom courts over this issue. He stated at para. 5:

> Some confusion has however been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) but nevertheless thought that, because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.

36 The unanimous conclusion of the House of Lords was that there is only one civil standard of proof. At para. 13, Lord Hoffman states:

> ... I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.

However, Lord Hoffman did not disapprove of application of the criminal standard depending upon the issue involved. Following his very clear statement that there is only one civil standard of proof, he somewhat enigmatically wrote, still in para. 13:

> ... I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case, at p. 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

37 Lord Hoffman went on to express the view that taking account of inherent probabilities was not a rule of law. At para. 15 he stated:

> I wish to lay some stress upon the words I have italicised ["to whatever extent is appropriate in the particular case"]. Lord Nicholls [*In re H*] was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

38 *In re B* is a child case under the United Kingdom *Children Act 1989*. While her comments on standard of proof are confined to the 1989 Act, Baroness Hale explained that neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. At paras. 70-72, she stated:

> My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.
>
> As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.
>
> As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable.

(3) Summary of Various Approaches

39 I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

> (1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;
> (2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;
> (3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;

(4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and
(5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.
(4) The Approach Canadian Courts Should Now Adopt

40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

41 Since *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at pp. 158-64, it has been clear that the criminal standard is not to be applied to civil cases in Canada. The criminal standard of proof beyond a reasonable doubt is linked to the presumption of innocence in criminal trials. The burden of proof always remains with the prosecution. As explained by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 27:

> First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice, then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

42 By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence* (2nd ed. 1999), at p. 154:

> ... Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.

It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.

43 An intermediate standard of proof presents practical problems. As expressed by L. Rothstein et al., at p. 466:

> As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" leads one inevitably to inquire what percentage of probability must be met? This is unhelpful because while the concept of "51% prob-

> ability", or "more likely than not" can be understood by decision-makers, the concept of 60% or 70% probability cannot.

44 Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffman explained in *In re B* at para. 2:

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

47 Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *In re B* at para. 72:

> ... Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

48 Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffman observed at para. 15 of *In re B*:

> ... Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

(5) Conclusion on Standard of Proof

49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

50 I turn now to the issues particular to this case. B. *The Concerns of the Court of Appeal Respecting Inconsistency in the Evidence of F.H.*

51 The level of scrutiny required in cases of sexual assault was central to the analysis of the Court of Appeal. According to Rowles J.A. at para. 72, one of the issues was "whether the trial judge, in light of the standard of proof that had to be applied in a case such as this, failed to consider the problems or troublesome aspects of [F.H.]'s evidence". The "troublesome aspects" of F.H.'s evidence related to, amongst others, inconsistencies as to the frequency of the alleged sexual assaults as between F.H.'s evidence on discovery and at trial, as well as to an inconsistency between the original statement of claim alleging attempted anal intercourse and the evidence given at trial of actual penetration.

52 In the absence of support from the surrounding circumstances, when considering the evidence of F.H. on its own, the majority of the Court of Appeal concluded that the trial judge had failed to consider whether the facts had been proven "to the standard commensurate with the allegation" and had failed to "[s]crutinize the evidence in the manner required and thereby erred in law" (para. 79).

53 As I have explained, there is only one civil standard of proof - proof on a balance of probabilities. Although understandable in view of the state of the jurisprudence at the time of its decision, the Court of Appeal was in error in holding the trial judge to a higher standard. While that conclusion is sufficient to decide this appeal, nonetheless, I think it is important for future guidance to make some further comments on the approach of the majority of the Court of Appeal.

54 Rowles J.A. was correct that failure by a trial judge to apply the correct standard of proof in assessing evidence would constitute an error of law. The question is how such failure may be apparent in the reasons of a trial judge. Obviously in the remote example of a trial judge expressly stating an incorrect standard of proof, it will be presumed that the incorrect standard was applied. Where the trial judge expressly states the correct standard of proof, it will be presumed that it was applied . Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied:

> Trial judges are presumed to know the law with which they work day in and day out.
>
> (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, *per* McLachlin J. (as she then was)).

Whether the correct standard was expressly stated or not, the presumption of correct application will apply unless it can be demonstrated by the analysis conducted that the incorrect standard was ap-

plied. However, in determining whether the correct standard has indeed been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.

55 An appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 4 (emphasis deleted), *per* Fish J.). Rowles J.A. correctly acknowledged as much (para. 27). She also recognized that where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. Indeed, she quoted the now well-known words to this effect in the judgment of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 27 of her reasons (para. 22 of *Housen*).

56 Rowles J.A. was satisfied that the trial judge was aware of the standard of proof that had heretofore been applied in cases of moral blameworthiness. At para. 35 of her reasons she stated:

> ... From her reasons it is obvious that the judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made.

That should have satisfied the Court of Appeal that the trial judge understood and applied the standard of proof they thought to be applicable to this case.

C. *The Inconsistency in the Evidence of F.H.*

57 At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of supporting evidence. Although *R. v. R.W.B.* was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]

58 As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

59 It is apparent from her reasons that the trial judge recognized the obligation upon her to have regard for the inconsistencies in the evidence of F.H. and to consider them in light of the totality of the evidence to the extent that was possible. While she did not deal with every inconsistency, as she explained at para. 100, she did address in a general way the arguments put forward by the defence.

60 The trial judge specifically dealt with some of what the Court of Appeal identified as the troublesome aspects of F.H.'s evidence. For example, Rowles J.A. stated at para. 77, that F.H.'s evidence with respect to inspections in the supervisors' washroom was not consistent with the testimony of other witnesses:

> ... There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor's washroom so as to lend support to the respondent's recollection of events. In fact, the defense evidence was to the opposite effect, that is, the boys did not line up outside the staff washroom for any reason or at any time.

61 However, Gill J. dealt with the washroom inspections as well as the inconsistent recollection of the witnesses regarding these inspections. She also made a finding of fact that inspections were performed and were routine at the school. At para. 106 of her reasons she stated:

> It was argued that the evidence of F.H. was not consistent with the evidence of others. No inspections were done in the supervisors' washroom or in the way that F.H. described. I agree that no other witness described inspections being done in the supervisors' washroom. However, evidence about inspections was given by defence witnesses. I have already referred to the evidence of Mr. Paul. I accept that inspections were done in the manner he described. The boys were sometimes inspected on shower days and supervisors regularly checked to ensure that they had washed themselves thoroughly. Admittedly, Mr. Paul did not say that the defendant had conducted such examinations, but he described the inspections as a routine of the school. In fact, Mr. Paul's evidence is not consistent with the evidence of the defendant, who stated that the only examination of the boys was for head lice and it was done by the nurse.

62 In this passage of her reasons, the trial judge dealt with the inconsistency between the evidence of F.H. and other witnesses. She also considered McDougall's testimony in light of other evidence given by witnesses for the defence. From the evidence of Mr. Paul she concluded that examinations were routinely carried out. She found that Mr. Paul's evidence about examinations was not consistent with that of McDougall who had testified that examinations were only for head lice and were carried out by the nurse. The necessary inference is that she found McDougall not to be credible on this issue.

63 The majority of the Court of Appeal was also concerned with the testimony of F.H., that each time he was sexually assaulted by McDougall, he would go upstairs from his dorm to the supervisors' washroom. At para. 77 of her reasons, Rowles J.A. stated:

> However, [F.H.] was a junior boy rather than an intermediate one at the relevant time and his dorm would have been on the top floor. Based on the evidence of

> where the boys slept, [McDougall] could not have taken [F.H.] "upstairs" from his dorm.

Counsel for F.H. points out that in his evidence at trial, F.H. testified that he was an intermediate boy when the sexual assaults occurred and that as an intermediate boy he would have to go upstairs to the supervisors' washroom. Although there was contradictory evidence, there was evidence upon which F.H. could have been believed.

64 It is true that Gill J. did not deal with F.H.'s inconsistency as to the frequency of the inspections inside the supervisors' washroom as identified by Rowles J.A. at para. 75:

> The respondent also told Ms. Stone that the young boys regularly lined up outside the staff washroom, which they referred to as the "examination room", every second week in order to be examined. At trial he testified this lining up only happened the first time he was sexually assaulted. Again, this is a substantial change in the respondent's recounting of events.

Nor did Gill J. specifically address the change in the allegations of attempted anal intercourse and genital fondling in the original statement of claim and the evidence of F.H. at trial of actual penetration. Rowles J.A. stated at para. 76:

> The respondent's original statement of claim only alleged attempted anal intercourse and genital fondling. There was no allegation about the appellant actually inserting his finger in F.H.'s anus or having forced anal intercourse. The respondent's evidence at trial was of actual penetration. As the trial judge found, the respondent acknowledged that he had reviewed the statement of claim, including the paragraphs which particularized the alleged assaults, and that he was aware of the difference between actually doing something and attempting to do something.

65 However, at paras. 46 and 48 of her reasons, Gill J. had recounted these inconsistencies as raised in cross-examination. Her reasons indicate she was aware of the inconsistencies.

66 As for the inconsistency relating to the frequency of the sexual assaults, Rowles J.A. stated at para. 73:

> At his examination for discovery the respondent said that the sexual assaults took place "weekly", "frequently", and "every ten days or so" over the entire time he was at the School. The respondent admitted at trial that he had said on discovery that he had told the counsellor, Ms. Nellie Stone, that the sexual assaults by the appellant had taken place over the entire time he was at the School, while he was between the ages of eight and fourteen years. At trial, the respondent testified that the sexual assaults occurred on only four occasions over a period of two-and-a-half months. [Emphasis added.]

67 Counsel for F.H. points out that F.H.'s evidence was that he was subjected to physical and sexual abuse while he was at the residential school perpetrated by more than one person, that the question to which he was responding mixed both sexual and physical abuse and that the majority of

the Court of Appeal wrongly narrowed F.H.'s statement only to assaults perpetrated by McDougall. Counsel says that F.H. was commenting on all of the physical and sexual abuse he experienced at the school which involved more than McDougall and took place over his six years of attendance.

68 The Court of Appeal appears to have interpreted his evidence on discovery that he was sexually assaulted by McDougall over the entire time he was at the school, while in his evidence at trial it was only four times over two and a half months. Although the evidence is not without doubt, it is open to be interpreted in the way counsel for F.H. asserts and that there was no inconsistency between F.H.'s evidence on discovery and at trial.

69 As to the frequency of the alleged sexual assaults by McDougall, the trial judge did not ignore inconsistencies in the evidence of F.H. In spite of the inconsistencies, she found him to be credible. At para. 112 of her reasons, she stated:

> There are, however, some inconsistencies in the evidence of F.H. As the defence has also argued, his evidence about the frequency of the abuse has not been consistent and there are differences between what he admittedly told Ms. Stone, what he said at his examination for discovery and his evidence at trial. At trial, he said there were four incidents. On previous occasions, he said that this occurred every two weeks or ten days. That is a difference of significance. However, his evidence about the nature of the assaults, the location and the times they occurred has been consistent. Despite differences about frequency, it is my view that F.H. was a credible witness.

70 The trial judge was not obliged to find that F.H. was not credible or that his evidence at trial was unreliable because of inconsistency between his trial evidence and the evidence he gave on prior occasions. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.

71 All of this is not to say that the concerns expressed by Rowles J.A. were unfounded. There are troubling aspects of F.H.'s evidence. However, the trial judge was not oblivious to the inconsistencies in his evidence. The events occurred more than 30 years before the trial. Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be assumed that she took them into account in assessing the balance of probabilities. Notwithstanding its own misgivings, it was not for the Court of Appeal to second guess the trial judge in the absence of finding a palpable and overriding error.

72 With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various

> versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

73 As stated above, an appellate court is only permitted to intervene when "the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L.*, at para. 4 (emphasis deleted)). The Court of Appeal made no such finding. With respect, in finding that the trial judge failed to scrutinize F.H.'s evidence in the manner required by law, it incorrectly substituted its credibility assessment for that of the trial judge.

D. *Palpable and Overriding Error*

74 Notwithstanding that the Court of Appeal made no finding of palpable and overriding error, the Attorney General of Canada submits that the trial judge did indeed make such an error. This argument is based entirely on the inconsistencies in the evidence of F.H. The Attorney General says that in light of these inconsistencies, the trial judge was clearly wrong in finding F.H. credible.

75 I do not minimize the inconsistencies in F.H.'s testimony. They are certainly relevant to an assessment of his credibility. Nonetheless, the trial judge was convinced, despite the inconsistencies, that F.H. was credible and that the four sexual assaults alleged to have been committed by McDougall did occur. From her reasons, it appears that the trial judge's decision on the credibility of the witnesses was made in the context of the evidence as a whole. She considered the layout of the school and the fact that the manner in which F.H. described the assaults as taking place would have carried with it the risk of detection. She also considered whether F.H.'s evidence about inspections taking place in the supervisors' washroom and the availability of sheets and pyjamas was consistent with evidence of other witnesses. She acknowledged that F.H. had a motive to lie to save his marriage and decided that the circumstances surrounding disclosure were not suggestive of concoction. She also factored into her analysis the demeanor of F.H.: that "[he] was not a witness who gave detailed answers, often responding simply with a yes or no, nor did he volunteer much information" (para. 110), and that " [w]hen [he] testified, he displayed no emotion but it was clear that he had few, if any, good memories of the school" (para. 113).

76 In the end, believing the testimony of one witness and not the other is a matter of judgment. In light of the inconsistencies in F.H.'s testimony with respect to the frequency of the sexual assaults, it is easy to see how another trial judge may not have found F.H. to be a credible witness. However, Gill J. found him to be credible. It is important to bear in mind that the evidence in this case was of matters occurring over thirty years earlier when F.H. was approximately ten years of age. As a matter of policy, the British Columbia legislature has eliminated the limitation period for claims of sexual assault. This was a policy choice for that legislative assembly. Nonetheless, it must be recognized that the task of trial judges assessing evidence in such cases is very difficult indeed. However, that does not open the door to an appellate court, being removed from the testimony and not seeing the witnesses, to reassess the credibility of the witnesses.

E. *Corroboration*

77 The reasons of the majority of the Court of Appeal may be read as requiring, as a matter of law, that in cases of oath against oath in the context of sexual assault allegations, that a sexual assault victim must provide some independent corroborating evidence. At para. 77 of her reasons, Rowles J.A. observed:

> There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor's washroom so as to lend support to [F.H.]'s recollection of events.

At para. 79 she stated:

> ... No support for [F.H.]'s testimony could be drawn from the surrounding circumstances.

78 In her concurring reasons at para. 106, Southin J.A. stated:

> ... To choose one over the other in cases of oath against oath requires, in my opinion, an articulated reason founded in evidence other than that of the plaintiff.

79 The impression these passages may leave is that there is a legal requirement of corroboration in civil cases in which sexual assault is alleged. In an abundance of caution and to provide guidance for the future, I make the following comments.

80 Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available, especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private.

81 Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Modern criminal law has rejected the previous common law and later statutory requirement that allegations of sexual assault be corroborated in order to lead to a conviction (see *Criminal Code*, R.S.C. 1970, c. C-34, s. 139(1), mandating the need for corroboration and its subsequent amendments removing this requirement (*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125), as well as the current *Criminal Code*, R.S.C. 1985, c. C-46, s. 274, stipulating that no corroboration is required for convictions in sexual assault cases). Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

F. *Is W. (D.) Applicable in Civil Cases in Which Credibility is in Issue?*

82 At paras. 107, 108 and 110 of her reasons, Southin J.A. stated:

> It is not enough for the judge to say that I find the plaintiff credible and since he is credible the defendant must be lying.
>
> What I have said so far is, to me, no more than an application to civil cases of *R. v. W. (D.)*, [1991] 1 S.C.R. 742.
>
> ...

> I see no logical reason why the rejection of "either/or" in criminal cases is not applicable in civil cases where the allegation is of crime, albeit that the burden of proof on the proponent is not beyond reasonable doubt but on the balance of probabilities.

83 *W.(D.)* was a decision by this Court in which Cory J., at pp. 757-58, established a three-step charge to the jury to help the jury assess conflicting evidence between the victim and the accused in cases of criminal prosecutions of sexual assaults:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

84 These charges to the jury are not sacrosanct but were merely put in place as guideposts to the meaning of reasonable doubt, as recently explained by Binnie J. in *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30, at paras. 9 and 13:

> ... Essentially, *W. (D.)* simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts. It alerts the jury to the "credibility contest" error. It teaches that trial judges are required to impress on the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.
>
> ...
>
> In *R. v. Avetysan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

85 The *W.(D.)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. Lack of credibility on the part of an accused is not proof of guilt beyond a reasonable doubt.

86 However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean

explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. *W.(D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

G. *Did the Trial Judge Ignore the Evidence of McDougall?*

87 In an argument related to *W.(D.)*, the Attorney General of Canada says at para. 44 of its factum, that "[s]imply believing the testimony of one witness, without assessing the evidence of the other witness, marginalizes that other witness" since he has no way of knowing whether he was disbelieved or simply ignored.

88 The Attorney General bases his argument on the well-known passage in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), which concludes at p. 357:

> ... a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

89 Thus, the Attorney General contends, at para. 47 of its factum, that:

> ... In a civil proceeding alleging a sexual assault, if the trier of fact accepts the plaintiff's evidence and simply ignores the defendant's evidence, that conclusion would breach the requirement described in *Faryna*, that every element of the evidence must be considered.

90 I agree that it would be an error for the trial judge to ignore the evidence of the defendant and simply concentrate on the evidence submitted by the plaintiff. But that is not the case here.

91 The trial judge described the testimony given by McDougall with respect to his vocational beliefs, his subsequent marriage, his role at the school, the routine at the school, the laundry procedure and his denials as to having sexually assaulted either R.C. or F.H.. She also dealt with the defense arguments with respect to the credibility and reliability of the testimony of R.C. and F.H. regarding the sexual assaults. Indeed, she found that R.C. did not prove he was sexually assaulted by McDougall.

92 In determining whether McDougall had ever strapped R.C. or F.H., she summarized McDougall's evidence as follows at para. 131:

> As stated, it was the defendant's evidence that during his years at the school, he administered the strap to only five or six intermediate boys. He did so as punishment for behavior such as fighting or swearing. It was always to the hand and was always done in the dorm. He denied the evidence of Mr. Jeffries that he had frequently disciplined him for the reasons Mr. Jeffries described. He denied going to his grandmother's home or mocking him about wanting to visit his grandmother. He denied the evidence of F.H.

93 She also highlighted a contradiction in McDougall's testimony at para. 135:

> It is also my view that the defendant minimized his use of the strap as a form of discipline. Further, while he testified that no child was ever strapped in his room, when testifying about one specific incident, he said that he brought the boy "upstairs to my room and I administered the strap three times to his right hand".

Although McDougall later "corrected himself" to say that he had strapped the boy in the dorm and not in his room, it was open to the trial judge to believe his first statement and not his "correction".

94 And as earlier discussed, at para. 106 of her reasons, she pointed out inconsistency between the evidence of McDougall and one of the defence witnesses, Mr. Paul, on the issue of routine physical inspections of the students.

95 At para. 66 of her reasons for the majority of the Court of Appeal, Rowles J.A. stated:

> From the reasons the trial judge gave for finding that the appellant had strapped the respondent, one can infer that the judge did not accept the appellant's evidence on that issue. Disbelief of a witness's evidence on one issue may well taint the witness's evidence on other issues, but an unfavourable credibility finding against a witness does not, of itself, constitute evidence that can be used to prove a fact in issue.

96 I agree with Rowles J.A. However, the trial judge's unfavourable credibility findings with respect to McDougall's strapping evidence together with her belief in Paul's evidence in preference to that of McDougall with respect to routine physical inspections, indicates that she did not ignore McDougall's evidence or marginalize him. She simply believed F.H. on essential matters rather than McDougall.

H. *Were the Reasons of the Trial Judge Adequate?*

97 The Attorney General alleges that the reasons of the trial judge are inadequate. The same argument was not accepted by the Court of Appeal. At para. 61, Rowles J.A. stated:

> Generally speaking, if a judge's reasons reveal the path the judge took to reach a conclusion on the matter in dispute, the reasons are adequate for the purposes of appellate review. To succeed in an argument that the trial judge did not give adequate reasons, an appellant does not have to demonstrate that there is a flaw in the reasoning that lead to the result. In this case, the judge's reasons are adequate to show how she arrived at her conclusion that the respondent had been sexually assaulted.

Where the Court of Appeal expresses itself as being satisfied that it can discern why the trial judge arrived at her conclusion, a party faces a serious obstacle to convince this court that the reasons are nonetheless inadequate.

98 The meaning of adequacy of reasons is explained in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26. In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, Binnie J. summarized the duty to give adequate reasons:

> (6) To justify and explain the result;

(7) To tell the losing party why he or she lost;
(8) To provide for informed consideration of the grounds of appeal; and
(9) To satisfy the public that justice has been done.

99 However, an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor, is a failure to give adequate reasons a free standing basis for appeal. At para. 20 of *Walker*, Binnie J. states:

> Equally, however, *Sheppard* holds that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue... . The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" (para. 53).

100 An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *R. v. Gagnon*). But that does not make the reasons inadequate. In *R. v. R.E.M.*, 2008 SCC 51, released at the same time as this decision, McLachlin C.J. has explained that credibility findings may involve factors that are difficult to verbalize:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge in saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter, that does not always lend itself to precise and complete verbalization. [para. 49]

Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

101 Rowles J.A. found that the reasons of the trial judge showed why she arrived at her conclusion that F.H. had been sexually assaulted by McDougall. I agree with her that the reasons of the trial judge were adequate.

IV. Conclusion

102 I am of the respectful opinion that the majority of the Court of Appeal erred in reversing the decision of the trial judge. The appeal should be allowed with costs. The decision of the Court of Appeal of British Columbia should be set aside and the decision of the trial judge restored.

Solicitors:

Solicitors for the appellant: Donovan & Company, Vancouver.

Solicitors for the respondent Ian Hugh McDougall: Forstrom Jackson, Vancouver.

Solicitors for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia: Macaulay McColl, Vancouver.

Solicitors for the respondent Her Majesty The Queen: Attorney General of Canada, Toronto.

* * * * *

Corrigendum, released November 4, 2008

Please note the following changes in the following cases:

In para. 5, line 2, of the English version of *F.H. v. McDougall*, 2008 SCC 53, released October 2, 2008, the word "martial" should read "marital". At the end of para. 52, the reference to "(para. 52)" should read "(para. 79)" in the English version and "(par. 79)" in the French version.

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Case Name:

Stetler v. Agriculture, Food and Rural Affairs Appeal Tribunal

Between
Wyatt Stetler and 934671 Ontario Limited, respondent,
and
The Ontario Flue-Cured Tobacco Growers' Marketing Board, appellant, and
The Agriculture, Food and Rural Affairs Appeal Tribunal respondent, and
The Attorney General for Ontario, intervenor

[2005] O.J. No. 2817

Docket: C41821

Also reported at:
76 O.R. (3d) 321

Ontario Court of Appeal
Toronto, Ontario

S. Borins, K.N. Feldman and E.A. Cronk JJ.A.

Heard: December 16, 2004.
Judgment: July 8, 2005.

(113 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Correctness.

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness.

Administrative law -- Judicial review and statutory appeal -- When available -- Error of law -- Appeal from a decision of the Divisional Court quashing the decisions of the Agriculture, Food and Rural Affairs Appeal Tribunal and Ontario Flue-Cured Tobacco Growers' Marketing Boards' decisions allowed.

Appeal by the Ontario Flue-Cured Tobacco Growers' Marketing Board seeking an order re-instating the Agriculture, Food and Rural Affairs Appeal Tribunal decision finding the respondent, Stetler, guilty of engaging in the unlawful sale of tobacco outside the auspices of the Board's quota system. The original hearing was before the Board, and its decision was substantially confirmed on appeal to the tribunal. On judicial review, the Divisional Court quashed the decisions of the Board and the Tribunal.

HELD: Appeal allowed, and the decision of the divisional court set aside. The Divisional Court erred in failing to properly determine the appropriate standard of review applicable to the Tribunal's decision, and by applying a standard of correctness rather than reasonableness. The decision of the Tribunal, with respect to liability, was reinstated and the matter remitted to the Tribunal on the issue of penalty.

Statutes, Regulations and Rules Cited:

Farm Products Marketing Act, R.R.O. 1990 Reg 436, amended to O. Reg. 60/02, ss. 16(10), 17, 18

Ministry of Agriculture, Food and Rural Affairs Act, ss. 14(1.1), 16(2)

Appeal From:

On appeal from the decision of Justice Tamarin M. Dunnet, Justice John R.R. Jennings and Justice Colin Campbell, sitting in the Divisional Court, dated December 17, 2003, reported at (2003), 179 O.A.C. 398 (Div. Ct.).

Counsel:

Barry Bresner and Freya Kristjanson, for the appellant

F. Paul Morrisson and Jacob Glick, for the respondents Stetler and 934671 Ontario Limited

David Vickers for the respondent the Agriculture, Food and Rural Affairs Appeal Tribunal and for the intervenor The Attorney General for Ontario

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The judgment of the Court was delivered by

1 K.N. FELDMAN J.A.:-- The respondent Wyatt Stetler is a tobacco farmer who, along with his corporation the respondent 934671 Ontario Limited, was found to have engaged in the unlawful sale of tobacco outside the auspices of the Ontario Flue-Cured Tobacco Growers' Marketing Board's (the "Board") quota system. The penalty was the cancellation of the tobacco quota allotted to the respondent and to the respondent company. The original hearing was before the Board, and its decision was substantially confirmed on appeal to the Agriculture, Food and Rural Affairs Appeal Tribunal (the "Tribunal").[1] On judicial review, applying a standard of correctness, the Divisional Court quashed the decisions of both the Board and the Tribunal and declined to send the matter back to the Tribunal for a further hearing.

2 The appellant Board obtained leave from this court to appeal the decision of the Divisional Court and asks that the decision of the Tribunal be re-instated, or at least that the matter be referred back to the Tribunal for a new hearing. In the event the appeal is successful, the respondents ask that the penalty imposed by the Tribunal be reduced.

The Decisions Below

(1) The Board

3 The respondents were charged with selling, packing, shipping, transporting or disposing of tobacco on three occasions between December 1, 1997 and March 22, 1999 other than through the Board, contrary to one or more of the provisions of s. 5 of Regulation 435, R.R.O. 1990, as amended, under the Farm Products Marketing Act, R.S.O. 1990, c. F.9, and ss. 9(3), (4), (5) and 21 of the General Regulations of the Board.

4 The Board originally adjourned its hearing at the request of the respondents to allow them to first deal with charges brought against Wyatt Stetler and his daughter Lori Stetler under the Excise Act, R.S.C. 1985, c. E-14, in respect of the same alleged conduct. In January, 2001, Wyatt Stetler made an agreement whereby the Excise Act charges were stayed. In consideration of the stay, he agreed that all of the evidence in the Crown brief would be submitted in evidence before the Board, subject to the right of counsel to address the proper interpretation of and conclusions to be drawn from that evidence by the Board.

5 The evidence presented at the Board hearing consisted of that record, which included transcripts of wiretapped conversations, truck rental records, witness statements and videotapes gathered by the RCMP during their investigation into illegal tobacco sales. RCMP Constable Reed also testified regarding the criminal investigation and the surveillance conducted on the cube van that was used on the three occasions in question to transport tobacco, allegedly from the Stetler farm to Quebec. Wyatt Stetler also testified. Both the Board and the respondents were represented by counsel. No transcript of the proceedings was made.

6 In its reasons, the Board set out its findings of what occurred based on the evidence presented. The Board also reproduced extensive passages from the wiretap transcripts from which it drew inferences. It set out the respondents' position, which was a denial that they had participated in the unlawful sale of tobacco and the suggestion that the tobacco that was picked up for transport was not from the Stetler farm. The Board then stated its conclusions.

7 The following is a summary of the Board's factual findings: The RCMP in Quebec began the investigation in September 1998, after noting a cube van with Ontario licence plates delivering tobacco to Marcel Guillemette in Mascouche, Quebec. On the evidence, Ronald Coucke had made an arrangement with a number of Ontario tobacco farmers to purchase tobacco for sale to M. Guillemette. The Hertz rental records from the Simcoe outlet showed that the same cube van was rented 52 times between December 1997 and March 1999 by Ronald Coucke, his father Joseph Coucke or his wife Janet Stetler, the former wife of Wyatt Stetler and the mother of Lori Stetler. Each time the van was driven approximately 1500 kilometres and delivered tobacco to M. Guillemette. On three occasions, September 13, 1998, September 20, 1998 and February 4, 1999, the cube van was observed under police surveillance heading toward and away from the Stetler farm and then on to Quebec.

8 On the nights of September 13th and 20th 1998, the cube van was driven into a lane on the Stetler farm. The RCMP surveillance officer could not observe the van at the farm because of the darkness and farm buildings that obstructed the view. On the 13th, the van did not leave the farm the same way that it entered. The RCMP later discovered that the lane connected to a road north of the farm, and concluded that the van must have departed using that route. On September 20th, the van departed the same way that it entered, 25 minutes following its arrival. RCMP surveillance teams followed the van to Quebec and witnessed bales of tobacco being unloaded from it.

9 On January 22, 1999 the RCMP obtained judicial authorization for certain telephone wiretaps as well as for a listening probe in the cube van. This gave them information about future deliveries, including one on February 4, 1999. On that evening, the cube van was picked up at Hertz and followed to the Stetler farm. The van was on the farm property for 13 minutes, and was under continuous RCMP surveillance until it arrived in Quebec, where 90 bales of tobacco were unloaded. The van was driven by Ronald Coucke's son Joseph Coucke and by Daniel Lucas.

10 The Board used the wiretap evidence to help it understand how the shipments were arranged. The recorded conversations were between Ronald Coucke and Marcel Guillemette on February 4, 1999 and February 5, 1999, between Wyatt Stetler and Lori Stetler on February 5, 1999, between Janet Stetler and Lori Stetler on February 17, 1999, between Ronald Coucke and Janet Stetler on February 18, 1999, between Wyatt Stetler and Lori Stetler on February 27, 1999, between Ronald Coucke and Lori Stetler on March 1, 1999 and between Daniel Lucas and Joseph Coucke on March 12, 1999.

11 Wyatt Stetler testified that he had not participated in the unlawful sale of tobacco. He also denied that any of the tobacco shipped to Quebec came from his farm, but said that if it did, it was without his knowledge. Mr. Stetler's counsel, Mr. Peel, suggested that the laneway into the Stetler farm could have been used to access other farms via a railway line that cut across the Stetler property.

12 Having reviewed the evidence and the position of the respondents, the Board then stated its conclusions. First, the Board was satisfied beyond a reasonable doubt that the 90 bales of tobacco were picked up from the Stetler farm on February 4, 1999 and that such a quantity could not go missing without being noticed by Wyatt Stetler. Second, it found on a balance of probabilities that Wyatt Stetler unlawfully sold tobacco on September 13 and September 20, 1998. The Board specifically rejected the submission that the cube van only passed through the Stetler property to another farm or farms to obtain the tobacco. The Board reasoned that on February 4, 1999 the path would likely have been impassable with snow and there was insufficient time (15 minutes it said) to get to another farm. The Board also relied on Constable Reed's testimony that none of the farms of farmers accessible by that path was implicated in the investigation.

13 The Board also rejected as incredible, Wyatt Stetler's alternative position that if the tobacco did come from his farm, it was done without his knowledge. The quantities involved were too large for an experienced tobacco farmer not to notice that they were missing. Also, the Board used the recorded wiretap conversations to infer that Wyatt Stetler knew of the scheme.

14 The Board rejected an argument made by counsel for the respondents, that there was no evidence to show whether it was Wyatt Stetler's tobacco or the respondent company's tobacco that was shipped unlawfully. The Board concluded that the respondent company is Wyatt Stetler's alter ego and, therefore, the distinction between the respondents was not significant to the Board.

15 The Board also took into account Wyatt Stetler's testimony that, on more than one occasion, he transferred tobacco to neighbours to sell using their quota when he had insufficient quota of his own to sell all of his tobacco. As this activity also constituted the illegal sale of tobacco, the Board viewed it as reflective of a cavalier attitude towards the Board and the Regulations.

16 Finally, the Board said that based on "the totality of the evidence," it had "no difficulty concluding that": (a) Wyatt Stetler had engaged in the unlawful sale of tobacco on at least three occasions; (b) he would have continued to do so had Ronald Coucke agreed to pay in advance; and (c) he had previously engaged in unlawful sales to his neighbours.

17 The Board went on to determine penalty. I will discuss that aspect of its decision later in these reasons.

(2) The Tribunal

18 On an appeal from a decision of the Board, the Tribunal is authorized to hold a hearing to which the Statutory Powers Procedures Act, R.S.O. 1990, c. S.22 ("SPPA"), applies. The Tribunal may substitute its opinion for that of the Board: Ministry of Agriculture, Food and Rural Affairs Act, R.S.O. 1990, c. M.16, s. 16(11).

19 At the Tribunal hearing, both the Board and the respondents were represented by the same counsel as at the Board hearing. No transcript of the proceedings was made. The Tribunal first noted, as a matter of background, that it was informed that the Board and the respondents had agreed that the evidence in the Crown brief from the RCMP Excise Act investigation could be submitted before the Board at its hearing into the matter, subject to the right of counsel to address the proper interpretation of and conclusions to be drawn from that evidence on appeal. The Tribunal also noted that the time within which the stayed criminal charges against the respondents could be reactivated had passed.

20 The Tribunal received certain written documentation as evidence, although it did not describe the content of that documentation in its reasons. It also heard the evidence of four witnesses: Dudley Stetler (Wyatt Stetler's son), Wyatt Stetler, RCMP Constable Ed Ferrara and Gary Godelie, an experienced tobacco farmer and Vice-Chair of the Board.

21 In its reasons, the Tribunal set out the two issues to be determined, gave a detailed recitation of the oral evidence given by each of the witnesses, then a description of the submissions made by counsel and finally, stated its findings.

22 The two issues were: (a) whether the respondents participated in the unlawful sale of tobacco on September 13 or 20, 1998 or February 4, 1999; and (b) if they did, was the penalty imposed by the Board appropriate and, if not, what was the appropriate penalty.

23 Dudley Stetler testified about his knowledge of the geographic area. In that context, he testified that other farms were accessible from the Stetler farm using the abandoned railway line and the path beside it. He had used this route in the winter, although it was neither lit nor ploughed. Two of the accessible farms were the Devos farms, another farmer who had admitted involvement in illegal tobacco sales. Those farms were two and five miles respectively from the Stetler farm. He also testified that his sister Lori lived on the Stetler farm at the relevant time and that his father lived part-time on the farm and part-time in Delhi. He considered his father to be a hands-on farmer.

24 Wyatt Stetler testified that he had grown tobacco all his life, and that he had not illegally sold tobacco to Ronald Coucke or anyone else on the three dates charged or at any other time. He said that he was aware that Ronald Coucke and Janet Stetler had hinted to her daughter Lori that money could be made selling tobacco in Quebec, but he never spoke directly to Ronald Coucke and did not know how much tobacco he wanted or the price he would pay. He stated that it was his understanding that Ronald Coucke was looking for hand-tied tobacco, and that he had none on his farm. Nor did he know Marcel Guillemette. He never noticed any tobacco missing, but said that most of it was in bales so he would not necessarily notice. On the issue of selling tobacco to neighbours, he said that he had shipped through the Board warehouse using another grower's shipping number and that he had heard that 25 per cent of growers did this, including a member of the Board. He did not read well and did not know that he was not allowed to sell tobacco in this manner. He did know that he required a permit to transport tobacco.

25 On February 27, 1999 in a recorded conversation with his daughter Lori, Wyatt Stetler said:

February 27, 1999

LS: what did you want

WS: jus' wonderin' if you had any ring a ding a lings (pause) no

LS: did I have any c ... calls ...

WS: you know what I mean yeah

LS: no

WS: oh you know what to say when you talk eh

LS: yeah I guess

WS: you want up front

LS: yeah

WS: you know what I mean

LS: yeah

WS: that will stop

LS: mmhmm

WS: ah shit

On March 1, 1999, Lori Stetler reported to Ronald Coucke as follows:

March 1, 1999

RC: so did you'a ever ... did you ever get around to talking to your dad

LS: yeap I did (unintelligible conversation in background) but ah he said **he wanted it up front** before you took any [Emphasis added]

26 With respect to his February 27, 1999 conversation with his daughter recorded on the wiretap, Wyatt Stetler explained that when he discussed getting his money up-front, he was referring to a car loan he had made to his ex-wife. He did not recollect which tobacco shipments he had discussed with Lori in February 1999. Nor did he recall what he meant when he asked her about receiving any phone calls and when he said to her that she knew what he meant.

27 Constable Ferrara testified about the RCMP investigation and the surveillance conducted in connection with that investigation. An Ontario-licensed cube van was used to transport tobacco to Marcel Guillemette in Quebec, where the tobacco was cut into fine pieces and sold in plastic bags or hand-tied and sold. His team had traced the van's license plates to a rental agency and discovered that the van had been rented by Ronald Coucke several times, including dates when tobacco was transported to Quebec. Mileage and time records were also consistent with a round-trip to M. Guillemette's residence.

28 On September 13, 1998, his team had the cube van under surveillance but lost sight of it after it turned off Windham Road #9 at 10:10 p.m. The Quebec RCMP saw the 70 bales of tobacco unloaded from the van the next morning. A few days later, the Board informed the RCMP team that

the farm in the area where the van was lost from sight was the Stetler farm. The team then discovered the northern entrance to the farm.

29 On September 20, 1998, the RCMP surveillance team observed the cube van driving from the rental agency to Ronald Coucke's residence. They lost sight of the van after it left the residence, but picked it up again driving south on the farm lane from Regional Road #9 to the Stetler farm at 11:45 p.m. They observed the van leave the farm via the same route twenty-five minutes later. They did not see any tobacco being loaded. The van was followed to the Guillemette residence where 66 bales of tobacco were unloaded. There had been numerous calls between Ronald Coucke's residence and Marcel Guillemette's residence, between Ronald Coucke's residence and the Stetler farm, and one call from the Stetler farm to the Guillemette residence. The police did not know who made the calls.

30 On February 4, 1999, the RCMP team observed the van leave the rental agency, enter the Stetler farm from the south via the driveway and leave the same way thirteen minutes later. The van was accompanied by a vehicle. The RCMP followed the van to M. Guillemette's residence where 85 bales of tobacco were unloaded. Constable Ferrara was the closest officer to the Stetler farm, but from inside his car he did not see or hear tobacco being loaded. His view was hindered by darkness, buildings and trees. The Stetler farm had one light on and the house showed no sign of being occupied.

31 When the RCMP searched the farm on March 12, 1999, they seized 29,609 pounds of tobacco and found loose tobacco stored in a tall building. Constable Ferrara testified that a cube van could be driven into the building and that there was a forklift truck inside.

32 The last witness was Gary Godelie, a tobacco grower for over 29 years and Vice-Chair of the Board. His own tobacco average yield was 2,475 pounds per acre. He testified that it was possible to load a cube van with bales of tobacco in 13 minutes by hand or with a forklift. He said that although tobacco could not be loaded in the dark, lights inside a barn may not be visible from outside. He also said that a forklift would make noise. He did not believe that it was common for tobacco growers to engage in the illegal practice of shipping tobacco through the Board's warehouse using another producer's shipping number. That practice would not affect the market but would undermine the quota system. Illegally selling tobacco to an unlicensed buyer was a more serious offence.

33 The Tribunal gave a detailed summary of the positions taken by each side in argument. Mr. Peel, on behalf of the respondents, took the position that there was no evidence that tobacco was removed from the Stetler farm on September 13, 1998. If tobacco was removed, there was no evidence that Wyatt Stetler was involved. He suggested that the phone call to the Guillemette residence from the Stetler farm that night may have been placed by Lori Stetler, who had been discussing illegal tobacco sales.

34 Mr. Peel suggested that on September 20, 1998, the cube van that entered the Stetler farm could have used the railway path to go to another farm, and that no activity was observed on the Stetler farm that night or on February 4, 1999. He submitted that the evidence did not show on a balance of probabilities that the tobacco came from the Stetler farm with Wyatt Stetler's knowledge. He acknowledged that Lori Stetler had tried to persuade her father to sell illegally, but Wyatt Stetler had declined to do so. Finally Mr. Peel asked the Tribunal to be compassionate with respect to penalty and to reduce the penalty imposed by the Board.

35 Mr. Bresner, for the Board, submitted that it would not make sense for the van to have accessed a nearby farm using the long route through the Stetler farm, and that the short time periods on September 20, 1998 and February 4, 1999 between when the van entered the Stetler farm and when it headed for Quebec were not long enough to go beyond the Stetler farm. He suggested that no activity was observed by police because the van could be driven right inside the barn.

36 He submitted that the wiretap evidence should be read as a whole in order to interpret it properly. This evidence showed that Wyatt Stetler sold tobacco illegally to Ronald Coucke until February 1999, when Wyatt Stetler refused to continue without being paid in advance. Mr. Bresner suggested that Wyatt Stetler was unnaturally guarded in his telephone conversation with his daughter. The balance of his submissions related to penalty and the need for general deterrence.

37 After setting out the evidence and summarizing the submissions, the Tribunal made its findings:

(1) There was insufficient evidence to determine on a balance of probabilities that the tobacco shipped to Quebec on September 13, 1998 came from the Stetler farm.

(2) The tobacco shipments on September 20, 1998 and February 4, 1999 came from the Stetler farm.

(3) The Tribunal accepted that it was possible to load the cube van within the times between which the van was seen entering and exiting the Stetler farm on September 20th and February 4th. It was possible that the RCMP officers would not have seen the loading if the van was inside the barn.

(4) The Tribunal found Dudley Stetler to be credible, but rejected as implausible his suggestion that the cube van could have been driven from the Stetler farm to another farm to pick up tobacco on September 20th and February 4th.

(5) The Tribunal had no doubt that the cube van could not have gone further than the Stetler farm in the thirteen minutes that it was out of sight on February 4, 1999.

(6) The Tribunal also found Constable Ferrara to be a credible witness, but resolved the discrepancy between his and Dudley Stetler's evidence regarding the proximity of the nearest Devos farm by saying that it was possible that the Constable was not aware of the farm described by Mr. Stetler.

(7) With respect to Wyatt Stetler's credibility, the Tribunal specifically excluded any consideration of his sale of tobacco using other growers' shipping numbers, although it noted his honesty in acknowledging these violations.

(8) The Tribunal rejected as incredible Wyatt Stetler's explanation that his comments in the wiretapped conversation regarding "up front money" referred to an unpaid car loan to his ex-wife Janet Stetler, and noted that he could not recall many other details about this conversation.

(9) There was considerable debate between the parties regarding the state of the tobacco on the Stetler farm and the tobacco delivered to the Guillemette residence in Quebec. The Tribunal could not determine whether the tobacco was hand-tied in Ontario or in Quebec, but only that it was deliv-

ered in bales. Nor could the Tribunal establish whether in a wiretapped conversation, Ronald Coucke said that the tobacco was hand-tied in Ontario. Therefore, the Tribunal did not use the state of the tobacco as a determinative consideration in its decision.

(10) On balance, the wiretap evidence supported the finding that tobacco was shipped from the Stetler farm to Quebec on September 20, 1998 and February 4, 1999.

(11) The Tribunal found that it was clear that Wyatt Stetler knew what was going on, even if he did not participate in loading the tobacco. First, the wiretap evidence suggested that Wyatt Stetler was aware that tobacco was being shipped from his farm to M. Guillemette. Second, the Tribunal did not believe that it was likely that over 85 bales of tobacco could be removed from the Stetler farm without Wyatt Stetler becoming aware that it was missing.

(12) The Tribunal confirmed the penalty imposed by the Board on the basis that Wyatt Stetler chose to undertake illegal sales of tobacco and should have been aware of the consequences as he had been active in the tobacco industry for many years.

(3) The Divisional Court

38 The respondents sought judicial review of the decision of the Tribunal. They raised five issues: (1) the standard of review; (2) the procedure adopted by the Tribunal; (3) errors of law by both the Board and the Tribunal with respect to the admission of evidence and the burden of proof; (4) reasonable apprehension of bias; and (5) the penalty.

39 The Divisional Court concluded that the applicable standard of review was the correctness standard. It noted that the Tribunal's decisions are by statute final and therefore protected by a privative clause, suggesting a deferential standard of review. However, the Divisional Court justified its finding that the applicable standard is correctness, on the basis that the issues were legal issues involving the admission of evidence and the burden of proof in the context of quasi-criminal charges with penal consequences, which did not engage the specialized expertise of the decision-makers.

40 The Divisional Court rejected the procedural claim, noting that the Tribunal held a trial de novo, which was a procedure it was entitled to use: Ministry of Agriculture, Food and Rural Affairs Act, s. 16(11).

41 The Divisional Court found, however, that the Tribunal committed errors of law. First, by finding only that Wyatt Stetler was aware that tobacco was being shipped from his farm to Quebec, the Tribunal failed to answer the question before it: whether Wyatt Stetler participated in the illegal sale of tobacco. Second, since the Divisional Court viewed the case as quasi-criminal in nature, involving a person's livelihood and the potential penalty of licence revocation, it found that the standard of proof required was not proof on a balance of probabilities, but clear and convincing proof based on cogent evidence. Third, the Divisional Court then found that the evidence before the Tribunal was not sufficient to entitle the Tribunal to make its findings.

42 On the fourth issue, the Divisional Court found that the Tribunal permitted itself to be tainted by "a clear apprehension of bias" by accepting and relying on the evidence of Gary Godelie, a Vice-Chair of the Board who had participated in the original Board decision. He gave evidence that sup-

ported the Board's decision regarding the time it would take to load a van with tobacco. The Divisional Court rejected the argument that the respondents were precluded from raising the bias issue for the first time before it because they did not object when the evidence was led before the Tribunal.

43 The Divisional Court concluded that the errors of law made by the Tribunal, including the bias issue, were sufficient for it to quash the decisions of both the Tribunal and the Board. The Divisional Court declined to refer the case back to the Tribunal because of its conclusion regarding the insufficiency of the evidence.

The Issues

44 The appellant identified three issues for appeal, although there are several sub-issues within the first one: (1) the standard of review; (2) bias and waiver; and (3) the remedy of quashing the Tribunal decision and not sending the matter back for a new hearing.

(1) Standard of Review

45 The method for determining the appropriate standard of review to be applied by a court on judicial review (or on an appeal) of an administrative decision was explained recently by the Supreme Court of Canada in Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, a discipline case similar to this case. See also Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152; Re Cartaway Resources Corp., [2004] 1 S.C.R. 672; Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers, [2004] 2 S.C.R. 427 at para. 48. In the Dr. Q. case, the Supreme Court stated that a pragmatic and functional approach is required in order to determine the legislative intent of the statute that creates the administrative tribunal. The three standards reflect different degrees of relative deference to the tribunal: (1) correctness, an "exacting review"; (2) reasonableness, a "significant searching or testing"; and (3) patent unreasonableness, where the issue is "left to the near exclusive determination of the decision-maker" (Dr. Q. at para. 22).

46 The pragmatic and functional approach to determining the degree of deference to be accorded to the administrative decision-maker in the circumstances involves a consideration of four contextual factors: (a) the presence or absence of a privative clause or statutory right of appeal; (b) the expertise of the tribunal relative to a court on the issue in question; (c) the purposes of the legislation and the provision in question; and (d) the nature of the question as one of fact, of law, or of mixed fact and law (Dr. Q. at para. 26).

47 The Supreme Court described the application of each factor. First, the existence of a privative clause militates in favour of deference, and the stronger the privative clause, generally, the more deference is due.

48 In order to properly address the second factor, the reviewing court is to characterize the expertise of the tribunal in question, consider the court's own expertise relative to that of the tribunal, and identify the nature of the specific issue before the tribunal relative to its expertise: Pushpanathan at para. 33. As the Supreme Court pointed out in Dr. Q., relative expertise can derive from a number of sources and from experience. Importantly, expertise can relate not only to factual and policy issues, but to issues of pure law and of mixed fact and law. Again, more deference is called for where the question at issue is within the tribunal's relative expertise.

49 For the third factor, the reviewing court is to consider the general purpose of the statutory scheme within which the tribunal's decision is being made. A reviewing court is expected to accord increased deference where the legislation is intended to balance and resolve competing policy objectives. In contrast, where the issue is the factual resolution of a dispute between two parties, less deference is required (Dr. Q. at paras. 30-32).

50 Finally, the Supreme Court noted that while the nature of the problem is only one of the four contextual factors to be assessed to determine the appropriate standard of review of administrative decisions, in the case of an appeal of a court decision, whether the question is one of fact, law, or mixed fact and law is essentially the only factor: see for example, Housen v. Nikolaisen, [2002] 2 S.C.R. 235 and H.L. v. Canada (Attorney General), [2005] S.C.J. No. 24. In administrative review, a factual decision or a mixed decision with a strong factual component will attract more deference, while a legal decision or a law-intensive mixed question will attract less deference.

51 In Dr. Q., an Inquiry Committee of the College of Physicians and Surgeons found the doctor guilty of professional misconduct with a patient, and suspended him from practice. The Medical Practitioners Act, R.S.B.C. 1996, c. 285, provided for an appeal to the Supreme Court of British Columbia "on the merits" of the case. The reviewing judge reassessed the evidence of guilt to determine whether it was sufficient to meet the standard of clear and cogent evidence. She disagreed with the Committee's findings of credibility and concluded that the evidence was not sufficiently cogent to allow the court to safely uphold the Committee's findings. On appeal to the British Columbia Court of Appeal, the court concluded that the reviewing judge's decision was not clearly wrong and dismissed the appeal.

52 The Supreme Court of Canada applied the four factors discussed above to determine the standard of review of the Committee's decision. The Supreme Court concluded that the proper standard was reasonableness. In that case, there was a broad right of appeal (the opposite of a privative clause) and the Committee was no more expert than a court on the issue. Therefore, the first two factors suggested low deference. The third factor, the purpose of the statute and the particular provision, was not determinative. One purpose was to protect the public and set ethical standards of conduct, suggesting more deference, but a second was to adjudicate fairly individual cases of alleged misconduct, suggesting less deference. However, because the nature of the question was factual, involving findings of credibility, the court should have accorded a high degree of deference to the Committee who saw and heard the witnesses. The court balanced these factors and concluded that the reviewing court should have asked "whether the Committee's assessment of credibility and application of the standard of proof to the evidence was unreasonable, in the sense of not being supported by any reasons that can bear somewhat probing examination" (at para. 39). Instead, the reviewing judge had used a correctness standard and had substituted her view of the evidence for the Committee's view.

53 Finally, the Supreme Court clarified the role of the court of appeal, which is to determine the proper standard of review. It is an error of law for the reviewing court to apply an incorrect standard of review. The court of appeal is to set aside the decision of the reviewing court and apply the correct standard of review to the administrative decision. The Supreme Court concluded in the Dr. Q. case, applying the reasonableness standard of review, that there was ample evidence to support the Committee's decision, which it reinstated.

54 In this case, the Divisional Court conducted an abbreviated standard of review analysis, using only some of the contextual factors. In my view, the Divisional Court committed the error of law

identified by the Supreme Court in Dr. Q. - it failed to conduct the pragmatic and functional analysis addressing all four contextual factors, and therefore failed to conduct the necessary balancing of those factors. Furthermore, it erred in its characterization of the decision as involving penal consequences, which error significantly influenced its decision on the standard of review.

55 More fundamentally, however, the Divisional Court's analysis failed to properly identify the issue that was decided by the Tribunal and was the subject of the judicial review - the conclusion that the respondent sold tobacco in contravention of the regulations and became subject to a penalty. Instead, the Divisional Court focused on certain legal and procedural issues that may arise during any hearing where evidence is led and where a determination must be made that involves findings of fact and the application of the law to those facts. The Divisional Court treated these problems as the issues under review. Looked at in that way, any administrative hearing and decision would be reviewable on the correctness standard.

56 Because of these errors, this court must determine the appropriate standard of review, and apply that standard to the decision of the Tribunal.

The Legislative Framework

57 Under the Farm Products Marketing Act, the Ontario Farm Products Marketing Commission is empowered to carry out the purpose of the Act, which is to "provide for the control and regulation in any or all aspects of the producing and marketing within Ontario of farm products including the prohibition of such producing or marketing in whole or in part" (s. 2). For tobacco, that power has been delegated by the Commission to the Board by regulation (R.R.O. 1990, reg. 435). This delegation includes all power over the allocation and revocation of tobacco production quotas. By General Regulations, promulgated on a year-to-year basis, the Board regulates the production and marketing of tobacco through licenses to produce and buy tobacco and by the allocation of marketing and production quotas. Section 9 of the General Regulations prohibits the sale or transfer of tobacco other than at a tobacco exchange operated by the Board. By s. 21, the local board may cancel, reduce or refuse to increase the quota of a person who has circumvented the General Regulations or for any other reason. The Ministry of Agriculture, Food and Rural Affairs Act, s. 16(2), provides for an appeal to the Agricultural, Food and Rural Affairs Appeal Tribunal from a decision of a local board made under the Farm Products Marketing Act. The SPPA applies to the hearing of an appeal by the Tribunal (s. 16(10)). By s. 16(11), on an appeal the Tribunal may, as the Tribunal considers proper, order the Board to take any action it is authorized to take under the Farm Products Marketing Act. The Tribunal may substitute its opinion for that of the Board. The Act goes on to provide for a possible reconsideration by the Tribunal as well as a further power in the Minister to vary the Tribunal's decision (ss. 17 and 18).

58 The members of the Board must be tobacco producers (Farm Products Marketing Act, R.R.O. 1990 Reg. 436, amended to O. Reg. 60/02). The members of the Tribunal are appointed by the Lieutenant Governor in Council and one of them must be a barrister and solicitor (Ministry of Agriculture, Food and Rural Affairs Act, s. 14(1.1)). The members of the Board have expertise in all aspects of the production and marketing of tobacco, while the members of the Tribunal sit on appeals from numerous local agricultural boards dealing with different agricultural products and marketing schemes.

Application of the Four-Factor Test from Dr. Q.

59 Although the Divisional Court purported to quash the decision of the Board as well as the decision of the Tribunal, the court was conducting a judicial review of the decision of the Tribunal, not of the Board. Similarly, this court is dealing with an appeal of the Divisional Court decision and therefore is concerned with judicial review of the Tribunal, which held a de novo hearing.

60 The first factor to be considered in determining the standard of review is the privative clause identified by the Divisional Court. The respondents argue that a clause that makes the decision of an administrative tribunal a "final" decision is a weak privative clause, because it does not use language that prohibits judicial review: Sara Blake, Administrative Law in Canada, 3d ed. (Markham: Butterworths, 2001) at 190. In Pushpanathan, the Supreme Court characterized such a clause as signalling deference, but subject to the other three factors (at paras. 30-31).

61 The second factor is the relative expertise of the Tribunal as compared with that of the reviewing court, in respect of the issue to be determined by the Tribunal. In this case the issue before the Board and then on appeal before the Tribunal was whether the respondents had engaged in the unlawful sale of tobacco outside the auspices of the Board and the quota system, and if so, whether their quota should be cancelled or reduced.

62 The allegations against the respondents in this case involve surreptitiously transporting tobacco from Ontario to Quebec outside the quota system. This activity, if proven, is an "offence" because it contravenes the legislation I have just outlined. But, in the context of the hearing before the Tribunal, it is a regulatory, not a criminal offence. The jurisdiction of the Board is to investigate such activity and to hold a hearing. If the Board finds that the activity has occurred, it can impose penalties that involve limiting the person's ability to grow or market tobacco. Contrary to the statement by the Divisional Court, there are no possible penal consequences, nor is there any finding of criminality or quasi-criminality made by the Board.

63 As the Supreme Court stated in Martineau v. Canada (Minister of National Revenue), [2004] 3 S.C.R. 737, "proceedings of an administrative -- private, internal or disciplinary -- nature instituted for the protection of the public in accordance with the policy of a statute are not penal in nature" (at para. 24). The court held that although a disciplinary proceeding may be aimed at deterring potential offenders, this feature does not make it penal or quasi-criminal (at para. 38). The reasoning of Fish J. is apposite:

> This process thus has little in common with penal proceedings. No one is charged ... No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings (at para. 45).

64 In conducting the hearing, the Tribunal necessarily had to determine the admissibility and the weight to be accorded to the evidence and had to determine and apply the correct burden of proof. These are necessarily functions of all hearings of a disciplinary nature. The power to make determinations regarding the admission and use of evidence in an administrative context is given by the SPPA (ss. 15, 15.1, 15.2, 16). The Tribunal was also concerned with making findings of credibility and of fact and with drawing inferences from the evidence. Again, these are common issues in hearings of a disciplinary nature.

65 The governing legislation ensures that the Tribunal has some expertise in legal matters by requiring that one of the members must be a lawyer. Given the nature of the issues before the Tribu-

nal, which are equally familiar to a court and to the Tribunal, as was the case in Dr. Q., the factor of relative expertise in assessing the standard of review is a neutral one.

66 The third factor relevant to the determination of the standard of review is the purpose of the legislation and the provision in question. The purpose of the legislative scheme I have briefly described is to ensure that tobacco is grown and marketed under an orderly system that regulates the quantity and price of tobacco produced, providing a fair scheme for all those involved in the industry. The purpose of the specific provision that allows the Board, and on appeal, the Tribunal, to cancel or reduce the quotas of those who violate the scheme is to enforce compliance for the benefit of all. It is intended that the Board and the Tribunal, who are familiar with the marketing schemes, their purpose, their effect and their rules, are to employ that understanding in the enforcement of the regulations. The Tribunal is less specialized than the Board, and to that extent, its particular expertise in tobacco is much more limited. In any event, because these types of administrative decisions are not policy decisions, but are adjudicative in nature, as in the Dr. Q. case, this factor does not weigh strongly in favour of a deferential standard of review.

67 The final factor is the nature of the issues to be determined. In deciding any case where witnesses are called, there are issues of fact, including findings of credibility and inferences to be drawn from the evidence. There are also procedural and legal issues including notice, the opportunity to be heard, the admission of evidence, the burden of proof and the duty to give reasons, to name a few. In this case, the Tribunal made findings of fact, including significant findings of credibility. It was also required to draw inferences from the evidence, including the wiretap evidence. The Tribunal admitted evidence, decided what use to make of it and determined and applied the burden of proof.

68 Where a tribunal is making factual decisions based on the evidence presented before it, a significant degree of deference is accorded to those decisions. Similarly, where a tribunal governed by the SPPA conducts its hearing within the procedural discretion afforded by that statute, a court will accord substantial deference to its discretionary procedural and legal decisions, provided there has been no denial of natural justice in the procedure chosen: Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 249 at paras. 74-75; London (City) v. Ayerswood Development Corp., [2002] O.J. No. 4859, 167 O.A.C. 120 at para. 10. However, questions of law of general application that do not engage the specialized expertise or the discretion of the tribunal are reviewable for correctness: Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487 at para. 39; Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77 at paras. 14-15; London (City) at para. 7.

69 In this case, the respondents' position is that the Tribunal made errors on legal issues before it (1) by failing to employ the standard of "clear, cogent and convincing evidence"; and (2) by using the hearsay wiretap conversations where Wyatt Stetler was not a party, without applying the R. v. Carter, [1982] 1 S.C.R. 938, analysis for the admission of hearsay by co-conspirators. The respondents also argue that the Tribunal made an error of law or denied them natural justice by admitting the evidence of Gary Godelie, thereby creating an apprehension of bias in the Tribunal.

70 On the standard of proof and bias issues, the Tribunal had to be correct regardless of the standard of review to be applied to the decision of the Tribunal. In contrast, the hearsay issue is a question of law within the context of the procedure of the Tribunal and includes a discretionary element. In that context, it is subject to the overall standard of review of the Tribunal decision.

The Correct Standard of Review in this Case

71 Balancing all of the four factors, I conclude that, as in Dr. Q., the Tribunal's decision on the issue before it, which was whether the respondents engaged in the unlawful sale of tobacco outside the auspices of the Board and the quota system, should have been reviewed by the Divisional Court on a standard of reasonableness. The court was therefore required to ask whether the conclusion reached by the Tribunal was unreasonable considering the record before it and applying the proper standard of proof. That said, on pure questions of law that do not involve the discretion or expertise of the Tribunal, the Tribunal had to be correct.

Treatment of Hearsay Wiretap Evidence

72 Before considering whether the Tribunal's decision on the issue before it was unreasonable, I must first address the specific concerns raised by the respondents that they characterize as legal issues. The first is the treatment of the hearsay evidence contained in the transcripts of wiretapped conversations that did not involve Wyatt Stetler, but which referenced him. The respondents argue that because the Tribunal concluded that Wyatt Stetler did not participate in loading the tobacco himself, he could only have been found guilty as a co-conspirator and, on that basis, the Tribunal could only admit the hearsay evidence after applying the Carter test for the admission of hearsay evidence of a co-conspirator against an accused person.

73 I reject this argument for several reasons. First, the rule in Carter is a test applied to certain hearsay evidence that allows the evidence to be used to prove beyond a reasonable doubt that a person was a member of a conspiracy. In an administrative proceeding such as the one at issue in this case, the standard of proof beyond a reasonable doubt is not applicable.

74 Second, under the SPPA, an administrative tribunal is entitled to admit and rely on hearsay evidence. The Tribunal did not exercise that discretion unreasonably in admitting the evidence. Third, and of great significance in this case, the agreement that was made by counsel in exchange for the stay of the Excise Act charges was that all the RCMP evidence in the Crown brief would be submitted in the regulatory proceeding, subject to the right of counsel to address the proper interpretation of the evidence and the conclusions to be drawn from it. The respondents cannot now complain about the admission or the use of that evidence by the Tribunal. In any event, I am satisfied that there was sufficient non-hearsay evidence admissible against Wyatt Stetler (such as his own recorded conversation with Lori Stetler and the evidence of the removal of a substantial amount of tobacco from his farm), to prove that he was probably a member of the conspiracy in accordance with the Carter test, had the Tribunal applied it.

The Standard of Proof

75 The second legal error alleged by the respondents is that the Tribunal failed to employ the correct standard of proof which, they submit, is proof by "clear, cogent and convincing evidence".

76 The respondents assert that this "higher degree of proof" is required in all cases where a person's professional standing or livelihood is at risk. They rely on a list of Ontario cases to illustrate that this standard has consistently been held to apply to disciplinary hearings involving professionals, including doctors, accountants, architects, chiropractors, nurses, ophthalmologic dispensers, pharmacists and physiologists, as well as to certain non-professionals, namely, motor vehicle dealers and stock brokers: Re Bernstein and College of Physicians and Surgeons of Ontario (1977), 76 D.L.R. (3d) 38 (Ont. C.A.); Persaud v. Society of Management Accountants of Ontario (1997), 144

D.L.R. (4th) 375 at 382 (Div. Ct.); Guthrie v. Ontario Assn. of Architects (1988), 29 O.A.C. 146 at para. 4 (Div. Ct.); College of Chiropractors of Ontario v. Kovacs (2004), 191 O.A.C. 88 at paras. 16 and 198 (Div. Ct.); Carruthers v. College of Nurses of Ontario (1996), 31 O.R. (3d) 377 at 401 (C.A.); Markandey v. Ontario (Board of Opthalmic Dispensers), [1994] O.J. No. 2913 (Gen. Div.); Abji v. Ontario College of Pharmacists, [2001] O.J. No. 4546 (Div. Ct.); Brett v. Board of Directors of Physiotherapy (1991), 48 O.A.C. 24 at 33 (Div. Ct.); Coates v. Registrar of Motor Vehicle Dealers and Salesmen (1988), 65 O.R. (2d) 526 at 535-537; Robinson v. Ontario (Securities Commission), [2000] O.J. No. 648. See also: Robert W. Macaulay & James L.H. Sprague, Practice and Procedure Before Administrative Tribunals, Vol. 2 looseleaf (Toronto: Carswell, 1988) at 17-8; Brown & Evans, Judicial Review of Administrative Action in Canada, vol. 3 looseleaf (Toronto: Canvasback Publishing, 1998) at 12:3200.

77 The Attorney General for Ontario was granted intervenor status to address four issues on the appeal, including the standard of proof. The Intervenor takes the position that the standard of proof for this Tribunal should be on a balance of probabilities with no higher degree of proof required. Its submission is based on three grounds: (1) that a tobacco producer's livelihood is not affected because the person can still grow other crops; (2) a tobacco producer does not have the same years of education, skill and training invested as a professional; and (3) as tobacco is a highly regulated industry, to require the "higher standard of proof" asserted by the respondents could lead to abuses in the regulatory scheme and unfairness to other producers operating within it.

78 The Intervenor relies on the British Columbia Court of Appeal decision in British Columbia (Superintendent of Brokers) v. Rak (1990), 74 D.L.R. (4th) 725, involving a disciplinary hearing by the Securities Commission of a director and officer of several companies who was found to have breached the Securities Act, S.B.C. 1985, c. 83. In that case, the court declined to require a higher degree of proof. The court said that trading in securities is not a profession, and that the paramount consideration for the Commission is the protection of the public. However, interestingly, the Commission itself, in its reasons, recognized that the case was a serious one requiring a high degree of proof. The court agreed that the serious consequences for the person in question should be taken into account by the Commission in appropriate cases.

79 In my view, the respondents' argument is misconceived. There are only two standards of proof used in legal proceedings. In civil and administrative matters, absent an express statutory provision to the contrary, the standard of proof is on a balance of probabilities, while in criminal matters it is proof beyond a reasonable doubt. The well-established standard articulated in Bernstein and numerous subsequent cases is an evidential standard that speaks to the quality of evidence required to prove allegations of misconduct or incompetence against a professional. Thus, within the administrative context, it is accepted that strong and unequivocal evidence within the civil standard of proof is required where either the issues, or the consequences for the individual, are very serious. See for example, Brown & Evans, Judicial Review of Administrative Action in Canada, vol. 3 at 12:3200; Blake, Administrative Law in Canada at 66-67.

80 I do not share the concern of the Intervenor that requiring clear, cogent and convincing evidence in cases such as this will have any negative effect on the regulatory scheme governing the tobacco industry in Ontario. The case law in Ontario has been consistent in requiring this high evidential standard in disciplinary cases, whether of professionals or of others where their established means of livelihood may be at risk.

81 In its reasons, the Tribunal referred to the standard of proof as "on the balance of probabilities." It made no error in so doing, as that is the correct standard in administrative proceedings, absent clear statutory language to the contrary in the constating statute of the Tribunal in question. This was also the standard urged by respondents' counsel at the Board and Tribunal. Furthermore, I agree with the appellant that in this case, although the Tribunal did not articulate a requirement for clear, cogent and convincing evidence, its analysis of the evidence demonstrated that it was only prepared to make findings against the respondents if it was satisfied that the evidence justified the findings to that degree. Therefore, the Tribunal made no error, because it applied this exacting evidential standard before finding that the respondents had sold tobacco in contravention of the regulations.

82 For example, in the face of a finding by the Board on this issue, although there was some evidence from which an inference could be drawn that on September 13, 1998, the van picked up tobacco at the Stetler farm, the Tribunal found the evidence insufficient on a balance of probabilities, even though it was satisfied of Wyatt Stetler's involvement on the other occasions.

83 In contrast, the Tribunal was satisfied, and so found, that the shipments were made from the Stetler farm on September 20, 1998 and on February 4, 1999. Although the RCMP surveillance lost sight of the cube van for 25 minutes and 13 minutes respectively on those dates, the Tribunal considered it implausible that the van was driven to another farm and back on September 20th, and impossible on February 4th. The Tribunal heard evidence regarding the proximity of other farms and the nature of the railway path access between farms, the evidence that no nearby farms were the subject of the RCMP investigation into the entire operation, the timing of the appearances of the van, and the fact that the van fit inside the Stetler farm building and would not be noticeable when tobacco was loaded in that location.

84 The Tribunal scrutinized the wiretap evidence to decide what facts could be found based on it and what inferences could be drawn from it. The Tribunal could not determine on the evidence whether the tobacco shipped to Quebec was hand-tied. Taking that issue out of consideration, it was satisfied that, on balance, the wiretap evidence supported the finding that the tobacco came from the Stetler farm on September 20th and February 4th. I understand the Tribunal to be saying that there was nothing in the wiretap evidence that contradicted that finding made on other evidence.

85 On the critical issue of Wyatt Stetler's knowledge and acquiescence in allowing his tobacco to be picked up and shipped to Quebec and receiving payment, the Tribunal had to assess his credibility and the strength of the evidence against him. First, in contrast to the approach taken by the Board, the Tribunal declined to base its credibility decision on Wyatt Stetler's other activity in contravention of the Board regulations, namely, selling tobacco using other growers' shipping numbers, which the Board had found displayed a cavalier attitude regarding the Board and the regulations. Instead, the Tribunal noted its appreciation of Wyatt Stetler's honesty in admitting this activity.

86 The Tribunal based its credibility findings on Wyatt Stetler's own testimony. It found his explanation for his wiretapped reference to a requirement for "up front money" to be incredible. The Tribunal also noted his inability to recall other details relating to that conversation. The Tribunal concluded that the wiretap evidence suggested that Wyatt Stetler was aware that tobacco was being shipped from his farm to Quebec. Turning to the other evidence, the Tribunal concluded that it was not likely, again rejecting Wyatt Stetler's evidence, that 85 bales of tobacco could be removed from his farm without Wyatt Stetler realizing that it was missing. The Tribunal concluded, based on all

the evidence, that Wyatt Stetler knew what was going on even if he did not load the tobacco himself.

87 The respondents argue in their factum that the evidence against Wyatt Stetler was weak because it was entirely circumstantial. This is a misstatement on two fronts. First, circumstantial evidence can be very strong evidence. In this case, the movements of the van onto the Stetler farm and the timing on the two days in question is strong circumstantial evidence. Second, there was also direct evidence in the form of the wiretapped conversations, including Wyatt Stetler's own conversation with his daughter Lori on February 27, 1999 and the follow-up conversation on March 1st between Ronald Coucke and Lori Stetler, referred to in paragraph 25 above.

88 In my view, the Tribunal understood the seriousness of the allegations against the respondents and was careful to scrutinize the evidence and only make findings that were supported by clear, cogent and convincing evidence that it accepted. The Bernstein evidential standard, therefore, was met.

Reasonable Apprehension of Bias and Waiver

89 The third legal error raised by the respondents is that the Tribunal "allowed itself to be tainted by a reasonable apprehension of bias" by allowing the Board to call Gary Godelie as a witness. Mr. Godelie was Vice-Chair of the Board and participated in the decision that was appealed to the Tribunal. As part of this error, the respondents say that Mr. Godelie's evidence was in the nature of expert evidence and was admitted without compliance with the Tribunal's own Rules of Procedure.

90 The Divisional Court agreed with the respondents and also held that the respondents' failure to object to this evidence in a timely manner was not fatal. The appellant says that the Divisional Court erred in finding a reasonable apprehension of bias and, in any event, by failing to raise the issue before the Tribunal, the respondents waived any objection on this ground. The Intervenor takes the position that there is no apprehension of bias where an appeal Tribunal conducting a trial de novo receives evidence from an adjudicator on the Board below that is within the person's knowledge or expertise.

91 The issue of reasonable apprehension of bias most often arises in the context of the need for a member of an adjudicative body to disqualify himself or herself because of some connection with the case that would raise the apprehension. The accepted test was articulated by the Supreme Court of Canada in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369 at 394 and recently restated in Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259 at para. 60:

> "[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would [that person] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

92 Although not identical, the issues raised by a tribunal appearing as a party on a judicial review application are somewhat analogous to those raised here by a member of the Board appearing as a witness before the Tribunal. This court recently considered whether according an administrative tribunal standing before an appellate court reviewing the tribunal's decision creates a reasonable ap-

prehension of bias in the tribunal. Children's Lawyer for Ontario v. Goodis, [2005] O.J. No. 1426 at para. 43 (C.A.). One concern is that the tribunal's participation may raise a reasonable apprehension that it will be biased in relation to the specific parties or similar issues in the future: Northwestern Utilities Ltd. v. Edmonton (City), [1979] 1 S.C.R. 684 at 709. In the face of an unclear statute, whether to grant standing is a matter of discretion that requires the court to balance the importance of fully informed adjudication and the importance of maintaining the board or tribunal's impartiality: Goodis at para. 43. In this case, however, the respondents allege that a Board member's testimony created a reasonable apprehension of bias in the Tribunal hearing the matter de novo, not in the Board that made the original decision.

93 On the record before us, it is not entirely clear how an apprehension of bias arises in the Tribunal because it heard evidence from a member of the Board. Perhaps the suggestion is that because the witness was a member of the Board that decided the original case, that that person's position would cause the appeal Tribunal to give greater weight to his evidence than to that of other witnesses. In some instances, as where the procedure calls into question hearing fairness or the appearance of impartiality, this submission could well have considerable force. But here there is no suggestion in the record that there was any relationship between Mr. Godelie and the members of the Tribunal. There is also nothing in the record to indicate whether the procedure followed in calling Mr. Godelie is either common or uncommon before this Tribunal.

94 The record does establish, however, that Mr. Godelie was not called as a witness in his capacity as a Board member but, rather, to give evidence within the domain of his extensive, and unchallenged, experience as a tobacco grower.

95 The respondents also suggest that the witness had a conflict of interest in the circumstances, or at least the appearance of a conflict. However, in the context of an analysis of reasonable apprehension of bias in the Tribunal, that fact would have been clear to the Tribunal when assessing his evidence.

96 In Wewaykum, the Supreme Court thoroughly reviewed the law of reasonable apprehension of bias. One of the important principles that the court identified is that every inquiry on this issue is "highly fact-specific." The court quoted with approval the statement of Lord Steyn in Man O'War Station Ltd. v. Auckland City Council (Judgment No. 1), [2002] 3 N.Z.L.R. 577, [2002] UKPC 28 at para. 11: "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As I have noted, we have very little information about the context and the particular circumstances in this case. Certainly, had an objection been made to the Tribunal when the witness was called, the context and any relevant facts could have been identified and considered before the Tribunal decided whether to allow him to testify. However, experienced counsel on behalf of the respondents made no objection to this witness before the Tribunal.

97 Given the unusual context of the allegation of reasonable apprehension of bias, the lack of a fact-specific context that suggests such an apprehension, and the law that requires a fact-specific analysis, I cannot agree with the Divisional Court that a reasonable apprehension of bias in the Tribunal was made out in this case. On the record before us, neither the Divisional Court nor this court is in a position to determine that there was a reasonable apprehension of bias in the Tribunal by hearing the evidence of Mr. Godelie.

98 Moreover, and importantly, in the circumstances of this case, any objection was waived by the respondents when they did not raise any issue regarding this witness before the Tribunal: Canada

(Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892 at para. 174, citing with approval In Re Human Rights Tribunal and Atomic Energy Canada Ltd. (1986), 24 D.L.R. (4th) 675 at 682-83 (F.C.A.). The same can be said about any alleged non-compliance with the procedural rules of the Tribunal in admitting this witness' evidence without notice. I agree with the appellant that had a timely objection been raised, the Board could have sought an adjournment to find a different witness, declined to call the evidence, or persisted with its position and obtained a ruling by the Tribunal which would have been subject to judicial review. By failing to make a timely objection so that the issue arose for the first time on judicial review, the respondents created a potential ground for review to be raised only if the Tribunal decision was unfavourable.

99 The principle of implied waiver is described in Halsbury's Laws of England 4th ed., vol. 1 at para. 71, p. 87, quoted with approval by the Federal Court of Appeal in Zundel v. Canada (Canadian Human Rights Commission) (re Canadian Jewish Congress), [2000] F.C.J. No. 1838 at para. 4:

> The right to impugn proceedings tainted by the participation of an adjudicator disqualified by interest or likelihood of bias may be lost by express or implied waiver of the right to object. There is no waiver or acquiescence unless the party entitled to object to an adjudicator's participation was made fully aware of the nature of the disqualification and had an adequate opportunity of objecting. Once these conditions are present, a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity.

100 In this case, all parties and their counsel were fully aware that Mr. Godelie had been a member of the Board that heard the case originally, and no objection was made. In addition, on the issue of alleged prejudice from the failure to comply with the Tribunal's rules for expert evidence, it does not appear that the respondents sought an adjournment to permit them to prepare or to respond to Mr. Godelie's evidence. In my view, in those circumstances, the respondents failed to demonstrate any prejudice and the doctrine of implied waiver and deemed acquiescence applies.

Applying the Reasonableness Standard of Review

101 In my view, the Tribunal's factual findings, including its decisions on credibility and its application of the standard of proof to the evidence, were not unreasonable. I have outlined above the evidence that the Tribunal expressly addressed in coming to the following conclusions: (1) the shipments on September 20, 1998 and on February 4, 1999 came from the Stetler farm; and (2) Wyatt Stetler was aware of what was going on and participated by allowing tobacco grown by him, which was required to be sold through the Board, to be transported instead to Quebec surreptitiously by van, outside the Board's tobacco marketing quota system. The Tribunal acknowledged that Wyatt Stetler may not have physically participated in loading the tobacco, but that was not necessary for its finding. The Tribunal was entitled to draw inferences from the evidence, including the wiretap evidence. The respondents had a full opportunity to rebut that evidence and call any witnesses they wished.

Conclusion on Liability

102 In my view, the Divisional Court erred by failing to properly determine the appropriate standard of review to apply to the decision of the Tribunal, and by applying the standard of correctness rather than reasonableness. That said, to the extent that the Divisional Court dealt with errors of law,

the Tribunal was required to be correct. However, in my view, for the reasons I have given, the Tribunal did not err in respect of those matters. Also, the admission of the wiretap hearsay evidence was a question of law but one on which the Tribunal had a discretion which it did not exercise unreasonably in the circumstances in admitting and relying on the wiretapped conversations. I would allow the appeal on the liability issue and set aside the decision of the Divisional Court quashing the decision of the Tribunal on liability. It is therefore unnecessary to address the decision of the Divisional Court not to remit the case back to the Tribunal for a further hearing.

Penalty

103 In both their written and oral submissions, the respondents sought to set aside the penalty imposed by the Tribunal. Although there is no Notice of Cross-Appeal, this relief is subsumed in the original request for judicial review, and no objection was taken to these submissions.

104 The penalty originally imposed by the Board was the cancellation of 100% of both respondents' basic production quota, a total of 232,604 pounds, although the Board allowed the respondents to sell the tobacco they had already grown. The Board compared the respondents' circumstances with those of others who were convicted of the same offence and involved in the same scheme.

105 In the DeVos case, Mr. DeVos admitted engaging in the illegal sale of 48,960 pounds of tobacco, but he sincerely apologized to the Board and co-operated with the RCMP investigation. The Board was completely satisfied that he would not transgress again. Although it is not stated in the Board's decision, its cancellation of 220,838 pounds of basic production quota represented only 25 per cent of Mr. DeVos' quota. He also paid a $10,000 fine. The Bodnars admitted the unlawful sale of 4000 pounds of tobacco and had 49,260 pounds of basic quota cancelled, representing 100 per cent of their quota. In the Duval case, Mr. Duval admitted the unlawful sale of 6500 pounds of tobacco. His entire quota of 30,000 pounds was cancelled and he was ordered to destroy the tobacco he had.

106 The Board found that Wyatt Stetler unlawfully sold tobacco on at least three occasions, two in September, 1998 and one in February, 1999. The Board commented on the fact that he did not apologize and was defiant and argumentative. It concluded that it had no reason to believe he would adhere to the Board's regulations in the future, and noted the absence of any mitigating factors. The Board also made a specific finding regarding the illegal sales of tobacco to his neighbours, which were admitted, and drew the inference that these transactions displayed a cavalier attitude on his part.

107 The Tribunal dealt with penalty in one paragraph in its reasons. It found that Wyatt Stetler was an experienced tobacco grower in a highly regulated industry who knew his obligations and knew that the penalty would be severe for breaking the rules. The Tribunal concluded that the penalty imposed by the Board was appropriate. The Tribunal was not inclined to vary that penalty.

108 The issue of the appropriate penalty for infractions within a profession or industry is one that is uniquely within the experience, expertise and discretion of the relevant disciplinary tribunal and is therefore subject to a high degree of deference. The penalty imposed by the Tribunal, nevertheless, is subject to a reasonableness standard on review. The Tribunal's reasons, taken as a whole, must stand up to a somewhat probing examination. Given that a person's livelihood is at stake, however, the extremely serious consequences of the penalty require the court to inquire whether the Tri-

bunal "properly considered all relevant factors in determining the appropriate penalty": Ontario Provincial Police v. A.L. Favretto, [2004] O.J. No. 4248, 72 O.R. (3d) 681 (C.A.) at para. 50.

109 In this case, the Tribunal upheld, without variation, the penalty imposed by the Board. Yet the Board had found liability on three dates, whereas the Tribunal only found liability on two. Also, the Board took significant account of Wyatt Stetler's sales to neighbours in its decision, whereas the Tribunal had discounted that evidence for credibility purposes. It is unclear whether the Tribunal took it into account for the purpose of imposing penalty. The Board's penalty clearly was based significantly on Wyatt Stetler's failure to apologize, as compared with other growers. Again, the Tribunal does not say what effect, if any, that factor played in its decision to uphold the penalty. Nor is it clear that the Tribunal was alive to the fact that it could not treat this factor as an aggravating circumstance.

110 The Tribunal's hearing was a trial de novo. Certainly on an appeal, the Tribunal is entitled to consider the penalty imposed by the Board. In so doing, it must also ensure that to the extent the evidence and findings made differed from those of the Board, either the penalty imposed reflects that difference, or the Tribunal explains in its reasons why, in spite of the different findings, the same penalty is warranted. This is especially important when the penalty is the complete cancellation of a basic production quota and therefore affects the respondents' ability to continue in tobacco farming. Because it is not clear that in imposing the original penalty set by the Board and in the face of its different findings, the Tribunal considered all relevant factors, I conclude that the Tribunal's penalty decision is unreasonable: Ontario (Provincial Police) v. Favretto at para. 50.

111 This court is not in a position to determine the proper penalty. Therefore, the matter is referred back to the Tribunal only for the purpose of reconsidering the issue of penalty and providing reasons for whatever penalty is imposed.

Result

112 I would allow the appeal, set aside the decision of the Divisional Court, reinstate the decision of the Tribunal on the findings with respect to liability, and remit the matter to the Tribunal to reconsider, as it deems appropriate, the issue of penalty.

113 Each side submitted a bill of costs. On the partial indemnity scale the totals were virtually identical: approximately $47,500.00. The appellant was wholly successful on the liability issue, while the respondents had partial success on the penalty issue. I would therefore award costs fixed at $30,000.00 to the appellant inclusive of disbursements and G.S.T.

K.N. FELDMAN J.A. S. BORINS J.A. -- I agree.
E.A. CRONK J.A. -- I agree.

cp/e/qw/qlalc/qlsxs/qlkjg/qlgxc

e/drs/qlcg/qljal

1 The Tribunal is also a respondent in this proceeding. I refer in these reasons to Wyatt Stetler and 934671 Ontario Limited, collectively, as the "respondents" and to the Tribunal as the "Tribunal".

Case Name:

Chastain v. British Columbia Hydro and Power Authority

Between
Karen Chastain, Phillip Rankin, Alistair Waddell, suing on behalf of themselves and suing on behalf of all other individual persons in residential premises being required to pay security deposits or who have paid security deposits to the British Columbia Hydro and Power Authority for the supply of gas and electrical power, plaintiffs, and
British Columbia Hydro and Power Authority, defendant

[1972] B.C.J. No. 576

32 D.L.R. (3d) 443

[1973] 2 W.W.R. 481

Vancouver Registry No. 13647/72

British Columbia Supreme Court
Vancouver, British Columbia

McIntyre J.

Heard: October 19, 20, 23, 24 and 31, 1972.
Judgment: filed December 28, 1972.

(32 paras.)

Counsel:

I.G. Waddell, and D.W. Mossop, for the plaintiffs.

R.D. Strilive, for the defendant.

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1 McINTYRE J.:-- The plaintiffs sue on behalf of themselves and all others in residential premises being required to pay security deposits or who have already paid such deposits to the defendant

for the supply of gas and electric power. The plaintiff Karen Chastain is a student, the plaintiff Rankin is a student and the plaintiff Waddell was, at the commencement of these proceedings, unemployed, but is now employed as a detention home supervisor. All of the named plaintiffs are young, though precise evidence of age was not given, and although Karen Chastain and her husband jointly own some real property in Mission, British Columbia, all are in modest, if not impecunious, circumstances. The defendant is a Crown corporation incorporated under the provisions of the British Columbia Hydro and Power Authority Act, 1964. By section 14(1)(a) of the Act the defendant is empowered to generate, manufacture, distribute and supply power. The word "power" as defined in section 2 of the Act includes electricity and gas. It was alleged that the defendant has an absolute monopoly in British Columbia for the supply of gas and electricity. This was denied and it was asserted that other agencies in British Columbia could also supply gas and electricity. It was conceded, however, and I find as a fact that in the area in which the plaintiffs sought the delivery of services from the defendant and, indeed, for the majority of power users in British Columbia the defendant does have an absolute monopoly and there was no other source to which the plaintiffs could turn for the supply of gas and electricity.

2 Karen Chastain, one of the plaintiffs, is a student at Simon Fraser University and a part time waitress. She and her husband lived at Mission, British Columbia in 1968. They had a power account with the defendant there in the husband's name. The husband was also a student in receipt of some form of military pension from the United States Government. They were not asked for a security deposit in Mission and there is no suggestion that when that account was closed there were unpaid bills for service. They moved to 4429 James Street in Vancouver about October 1st of 1971. Power and gas were already connected, presumably in the name of an earlier occupant, and she, her husband and three others (two of whom left when there was a threat of a power cut-off) had the use of a power supply from October 1st, 1971. She applied in her own name for the power connection and signed the defendant's application form in early November of 1971. The exact date is not clear but the application which was mailed to the defendant bears a postmark of November 9th. This application and others signed by the other plaintiffs bear above the signature of the applicant the following words:

> "AGREEMENT: The undersigned agrees to take and pay for electricity and/or gas from the British Columbia Hydro and Power Authority in accordance with this application and the rates, terms, and conditions contained in the Authority's electric and/or gas tariff(s) as amended from time to time and available for inspection at any general office of the Authority."

3 By letter dated November 30th, 1971, the defendant wrote to the plaintiff in the following terms:

> "As provided in the tariffs of the British Columbia Hydro and Power Authority, a Security Deposit in the amount of $75.00 is required on the above account.
>
> We would appreciate receiving payment in this office on or before 7 December 1971.
>
> Please mark your cheque or money order 'For Security Deposit Only'."

This letter was duly received but Mrs. Chastain did not pay the $75.00. On the 8th of December, 1971 the defendant wrote a second letter in which it stated that if the $75.00 was not paid by the 20th of December, 1971, service would be discontinued without further notice. The plaintiff 'phoned the defendant's office and arranged for an extension of time until the end of December, 1971 and on or about the 20th or 21st of December wrote to the defendant in the following terms:

> "In reference to your letters of November 30th and December 8th 1971, I would like to know why I have to pay this deposit. I would also like to know what are 'the tariffs of the British Columbia Hydro and Power Authority' as they affect me in your demand for a security deposit.
>
> I would appreciate an early reply to my letter since my hydro will be cut off on December 28th."

This letter drew a reply dated 29th of December, 1971:

> "In reply to your enquiry regarding the necessity for a Security Deposit for a utility account, we trust the following information will clarify the matter.
>
> Obtaining a Security Deposit to guarantee payment of a utilities account is a common business practice exercised by most utility companies on the North American continent. The Electric and Gas Tariff available for public inspection at the Hydro Authority's head office at 970 Burrard Street, Vancouver, states: 'Any customer may at any time be required by the Authority to deposit and to maintain with the Authority a Security Deposit in cash or its equivalent'.
>
> You may establish a good payment record with the British Columbia Hydro and Power Authority by paying your bills promptly for two years. At the expiry date of such time, and upon request, a review of your account will be undertaken with the view to refunding your Deposit if terms of payment have been met.
>
> We would appreciate receiving payment of the $75.00 Security Deposit in our office by the 17 January 1972, after which time the service would be subject to disconnection without further notice."

The deadline of January 17th, 1972 passed with no interruption in service and these proceedings were commenced on January 26th of 1972. Mrs. Chastain then stood in peril of having her power cut off at the date of the commencement of these proceedings.

4 The plaintiff Rankin was at all relevant times a student at Simon Fraser University. He and three or four other students occupied the residential premises at 1139 East 13th Avenue in Vancouver from September 14th, 1971 to about the end of May, 1972. On occupation, there was an existing power connection which he and his companions used. He paid at least one bill rendered for service while the account remained in the former name and there is no suggestion that any bills for service

during his period of occupancy went unpaid. He applied for service in his own name by filling out the company's form of application in or about November 6th, 1971 and at or about that time received a demand from the defendant for a security deposit in the amount of $60.00. He could not pay because he did not have the money. When the defendant insisted on payment or termination of power service, he procured the money from his father and paid the deposit on December 7th, 1971. On his departure from that address in May or June of 1972 he received the deposit back less the amount of a bill covering services up to the date of his departure from the premises.

5 The plaintiff Waddell occupied residential premises at 2187 York Avenue, Vancouver in December of 1971. He took over from an earlier tenant who had an account with the defendant and he made use of the service. He applied for service from the defendant in late December of 1971 after using the power for some time. He found there was an unpaid account in the sum of $43.00 for service rendered to his predecessor. He did not want to have trouble with the defendant and, having the money at that time, he paid this old account of $43.00, He did not say that he had been required to pay it by the defendant but he feared power interruption if it was not paid. He also paid $27.00 for power supplied to him and was then faced with a demand for a security deposit of $50.00. On the 30th of December, 1971 he paid $25.00 towards the $50.00 security deposit. Later he was informed that if he did not pay the remainder of the security deposit his power would be cut off. Again there is no suggestion that any account rendered to him was unpaid.

6 Witnesses were called for the defendant who gave evidence of the system used by the defendant in requiring residential security deposits including the basis upon which the persons from whom deposits are demanded are selected. The policy of the defendant is set forth in Gas and Electrical Tariffs made, purportedly, under the powers contained in section 57 of the British Columbia Hydro and Power Authority Act, 1964, which gives a general power to make regulations. These tariffs provide that any customer may be required at any time to deposit and maintain a security deposit in cash or its equivalent in an amount not less than the estimated billing for two months or $10.00, whichever sum is greater. They also provide that if the customer's bill is in arrears the defendant may apply the security deposit in whole or in part in payment of the bill, but the right of the defendant to cut off power in the event of non-payment is specifically reserved, notwithstanding the furnishing of the deposit. The regulations also provide for the return of the deposit after the final bill is paid.

7 According to the evidence, on January 31st of 1972 the defendant had some 620,000 residential electrical customers and some 180,000 residential gas customers. In the year 1971, 19,982 customers out of an estimated 265,000 new accounts were required to furnish security deposits. Some 23,624 deposits were held by the defendant on December 31st, 1971 and on that date they totalled in value $1,041,443.00. These figures covered all types of accounts, commercial, industrial and residential. It was said that it was not possible to segregate the residential accounts but some of these funds would involve residential security deposits and one of the defendant's officers estimated that 25 to 40 residential applicants per day would be required to furnish deposits. These funds form part of the cash resources of the defendant and are used by the defendant. A record, of course, is kept and the books of the defendant show the deposits as a liability to individual depositors but no interest is paid upon them.

8 It was said that security deposits were necessary in order to reduce losses attributable to unpaid accounts. Evidence was given in an effort to show that where the practice of requiring deposits was suspended in one city for a period of time, the rate of loss due to unpaid bills increased. This evi-

dence was attacked by the plaintiffs as being valueless and I find it impossible to base any finding upon this evidence because of its equivocal nature. In any event, the rate of loss on residential accounts was given as .20 per cent. of the total billed for 1972 and whether this rate is increasing or decreasing and whether it has increased or decreased because of the presence or absence of security deposits, there can be no doubt that it is a very small rate of loss indeed. I refer to this evidence because it affords some background for this case. It does not seem to me, however, to be of great significance since the issue before me concerns the legality of the imposition of security deposits and must be decided without reference to the wisdom of their use from an economic point of view.

9 Security deposits are required of poor credit risks, that is, people who the defendant considers might not pay. No deposit is required of a person who is a home owner or who has a previously established payment record with the defendant or who can show steady employment. If a person does not fit any one or more of these categories, he or she may be faced with a demand to furnish a security deposit. The persons from whom a deposit is demanded are chosen at the discretion of the officers of the defendant and failure to pay deposits can lead to termination of service.

10 Deposits can be reclaimed after the account is closed and the final bill paid or after one year with a good payment record or where a credit record has been established with the defendant by other means. It is clear that the defendant has carried out a policy of requiring security deposits as a condition of service or of continued service from a section of the community selected by the defendant on a consideration of financial reliability. Evidence was given of demands for deposits from other persons not named plaintiffs and of the actual cutting off of power in at least one case when a deposit was not paid.

11 The plaintiffs seek certain declarations to the effect that the defendant has no valid authority to require the posting of security deposits and for a return of the money so deposited and for an injunction against the requiring of further deposits.

12 In the pleadings the defendant raised the question of the status of the plaintiffs and claimed that the named plaintiffs had no status to sue personally or as representatives of the class referred to in the pleadings. At the trial the defendant moved to strike out the plaintiffs' proceedings in a preliminary motion upon this basis. Argument was heard on the motion and judgment reserved and the case was heard on its merits.

13 The defendant argued that the policy of requiring security deposits is one which applies to the whole population and affects the whole population because any member of the public could be required to furnish a deposit by falling into any of the categories referred to above. No individual, then, it was said, has any right to bring a suit because in its nature the matter is a public one. To bring such proceedings the plaintiff must have a special direct interest in the matter going beyond that of the public generally and this, it was contended, the plaintiffs do not have. Furthermore, the plaintiffs do not have any right to act or purport to act for a class since the members of the class, even if ascertained or ascertainable, have no such special interest which would enable them to sue individually on their own. To this the plaintiffs reply that the three named plaintiffs and all in like case clearly have a special and direct interest which gives them the right to sue. They have been selected from the public at the discretion of the defendant and have been required to pay, or have been threatened with a loss of power service in the event of non-payment, a sum of money not required of others and thus they have a direct interest separate and distinct from any interest in the matter held by the public at large.

14 The defendant's contention was based on such authorities as Smith v. The Attorney-General of Ontario (1924) S.C.R. 331; Jamieson et al. v. The Attorney-General of British Columbia (1971) 21 D.L.R. (3d) 313; Cowan v. Canadian Broadcasting Corporation (1966) 56 D.L.R. (2d) 578; and Burnham v. Attorney-General of Canada (1970) 15 D.L.R. (3d) 6. From these authorities the law applicable to this objection emerges and is clearly stated in the Cowan case, supra, by Schroeder, J.A. at p. 580 in the following terms:

> "A plaintiff, in attempting to restrain, control, or confine within proper limits, the act of a public or quasi-public body which affects the public generally, is an outsider unless he has sustained special damage or can show that he has some 'special interest, private interest, or sufficient interest'. These are terms which are found in the law of nuisance but they have been introduced into cases which also involve an alleged lack of authority. Therefore, in an action where it is alleged that a public or quasi-public body has exceeded or abused its authority in such a manner as to affect the public, whether a nuisance be involved or not, the right of the individual to bring the action will accrue as it accrues in cases of nuisance on proof that he is more particularly affected than other people."

Leave to appeal from this judgment to the Supreme Court of Canada was refused. This statement is entirely consistent with what I take to be the leading case on the point in Canada, Smith v. The Attorney-General of Ontario, supra.

15 The plaintiffs contend that they do have such a special interest shared in their submission by members of the class they represent. They say there is nothing hypothetical about their situation. They have been subjected to demands for money and faced with a harsh penalty, that of the loss of power service if they do not comply and pay. Two of the named plaintiffs and certain members of the class they seek to represent have been compelled to pay money and some members of the class have had their power discontinued as a result of non-payment. If it can be said in respect of the plaintiffs Rankin and Waddell that the case is now academic since they have terminated their power connections and received a return of their deposits, it cannot be so said of the plaintiff Chastain who still faced, at the date of the commencement of these proceedings, the possibility of a power cut off because of her refusal to pay the security deposit. This is not a situation faced by the public at large. This is a problem faced by some members of the public only and those who are compelled to pay these deposits or suffer the consequence of non-payment have suffered a special injury and damage beyond that suffered by the community at large and they have thus acquired a status to sue.

16 With this argument I agree. The words used by Duff, J. in the Smith case, supra, at pp. 335 and 336 in distinguishing the case of Dyson v. The Attorney-General [1911] 1 K.B. 410; and Burghes v. Attorney General [1911] 2 Ch. 139; from the case then before him may also be applied to distinguish the facts in the case at bar from the Smith case. He said:

> "The Finance Commissioners, having certain strictly defined powers by statute, delivered to the plaintiffs a list of questions with a peremptory demand that they should be answered within a nominated time, and the notice contained an intimation, which amounted to a threat, that, unless the demand was complied with, proceedings could be taken to recover the penalties authorized by the statute under which they professed to act. The time nominated was less than the time

> permitted by the Act; the answers demanded were not answers which the Act authorized the Commissioners to require; and the demands therefore were illegal demands. These notices had been sent broadcast over the country under the authority of the Commissioners, and it may be added that the penalties to which the threat referred were penalties recoverable in the Supreme Court of Judicature, at the instance of the Attorney General. There was in each case a demand actually made by the Finance Commissioners, professing to act under the authority of statute, a demand which they were not entitled to make, accompanied by a threat that if the illegal demand were not complied with the person to whom the notice was addressed would be subjected to proceedings at the suit of the Attorney General for penalties.
>
> Two points should be noted in relation to these authorities: first, there was no decision upon a hypothetical state of facts, and secondly, the demand in each case was a personal demand and an illegal attempt to constrain the plaintiff personally by an illegal threat addressed t o him as an individual. These points appear, superficially at all events, to mark rather important distinctions between the circumstances of the decisions cited and those of the case now under appeal. As to the penalties, the appellant was subjected to no actual threat and no actual risk; only if the liquor ordered were actually shipped, that is to say, only in a contingency which has not happened, could the appellant be put in jeopardy."

17 In the case at bar there is no hypothetical state of facts and the demand made for a deposit is actual and personal. In my view, the case at bar falls into the same category as the Dyson case, supra, and the plaintiffs have the status to approach the court for a determination of the legality of the demands made upon them and of which they complain.

18 It was objected by the defendant but not strenuously that this was not a case which the plaintiffs could bring as a class or representative action. Little authority was referred to, but in my view this case does not differ in this respect from Alden v. Gaglardi et al., Victoria Registry, 3065/70, where Dohm, J. in this court allowed the bringing of a class action. This case went on appeal to the British Columbia Court of Appeal and to the Supreme Court of Canada and in neither appellate court was any adverse comment made upon the class aspect of the action. In my view, the plaintiffs and the people they seek to represent form a group having the same interest in the cause and the action is well founded in accordance with O. 16, r. 9 of the Rules of the Supreme Court.

19 The plaintiffs argue that the defendant, as a public utility, is bound to provide its service to all who seek it as a matter of law and not of contract, charging only a reasonable price for such services and treating all consumers equally. To require some consumers to provide security deposits and not others is to make an unlawful distinction between consumers. It is also contended that if power is supplied by the defendant on a contractual basis, then such contract requiring, as it does, a security deposit, is harsh, unconscionable and inequitable and contrary to the provisions of the Consumer Protection Act, S.B.C. 1967, Ch. 14.

20 The defendant contends that it is not a public utility but a super power authority created by statute for a special purpose and not bound by the Statutes of British Columbia and the general law relating to public utilities. Counsel for the defendant at trial conceded that if the defendant was a public utility its defence would fail but insisted that the defendant, because of the general terms of

its statute and particularly the provisions of section 53 and 53A, was exempt from the provisions of the Public Utilities Act and the general law governing utilities.

21 To the claim under the Consumer Protection Act there is a short answer. Sections 53 and 53A of the British Columbia Hydro and Power Authority Act, 1964, effectively put the defendant beyond the reach of that statute and no effect may be given to that argument.

22 Turning to the question of the nature of the defendant, I cannot give effect to the argument that it is not a public utility. The mere fact that the defendant is not subject to the provisions of the Public Utilities Act, R.S.B.C. Ch. 323, does not alter its essential character. It partakes so much of the nature of a public utility that it must be amenable to the law governing public utilities. For the great majority of the people of British Columbia and for all of the plaintiffs joined or represented in this action, the defendant has a monopoly on the supply of gas and electricity. It is clear from the statute that it was intended to have such a monopoly and it is also clear that in relation to the public it is a public utility. To accede to the defendant's argument and find otherwise would be to hold that the Legislature, in passing the British Columbia Hydro and Power Authority Act, 1964, intended to create a body with a monopoly on the generation and distribution of power for the greater part of the Province of British Columbia with an unfettered discretion to deliver service on differing terms and conditions to different members of the public and even to withhold service at its own discretion from parts of the public. I cannot find, in the language of the statute, any such intention. While the defendant is not subject to the provisions of the Public Utilities Act, it is to be noted that section 53A of the defendant's own statute provides that it shall be deemed to have been granted a certificate of public convenience and necessity under the Public Utilities Act. Reference to section 12 of the Public Utilities Act dealing with such certificates makes it clear that one of the purposes of the certificate is to provide for the protection of the public interest and the certificate is given to the recipient in its character as a public utility with the interest of the public in mind. The fact that the defendant's statute deems such a certificate to have been given strengthens my view that it was intended to create a public utility for the public service. I find that the defendant is a public utility and amenable to the general law relating to public utilities, notwithstanding the fact that the particular provisions of the Public Utilities Act do not apply to it.

23 The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers. The great utility systems supplying power, telephone and transportation services now so familiar may be of relatively recent origin, but special obligations to supply service have been imposed from the very earliest days of the common law upon bodies in like case, such as carriers, innkeepers, wharfingers and ferry operators. This has been true in England and in the common law jurisdictions throughout the world. In Munn v. Illinois, 94 U.S. 113 in the Supreme Court of the United States, the historical roots of this principle were examined and they have been applied in the United States. In Canada the law has followed the same path. In St. Lawrence Rendering Company Ltd. v. The City of Cornwall [1951] O.R. 669 at p. 683, Spence, J. then of the Ontario High Court, said:

> "That a public utility was at common law compelled to treat all consumers alike, to charge one no more than the others and to supply the utility as a matter of duty and not as a result of a contract, seems clear: The Attorney-General of

> Canada v. The City of Toronto (1893), 23 S.C.R. 514; Scottish Ontario and Manitoba Land Co. v. City of Toronto (1899), 26 O.A.R. 345; The City of Hamilton v. The Hamilton Distiller Company; The Same v. The Hamilton Brewing Association (1907), 38 S.C.R. 239; 51 Corpus Juris, para 16."

24 This statement is well rooted in authority. In Attorney General of Canada v. Toronto (1893) 23 S.C.R. 514, the question arose whether a municipal by-law fixing a higher rate for the supply of water to non-tax-paying consumers than that charged tax-payers was valid. It was held invalid and Strong, C.J. said at p. 519-20:

> "A good deal has been said in argument, and some allusion was also made to it in the judgments below, about the reasonableness of charging differential rates against persons not paying taxes. I am unable to recognize any force in this argument. The water-works were not constructed for the benefit of the rate-payers alone, but for the use and benefit of the inhabitants of the city generally, whether tax-payers or not. The provision embodied in section 480, sub-section 3 of the Municipal Act (which is referred to above) has a most important bearing upon this. That provision makes it a duty obligatory upon the city to furnish water to all who may apply for it, thus treating the corporation not as a mere commercial vendor of a commodity but as a public body entrusted with the management of the water for the benefit of the whole body of inhabitants, and compelling them as such to supply this element, necessary not merely for the private purposes and uses of individuals but indispensable for the preservation of the public health and the general salubrity of the city. It must therefore have been intended by the legislature that the water was to be supplied upon some fixed and uniform scale of rates for otherwise the city might, by fixing high and exorbitant prices in particular cases, evade the duty imposed by this section. In other words, the city, like its predecessors in title the water-works commissioners, is in a sense a trustee of the water-works, not for the body of rate-payers exclusively but for the benefit of the general public, or at least of that portion of it resident in the city; and they are to dispense the water for the benefit of all, charging only such rates as are uniform, fair and reasonable. This obligation is to be enforced by subjecting the by-laws indispensable for the legal enforcement and collection of rates, and which the city council have power to pass, to a judicial scrutiny in order to ascertain whether they comply with the conditions which, as before stated, it is a fair implication from the statute they were intended to be subjected to, and also whether they conform to the requisites essential to the validity of all municipal by-laws in being, so far as the power to enact them is left to implication, consistent with public policy and the general law uniform in operation, fair and reasonable."

25 In The City of Hamilton v. The Hamilton Distillery Company; The Same v. The Hamilton Brewing Association (1907) 38 S.C.R. 239, discrimination between different kinds of manufacturers was held unlawful in the supply of water. Other authorities in New Zealand such as McLean v. Municipal Council of Dubbo (1910) N.S.W.R. 911; and Wairoa Electric Power Board v. Wairoa Borough (1937) N.Z.L.R, 211, speak to the same effect and these principles are declared to be applicable in the United States in 73 Corpus Juris Secundum p. 999 - 1001, para. 7. It is of interest as well to note here that in the American case of Town of Wickenburg v. Sabin 200 P. (2d) p. 342, 68

Arizona Reports 75, security deposits of the kind imposed in the case at bar were held to be unlawful. There are American authorities to the contrary but the general trend of American authority appears to be consistent with the statement of Spence, J. quoted above. It follows that in the Province of British Columbia the defendant, as a public utility, must treat all residential consumers alike. To require some consumers to furnish a deposit for power to be supplied in the future as a condition of service or continued service and not to require the same deposit from all constitutes unequal treatment of consumers and is unlawful in the Province of British Columbia. It should be noted that this question was dealt with in section 36 of the Public Utilities Act where it was felt necessary to give specific power to utilities under that act to require security, a power not granted to the defendant under this statute.

26 It was argued that the authorities referred to above depended on particular statutes and by-laws governing the supply of the commodity concerned. There being no statutory requirement here for the delivery of power, these cases, it was said, do not support the plaintiffs' position. This argument I consider to be without merit. While it is true that in the Canadian decisions cited above there were statutory provisions imposing an obligation to supply a commodity to the public, nevertheless the judgments make it clear that the statutes in this respect are merely declarative of common law principles and in cases even outside the statute the duty to supply remains upon the utility. See Minister of Justice for the Dominion of Canada v. City of Levis [1919] A.C. 505, per Lord Parmoor at p. 513:

> "It must be recognized, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply Government buildings, on the ground that these buildings are not liable to water taxation. The respondents are dealers in water on whom there has been conferred by statute a position of great and special advantage, and they may well be held in consequence to come under an obligation towards parties, who are none the less members of the public and counted among their contemplated customers, though they do not fall within that class who are liable to taxation, and who being in the immense majority are expressly legislated for and made subject to taxation. Their Lordships are therefore of opinion that there is an implied obligation on the respondents to give a water supply to the Government building provided that, and so long as, the Government of Canada is willing, in consideration of the supply, to make a fair and reasonable payment. The case stands outside of the express provisions of the statute, and the rights and obligations of the appellant are derived from the circumstances and from the relative positions of the parties."

27 The defendant also sought to justify the security deposits on the basis of section 57 of the British Columbia Hydro and Power Authority Act, 1964, which is quoted hereunder:

> "57. In order to give full force and effect to the meaning and intent of this Act the Lieutenant-Governor in Council may make any orders and regulations deemed necessary or advisable for carrying out the spirit, intent, and meaning of this Act in relation to matters for which no express provision has

> been made or for or in respect of which only partial or imperfect provision has been made."

The deposits complained of were provided for in tariffs published by the defendant in the purported exercise of the power contained in section 57. It is undoubtedly true that the Legislature could, if it wished, by the use of appropriate language, authorize discrimination among residential consumers and authorize virtually any other form of discrimination in any manner it wished and even give a power to withhold service at its discretion. I cannot, however, agree that the Legislature has done so in the British Columbia Hydro and Power Authority Act, 1964. The Legislature will not be presumed to have intended to grant such powers in the absence of specific words adequate to confer them. In Attorney General of Canada v. Toronto, supra, Strong, J. said at p. 523:

> "Had the Provincial legislature possessed plenary powers of legislation, unfettered by any provision in the British North America Act, I should have considered that the by-laws which it empowered first the water-works commissioners and then the city to make must have been fair, reasonable and uniform regulations as regards rates. Of course in the case just supposed the exact case presented here could not have arisen, but even so, and assuming that the Provincial legislature could confer unlimited authority to impose arbitrary and discriminating rates for the water, they would not be deemed to have intended to do so from a power to make by-laws expressed in general terms."

And in The City of Hamilton v. The Hamilton Distillery Company, Davis, J. said at pp. 247-8:

> "Alike, however, in that case as in these there is involved the validity of a city by-law claiming in one way or another to confer upon the city the power to differentiate or discriminate in the prices actually charged as between different members of the same class of customers for water supplied.
>
> As to the power of the legislature to confer such powers upon a civic corporation I do not entertain any doubt. It falls within those plenary powers vested in those bodies by the 'British North America Act, 1867,' and if any of them in attempting to confer such powers used apt and proper language I conceive it would be the duty of this court to give the language its full and proper effect. The question would be and ought to be simply whether such language has been used as confers the power claimed."

28 There is nothing in the statute creating the defendant which would authorize it in the exercise of its power to make regulations to depart from the well established principles governing utilities. A statutory power to make regulations must be exercised within the framework of the statute and must be consistent with the purposes of the statute. In Padfield and Others v. Minister of Agriculture, Fisheries and Food and Others (1968) 1 All E.R. 694, Lord Reid said at p. 699:

> "It is implicit in the argument for the Minister that there are only two possible interpretations of this provision - either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that that

> is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

This principle has been applied in many other cases such as McLean v. Municipal Council of Dubbo, supra, at p. 927; Re Kendrick and The Milk Control Board of Ontario [1935] O.R. 308; Brampton Jersey Enterprises Limited v. The Milk Control Board of Ontario (1956) S.C.R. 1; British Oxygen Co., Ltd. v. Board of Trade [1968] 2 All E.R. 177.

29 The British Columbia Hydro and Power Authority Act, 1964, in my view, clearly created a public utility and to construe section 57 as conferring a power on the defendant by regulation to depart from well settled principles of law, long held to be applicable to public utilities would be to frustrate the purpose of the Act and the tariffs of the defendant, insofar as they purport to authorize the requirement of security deposits on a selective basis, are invalid.

30 Furthermore, I find no merit in the defendant's contention that the plaintiffs, in signing the application form for the delivery of power, effectively bound themselves by contract to take power on the defendant's terms and thus deprived themselves of the benefit of any obligation imposed by law on a public utility. The utility, in the words of Spence, J. in St. Lawrence Rendering Company Ltd. v. The City of Cornwall, supra, supplied power as a matter of law, not contract, and in any event the basis of the contract being tariffs unlawfully adopted, it cannot bind the plaintiffs.

31 I am asked to make several declarations and to order an injunction against the continuation of the practice complained of. An examination of the prayer for relief leads me to the conclusion that the real substance of the plaintiff's claim is set out in paragraphs (a) and (g). I therefore make the declaration that the defendant has no valid authority under the British Columbia Hydro and Power Authority Act, 1964, or any other statute, to require the plaintiffs to pay a security deposit before gas and electrical services are provided or are continued to be provided by the defendant authority. I also order the injunction prayed for in paragraph (g) of the prayer for relief, being a permanent injunction restraining the defendant, its servants, agents, representatives and persons acting on its behalf from demanding, or collecting, or keeping security deposits as a condition precedent to the supply of gas or electrical power to residential consumers, or as a condition to the continuation of the supply of gas and electrical power to any of the plaintiffs or any member of the class represented in this action.

32 I make it clear that in this case I have not considered and I make no declaration in respect of commercial or industrial consumers of the defendant, and refer solely to residential accounts. In addition to the above relief, the plaintiffs will have their costs.

McINTYRE J.

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1910 CarswellAlta 28

Red Deer (Municipality) v. Western General Electric Co.

Town of Red Deer vs. Western General Electric Company Ltd.

Alberta Supreme Court (Trial.)

Beck, J.

Judgment: June, 1910

Counsel: *Walsh*, K.C., for the plaintiffs.

O. M. Biggar, for the defendants.

Subject: Public

Communications Law --- Telephone and telegraph services — Telephone companies — Contract with subscribers — General.

Public utilities — Telephone company — Franchise from town — Obligations of enfranchised company — Refusal to supply service as agreed — Written application required — Interpretation of contract — Forfeiture — Action by municipality — Individual rights of inhabitants of the town — Mandamus — Costs.

There is an implied obligation upon the holder of a franchise from a municipality to render and supply to each inhabitant of the town such services and commodities as the franchise was granted for on request and without unfair discrimination, provided the inhabitant is ready and willing to pay in advance therefor and the place at which the obligation is required to be performed lies within the sphere of the franchise-holder's operations, and provided he accords to the franchise-holder all reasonable facilities to admit of the convenient performance by the franchise-holder of its obligations, the position of such a franchise-holder being analogous to that of a common carrier or innkeeper.

Authorities reviewed.

And, *held*, that a telephone company whose contract with the town did not expressly give to the franchise-holder the right of insisting upon a written application before installing a telephone, had no power to impose the signing of such an application — at all events an application being more than a mere application — as a condition precedent to the installing of telephone service, but were not precluded from imposing special conditions in such application if applicants were willing to execute same for a consideration — e.g., a discount from the regular rates.

One clause in the agreement between the plaintiffs and the defendants provided that if the defendants should fail to supply either public or private telephone service within the town according to the terms of the agreement, they should thereby forfeit

all their powers and privileges under the agreement.

Held, that as a matter of interpretation this clause did not apply to any case of refusal to supply to individuals as such, however numerous, at least upon a *bona fide* dispute as to the legal rights and obligations existing between the company and the individual.

Semble, if the plaintiffs had asked for mandamus to compel the franchise-holder to furnish telephone service, a mandamus would have been granted although no such relief could have been given in this action to individual inhabitants in the same position.

Held, however, that as the only relief asked by the plaintiff was forfeiture of the contract, and no application was made to amend, the Court would in any event in its discretion have relieved against forfeiture and the action was therefore dismissed but without costs.

This was an action for a declaration that the defendants had failed to supply a telephone service and system in accordance with the terms of an agreement existing between the plaintiffs and the defendants, and for a declaration that by reason of such failure defendants had forfeited all their rights under the agreement, and for a mandatory injunction requiring the defendants to remove their poles, wires, etc., from the public places within the plaintiffs' jurisdiction. The action was tried at Red Deer before Beck, J., without a jury.

June, 1910.

***Beck, J.*:**

1 The defendant company is the assignee of the Western Telephone Co., which, by an agreement dated the 29th of May, 1903, made between it and the plaintiff municipality, were given a franchise by the town, with the usual powers, to supply telephone service to the town and its inhabitants. This agreement, as well as a further agreement between the same parties dated the 23rd of November, 1903, the assignment from the Western Telephone Co. to the defendant company dated the 8th September, 1904, a further agreement between the defendant company and the town dated the 29th September, 1904, and a further agreement between the Western Telephone Co., the defendant company and the town, dated the 5th of October, 1904, are all set out at length in the schedule to c. 39 of 1906 (Alberta) by which they are confirmed and validated.

2 The original agreement purported to grant an exclusive franchise for the term of twenty-five years for the distribution of light, power and other electrical services for municipal, industrial, commercial and domestic use as well as telephonic service One of the subsequent agreements recites that it had been made to appear that the corporation had not authority "to grant to the company the absolute exclusive rights and privileges as in the said agreement intended to be granted"; and the company thereby released the corporation "from the franchise in the said agreement contained so far only as it may appear that the corporation had not at the time of the said agreement the power and authority so to do." Whether this touched the franchise so far as it related to telephone service, or reduced its term or eliminated its exclusive character I have not investigated, as it seems to me immaterial.

3 The agreement of the 29th of May, 1903, contained a covenant on the part of the Western Telephone Co. to the effect that it would, during the term of the agreement, *i.e.*, twenty-five years from the 1st of June, 1903, at its own cost and expense, instal a certain stated kind of telephone system, and that the service of the said system should be a daily service, night as well as day, and that it would furnish such service and system at the rate of $25 per year for business telephones and $10 per year for residence telephones, payable half yearly in advance subject to a proviso that the prices thereinbefore mentioned for any of the services mentioned therein should always be subject to adjustment. The plaintiff municipality and the defendant company went to arbitration for the purpose of adjusting the rates, and the award made therein fixed the rates as follows: $35 a year for business telephones and $23 a year for residence telephones.

4 Paragraph 17 of the agreement of the 29th May, 1903, is as follows: —

> 17. And further that if the said company shall at any time hereafter fail to supply either public or private .. telephone service within the town of Red Deer according to the terms of this agreement they shall thereby forfeit all their powers and privileges under this agreement; provided always that the condition for forfeiture specified herein shall not be enforced in case default is at any time occasioned by unavoidable accident, casualty, civil commotion, riot, strike or other unavoidable cause or unavoidable delay in delivery of freight or by reason of any misunderstanding between the Government of Great Britain and Canada or any foreign power whereby it may become impossible for them to obtain the necessary supplies for the purposes aforesaid, if the company use all reasonable means in their power to overcome the difficulties and supply the necessary service according to the terms of this agreement.

5 In August, 1909, the defendant company notified the plaintiff municipality and its other patrons as follows:

> We hereby give you notice of cancellation of your contract for telephone service ... at the expiration of the current yearly term on the 30th of September, 1909.
>
> We will in the course of a few days take the liberty of mailing to you our new form of contract embodying the new rates for telephone services, and if you desire to continue as a subscriber you will please execute the contract and deliver same at our office not later than September 25th next, thus giving us ample time to make the necessary records.

6 The plaintiff municipality and several resident ratepayers — having evidently made up their minds not to sign the proposed new form of contract — a day or two before the 1st of October, 1909, demanded in writing of the defendant company certain telephone service — apparently what they had up to that time had — accompanying their demands by a formal tender of the amount required to pay for such service for six months according to the rates permitted to the company by the award. The company refused to comply with these demands unless the demandants would sign a certain form of application containing a considerable number of "terms and conditions." They refused to sign that "or any contract." Thereupon the company removed its instruments and refused to supply any of these parties with the telephone service which they had demanded, basing its right to refuse to do so upon the ground that these parties had refused to sign the application form submitted, to the terms and conditions of which no specific objection had been made. The demandants were seven in number besides the plaintiff municipality. Of these seven, subsequently one signed an application form unconditionally, three expressly without prejudice, two removed from the town.

7 On the 9th of October, 1909, the plaintiff municipality gave the defendant company the following notice: —

> To the Western General Electric Company, Limited: Whereas you have failed to furnish to the town of Red Deer the telephone service and system required by it and called for by paragraph five of the agreement bearing date the 29th day of May, 1903, made between the Western Telephone Company, Limited, and the town of Red Deer, which agreement has since been assigned by the Western Telephone Company, Limited, to you, although on the 7th day of October, 1909, you were duly notified so to do.
>
> And whereas you have failed to furnish to the following residents and ratepayers of the town of Red Deer the telephone service and system required by them and called for by the said agreement although on the 7th day of October, 1909, you were duly notified so to do, namely: —
>
> R. C. Brumpton, G. H. Bawtinheimer, G. W. Greene, Greene & Payne, Michener, Carscallen & Co., Latimer & Botterill, W. J. Botterill, and the town of Red Deer in its secretary-treasurer's office and in the police station.
>
> The town of Red Deer hereby gives you notice that the power and privileges granted by the town of Red Deer to the Western Telephone Company Limited, under the said agreement of the 29th day of May, 1903, which has since been assigned to you, have now been declared forfeited pursuant to the provisions of paragraph seventeen of the said agreement.

> The town of Red Deer hereby gives you further notice that you are not hereafter to supply it either public or private lights or telephone service under the said agreement.
>
> Given under the corporate seal of the town of Red Deer and of the mayor and secretary-treasurer at Red Deer this ninth day of October, 1909.
>
> (Sgd.) W. J. Botterill, Mayor,
> (Sgd.) A. T. Stephenson, Secretary-treasurer.

8 This action is brought by the town of Red Deer alone. The plaintiff municipality ask for a declaration that the defendant company has failed to supply the telephone service and system according to the agreement of the 29th May, 1903; a declaration that by reason of such failure the defendant company has forfeited all its powers and privileges under the agreement and a mandatory injunction requiring the company to remove its apparatus from the public places under the plaintiffs' jurisdiction.

9 The main question I have to consider is the broad one — the legal relation between the holder of a franchise, whether exclusive or not, entitling the holder of the franchise to use public highways and other public places, and to exercise powers with regard to persons or property which the franchise holder has not of common right for the purpose of supplying commodities or rendering services in common use to the inhabitants of the territory over which the franchise extends. In my opinion this relationship is analogous to that between a common carrier of goods by land and the public and between an innkeeper and the public.

> A common carrier exercises a public employment; and just as an inn-keeper is bound at law to receive guests into his inn if he have no lawful excuse, so a common carrier is bound to accept goods which are offered to him for carriage if he have no lawful excuse. ...
>
> His obligation, however, is only to carry according to his profession. ...
>
> A common carrier is also entitled when goods are offered to him to demand and to be paid the full price of carriage, and if this is not paid he may lawfully refuse to carry at all. But he is not entitled to charge what he pleases; the price demanded must be a reasonable one. If he demand an unreasonable sum or require the consignor to consent to unreasonable conditions this amounts to a refusal to carry.

(Halsbury's Laws of England, vol. 4, tit. "Carriers," p. 6.)

10 A common carrier is responsible for the safety of the goods entrusted to him in all events, except when loss or injury arises from the act of God or the King's enemies. (*Ib.* p. 8.)

11 Owing to this extraordinary liability, a practice arose, apparently early in the 18th century, by which carriers sought to restrict their liability by giving notice that they would not be answerable for loss, except on conditions limiting the extent of their common law liability as carriers.

12 In *Wyld vs. Pickford*,[FN1] PARKE, B., said: "We are agreed that if the notice furnishes a defence, it must be either on the ground of fraud or of *a limitation of liability by contract*, which limitation it is competent for a carrier to make because, being entitled by common law to insist on the full price being paid beforehand, if such price be not paid, he may refuse to carry them upon the terms imposed by the common law, and insist upon his own, and if the proprietor of the goods still chooses that they should be carried it must be on those terms" (*i.e.*, those imposed by the common law.)

13 The history of judicial decision and of legislation concerning the limitation of liability by contract implied by notice

brought home to the consignor is set forth in the judgment of Blackburn, J., in *Peek* vs. *North Staffordshire Ry. Co.*[FN2] In the course of that judgment (p. 512), he says: "A carrier is bound to carry for a reasonable remuneration, and, if he offers to do so, but at the same time offers in the alternative to carry on the terms that he shall have no liability at all and *holds forth as an inducement a reduction of the price* below that which would be a reasonable remuneration for carrying at carriers' risk *or some additional advantage which he is not bound to give* to those who employ him with a common law liability, I think a condition thus offered may be reasonable enough. For the terms of a special contract entered into by a person who has *the option of employing the carrier on the terms of the contract or on the terms of his undertakingcommon law liability* are necessarily reasonable as regards persons having that option."

14 Further on he continues:

> But then, as it seems to me, to bring a case within this principle it must appear that the customer really had an alternative; that he had power if he pleased to have sent his goods at the ordinary rates and on the ordinary terms as to liability, and having that option elected to send them otherwise.

15 The passages which I have quoted shew that in order to effect a limitation of liability an express or implied contract must be established; and further, that such a contract must be founded (unless under seal) upon a consideration, *e.g.*, a reduction of rates. The American authorities establish the same principle which is an elementary principle of the law of contract. (5 Rule Cases, p. 348; notes to *Peek* vs. *North Staffordshire Ry. Co.*, 6 Cyc. tit. "Carriers," pp. 39, 56). In 21 L. R. A. p. 321, in a note to *Rushville vs. Rushville Natural Gas Co.*, it is said: "The general rule that one engaged in business may refuse to have business relations with any person with whom he does not choose to deal has a few exceptions of which several are analogous to the ancient instances of inn-keepers and common carriers"; and this is followed by references to cases respecting common carriers, inn-keepers, telephone companies, telegraph companies, water companies and log-driving companies.

16 In *Portland Natural Gas & Oil Co. vs. State of Indiana*,[FN3] it was held that a natural gas company occupying the streets of a town or city with its mains owes it as a duty to furnish those who own or occupy the houses abutting on such streets, where such owners or occupiers make the necessary arrangements to receive it and comply with the reasonable regulations of such company, such gas as they may require, and that where it refuses or neglects to perform such duty it may be compelled to do so by writ of mandamus. In *Coy* vs. *Indianapolis Gas Co.*,[FN4] it is said:

> In the case at bar the arrangements and reasonable conditions referred to in the cases cited were all provided for by the contract between the parties. The agreement so entered into did not in any manner absolve appellee from the duty assumed under its franchise, but rather by its terms fixed the character and scope of the duty so assumed. *Even without and before the contract* it was the duty of the company to attach its mains to appellant's house pipe *on being requested* to do so by him, and on the compliance with the reasonable conditions imposed by the company.. Nor would it be enough to make such connections without also supplying the gas therefor. Not a partial, but a full compliance with the company's duties is required, and this without any discrimination as to persons having a right to the gas.

17 Adopting the foregoing principles I am of opinion that where a person or a company has obtained a franchise by which authority is given to enter upon and use the highways and other public places and to exercise powers which the franchise holder has not of common right, for the purpose of rendering, or supplying to the inhabitants of the locality over which the franchise extends services or commodities of common use, there is an implied obligation upon the franchise holder to render such services or supply such commodities on request and without unfair discrimination to every inhabitant who is ready and willing to pay in advance therefor, and whose place at which the obligation is required to be performed lies along the line of the franchise holder's operations, and who accords to the franchise holder all reasonable facilities to admit of the convenient performance of the obligation. That, in my opinion, is the obligation in general terms. There may, I have no doubt, be legal grounds of excuse, such as accident. But no defence to the general obligation, if I have correctly stated it, is in question here. There are American authorities which say that the franchise holder may lay down reasonable conditions or regulations relating to performance of the obligation. That is no doubt so, but, only, in my opinion, in the sense in which I have expressed it, namely, that the customer is to accord all reasonable facilities to admit of the convenient performance of the obligation — the obligation of the consumer is not to be tested by the conditions or regulations of the franchise holder, but by the reasonable-

ness of his requirements to enable him to fulfil his obligation conveniently. Although there is American authority for the proposition that the franchise holder may demand a written application from the consumer I see no sound principle for this. Even if this is so, there is, in my opinion, no right to demand more than a bald request for what is wanted. The company's franchise in this instance entitles it to insist upon payment for six months in advance. Any consumer requesting service — an oral request being I think sufficient — and tendering payment for six months' service at the maximum rate permitted to the company is, in my opinion, entitled to the service. A person taking that position would, of course, not be entitled to a discount for prompt payment such as is customarily allowed, and is, as I see, provided for by the company's form of application. The right to such a discount would furnish a consideration for the consumer executing the company's form of application if he should see fit to do so; and the advantage gained by the company would, no doubt, justify the slight discrimination thus made.

18 Considerable stress was laid by counsel for the company upon sec. 17 of the Ordinance respecting water, gas, electric and telephone companies, c. 21 of 1901. That section provides that a company before supplying, or as a condition of its continuing to supply, may require any consumer to give reasonable security for the payment of the proper charges of the company. It seems to me that this provision is wholly met by the consumers in this case paying for six months' service in advance in accordance with the agreement between the company and the town.

19 The company, then, for the reasons I have indicated, were at fault in refusing the telephone service to plaintiff municipality and the several individual ratepayers unless they should execute the proposed form of application. I should be of the same opinion even if, as was contended, the terms and conditions of the application expressed nothing more than the law would imply. Then what is the result? The plaintiff municipality claims a forfeiture. I have quoted the provision from the agreement upon which the claim of this remedy is based. It seems to me that as a matter of interpretation it was not intended to apply to any case of refusal to supply to individuals as such, however numerous, based upon a *bona fide* dispute as to the legal rights and obligations existing between the company and the individual, and therefore not an absolute and unconditional refusal. In any case had I been of opinion that a forfeiture had arisen I should relieve against it upon terms as to costs and prompt remedying of the default.

20 Had the plaintiff asked for a mandamus for the furnishing of telephone service in accordance with its own application I should have granted it; but I think I could have given no relief in this action on behalf of the individuals who are in the same position. I fancy, however, that the omission to claim remedy by way of mandamus was intentional — the municipality desiring to secure a forfeiture and not to prejudice its position by claiming an alternative remedy. No amendment was asked. The plaintiff therefore fails. Under the circumstances I dismiss the plaintiff's action without costs.

21 As to the obligations of the railway company as common carriers, reference may be made to *Rise* vs. *C. P. R.*, 3 A. L. R., decided by the Court *en banc* since the foregoing opinion was written.

Action dismissed without costs.

Solicitors of record:

Greene & Payne, solicitors for plaintiffs.

J. C. Moore, solicitor for the defendants.

FN1 (1841), 8 M. & W. 443.

FN2 10 H. L. 473; 32 L. J., Q. B. 241; 9 Jur. (N.S.) 914; 8 L. T. 768; 11 W. R. 1023.

FN3 (1893), 21 L. R. A. 639.

FN4 (1897), 36 L. R. A. 535.

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1951 CarswellOnt 74, [1951] O.R. 669, [1951] 4 D.L.R. 790

1951 CarswellOnt 74

St. Lawrence Rendering Co. v. Cornwall (City)

St. Lawrence Rendering Company Ltd. v. The City of Cornwall

The City of Cornwall v. St. Lawrence Rendering Company Ltd.

Ontario Supreme Court [High Court of Justice]

Spence J.

Heard: May 21 - June 28, 1951
Judgment: August 24, 1951

Counsel: *P. J. Bolsby, K.C., P. B. C. Pepper* and *H. A. V. Dancause*, for the plaintiff company.

R. F. Wilson, K.C., and *G. A. Stiles*, for the defendant City.

Subject: Public; Torts

Public Utilities --- Operation of utility — Supply — Duty to supply — On default of payment.

Torts --- Nuisance — Practice and procedure — Standing — Public nuisance.

Torts --- Nuisance — Practice and procedure — Standing — Private nuisance.

Nuisances — Right to Sue — Public and Private Nuisance — Necessity for Showing Special Damage where Subject Sues to Restrain Public Nuisance — Impossibility of Class Action for Nuisance.

The Attorney-General is the only person entitled to sue to restrain a public nuisance, and there is no room for a class action based on nuisance. While a public nuisance may also be a private nuisance, if it differs in kind and not merely in degree, a subject who sues to restrain such a nuisance cannot succeed unless he establishes special damage resulting from it.

Parties — Adding Parties — Application at Trial to Add New Plaintiff by Counterclaim — Original Defendant without Status to Assert Counterclaim — The Judicature Act, R.S.O. 1950, c. 190, s. 15(h) — Rules 114, 134.

The Court will not, after the conclusion of a trial, having determined that the original defendant had no cause of action upon a counterclaim asserted by it, add a new plaintiff by counterclaim, who is not a defendant in the action, or to be added as a defendant, and whose presence is not necessary to enable the Court to dispose of all the issues raised by the original claim and counterclaim.

1951 CarswellOnt 74, [1951] O.R. 669, [1951] 4 D.L.R. 790

Public Utilities — Duties to Consumers — Discontinuance of Service — Permisssible Grounds — Municipally-Owned Utility Supplying Consumers Outside Municipality — The Public Utilities Act, R.S.O. 1950, c. 320, ss. 11(1), 27(3), 55.

A public utility is bound at common law to treat all consumers alike, to charge one no more than others, and to supply the utility as a matter of law rather than of contract. It is not entitled to discontinue supply to a consumer upon any ground other than the consumer's failure to pay rates.

Two actions, tried together.

The action was tried by Spence J. without a jury at Cornwall.

***Spence J.*:**

1 These are two actions which were tried together at the city of Cornwall from the 21st to the 26th May 1951. In the first action, in which the writ of summons was issued on the 19th June 1950, the St. Lawrence Rendering Company Ltd. sued for an injunction restraining the Corporation of the City of Cornwall from discontinuing or in any way interfering with the flow or supply of water to the plaintiff's plant and, in the alternative, for a mandatory injunction compelling the City to continue to supply water, for an order quashing a resolution of the city council of the 17th June 1950, which determined that the water supply should be discontinued, and for $5,000 damages. The City of Cornwall filed a statement of defence to that action and a counterclaim and in the counterclaim alleged that the actions of the St. Lawrence Rendering Company Ltd. constituted a nuisance and claimed an injunction restraining the Company from so carrying on its operations as to commit a nuisance by the emission of obnoxious fumes, odours and gases, and also counterclaimed for damages in the sum of $9,000. On the 20th November 1950 the municipal council of the Corporation of the City of Cornwall passed a similar resolution to discontinue the water, the said discontinuance to take place on the 20th May 1951, and on the 9th December 1950 the Corporation of the City of Cornwall issued a writ against the St. Lawrence Rendering Company Ltd. in which it claimed a declaration that the notice given on the 21st November 1950 was a valid notice. The St. Lawrence Rendering Company Ltd. counterclaimed in this second action for a declaration that the notice was illegal and a nullity and for an injunction restraining the Corporation of the City of Cornwall from acting or taking any proceedings under the said resolution. Upon the opening of the trial of the actions counsel for the St. Lawrence Rendering Company Ltd. moved to strike out the counterclaim filed by the corporation in the first action, that is, the counterclaim for an injunction, on the following grounds:

2 (1) that the plaintiff by counterclaim, the Corporation of the City of Cornwall, had no status to sue;

3 (2) that such plaintiff by counterclaim was attempting to allege and prove injuries to third parties;

4 (3) that the plaintiff by counterclaim was attempting to bring a class action for nuisance and that such an action was not maintainable.

5 When this motion was argued counsel for the Corporation of the City of Cornwall first objected that the matter was *res judicata* as an application had been made in Weekly Court which came before Mr. Justice King and which Mr. Justice King disposed of on the 6th September 1950. The notice of motion which instituted that application was for the following relief: "for an order to strike out that part of paragraph 6 of the Statement of Defence referred to in the original notice of motion herein and all of the defendant's Counterclaim on the ground that the same are irrelevant and may tend to prejudice, embarrass or delay the fair trial of this action and that the said order of the Senior Master may be reversed or varied accordingly."

6 I have had the advantage of conferring with Mr. Justice King on the above application and I have perused both his notes of the argument and his endorsement of judgment on the notice of motion. That endorsement of judgment, in so far as it deals with the counterclaim, reads as follows: "Application of plaintiff to strike out defendant's counterclaim on ground that it discloses no cause of action or that defendant has no status to sue is dismissed for the reason, in part, that an order permitting the amendment of the counterclaim was made by the Senior Master on September 5, 1950, and otherwise I am of the opinion that I should not find at this stage that the defendant has no status. I am also of the opinion that the counterclaim before me in these proceedings indicates, rather vaguely it is true, a sufficient claim so that I should not strike it out under the circumstances, particularly where an order allowing the amendment has been taken out." I am therefore of the opinion that Mr. Justice King's order of the 6th September 1950 is one based on the well-recognized principle that a pleading should be stricken out as showing no cause of action only if it is clearly shown on the face of the pleading that no action is maintainable: *Electrical Development Company of Ontario v. Attorney-General for Ontario et al.*, [1919] A.C. 687, 47 D.L.R. 10; *Orpen v. Attorney-General for Ontario*, 56 O.L.R. 327 at 332-3, [1925] 2 D.L.R. 366, varied 56 O.L.R. 530, [1925] 3 D.L.R. 301; *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company*, [1892] 3 Ch. 374, and that I, therefore, am free to consider the application made by counsel on behalf of the St. Lawrence Rendering Company Ltd. without reference to the judgment of Mr. Justice King upon the aforesaid motion.

7 Counsel for the St. Lawrence Rendering Company Ltd. (hereinafter referred to as "the Company") argued that the nuisance complained of is a public nuisance and that therefore the nuisance may not be restrained at the suit of the municipality or even of a private individual, but rather only in proceedings initiated by the Attorney-General of the Province. A "public nuisance" is defined in 24 Halsbury, 2nd ed. 1937, p. 24 at the foot, as follows:

> A public nuisance is one which inflicts damage, injury or inconvenience upon all the King's subjects or upon all of a class who come within the sphere of its operation. It may, however, affect some to a greater extent than others.

8 Counsel for the Corporation of the City of Cornwall (hereinafter called "the City") alleged that the city in its counterclaim is setting up a public nuisance on behalf of all the citizens of the city and also a private nuisance alleging the damage it has suffered from the existence and continuance of the nuisance as an owner of the soil of public streets and of a certain park called King George V Park. The provisions of ss. 221-223 of The Criminal Code, R.S.C. 1927, c. 36, were referred to by counsel for the Company to show that the Dominion Parliament has recognized the principle that a public. nuisance may be the subject of a prosecution.

9 There are, of course, many cases in which the Attorney-General has proceeded either to prosecute a public nuisance or to sue for an injunction to restrain the public nuisance both in England and in Canada and the proposition that the Attorney-General is a necessary party is repeated in many of these cases.

10 In *Wallasey Local Board v. Gracey* (1887), 36 Ch. D. 593, the action was taken in the first instance by the local board without the Attorney-General being a party to the action and Stirling J. at p. 597 cited this proposition and stayed the action until the Attorney-General joined, and then proceeded to grant the injunction. In *Tottenham Urban District Council v. Williamson & Sons, Limited*, [1896] 2 Q.B. 353, a strong Court approved *Wallasey Local Board v. Gracey*, and Kay L.J., at p. 354, said: "The ordinary law is, that when any one complains of a public nuisance he must obtain the fiat of the Attorney-General . . . unless he can shew . . . special damage to himself."

11 In *Attorney-General v. Logan*, [1891] 2 Q.B. 100, the Attorney-General acted on the information of a local board to restrain the defendants from causing a public nuisance by emitting obnoxious smells and vapours. The cause of action therefore much resembled the counterclaim in the first action. The local board also joined as an individual plaintiff and alleged special damage in that the said obnoxious vapours caused injury to trees and shrubs in the park which was the property to which the local board held title. The Court held that in so far as the public nuisance was concerned it might be restrained by the action of the Attorney-General and that so far as the private nuisance, that is the injury to the trees and shrubs in the park, was concerned, the local board could maintain an action

for an injunction based on such special damage.

12 Halsbury, *loc. cit.*, at p. 55, cites various cases where the emission of noisome smells has been the subject of prosecution by the Attorney-General.

13 The proposition that a public nuisance is subject to restraint only at the suit of the Attorney-General has been repeated in Canadian cases: *Turtle v. City of Toronto* (1924), 56 O.L.R. 252; *O'Neil v. Harper* (1913), 28 O.L.R. 635, 13 D.L.R. 649, where Clute J., giving judgment in the Appellate Division, said at p. 647: "The remedy is by indictment or an action at the suit of the Attorney-General. . . . a member of the public can only maintain an action . . . if he has sustained therefrom some substantial injury beyond that suffered by the rest of the public", quoting from 16 Halsbury, 1st. ed. 1911, s. 269, and referring to *Drake v. Sault Ste. Marie Pulp and Paper Company* (1898), 25 O.A.R. 251 at 256, and *Fritz v. Hobson* (1880), 14 Ch. D. 542.

14 It would therefore appear that so far as the public nuisance is concerned the action is maintainable only at the suit of the Attorney-General and not at the suit of the municipality.

15 The municipality cannot succeed in its counterclaim by alleging a class action in that it acts on behalf of all the citizens of the municipality. Paragraph 13 of the City's counterclaim seems to set up that type of a class action in these words: "Inhabitants of the defendant are the owners and occupiers of lands in the said area of the City of Cornwall lying immediately to the east of the plaintiff's said lands and premises and such inhabitants of the defendant have suffered damage to the use and enjoyment of their premises by reason of the said fumes emitted by the plaintiff." A class action for nuisance is not maintainable: *Preston v. Hilton* (1920), 48 O.L.R. 172 at 179, 55 D.L.R. 647; *Turtle v. City of Toronto, supra*.

16 There remains to be considered the City's claim in so far as it is based upon the private nuisance. Such a claim is maintainable when the injury differs in nature and not merely in degree: *Turtle v. City of Toronto, supra; O'Neil v. Harper, supra*, and the same right of action may be asserted by a municipal corporation in reference to damage to its lands as may be asserted by a private citizen: *Attorney-General v. Logan, supra*. It is noteworthy, however, that in the latter case the local board alleged and proved that trees and shrubs in the public park were injured so that they withered and died as a result of obnoxious vapours. Here no such pleading is set up in the city's counterclaim and the only pleading of such damage to the city is contained in para. 12 of the counterclaim, which reads as follows:

> 12. The defendant is the owner of streets, lanes and park lands in the area of the City of Cornwall lying immediately to the east of the plaintiff's said lands and premises which have been and are unusable and unenjoyable by reason of the said fumes emitted by the plaintiff.

17 Much evidence was given at the trial by citizens of Cornwall who had suffered discomfort, unpleasantness and, in some cases, even nausea when travelling on the public streets in the area or when attending either ball games or club meetings in the King George V Park. I take it, as proved by the City, that the title to the soil in both the public streets and the park is held by the City. I cannot, however, say that the City has proved any special damage in proving the discomfort of various citizens. It has simply proved with this evidence that possibly a public nuisance exists which could be restrained in the fashion I have outlined above. No special damage was alleged in the pleadings but some attempt was made at the trial to prove such damage. James Flaro, the foreman of the City's public works department in charge of construction of roadways, gave evidence that when laying a concrete roadway on Cumberland Street, immediately to the east of the Company's plant, in September 1950, he had had to move the crew engaged in the construction from the Seventh Street corner northerly to the Eighth Street corner on one day so that they could proceed with their work, the obnoxious odour being so overpowering that the crew could not continue to work at the Seventh Street corner. Flaro refused to say that the total time occupied in the work was any longer than if the obnoxious odour had not been present or that any additional cost had accrued to the City. Hyman Phillips, a realtor, was called by the City to give evidence. He stated that he was familiar with the problem caused by the obnoxious odours

given off by the Company's plant but had had no personal experience; he gave it as an opinion that if the odours were as bad as they were said to be, it would not add any value to any property in that section. "I would say it would hurt values." Cross-examined, Phillips stated that he had not sold any property in that section for three years, that is, for a considerably longer period than the Company's plant had been in operation. He had had a few listed. It was evident that upon this basis the City hoped to argue that the obnoxious odours lowered values and therefore eventually would lower assessment and, as a result, cause a decrease in the tax revenues. Such evidence falls far short of any such conclusion and no reliance can be placed upon it to prove such damage. Upon cross-examination by the Company's counsel the various witnesses produced to give evidence as to the effect of obnoxious odours both on the streets and in the park were unanimous in stating that communal activities continued in both places unabated. The ball leagues which function at King George V Park were most active throughout 1950 and to date in 1951. The associations which met in the club-house in that park were still meeting. The streets in the district were busy and crowded. Therefore if any dimunition of usual communal activity can be held to be such damage to the City, no such dimunition has been proved.

18 In the result, therefore, the City has failed to prove special damage and can maintain no action for an injunction based on such damage. Therefore the Corporation of the City of Cornwall, having proved no private nuisance and having no cause of action for public nuisance nor any right to bring a class action, fails upon its counterclaim.

19 After the completion of the evidence an adjournment was granted for the submission of argument by counsel. Such submission proceeded through the whole of the 8th June and then a further adjournment was granted until 22nd June. On that latter date counsel for the City moved for leave to add as a plaintiff by counterclaim, or to substitute in the place and stead of the City, the Attorney-General for Ontario. Counsel filed the consent of the Attorney-General which will be identified as ex. LL, and based such application on the provisions of Rule 134 and s. 15(*h*) of The Judicature Act, R.S.O. 1950, c. 190. Counsel for the Company, pointing out that the consent of the Attorney-General was the first document filed in the action which exhibited such a style of cause, opposed the application, arguing that such an application could not be successful in law and even if it could have succeeded if made at an earlier stage it should not be granted when made for the first time after the completion of all the evidence. The position of counsel for the Company was that there was no need to add the Attorney-General to deal fully and effectually with the cause of action that the City had set up in its counterclaim and that there was no *bona fide* mistake in the commencement of proceedings by counterclaim in the name of the wrong person as plaintiff by counterclaim, or any doubt whether the action had been commenced in the name of the right person as plaintiff by counterclaim so that the City, as plaintiff by counterclaim, had not brought this application within the terms of Rule 134. Counsel for the Company as defendant by counterclaim further argued that neither Rule 134 nor any other Rule of Practice permitted the adding of a stranger to the action as a plaintiff by counterclaim and that by Rule 114 a defendant alone may counterclaim.

20 Firstly, as to *bona fide* mistake, the plaintiff and defendant by counterclaim moved early in the action to strike out the counterclaim and the defendant as plaintiff by counterclaim successfully opposed such application and had from that day to this the fullest notice of the plaintiff's contention that such counterclaim could not be maintained. Yet the defendant made no move to add the proper party, the Attorney-General, until after the trial and throughout the trial it has attempted to obtain judgment on the basis of a private nuisance and on the basis that the defendant City in counterclaiming is acting in some way as the agent for and representative of its citizens. Certainly on these facts I can find no *bona fide* mistake sufficient to justify the application of Rule 134.

21 The plaintiff alleges that the defendant, in paras. 12 and 13 of its counterclaim, has outlined the cause of action which it wished to advance in the said counterclaim, in para. 12 a private nuisance, in para. 13 a class action, and in the prayer for relief it asks an injunction and damages. There is no need to add the Attorney-General "in order to enable the Court effectually and completely to adjudicate upon the question involved in [that] action". I am of the opinion that I have completely adjudicated on such question by dismissing the counterclaim. Therefore it would appear that the application to add the Attorney-General as a plaintiff by counterclaim must be considered on the basis that the original plaintiff by counterclaim, the City, had no cause of action, but it appears that someone else, *i.e.*,

the Attorney-General, might have had, and I must then determine whether the Attorney-General should be added to avoid multiplicity of actions.

22 The fact that the original plaintiff had no cause of action was regarded as irrelevant by the Court of Appeal in England in *Hughes v. The Pump House Hotel Company, Limited*, [1902] 2 K.B. 485, per Cozens-Hardy L.J. at p. 487, but in Ontario in *Colville v. Small* (1910), 22 O.L.R. 426, Riddell J., in giving one of the judgments in a Divisional Court, said at p. 429: "It is contended that the plaintiff should have leave to amend by adding his assignors, or substituting them, as plaintiffs. The Rules, however, never were intended to cover a case in which the actual plaintiff had no cause of action, but it is suggested some one else may have." The validity of this principle was acknowledged in *Mortimer v. Fesserton Timber Co. Limited* (1917), 40 O.L.R. 86, 39 D.L.R. 781, both by Hodgins J.A., giving the majority judgment of the Court, at p. 89, and by Ferguson J.A., dissenting, at p. 99.

23 The same principle has been adopted in other decisions in Courts in Ontario: *Winnett v. Heard*, 62 O.L.R. 61 at 65, [1928] 2 D.L.R. 594; *Fields v. Purser* (1928), 35 O.W.N. 205 at 206; *Croll v. Greenhow* (1930), 38 O.W.N. 101, affirmed 39 O.W.N. 105.

24 I have found no case in which the principle has been doubted, let alone refuted. Counsel for the City has cited *Ottawa Separate School Trustees v. Quebec Bank; The Same v. Bank of Ottawa; The Same v. Murphy* (1917), 39 O.L.R. 118, 35 D.L.R. 134, but that case deals with an application to add a party defendant and the principle announced by Riddell J. in *Colville v. Small, supra*, was not at issue. In *Bell v. Brill* (1931), 40 O.W.N. 374, Kelly J. dismissed an appeal from an order of the Master granting leave to add the United Silk Mills Limited as a party plaintiff. The judgment, however, was based on the consideration that it was doubtful whether Bell, as agent, had a right to sue in his own name and that therefore the power to add was contained expressly in Rule 134.

25 In the present case, I have, as I have said, already determined that the original plaintiff by counterclaim, *i.e.*, the City, had no cause of action and therefore there is, in my opinion, no doubt that would bring into play that provision in Rule 134.

26 Therefore, for these reasons, I have determined that I cannot grant the defendant's application to add the Attorney-General as party plaintiff by counterclaim.

27 Had I come to an opposite conclusion, considering the application simply as one to add a party plaintiff, I still would not have been able to consider an application to add the Attorney-General, not as plaintiff in the action but as a plaintiff by counterclaim, when the Attorney-General was not an original defendant. Rule 9 provides that a claim by His Majesty may be enforced by action by the Attorney-General. Section 1(*a*) of The Judicature Act defines "action" as "a civil proceeding commenced by writ or in such other manner as may be prescribed by the rules". Rule 114 provides: "A defendant may set up by way of counter-claim, any right or claim whether the same sounds in damages or not," and Rule 115 provides that: "A counter-claim shall be treated as an action, so as to enable the Court to pronounce a final judgment upon all matters *set up therein*". (The italics are mine.) But a counterclaim is not an "action": *Martin Transports Ltd. v. Moir*, [1936] O.R. 99, [1936] 2 D.L.R. 104, per Masten J.A. at p. 101. Counsel for the City was unable to cite any case where a person not a party defendant to the original action was added as a plaintiff by counterclaim. It has been held that the Court will refuse to add a person as a party defendant when the object of the application is merely to enable that person to counterclaim against the original plaintiff: *Norris et al. v. Beazley* (1877), 2 C.P.D. 80, and the cases in which the Court followed the course of adding a person as a party defendant to the original action and then permitting that added defendant to counterclaim against the original plaintiff are cases where the counterclaim was upon the same issue as the original claim and where the added defendant was a necessary and proper party to determine the original claim: *Fisher v. Fisher* (1920), 19 O.W.N. 227; *Spearman v. Renfrew Molybdenum Mines Limited* (1920), 17 O.W.N. 466. In the present case the Attorney-General was neither a necessary nor a proper party for the determination of the issue in the action launched by the Company as plaintiff and the counterclaim did not involve the issue involved in the original action but an altogether different issue. Moreover, the consent of the Attorney-General is to be added as a plaintiff by counterclaim and the Attorney-

General has given no consent to be added as a defendant. I am of the opinion that Rule 114 does not permit such a course, therefore on this ground also I would dismiss the application to add the Attorney-General as plaintiff by counterclaim.

28 It therefore becomes unnecessary for me to find as a fact whether or not a public nuisance existed. I had contemplated making such a finding in order to avoid further litigation should an appellate tribunal be of the opinion that my refusal to add the Attorney-General was in error. On further consideration I feel that such a finding might prove most embarrassing to any other Court trying an action brought by the Attorney-General, and of course the Attorney-General is not affected by this judgment in any right he may have to take proceedings as to an alleged public nuisance. Moreover, counsel for the Company alleges that he was prepared to meet at trial and did meet at trial only the cause of action alleged in the pleadings, and if the Attorney-General had appeared at the trial alleging a public nuisance then the Company would have submitted much evidence that was not required or relevant to the defence to the counterclaim as it was framed in the pleadings. That such an allegation might be of considerable merit is corroborated by the fact that the City adduced evidence from 32 witnesses largely to support its counterclaim while the Company, in defence to this counterclaim, called only six witnesses. It would therefore seem proper to refrain from making any finding of fact as to the existence of a public nuisance.

29 There remains to be considered the plaintiff's claim in the first action for an injunction to restrain the defendant from discontinuing water service or a mandatory injunction requiring the defendant to continue to supply water service and damages and the City's claim as plaintiff in the second action for a declaration that the notice of discontinuance served by the City on the 21st November 1950 was a lawful notice and that the City is under no obligation to supply water service to the defendant, *i.e.*, the plaintiff in the first action, the St. Lawrence Rendering Company Ltd.

30 A short summary of the history of the supply of water in the area would appear to be relevant. In 1886 the Town of Cornwall entered into an agreement with certain persons who were to incorporate a company to be called The Cornwall Water Works Company, granting these persons a 50-year franchise upon its streets, etc., requiring the construction of works of an extent outlined in the agreement and setting up a complete tariff of water rates which might be charged to consumers. In the agreement the Town reserved the right to purchase or expropriate the works within ten years. A copy of this agreement has been filed at the trial as ex. 1. In the same year the Township of Cornwall, by By-law 504 (ex. 2) permitted The Cornwall Water Works Company to lay down pipes, etc., in streets of the township. The by-law provided that the company was to furnish hydrants for fire protection and the water to consumers upon the same terms and conditions and at the same rates that the company furnished such hydrants and water in the town of Cornwall. The agreement was limited in effect to a period of ten years. The waterworks were established and the actual pump-house and main line of the waterworks were situate within the limits of the township of Cornwall, the line running across the southerly portion of the said township to the Town of Cornwall.

31 In 1896 the Town of Cornwall determined to acquire the waterworks system and enacted By-law 14 (ex. 7) declaring that "it is expedient in the interests of the Town of Cornwall to acquire the works and property of the Cornwall Water Works Company *both within and without* the Municipality of the Town of Cornwall". (The italics are my own.) The by-law continued to appoint an arbitrator and to authorize the clerk to notify the company that the Town intended "to acquire the Works and property of the Cornwall Water Works Company within and without the Municipality of the Town of Cornwall". By-law 21 (ex. 8) authorized the raising of money for the exact purpose. By-law 638 of the Township of Cornwall (ex. 9) enacted 1st June 1898 granted to the board of water commissioners of the Town of Cornwall the same rights and privileges as had, by By-law 504 (ex. 2) been granted to The Cornwall Water Works Company, stipulating: "Provided and this By-law is passed upon the express condition that the Corporation of the Township of Cornwall shall have the privilege of renting hydrants at the rate of Fifty Dollars per annum per hydrant and that the said Board of Water Commissioners shall furnish if required hydrants for fire purposes and water to consumers or either upon the same terms and conditions and at the same rates that the Board of Water Commissioners furnish hydrants for fire purposes and water to consumers in the Town of Cornwall."

32 This by-law was limited in effect to ten years, but all witnesses agreed that from that day to the present the same

procedure had been followed by the waterworks authorities with the inhabitants of the town of Cornwall, later the city of Cornwall, and the township of Cornwall, in exactly the same manner. Upon an application for water service being received, it was referred to the city engineer for report as to the cost of installation and then the applicant, or in some cases, if the extension was into a large, new sub-division in the township, the Township itself, was required to guarantee that the annual revenue would amount to at least one-tenth of the cost of installation; the installation was made; the city treasurer billed the consumer, whether he was an inhabitant of the city of Cornwall or of the township of Cornwall and deposited all rates in the waterworks account of the City.

33 It is unnecessary to go through each of the sixty documents filed as numbered exhibits and it is sufficient to say that dozens of them recite that the Town and later the City of Cornwall operated a waterworks system in the township of Cornwall. Some of these exhibits show that large grants were obtained from the Province of Ontario and the Dominion of Canada during the depression years for the extension of this system into areas both in the city and in the township.

34 When the plaintiff's predecessor in title applied for extension of water service to the plant in question, the City by By-law 147 for the year 1948 (ex. 48) authorized the extension and by By-law 190 for the year 1949 (ex. 49) authorized the issue of debentures to cover the cost. Both of the by-laws dealt with extensions some of which were within the city limits and some of which were outside the city limits and in the township of Cornwall. Both by-laws were perfectly usual corporate actions repeated inumerable times in reference to such extensions during the whole of the period from 1898 to the present time.

35 Until 1930 the fact that By-law 638 of the Township (ex-9) was limited in effect to ten years was forgotten, but in that year an agreement was drafted between the City and the Township to continue in effect the provisions of the said by-law. This agreement appears as ex. 23 and a photostat of the final page shows it to be so altered as to be illegible, to be executed by the then reeve of the Township but not the clerk, by the mayor and clerk of the City of Cornwall, but not to bear the seal of either municipality. Both the then reeve, Mr. W. A. Murray, and the mayor at the time and at the present time, Mr. Aaron Horovitz, gave evidence but could add little enlightenment as to the execution of this agreement and no by-law of either municipality could be produced authorizing the execution of the agreement.

36 From that day to the present, the City and the Township have entered into many almost annual agreements in reference to the supply of water for fire-protection purposes in the township, but never into another agreement for the supply of water to consumers in the township. Despite this informality, the City has continuued to treat consumers in its own confines and within the township of Cornwall on exactly the same basis. The City, in fact, has enacted a series of by-laws regulating the operation of the water system, setting up rules, etc.

37 The by-law in effect during the years 1946 to 1950 would appear to be no. 67 for the year 1946 (ex. 46), which is entitled: "A By-law to Fix a Tariff for Water Rates in and around the City of Cornwall to be known as 'The Tariff of the Cornwall Water Works Department'." This by-law provides for the discontinuance of water to any consumer only upon the consumer's failure to pay the rates assessed, and it is significant that The Public Utilities Act, now R.S.O. 1950, c. 320, in s. 27(3) makes the same provision and such provision is the only one in the statute dealing with the discontinuance of water service.

38 In these circumstances the plaintiff submits that the then Town of Cornwall purchased or expropriated under an agreement in 1898 a public utility operated in the town of Cornwall and in the township of Cornwall and that the Town of Cornwall and later the City of Cornwall has continued to operate such public utility in the two areas to this day and that therefore at common law and by statutory enactment it is compelled to continue service to all consumers and may discontinue service only for non-payment of rates. The plaintiff further submits that the resolutions of the municipal council of the defendant to discontinue the supply of water to the plaintiff, dated 17th June 1950 and 20th November 1950 (exhibits 53 and 58), were adopted without authority and were adopted in bad faith, being purported exercise of municipal powers for ulterior purposes. Counsel cites *Mayor, etc. of Westminster v. London and*

North Western Railway Company, [1905] A.C. 426, per Lord Macnaghten at p. 432; *The Bell Telephone Company v. The Town of Owen Sound* (1904), 8 O.L.R. 74, per Meredith J. at p. 80; *Re Hamilton Powder Co. and Township of Gloucester* (1909), 13 O.W.R. 661, per Britton J. at p. 669. The various witnesses who were municipal officers or members of the municipal council of the defendant frankly admitted in evidence that they knew of no other cases where the water service had been discontinued to a consuumer either in the city or in the township except for failure to pay water rates and quite frankly admitted that the purpose behind both resolutions was to drive the plaintiff company away from Cornwall and therefore to terminate the nuisance which they believed was caused by its operation.

39 That a public utility was at common law compelled to treat all consumers alike, to charge one no more than the others and to supply the utility as a matter of duty and not as a result of a contract, seems clear: *The Attorney-General of Canada v. The City of Toronto* (1893), 23 S.C.R. 514; *Scottish Ontario and Manitoba Land Co. v. City of Toronto* (1899), 26 O.A.R. 345; *The City of Hamilton v. The Hamilton Distillery Company; The Same v. The Hamilton Brewing Association* (1907), 38 S.C.R. 239, 51 Corpus Juris, para. 16.

40 Section 55 of The Public Utilities Act provides: "Where there is a sufficient supply of the public utility the corporation shall supply all buildings within the municipality situate upon land lying along the line of any supply pipe, wire or rod, upon the request in writing of the owner, occupant or other person in charge of any such building." The City points to the words "within the municipality" and submits that this makes the section inapplicable to the present situation as the buildings of the plaintiff are within the township of Cornwall and not within the city of Cornwall although they are situate along the line of a supply-pipe installed for the purpose of supplying them. "Municipality" is not defined in The Public Utilities Act. Section 11(1) of that statute provides: "A corporation may supply water to owners or occupants of land beyond the limits of the municipality", and counsel for the City submits a plausible argument that s. 55 compels supply within the borders and s. 11(1) permits supply to consumers beyond the borders if the requirements of The Municipal Act, to which I shall refer, are observed. The difficulty with that view, however, is that section 55, being in Part IV of the statute, applies by virtue of s. 49 to all municipal *or other* corporations owning or operating public utilities. One may imagine the case of the Brown Waterworks Company which supplies consumers in the municipality of Alpha Beta Omega. Surely then, the words "within the municipality" in s. 55, to have any meaning, must mean not the supplier of the utility but the area in which the utility is supplied. On the other hand, s. 11(1) of the statute may have a perfectly reasonable meaning and a perfectly proper application to the case of a municipal corporation operating a waterworks system solely within its own boundaries and then by agreement supplying certain consumers adjacent to but not within these boundaries.

41 I have been convinced from the evidence as to the original initiation of the waterworks system and all its subsequent history that what was established in 1886 by the private company, what was acquired in 1896 by the Town of Cornwall, what was operated from then on by the Town of Cornwall, and what is now operated by the City of Cornwall is a public utility system for the supplying of water to consumers on its line in both the present city of Cornwall and the township of Cornwall. That being so, its relationship with such consumers is not a matter of contract but of duty and the common law and also s. 55 of The Public Utilities Act compel it to continue to supply such consumers.

42 On this view, which is the one I adopt, the defendant's defence based on s. 259(1) of The Municipal Act, now R.S.O. 1950, c. 243, *i.e.*, the necessity for the City acting by by-law, is untenable. However, even if such defence were available, the decisions in both England and Ontario have interpreted like sections regulating municipalities as not making unenforceable an executed contract where no by-law exists. *John Mackay and Company v. The City of Toronto*, [1920] A.C. 208, 48 D.L.R. 151, [1919] 3 W.W.R. 253, and *The City of Toronto v. Prince et al.*, [1934] S.C.R. 414, [1934] 3 D.L.R. 81, are both cases of the Courts holding that contracts were not executed. In *Macartney v. County of Haldimand* (1905), 10 O.L.R. 668, an executed contract was upheld notwithstanding the lack of a by-law.

43 In the present case the plaintiff's predecessors applied for water service (ex. 47). In the usual course the matter was referred to the city engineer for a report and he did report (ex. 46). A by-law to authorize the extension was en-

acted (ex. 48) and a by-law to authorize the necessary debenture issue was enacted (ex. 49). The water-main was connected and the water service was supplied. The treasurer of the defendant corporation billed the plaintiff and the bill was paid. I am of the opinion that the contract, if contract be necessary, was executed and the defendant cannot now say it is invalid. In my view, however, such consideration is secondary as the defendant was operating a public utility and once the line was extended along Seventh Street in the township of Cornwall, the defendant was under a duty, both at common law and by the aforesaid s. 55 of The Public Utilities Act, to supply the plaintiff, and any other person in the same position, with water service.

44 The plaintiff is therefore entitled to have the mandatory injunction it seeks and an order for such injunction will issue.

45 The second action, by which the City sought a declaration that its resolution of November 1950 to discontinue the supply of water was a valid exercise of its powers, must be dismissed for the reasons which already have been outlined.

46 The plaintiff St. Lawrence Rendering Company Ltd. is entitled to the costs of its action and of its defence to the City's counterclaim, which must be dismissed with costs. The second action, in which the City was plaintiff, will also be dismissed with costs up to but not including any costs of trial.

Judgment accordingly.

Solicitors of record:

Solicitors for the Company: *Bolsby & Pepper*, Toronto.

Solicitor for the City: *George A. Stiles, Cornwall.*

END OF DOCUMENT

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2009-0329

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

AND IN THE MATTER OF an order or orders authorizing certain distributors to conduct specific discretionary metering activities under section 53.18 of the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A;

AND IN THE MATTER OF Rules 42, 44 and 45 of the Board's Rules of Practice and Procedure.

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Sommerville
Member

Cathy Spoel
Member

DECISION AND ORDER

October 6, 2009

The Federation of Rental-Housing Providers of Ontario ("FRPO") filed a Notice of Motion requesting a review of the Board's Decision and Order in proceeding EB-2009-0111 (the "Motion"). The Decision and Order that is the subject of the Motion was made on August 13, 2009 and concerned the Board's authorization of certain discretionary metering activities under section 53.18 of the *Electricity Act, 1998* (the "Decision").

The Motion was filed pursuant to Rule 42.01of the Board's Rules of Practice and Procedure (the "Rules"). Rule 44.01 of the Rules sets out the grounds needed to support a motion to review, and Rule 45.01 authorizes the Board to consider, as a preliminary matter, whether the motion as filed meets a threshold justifying a consideration of the motion on its merits. Pursuant to Rule 45.01, the Board's determination of a threshold question can be made with or without a hearing.

In this case, after carefully considering the Motion, the Board has determined, without a hearing, that the Motion has not met the threshold needed to support a review of the Decision on its merits.

The Board's reason for making this finding is simply that it appears from the materials filed that the Motion is predicated on a fundamental misunderstanding of the Decision.

The Motion contends that the Board erred in its Decision to the extent that it found that the relationship between the smart sub-metering providers (the "SSMs") and the Exempt Distributors (the "EDs") was an agency relationship.

The Board made no such finding.

In its Decision, the Board made no finding with respect to the relationship between the SSMs and the EDs, other than to require that there must be a contractual relationship of some nature. In the Decision, in every instance where the Board references this contractual relationship, it characterizes the SSM as an agent or subcontractor of the ED. A plain English reading of the Decision establishes that the Board specifically did not characterize the relationship between the SSM and the ED as necessarily an agency relationship. An agency relationship is but one of the possible varieties of relationship arising from contract. To paraphrase the Motion materials themselves, the contractual architecture governing the respective relationships between the SSMs and the EDs could reflect a wide spectrum of business models. The Board's use of the

disjunctive word "or" was purposeful and intended to communicate that agency and subcontractor status were alternative outcomes of the contractual relationship.

In its materials, FRPO makes many references to the Board staff submission of May 12, 2009. Board staff's submissions have no special weight and in this case the Board did not adopt Board staff's point of view with respect to the characterization of the relationship between the SSM and the ED as necessarily being one of agency.

In its request for relief, FRPO sought confirmation from the Board that the Decision was not intended to serve as binding direction to other adjudicative administrative tribunals, most pointedly the Landlord and Tenant Board. The Board confirms that the Decision was not intended to serve as binding direction to other adjudicative administrative tribunals, including the Landlord and Tenant Board. In the Board's view, the Decision speaks for itself and other tribunals will apply it or not apply it according to their own authority and practice.

Finally, FRPO expressed concern respecting what it regards as a misinterpretation of the Decision by certain tenants' advocacy organizations. Again, in the Board's view, the Decision speaks for itself, and the Board should have no role in trying to influence its interpretation by others.

THE BOARD THEREFORE ORDERS THAT:

1. The Motion to Review is hereby dismissed.

Dated at Toronto, October 6, 2009

ONTARIO ENERGY BOARD

Original Signed By

John Pickernell
Assistant Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2009-0111

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

AND IN THE MATTER OF an order or orders authorizing certain distributors to conduct specific discretionary metering activities under section 53.18 of the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A.

BEFORE: Paul Sommerville
Presiding Member

DECISION AND ORDER

August 13, 2009

Introduction

The Ontario Energy Board (the "Board") has initiated this proceeding respecting discretionary metering activities on its own motion. Discretionary metering activity includes the installation of smart sub-meters.

This case has documented that considerable unauthorized discretionary metering activity has been undertaken by landlords or those working on their behalf.

Technically, landlords are "Exempt Distributors". This status has important implications for the manner in which smart sub-metering may be implemented in rental apartments and industrial, commercial, or office building settings. These implications will be dealt with later in this Decision and Order.

Prior to the creation of this proceeding the Board received many complaints from tenants with respect to the implementation of smart sub-metering in their apartment buildings.

In addition, in the course of this proceeding, the Board received over 250 submissions from affected parties, an overwhelming number of which came from bitterly unhappy tenants and tenant organizations. Tenants have indicated that smart sub-meters have been installed in their buildings and their units under a variety of terms and conditions, not all of which have been clear. Submissions made by smart sub-metering companies have confirmed that a considerable number of rental premises have in fact been smart sub-metered over the last couple of years.

As noted above, the volume of complaints, their nature, and the scope of the smart sub-metering activity being undertaken in the province led the Board's Chief Compliance Officer to issue a Compliance Bulletin which unequivocally characterized the discretionary metering activity being undertaken as unauthorized, and inconsistent with the requirements of the *Electricity Act, 1998* (the "Electricity Act").

It is not intended that this proceeding make any findings with respect to compliance with the Electricity Act, the *Ontario Energy Board Act, 1998* (the "Act"), any regulations made pursuant to either of those statutes, or Board codes.

For the purposes of this proceeding it is sufficient to say that there exists no regulation in force today that has the effect of authorizing discretionary metering activities by

landlords in rental apartment buildings, also referred to as "residential complexes"[1], or industrial, commercial or office building settings. Nor is there any Board order or any Board code which has the effect of authorizing such activities in those settings. The Board will address the effect of these unauthorized arrangements later in this Decision.

The issue facing the Board in this case is whether to make such an order in light of the considerable activity being undertaken by landlords.

In making this determination, the Board has considered the statements made by the Minister of Energy and Infrastructure respecting his intention to enact regulations authorizing discretionary metering activity by landlords on appropriate terms and conditions. In his public pronouncements[2] and in the Provincial Legislature[3] the Minister has indicated that it is his intention to introduce legislation and develop regulations for this purpose later this year. The Minister also recognized in the course of his comments that the development of these legislative tools would require consultation involving a variety of interests and opinion.

The development of a Board code directed to the subject, which could also serve as authorization pursuant to the Electricity Act, would take a considerable period of time, time during which there may be serious prejudice to legitimate interests.

In the Board's view, the best mechanism for the authorization of discretionary metering activity is in fact legislation specifically developed by and enacted by the government to address the issues after an appropriate period of consultation. It appears, however, that that process may take a considerable period of time. In this interval the aggressive pursuit of smart sub-metering by landlords in residential complexes may continue. In the past, the absence of authorization does not appear to have curbed the enthusiasm of landlords and smart sub-metering agents or contractors working on their behalf in this process. They have a legitimate interest in providing smart sub-metering systems, provided it can be done pursuant to an authorization consistent with the requirements of section 53.18 of the Electricity Act.

The consequences of the continued implementation of smart sub-metering without the benefit of authorization are serious. As indicated above, many tenants have

[1] *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, s. 2(1) [hereinafter referred to as the RTA].
[2] T. Hamilton, "Rogue energy sellers face fall clampdown" *The Toronto Star* (21 May 2009).
[3] Ontario, Legislative Assembly, *Debates* (2 June 2009) at 7144 and Ontario, Legislative Assembly, Standing Committee on Estimates, *Debates* (2 June 2009) at E-714.

complained about the process and outcomes associated with the rollout of smart sub-metering in apartments. In some instances, this process has led to very important financial consequences for tenants, and uncertain mechanisms for the consideration and resolution of their concerns. Tenants have been, and apparently are being, asked to consent to smart sub-metering under circumstances that do not meet the statutory requirements, or even reasonable practice. The submissions received from all sides of the issue suggest that there is an air of urgency respecting this subject.

It is the Board's view that, during the period between now and the time the government is able to put in place its comprehensive legislative package, the public interest requires that some measure of regulatory guidance is given. Accordingly, the Board has determined that it is appropriate for it to make an order arising from this proceeding which will authorize discretionary metering activities by landlords, and those operating on their behalf, on certain terms and conditions.

The terms and conditions are largely directed to consumer protection measures designed to ensure that tenants, in consenting to their participation in the smart sub-metering program that has been made available within their respective buildings, are appropriately informed about the financial, energy efficiency and environmental implications associated with it.

The Board is also mindful of the importance that the smart sub-metering program plays in the government's overall energy strategy. As things stand now, no discretionary metering activity by landlords in residential complexes or industrial, commercial, or office building settings is authorized. The Board considers it to be in the public interest to remove such barriers as it reasonably can to the orderly and lawful implementation of this important government policy.

Accordingly, the Board has decided to issue an order which will permit these discretionary metering activities, according to a set of terms and conditions which are thought to provide reasonable protection for the legitimate interests of all affected persons, until such time as the anticipated legislative package is in place. In the Board’s view, reasonable protection will be achieved through written consent, which is both informed and voluntary, by tenant consumers.

While the Board is issuing this Decision and Order to address the current situation, the Board cautions landlords and their smart sub-metering agents or sub-contactors that

this Order is intended to be transitional and interim in nature. Legislative action by the government in this area may have important consequences for any installations undertaken in this interim period.

The Submissions

The parties were sharply divided on which course the Board should take. Tenants and organizations representing tenants strongly urged the Board to not issue an order authorizing discretionary metering activity. Smart sub-metering companies, on the other hand, sought to have these activities authorized by the Board by way of order.

A common feature among those tenants and tenant organizations most vehemently opposed to the rollout of smart sub-metering was strong support for the government's overall electricity strategy of conservation and energy efficiency, and the general objectives associated with smart sub-metering and smart metering. Their concerns centered on several key questions.

First, they had little confidence in the methodologies employed by landlords to establish rent reductions associated with individual metering. A very high percentage of the submissions received reported that the rent reductions offered by landlords were far smaller than the new electricity bill they were being asked to pay. In many instances, there does not appear to have been a particularly programmatic exposition by the landlord as to how the rent reduction was arrived at, nor what would be the basis for the new electricity charges to be paid by the individual tenant. Tenants complained about being surprised at both the level of the new electricity bill and some of its constituent elements. These elements included installation charges and administration fees associated with the operation of the smart sub-meters.

Another area of concern for tenants really goes to the heart of the program itself. Tenants expressed the view that they had little ability to control or manage the costs associated with their electricity use. They complained that the landlord has exclusive authority to select and install all of the important electricity dependent appliances. In many cases they indicated that the appliances in use in their particular apartments were old, inefficient, and sometimes poorly maintained. Similar concerns were raised with respect to the insulation value of their respective apartments. Tenants have typically no authority, and little ability, to improve leaking windows and doors or poorly insulated walls. This lack of control of key elements of conservation potential is particularly

concerning. If tenants have no genuine ability to improve the energy efficiency of their units, how meaningful can individual billing be?

Many tenants complained that the proposal for smart sub-metering was presented substantially as a requirement and not as a matter requiring their consent. Many tenants also expressed concern about the unauthorized nature of the smart sub-metering activity in their buildings, and wondered how and where their remedies might lie.

The organizations representing residential tenants generally took the view that they would rather have any authorization of smart sub-metering activity be subject to the legislative process to be undertaken by the government later this year. In their view, that process offered their constituency its best opportunity to have its interests reflected.

For their part, organizations representing residential property owners and the smart sub-metering companies urged the Board to issue an order which would permit them to get on with the implementation of the government's program. They pointed to the general public interest in ensuring that conservation measures are implemented as soon and as effectively as possible. They submitted that consumer protection could be achieved through use of an approved voluntary code.

The smart sub-metering companies also noted the effect that the decision may have on employment levels within their industry and their legitimate interests in meeting their business objectives.

The companies also pointed to specific endorsements made by political officials as indicators of both the legality and desirability of the rollout of smart sub-meters in apartment building settings.

Representatives acting on behalf of owners of commercial buildings submitted that consumer protection should be available to residential tenant consumers but that smart sub-metering in commercial buildings occurs as an accepted normal business practice requiring no further tenant protections.

What Is Discretionary Metering Activity?

Discretionary metering activity is a defined term arising from the Electricity Act. The term was defined in amendments to the Electricity Act which were enacted to support

the government's smart metering initiative (the "SMI"). The SMI was defined in those amendments as the government's policy to ensure electricity consumers are provided, over time, with smart meters. The prohibition of discretionary metering activity ensured that the SMI is, in fact, phased in over time as distributors are authorized to conduct these activities.

Section 53.18 of the Electricity Act states:

> (1) On and after November 3, 2005, no distributor shall conduct discretionary metering activities unless the distributor is authorized to conduct the activity by this Act, a regulation, an order of the Board or a code issued by the Board or it is required to do so under the *Electricity and Gas Inspection Act* (Canada).
>
> (2) For the purpose of this section,
>
> "discretionary metering activity" means the installation, removal, replacement or repair of meters, metering equipment, systems and technology and any associated equipment, systems and technologies which is not mandated by the *Electricity and Gas Inspection Act* (Canada), by regulation, by an order of the Board or by a code issued by the Board or authorized by a regulation made under this Act.

Residential complexes and industrial, commercial or office building settings are typically supplied with electricity by licensed distributors through a bulk meter. This meter records all of the electricity flowing into the building without any differentiation between users.

Smart sub-metering systems are designed to enable the allocation of electricity usage by individual tenants on an apartment-by-apartment basis. Each tenant consumer will be assessed according to his or her actual usage as recorded by their individual smart sub-meters. Ultimately it is intended that the smart sub-meters will operate so as to be capable of charging for the actual electricity consumption by the tenant according to the time of usage. Smart sub-meters are intended to enable consumers to time their use of electricity so as to avoid high-priced peak period usage. Smart sub-meters will operate in conjunction with time-of-use rate structures that will reward off-peak usage with lower per unit rates.

In the residential complex setting the implementation of smart sub-meters is intended to at once make tenants directly responsible for their actual usage, while enabling them to control and constrain their usage to control their costs. This element of direct control

and attendant responsibility for electricity usage is key to the government's smart metering strategy. It is the government's stated intention to drive overall conservation and energy efficiency through individual responsibility incented by pricing structures. It is for this reason that the government announced that smart meters will be installed in every home in the province by the end of 2010. The government explicitly authorized licensed distributors to install smart meters through Ontario Regulation 427/06 made under the Electricity Act. That process for single-family residential dwellings is well underway, and in some communities in Ontario has been completed. It is expected that the government's goal of province wide installation of smart meters will be achieved soon, and that time-of-use rates, necessary to exploit the full value of smart meters and smart sub-meters, will be in place in the near term. The Board has noted the government's announcement on May 14, 2009 which stated that an estimated 3.6 million customers will be on time-of-use rates by June 2011.[4]

The government also explicitly authorized the installation of smart meters or smart sub-metering systems in condominium settings through the adoption of Ontario Regulation 442/07 made under the Electricity Act. The regulatory regime established by the government to achieve this purpose involved empowering the condominium corporation or the developer to enter into smart metering or smart sub-metering implementation arrangements.

In the condominium setting, the condominium corporation has a fiduciary duty to the unit holders and is unequivocally accountable to the occupants of the respective buildings. There is no parallel to the condominium corporation in the residential complex setting. Each tenant in a residential complex has a separate and distinct contractual relationship with the landlord, and there is no corporate entity that has the legal obligation to represent the interests of the respective apartment unit tenants.

Implementation of smart sub-metering in the residential tenancy environment is a very different exercise than in the condominium context. That may explain why the government has not yet put in place parallel legislative instruments to authorize the program for residential complexes.

First, in an important sense, the roll-out of smart sub-meters in residential complexes is inconsistent with a key principle of the overall culture of conservation energy strategy, which is that with control over energy usage comes cost responsibility.

[4] http://www.mei.gov.on.ca/english/news/?page=news-releases&body=yes&news_id=36

As was pointed out by many tenants in their submissions, a very substantial element of conservation and energy efficiency activity lies exclusively within the power and purview of the landlord. The landlord selects, maintains and installs the appliances used in the units, and is solely responsible for the maintenance of the buildings, including installation of windows, doors and insulation. Typically, the tenant has no control over these key elements, yet the installation of smart sub-meters has the effect of transferring responsibility for electricity charges for the apartment unit from the landlord to the tenant. This is a disconnect between control and cost responsibility.

In the Board's view, this set of circumstances requires that the implementation of smart sub-metering in residential complexes is accompanied by a set of terms and conditions that provides the tenant with sufficient information respecting the condition of the appliances and the integrity of the building's apartments to make his or her consent an informed consent. The Order accompanying this Decision will contain a provision requiring that the landlord conduct an energy audit of the premises, and make that audit available to the tenant at the time his or her consent is sought. A tenant should not be asked to agree to participate in the smart sub-metering program without having a good appreciation of the extent to which the building and the appliances in use meet the government's objectives with respect to conservation and energy efficiency.

There is a considerable variety of arrangements between landlords and tenants. The informed consent structure reflected in the Order enables tenants to take into account their specific circumstances in deciding whether to participate in a smart sub-metering program in their building.

The Board finds that any smart sub-metering installation in bulk metered residential complexes and industrial, commercial, or office building settings on or after November 3, 2005 is unauthorized, and any resulting changes to financial arrangements respecting the payment of electricity charges by tenants to be unenforceable. This conclusion flows directly from the clear wording of section 53.18(1) of the Electricity Act.

It is important to note again that this proceeding is not a compliance proceeding nor is it intended to impose any form of penalty, restitution order, or other disciplinary action against any Exempt Distributor that has engaged in unauthorized discretionary metering activity. However, having engaged in unauthorized metering activity, in contradiction to the terms of the Electricity Act, the Board finds that the landlord cannot now insist on performance of the changes to lease agreements. Whatever unwinding of changed

financial arrangements may be necessary should be undertaken within the context of the specific leasehold or rental arrangement existing between the tenant and his or her landlord.

The Architecture of Exempt Distribution

In order to put the rest of this Decision in its proper context, it is necessary to describe the manner in which landlords, who are Exempt Distributors, are entitled to engage in discretionary smart sub-metering activities.

The concept of an exempt distributor is set out in section 4.0.1 of Ontario Regulation 161/99 – *Definitions and Exemptions* made under the Act. In that regulation several categories of persons are exempted from the usual requirements of electricity distribution, such as licensing and rate regulation. For the purposes of this proceeding, the Board refers to the "Exempt Distributors" as those that are exempt under section 4.0.1(1)(a)(2) and (3); that is, those that distribute electricity entirely on land on which the following types of buildings are located: (i) a residential complex as defined in the RTA; and (ii) an industrial, commercial or office building. A key qualification for Exempt Distributors is that they must distribute electricity for a price no greater than that required to recover all reasonable costs. This means that the distribution of electricity cannot be undertaken by an Exempt Distributor for profit.

Exempt Distributors who are engaged in this case have entered into contractual arrangements with smart sub-metering providers whose business involves the installation and administration of the smart sub-meters. In conducting this activity, the smart sub-metering providers are in reality the agents or sub-contactors of the Exempt Distributor (e.g., the landlord). It is axiomatic that neither agents nor sub-contractors, sometimes referred to as smart sub-metering providers, acquire any novel or additional rights or status viz-a-vis third parties, in this case tenants, by reason of their agency or contractual relationship with the landlord.

Accordingly, the smart sub-metering provider does not have a stand-alone contractual relationship with the tenants in buildings that have been rewired, in the case of existing buildings, or configured for smart sub-meters during the construction phase, in the case of new buildings. The relationship is always a relationship rooted in the relationship between the landlord, who qualifies as the Exempt Distributor, and the tenant. The smart sub-metering provider, as agent or sub-contractor of the landlord, has no, and legally can have no, genuinely independent relationship with the tenant with respect to

the distribution of electricity within the building, whether related to smart sub-meters or otherwise.

It is worth noting that electricity charges are comprised of two basic components: a charge intended to recover distribution delivery costs on the one hand, and a charge intended to recover the costs of the electricity commodity on the other. The Exempt Distributor, that is the landlord, must pass each of these components through to the consumer, that is the tenant, at a rate that is no greater than the reasonable costs charged to the Exempt Distributor by the licensed distributor through the bulk meter.

The Board has no authority to regulate the rates of smart sub-metering companies. The Board also has no authority to regulate the rates of the Exempt Distributors so long as the distributor meets the exemption requirements. However, the status of Exempt Distributors is based upon the wording of the exemption regulation and is dependent on the Exempt Distributor distributing electricity for a price that is no greater than that required to recover all reasonable costs.

It follows that in installing and administering smart sub-meters, the fundamental rule governing the activity for the landlord is that the landlord may not impose any costs associated with the smart sub-metering activity that violates the primary rule governing his status, which is that the price charged for the distribution of electricity can be no greater than that required to recover all reasonable costs associated with the distribution of electricity to the building, as recorded by the bulk meter. There is no room in this equation for royalties payable to the landlord or for any other charge beyond a demonstrably reasonable set of costs associated with the smart sub-metering activity. The landlord, in passing these costs through to the participating tenants, must ensure that the full range of costs, including but not limited to the costs making up the administration charge, is justifiable and reasonable.

In establishing the rules governing discretionary metering activities, the transparency of this cost issue is key. A consenting tenant must be in a position to have confidence that the smart sub-metering activity does not impose an unreasonable cost burden associated with the distribution of electricity. This means that the arrangements between the landlord and the smart sub-metering provider must be disclosed to tenants and regulatory authorities requesting the same. Accordingly, the Order accompanying this Decision will contain a provision requiring that the landlord retain, for examination

upon request, all of the contractual documents related to any smart sub-metering activity at his or her place of business.

Administration charges imposed by smart sub-metering agents or sub-contractors are charges to the landlord, not to individual tenants; however, to the extent that these costs are reasonable, they can then be passed through to the tenant. Again, the smart sub-metering provider, as agent or sub-contractor for the Exempt Distributor, has no independent relationship with the tenant.

The methodology used to arrive at the rent reduction proposal shall contain a detailed and comprehensive depiction of any administration charges sought to be passed through to the tenant arising from the Exempt Distributor's relationship with the smart sub-metering agent or sub contractor.

There may be additional complexity relating to distribution delivery charges.

Landlords are charged by licensed distributors according to the amount of electricity entering the premises as measured by a bulk meter. The billing determinant used to create the bill for the landlord, who is typically a general service customer, is based on a non-coincident demand measured in kW or kVA at the meter. In order to qualify as an Exempt Distributor, it is the cost generated by this methodology that may be passed through to the individual tenants. To the extent that the smart sub-metering equipment uses a different billing determinant, the sum of individual tenants' burden will not accord with the bulk meter billing determinant methodology. The result of this mismatch is a potential for excess revenues, which would take the arrangement out of the Exempt Distributor qualification.

In order to avoid this outcome, which would violate the pass-through requirement, in these circumstances the landlord's allocation of the distribution cost to individual tenants must be based on their proportional share of the overall bulk meter burden. That is to say that the quantum of the monthly bill derived from the bulk meter and payable by the landlord must be distributed to individual tenants according to their proportional share.

Billing predicated on individual non-coincident peak demands, for example, is not apparently compatible with the requirements of the Exempt Distributor's pass through obligation.

In soliciting tenants for participation in the smart sub-metering program in individual buildings, Exempt Distributors must take care to ensure that this potential outcome is addressed, and that the underlying calculations demonstrating pass through of both delivery charges and commodity charges are available to tenants as part of the informed consent needed to support enrollment.

The Significance of Section 137 of the RTA

Section 137 of the RTA formed part of a reform package in 2006. It has not been proclaimed to be in force. The proclamation of the section, together with the development and adoption of necessary regulations, is intended to form part of the government's legislative approach to the implementation of smart metering in apartment buildings.

Organizations representing tenants, who generally opposed the issuance of an order by the Board authorizing smart sub-metering activities, looked to the existence of section 137 of the RTA as a definite short-cut to the implementation of the government's legislative package. And so it may be. But the Board urges caution in this approach.

There is an anomaly that lies at the core of section 137 of the RTA and its presumed relevance to smart sub-metering situations. In fact, the Electricity Act and regulations made under that Act make it clear that there is intended to be a distinction between "smart meters" as that term is used in the various legislative instruments, and "smart sub-metering systems" as that term is used in the same instruments.

Put simply, "smart meters" is a term that is used to describe exclusively the smart metering activities of licensed distributors. It does not appear to refer to smart sub-metering activities undertaken by Exempt Distributors.

The Board dealt with this distinction in the process leading to the development of the Smart Sub-Metering Code, proceeding EB-2007-0772. Interested persons are urged to read the Board's treatment of this issue in that proceeding, but the important distinction between smart metering on the one hand, and smart sub-metering on the other hand, flows directly from the use of those terms in the statute and the regulations adopted by the Lieutenant Governor in Council.

Section 137 of the RTA references only "smart metering". Even when proclaimed into force, it appears that section 137 of the RTA will only apply to the scenario where a

licensed distributor smart meters the individual units in the residential complex. Section 137 of the RTA does not appear to apply to the smart sub-metering situation where an Exempt Distributor, or its agent or sub-contractor, individually smart sub-meters the units in the residential complex.

Further support for the view that the terms are not intended to be used interchangeably can be found in the other provisions contained in section 137. Section 137 of the RTA appears to be geared towards the situation in which the Exempt Distributor is no longer the distributor of electricity, which is what occurs in the smart metering situation when the licensed distributor takes over the individual tenants as new, independent customers. This is not true in the smart sub-metering scenario.

In the smart sub-metering scenario, the smart sub-metering provider acts as an agent or sub-contractor for the Exempt Distributor under the terms of a contract. The smart sub-metering providers have no status to become distributors of electricity to tenants. That status is always reserved for the Exempt Distributor. The Exempt Distributor never terminates the obligation to provide electricity in the smart sub-metering situation even though there may be a change in the methodology used to account for and bill electricity.

The smart sub-metering agent or sub-contactor cannot assume the role of distributor, exempt or otherwise, independently. If the landlord chooses to abandon his role as distributor, he may only do so in favour of a licensed distributor.

It can be seen that section 137 of the RTA can operate only if the units of residential complexes are smart metered, not smart sub-metered. As stated above, the Board has previously determined that smart metering can only be undertaken by licensed distributors. Further, at the current time, almost all licensed distributors have been authorized to conduct smart metering activities by Ontario Regulation 427/06 made under the Electricity Act. This means that licensed distributors are currently authorized to install and implement smart meters in residential complexes.

For all of these reasons, the Board does not believe that the proclamation of section 137 of the RTA is relevant to this proceeding as it appears that section 137, once proclaimed, will not apply to smart sub-metering.

The Order

Should Exempt Distributors be authorized to install smart sub-metering systems?

The Board has concluded that it is appropriate at this time to make an order which authorizes Exempt Distributors to conduct discretionary metering activities in relation to smart sub-metering systems in residential complexes; however, as part of the authorization allowing the installation, the Board is requiring the Exempt Distributors to meet certain conditions before they can use the smart sub-metering systems for the purposes of billing tenant consumers. The Order establishes the elements necessary to establish informed consent and a genuine acceptance of the terms and conditions associated with the transition to smart sub-metering for billing purposes within an apartment building. It is the Board's view that any existing purported consents in the residential tenant setting are ineffective, and must be renovated in a manner consistent with this Order.

With respect to the industrial, commercial or office building settings, the Board considers that industrial and commercial entities have access to, and are presumed to avail themselves of, appropriate legal and other advice so as to protect their interests in relation to landlords seeking to smart sub-meter their leased premises. The Board notes that no concerns were submitted from consumers in this category. Further, representatives of consumers in this category supported the existing arrangements. Accordingly, while the Board will require a much more demanding set of conditions for residential tenants, implementation of smart sub-metering for commercial tenants will not be subject to these protections. The only requirements attaching to industrial, commercial or office building settings are that the consent of the commercial tenant must be evidenced in writing and a licensed smart sub-metering provider must be used. Where landlords have implemented smart sub-metering with their industrial or commercial tenants, and the consent of the industrial or commercial tenant is evidenced in writing, there is no requirement that the landlord re-visit that consent. If the consent of the industrial or commercial tenant is not in writing, the landlord must procure it in that form.

Scope of discretionary metering activities and associated services.

The Board considers that, provided the preconditions and conditions established within this Order are met, Exempt Distributors for residential complexes and industrial,

commercial or office buildings may conduct discretionary metering activities in relation to smart sub-metering systems.

The smart sub-metering companies argued for, and in some instances have apparently implemented, arrangements that would change the terms and conditions associated with consent to the implementation of smart sub-metering according to whether the residential tenant was an existing tenant or a new tenant entering the premises. The Board has found that all of the sub-metering activity in apartment settings following November 3, 2005 has been unauthorized, and arrangements predicated on the unauthorized activities are unenforceable. It makes no difference that those arrangements may have been made with a tenant who is newly entering the premises as opposed to a tenant who is already resident in the residential complex undergoing the transition to smart sub-metering. The same is true going forward. Prospective tenants are entitled to the same protections as those afforded existing tenants, and the same preconditions and conditions associated with informed consent will apply to both categories.

Must a licensed smart sub-metering provider be retained to provide and install smart sub-metering systems and/or to provide associated services?

Yes. Licensed smart sub-metering providers are obliged to conduct their activities in a manner consistent with the Board's Smart Sub-Metering Code. This Code ensures that appropriate metering equipment is installed and that protections are in place for consumers in relation to metering services and business practices and conduct. Failure to conform to the Code can result in a number of sanctions, including licence suspension. The Order will require licensed smart sub-metering providers to comply with the Code when providing smart sub-metering services on behalf of Exempt Distributors.

Tenant/Consumer consent.

The Board recognizes that the government's future program may not require the consent of individual tenants. It is the Board's view that for the purposes of this Order, which is intended to fill the gap pending the development and implementation of the government's legislative package, a regime requiring the written consent of individual tenants is most appropriate. To date, this environment has been characterized by a high degree of confusion and complaint, and imposing mandatory enrollment by residential tenants in smart sub-metering would seem to be premature. It is better in the

Board's view for all affected parties to gain a better working knowledge of how smart sub-metering can operate in residential complexes. There is also an unfortunate legacy of unauthorized activities, the effect of which should be purged to allow a more thoughtful and orderly roll-out of smart sub-metering programs.

The Board considers that an informed written consent by the tenant consumer is a precondition to any transition to smart sub-metering. This means that the conditions outlined in this Order must be satisfied before any consent executed by a tenant can be of effect.

As noted above, smart sub-metering may only be undertaken pursuant to a Board order or legislation enacted by the government. It follows that to be authorized any smart sub-metering activity must be consistent with the enabling order. In this case, the Board Order requires conformity with a set of conditions associated with the consent of a tenant for the implementation of smart sub-metering in his or her apartment.

Neither the landlord nor its agent or sub-contractor smart sub-meterer has the authority to assume any form of consent that is not explicitly consistent with the terms of this Order. The Board notes that a contrary position was advanced by at least one of the smart sub-metering companies who suggested that, where the landlord had reserved the right to change the contractual terms of the lease agreement, that no specific consent was required. The Board rejects this point of view on the basis of the clear words of the statute and the requirement that discretionary metering activities be conducted pursuant to, *inter alia*, an order of the Board. The landlord has no unilateral authority to assume consent or to act on a consent that is not consistent with this Order.

It is appropriate to remind landlords that the structure created by the legislation and regulations for the implementation of smart sub-metering places the landlord squarely at the centre of the process. Conformity with the Board Order is the responsibility of the landlord. This does not involve, and cannot involve, the termination of its obligation to provide electricity to its tenants. The Exempt Distributor, that is typically the landlord, is always the provider of electricity to the tenants within the building.

The smart sub-metering agent or sub-contractor is not a distributor of electricity and cannot be a licensed distributor of electricity unless duly authorized by the Ontario Energy Board. That engagement would involve the full range of regulatory measures,

including rate regulation and conformity to all of the Board's codes governing the actions, responsibilities and obligations of licensed distributors in Ontario.

The smart sub-meterer has no stand-alone billing relationship with the tenant and, to the extent that the smart sub-metering equipment records usage on a different billing determinant than that used to establish the landlord's obligation to the licensed distributor, the amount of the bill charged to the individual tenant must be predicated on the tenant's proportional share of the landlord's bulk meter electricity bill. Any other arrangement may take the situation out of the Exempt Distributor context and may place the landlord in the role of a conventional electricity distributor, requiring licensing and rate regulation.

The Board appreciates that this approach may create a need for adjustments to be made to the arrangements made to date by landlords and smart sub-metering companies in relation to tenants. Whatever unwinding of these arrangements may be necessary needs to be undertaken pursuant to structures and processes in place to resolve and adjudicate such matters. Landlords and smart sub-metering companies accepted a risk by embarking on discretionary metering activities without the benefit of any authorization pursuant to section 53.18 of the Electricity Act. Their approach has resulted in considerable confusion and disaffection among tenants. The rather awkward state that now exists must be regularized in a responsible fashion if the government's conservation program is to have any credibility among this segment of consumers. The Board's Order is intended to do that.

The constituents of informed consent for smart sub-metering in residential apartment buildings are set out below.

The landlord is required to conduct and share the results of an energy audit of the premises with the tenant. The audit must be conducted by an independent third party, and must disclose what proportion of the landlord-supplied appliances within the apartment units are certified to be Energy Star or otherwise certified to be energy-efficient appliances. The audit must also assess the overall energy efficiency of the building envelope and identify deficiencies that can be remedied through weatherization techniques. This includes an assessment of the integrity of in-suite outside doors and windows in the units. This audit report must be provided to the tenant unexpurgated.

The landlord is required to disclose to the tenant the methodology to be used to establish the rent reduction associated with that specific tenant's rent obligation. This will include an explicit description of all of the constituent elements brought to bear in establishing the proposed electricity-related reduction in the rent charge. The Board will not prescribe the precise methodology to be used, but it must include the method adopted to account for electricity usage associated with common areas, any assumptions that are made must be explicitly stated, and the landlord must detail how electricity charges associated with non-participating tenants will be used in the calculation for an individual tenant's rent reduction. The methodology must also disclose as a separate line item any administration charges the landlord seeks to recover from the tenant. The methodology must also disclose the methodology to be used to apportion an individual tenant's proportional share of the landlord's overall distribution delivery charge as established by the bulk meter.

The consent must be in writing, and attached to the document at the time of execution of the consent will be the energy audit and methodology disclosure referenced above. The landlord shall retain this record in a manner consistent with all other documents associated with the tenancy.

Confidentiality

In the Notice of Hearing and Procedural Order No. 1 (the "Notice"), the Board required each licensed smart sub-metering provider to file with the Board a list of the Exempt Distributors with whom it had entered into a contract for the commercial provision of smart sub-metering systems and/or associated services (the "List").

Stratacon Inc. ("Stratacon"), a smart sub-metering provider, filed the required information together with a request that the List be held in confidence by the Board. The filing was made in accordance with the Board's *Rules of Practice and Procedure* pursuant to section 10.01. In accordance with the Board's Practice Direction on Confidential Filings, Stratacon filed a non-confidential version of the document in which it redacted the List and instead disclosed the number of identified Exempt Distributors.

In its covering letter, Stratacon asserted that disclosure of the List would prejudice its competitive position and would not be required under either the *Freedom of Information and Protection of Privacy Act* or the *Statutory Powers Procedure Act*. Stratacon also stated that most of its contracts obligate it not to disclose the information.

As a rule, the Board is reluctant to receive information on a confidential basis, and is unsympathetic to contractual terms that purport to limit disclosure of arrangements made with regulated entities where those arrangements may be relevant from a regulatory point of view.

As is clear from the Decision and Order, the commercial environment surrounding the installation and operation of smart sub-metering systems is at an early and crucial stage. A key objective of this proceeding is to attempt to provide some regulatory guidance to smart sub-metering providers as they pursue their business goals. In the Board's view, in this light, Stratacon's request is not objectionable, and will be granted.

It is to be noted that the Board offers no opinion on whether the confidentiality claim made by Stratacon would survive a request made pursuant to the *Freedom of Information and Protection of Privacy Act*. In this Decision the Board merely finds that it will not, on its own motion, place the affected material on the public record. This approach should be seen to be very case specific, and without any broad or precedential application to other circumstances.

Funding

The Notice stated that the Board will provide funding.

Requests for funding were submitted by the following parties (altogether, the "requesting parties"):

- Advocacy Centre for Tenants Ontario ("ACTO");
- Building Owners and Managers Association of the Greater Toronto Area ("BOMA");
- Federation of Rental-housing Providers of Ontario ("FRPO");
- Green Light on a Better Environment ("GLOBE");
- Low-Income Energy Network ("LIEN"); and
- Vulnerable Energy Consumers Coalition.

The Board has reviewed the funding requests submitted by the requesting parties and has determined that 100% of the funds submitted by the requesting parties will be paid to each individual party.

THE BOARD THEREFORE ORDERS THAT:

1. Distributors that meet the requirements of section 4.0.1(1)(a)(2) of Ontario Regulation 161/99—*Definitions and Exemptions* (made under the *Ontario Energy Board Act, 1998*), namely distributors that:

   (a) distribute electricity for a price no greater than that required to recover all reasonable costs; and
   (b) distribute the electricity through a distribution system that is owned or operated by the distributor that is entirely located on land on which a residential complex as defined in the *Residential Tenancies Act, 2006* is located,

   are authorized, under section 53.18 of the *Electricity Act, 1998*, to conduct discretionary metering activities in relation to smart sub-metering systems in their properties; however, the distributors must comply with the conditions in sections 2 to 6 below in order to use the smart sub-metering system for the purposes of billing their customers.

2. Distributors included in section 1 of this Order must obtain an energy audit of the property where the smart sub-metering system is installed. The energy audit must be conducted by an independent third party. The report from the energy audit must, in addition to any other energy efficiency evaluation:

   (a) disclose the proportion of the landlord-supplied appliances within the individual units of the residential complex that are certified to be Energy Star or certified to be energy-efficient appliances; and
   (b) assess the energy loss through the building envelope, and identify deficiencies that can be remedied through weatherization techniques for the building and the individual units.

3. Distributors included in section 1 of this Order must retain all contractual documents relating to the installation of the smart sub-metering system in the property including, but not limited to, documents regarding the costs of installation, the costs of the capital assets, and the administrative fees for the smart sub-metering provider. This information must be provided to any customer of the distributor, or the Board, upon request.

4. Distributors included in section 1 of this Order may only use the smart sub-metering system for their customers that consent in writing to the use of the smart sub-metering system. The customer's written consent must be voluntary and informed. Therefore, distributors included in section 1 of this Order must provide their customers with the following information at the time they request their customer's consent to use the smart sub-metering system:

   (a) the results of the energy audit required by section 2 of this Order must be provided in their entirety;
   (b) the amount of any administrative charge that will be included on the electricity bills;
   (c) a detailed description of the methodology used to arrive at the rent reduction (including information relating to how the electricity used by the common areas will be accounted for, how the electricity charges for non smart sub-metered customers will be used in the rent reduction methodology, and any other numbers or assumptions used in the methodology);
   (d) the specific amount of the rent reduction being offered to the customer; and
   (e) the methodology used to apportion the delivery charges amongst the customers.

   The customer's written consent must be attached to the documents referred to above and the customer must initial all of the documents to show that they were provided to them. Distributors included in section 1 of this Order shall provide their customers with a copy of the executed documents and shall retain the customer's written consent and the initialed documents in a manner consistent with all other documents associated with the tenancy.

5. Any consent obtained by a distributor included in section 1 of this Order prior to this Decision and Order is ineffective and cannot be relied upon. Distributors included in section 1 of this Order will need to obtain new consents from their customers in accordance with the terms and conditions in this Order. The terms and conditions contained in this Order apply to existing customers as well as prospective customers.

6. Distributors included in section 1 of this Order must use a licensed smart sub-metering provider if the distributor is going to conduct discretionary metering activities in relation to a smart sub-metering system. Smart sub-metering providers must comply with the Board's Smart Sub-Metering Code, as applicable, when conducting these activities on behalf of the distributors included in section 1 of this Order. For the purpose of following the Smart Sub-Metering Code in relation to smart sub-metering in residential complexes as defined in the *Residential Tenancies Act, 2006,* smart sub-metering providers shall:

   (a) consider "prescribed activity" to mean the installation and use of smart sub-metering systems;
   (b) consider "prescribed location" to mean a residential complex as defined in the *Residential Tenancies Act, 2006*;
   (c) consider the "condominium corporation or developer" to mean a distributor included in section 1 of the Board's Order in Proceeding EB-2009-0111; and
   (d) for the purposes of section 4.1.3 of the Smart Sub-Metering Code, and in addition to sections 4.1.4 and 4.1.5 of the Code, deem a consumer to have a good payment history if the consumer provides a letter from its landlord or a service delivery provider (i.e., a telecommunications or cable provider) confirming a good payment history with the landlord or service delivery provider for the most recent relevant time period set out in section 4.1.3 of the Code where some of the time period which makes up the good payment history has occurred in the previous 24 months.

7. Distributors that meet the requirements of section 4.0.1(1)(a)(3) of Ontario Regulation 161/99—*Definitions and Exemptions* (made under the *Ontario Energy Board Act, 1998*), namely distributors that:

   (a) distribute electricity for a price no greater than that required to recover all reasonable costs; and
   (b) distribute the electricity through a distribution system that is owned or operated by the distributor that is entirely located on land on which an industrial, commercial, or office building is located,

   are authorized, under section 53.18 of the *Electricity Act, 1998*, to conduct discretionary metering activities in relation to smart sub-metering systems in their

properties provided that the conditions listed in sections 8 and 9 of this Order are met.

8. Distributors included in section 7 of this Order may only use the smart sub-metering system for their customers that consent in writing to the use of the smart sub-metering system.

9. Distributors included in section 7 of this Order must use a licensed smart sub-metering provider if the distributor is going to conduct discretionary metering activities in relation to a smart sub-metering system. Smart sub-metering providers must comply with the Board's Smart Sub-Metering Code, as applicable, when conducting these activities on behalf of the distributors included in section 7 of this Order. For the purpose of following the Smart Sub-Metering Code in relation to smart sub-metering in an industrial, commercial, or office building, smart sub-metering providers shall:

   (a) consider "prescribed activity" to mean the installation and use of smart sub-metering systems;
   (b) consider "prescribed location" to mean a commercial, industrial, or office building;
   (c) consider the "condominium corporation or developer" to mean a distributor included in section 7 of the Board's Order in Proceeding EB-2009-0111; and
   (d) for the purposes of section 4.1.3 of the Smart Sub-Metering Code, and in addition to sections 4.1.4 and 4.1.5 of the Code, deem a consumer to have a good payment history if the consumer provides a letter from its landlord or a service delivery provider (i.e., a telecommunications or cable provider) confirming a good payment history with the landlord or service delivery provider for the most recent relevant time period set out in section 4.1.3 of the Code where some of the time period which makes up the good payment history has occurred in the previous 24 months.

10. Licensed smart sub-metering providers shall promptly provide a copy of this Decision and Order to each Exempt Distributor with whom it has entered into a contract for the commercial provision of smart sub-metering systems and/or associated services. Furthermore, the licensed smart sub-metering provider shall inform the Exempt Distributor that the Exempt Distributor must promptly

post a copy of this Decision and Order in a prominent location in each building in which a smart sub-metering system has been installed.

ISSUED at Toronto, August 13, 2009.

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l' énergie de l'Ontario

Ontario

EB-2008-0244

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 PowerStream Inc. for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2009.

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Paul Vlahos
Member

Cathy Spoel
Member

MAJORITY DECISION

July 27, 2009

This is a Majority Decision by Members Paul Vlahos and Cathy Spoel. The Minority Decision by Vice Chair Gordon Kaiser follows the Majority Decision.

Background

On June 03, 2009, the Ontario Energy Board approved the terms and conditions of the Settlement Proposal dated May 19, 2009 in connection with PowerStream's application to approve just and reasonable rates for electricity distribution effective May 1, 2009. PowerStream and the intervenors settled all issues with the exception of one.

The one outstanding issue, raised by the Smart Sub-Metering Working Group, a group of seven Board-licenced companies offering smart sub-metering services to condominiums (the "SSMWG"), is whether and to what extent PowerStream should be permitted to include in distribution rates the costs and revenues associated with its condominium suite metering activities.

A one-day oral hearing was held on June 15, 2009 and written arguments were submitted by parties.

For the reasons set out below the Board approves the forecast revenues and costs of the condominium suite metering activities reflected in the 2009 revenue requirement that results from the settlement agreement.

The Issue and Relief Sought

Historically, condominium buildings have typically been treated as commercial customers with a bulk meter. The units are not individually metered and the utility has one customer, the condominium corporation.

Condominium suite metering, as offered by PowerStream, involves installing a separate meter for each condominium unit, and billing each unit owner as a residential customer; the condominium corporation is billed for the common areas. There is no bulk master meter required and there is no sub-metering taking place. The rates are regulated. As is common for residential customers, PowerStream does not charge for the cost of the meters; these are included in the costs allocated to the residential class as a whole. The cost of the condominium meter (Quadlogic) is considerably more expensive (about $680) than the standard meter for an individual single home (about $250). On the revenue side, PowerStream replaces one commercial customer with a larger number of residential customers, generating higher revenue because of the rate classification under which it bills for the same load previously billed for the bulk meter.

Smart sub-metering, as offered by members of the SSMWG, happens "behind" the bulk meter. Members of the SSMWG install the smart meters for the condominium units. The condominium corporation continues to be a commercial customer of PowerStream. Smart sub-metering allows for the allocation of the condominium corporation's bill among the various unit owners, presumably in relation to their consumption of electricity. The rates are not regulated.

Because no contribution is required by PowerStream for the higher cost of the meter for condominium customers, the SSMWG alleges that there is a cost subsidy for these customers by the rest of PowerStream's ratepayers and that this harms the competitive market and harms the SSMWG members.

The relief sought by the SSMWG is that the condominium activity should be performed by an affiliate of PowerStream. In the alternative, if in the utility, the condominium activity should be treated as a stand-alone program, on a fully-costed basis. Under the stand-alone categorization, revenues and costs of the condominium suite program would be segregated from the rest of the distribution business. In the event the program is less profitable than the distribution business on a fully-costed basis, revenue would be imputed thereby reducing the revenue requirement and rates for the rest of the ratepayers.

Should the Program be offered through an Affiliate?

The SSMWG accepted that under the existing legislative and regulatory framework, utilities are required, when asked, to install smart meters in condominiums but argued that it is open to the Board to require that the condominium activity should be undertaken through an affiliate.

PowerStream, Board staff and the intervenors argued that the legislative and regulatory framework clearly suggest that a utility such as PowerStream not only has the ability to carry out these activities directly through the utility as opposed to a separate subsidiary, but in fact it is required to do so. PowerStream argued that if the activity was carried out through a separate subsidiary, which is not by definition a distributor, a utility would not be meeting its requirements under the *Electricity Act*, the Regulations and the Distribution System Code.

Section 71 (1) of the *Ontario Energy Board Act, 1998* (the "Act") states that distributors cannot carry on any business activity other than the distributing of electricity, except through an affiliate. However, section 71 (2) of the Act provides an exception to the general rule. Section 71 (2) states that a distributor may provide services in accordance with section 29.1 of the *Electricity Act, 1998* that would assist the government of Ontario in meeting its objectives in relation to electricity conservation.

Ontario Regulation 442/07, promulgated on August 1, 2007, allows licensed distributors to install smart meters in existing condominiums when the board of directors of the condominium corporation approves the installation of smart meters.

The Board's Distribution System Code was recently amended by adding section 5.1.9 which reads as follows:

> When requested by either:
> (a) the board of directors of a condominium corporation; or
> (b) the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the Condominium Act, 1998,
>
> a distributor **shall install** smart metering that meets the functional specification of Ontario Regulation 425/06 – *Criteria and Requirements for Meters and Metering Equipment, Systems and Technology* (made under the Electricity Act).(Emphasis added).

On the basis of the existing legislative and regulatory framework, the Board accepts that it is appropriate for PowerStream to continue to carry out its condominium activities as it has and proposes to continue.

Should the Program be Stand-Alone?

The alternative relief sought by SSMWG is for the Board to treat PowerStream's condominium suite activity as a stand-alone program, with the ratemaking framework as described above.

The legislative framework does not specify the ratemaking treatment of the condominium suite metering activity by distributors. The Board accepts that there may be a legitimate concern by the SSMWG if PowerStream and the SSMWG companies

competed in the same market and if there is an undue cost subsidy of PowerStream's condominium suite metering activities. The Board deals with these two matters below.

Before doing so, the Board points out that treating an activity on stand-alone basis is not necessarily a remedy to allegations of anti-competitive behaviour and predatory pricing, the matters of concern for the SSMWG. Under the stand-alone ratemaking model, the Board's role is limited to imputing revenue, when warranted, to ensure that there is no cost subsidy for the suite metering business by the rest of the ratepayers. The Board would not regulate the pricing and offerings of the program. These would be at the discretion of the utility.

Do PowerStream and the SSMWG companies compete in the same market?

As noted above, suite metering, as offered by PowerStream, involves installing a separate meter for each condominium unit, and billing each unit owner as a residential customer; the condominium corporation is billed for the common areas. There is no bulk meter.

Also as noted above, sub-metering, as offered by members of the SSMWG, happens "behind" the distributor's bulk meter.

An existing condominium wishing to be smart metered or a developer of a new condominium building has the choice of choosing suite metering with PowerStream or sub-metering with another company, such as one of the SSMWG member companies. So, the metering market is contestable. The fact that PowerStream is allowed to carry this activity as part of its distribution business does not take away from the fact that the metering of condominium units is a contestable market. To the extent that there is a cost subsidy as the SSMWG alleges, and if material, the SSMWG may be legitimately concerned.

Is There a Cost Subsidy?

The SSMWG argued that, as PowerStream used a more expensive Quadlogic meter rather than the standard smart meters used for single unit residential customers, there is a cost subsidy or there is likely a cost subsidy since there is no customer contribution for the higher cost of the Quadlogic meter.

PowerStream on the other hand argued that the utility has an obligation to provide service that meets the applicable standards and the standard smart meter for technical reasons could only be used in about 5% of the units. Moreover, all market participants use the same Quadlogic meter for the same reasons - it is the most effective equipment to meet the requirements of condominium units. The Board accepts PowerStream's rationale for using the higher cost Quadlogic meter. The Board notes that members of the SSMWG use the same meter for its technical and other advantages in the condominium sub-metering market.

As a number of interveners note, metering costs (a capital cost) may be higher but operating costs are likely lower. PowerStream was unable to provide precise operating costs as it was not previously required to segregate costs for the condominium activity in any fashion. On the basis of the information produced, most parties argued that there is no cost subsidy but other parties conceded that there may be a cost subsidy. There was however general agreement that the information adduced was not sufficient to conclude confidently that there is a subsidy, and in which direction.

The Board agrees with that assessment. The SSMWG has not, in this case, convinced the Board that there is a cost subsidy to condominium unit customers by the other residential ratepayers and, if there is, that it is material.

On the findings and reasons above, the Majority Panel is not prepared to grant the relief requested by the SSMWG.

Which Way Forward?

The metering capital cost differentiation issue for condominium customers was first raised by Board staff in the Toronto Hydro proceeding (EB 2007-0680). (The SSMWG was not a participant in the Toronto Hydro proceeding). In that proceeding, that Board Panel stated as follows:

> *At this time, for the purposes of this Decision, the Board will not consider differentiation in metering costs to be a pivotal consideration in entertaining the separation of the existing residential class or to direct the institution of contributions, capital or otherwise.*
>
> *This is an issue that requires consideration in a more generic proceeding with appropriate notice to effected parties, directed towards rate design and cost allocation. (Decision of the Board dated May 15, 2008, EB 2007-0680 – page 20)*

The SSMWG intends to raise its issue in other rates proceedings. The Board's view is that consideration of the issue on a utility-specific basis going forward is not the best approach for two reasons. First, there are substantial differences in the rates and operating costs from one utility to the next. The conclusions drawn in one case will be of little if any value in the resolution of this matter. Second, this is clearly a matter of Board policy. The shaping of Board policy will of course need to consider this issue in the context of a number of other policy issues before the Board. In that regard, the Board will now have two decisions from rate proceedings as it considers this matter. In the Majority Panel's view, it would be advisable for the Board to take a generic approach in addressing this matter.

PowerStream's Conditions of Service and Contracts

The SSMWG argued that PowerStream's Conditions of Service and contracts (filed in the form of a Terms of Reference Letter in SSMWG Schedule 3-1) , are unclear and misleading and do not indicate that a multi-unit building has the option of bulk metering. On cross-examination the witness for PowerStream denied this was the meaning or intent of the Conditions of Service and offered to amend the Conditions of Service to clarify the wording. (TR pg 165).

On the issue of contract exclusivity, there were also some questions raised as to the clarity of provisions in the PowerStream contracts regarding the freedom of the condominium corporation to exit a contract for another service provider. Again the PowerStream witnesses indicated that the condominium corporation could choose another service provider and that there are no barriers to exit. (TR pg 77)

The Board directs that PowerStream amend its Conditions of Service and related contracts going forward in a manner that clearly reflects the intent described by the PowerStream witnesses in this hearing. PowerStream shall file, for convenience, the amended sections of the Conditions of Service and related Terms of Reference Letters or other contracts as part of its draft rate order.

Rate Base

In accepting the revenue requirement reflected in the Settlement Proposal earlier in this decision, the Board considered the argument advanced by SEC that non-revenue producing condominium suite meters should not be forming part of rate base. The Board does not accept that revenue-generation is the test for including an asset in rate base. The test is used or useful. SEC's suggestion is not consistent with the long-standing regulatory practices in this regard. Notably, as article 410 of the Board's Accounting Procedures Handbook points out, assets will be included in rate base if they have the "capacity" to contribute to future cash flows and earn income. PowerStream's asset recognition approach to condominiums is the same as that for conventional subdivisions where installations can pre-date connection and revenue producing by a considerable time period. There is no supportable basis to treat the condominium suite metering assets distinctly.

Implementation of Rates

Pursuant to the Settlement Proposal that was approved by the Board the new rates are to be effective May 1, 2009 and implemented August 1, 2009.

Given the date of this Decision, an August 1, 2009 implementation date is no longer possible. The Board authorizes PowerStream to implement the new rates September 1, 2009.

The results of the Settlement Proposal together with the Board's findings outlined in this Decision are to be reflected in a Draft Rate Order. The Board expects PowerStream to file detailed supporting material, including all relevant calculations showing the impact of the implementation of the Settlement Proposal and this Decision on its proposed revenue requirement, the allocation of the approved revenue requirement to the classes and the determination of the final rates, including bill impacts. Supporting

documentation shall include, but not be limited to, filing a completed version of the Revenue Requirement Work Form excel spreadsheet, which can be found on the Board's website. PowerStream should also show detailed calculations of any revisions to its low voltage rate adders, retail transmission service rates and variance account rate riders reflecting the Settlement Proposal and this Decision.

A final Rate Order will be issued after the following steps have been completed.

1. PowerStream shall file with the Board, and shall also forward to the intervenors, a Draft Rate Order attaching a proposed Tariff of Rates and Charges and other filings reflecting the Board's findings in this Decision, within 14 days of the date of this Decision.

2. Intervenors shall file any comments on the Draft Rate Order with the Board and forward to PowerStream within 7 days of the date of filing of the Draft Rate Order.

3. PowerStream shall file with the Board and forward to intervenors responses to any comments on its Draft Rate Order within 7 days of the date of receipt of intervenor submissions.

Costs Awards

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. The Board will determine eligibility for costs in accordance with its Practice Direction on Cost Awards. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's Practice Direction on Cost Awards. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

PowerStream and CCC requested that costs of this proceeding should be assessed against the SSMWG on the basis that this was not the appropriate forum to raise that issue. Having accepted the SSMWG's issue for consideration in this proceeding, the Board does not find it appropriate to assess costs against the SSMWG.

A cost awards decision will be issued after the following steps have been completed.

1. Intervenors found eligible for cost awards shall file with the Board, and forward to PowerStream, their respective cost claims within 30 days from the date of this Decision.

2. PowerStream shall file with the Board and forward to intervenors any objections to the claimed costs within 44 days from the date of this Decision.

3. Intervenors shall file with the Board and forward to PowerStream any responses to any objections for cost claims within 51 days of the date of this Decision.

PowerStream shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, July 27, 2009

ONTARIO ENERGY BOARD

Original Signed By

_____
Paul Vlahos
Member

Original Signed By

_____
Cathy Spoel
Member

MINORITY DECISION

I have had the benefit of reading the reasons of the majority. I agree that PowerStream should be granted the rate relief requested but would add two conditions. The first is that PowerStream file a study that identifies the costs and revenues of its condominium smart meter service. The second is that the contracts between PowerStream and the condominium corporation relating to this service be amended to indicate that the contracts can be terminated on 90 days notice without penalty.

Background

On June 3, 2009, the Ontario Energy Board approved the terms and conditions of the Settlement Proposal filed by PowerStream Inc. in connection with PowerStream's application to approve just and reasonable rates for electricity distribution effective May 1, 2009.

The Applicant and the intervenors settled all issues with the exception of one. The one outstanding issue is whether and to what extent PowerStream should be permitted to recover in rates the operating and capital costs of its smart metering activities in condominiums. That issue is the subject of this decision.

PowerStream's request is supported by Board staff and all intervenors with one exception. The opposing intervenor is the Smart Sub-Metering Working Group (the "Working Group"). The Working Group consists of eight licensed smart submetering companies that compete with PowerStream in providing Smart Meters to condominium residents.

It is accepted that the market for this service is competitive. All nine companies appear to supply essentially the same service using similar, if not identical equipment.

The Working Group argues that the costs PowerStream is seeking to recover should not be recovered in rates. Instead, they argue that PowerStream should deliver these services through a separate subsidiary or alternatively through the utility but by using a non utility account which means that expenses are not recovered in rates.

The Regulatory Framework

As a general rule, the Board requires utilities to carry out competitive activities through a separate subsidiary. There are two reasons for this approach. First, there is a concern that the utility will subsidize the competitive activities from revenues received from monopoly services. This works to the disadvantage of ratepayers of monopoly services. Second, it may provide a utility with an unfair competitive advantage in the marketplace if monopoly revenues are used to subsidize the competitive services.

In the case of conservation activities such as smart metering, however special provisions apply. The relevant exemption is set out in section 71 (2) of the *Ontario Energy Board Act, 1998.*

> **Restriction on business activity**
>
> **71.** (1) Subject to subsection 70 (9) and subsection (2) of this section, a transmitter or distributor shall not, except through one or more affiliates, carry on any business activity other than transmitting or distributing electricity. 2004, c. 23, Sched. B, s. 12.
>
> **Exception**
>
> (2) Subject to section 80 and such rules as may be prescribed by the regulations, a transmitter or distributor may provide services in accordance with section 29.1 of the *Electricity Act, 1998* that would assist the Government of Ontario in achieving its goals in electricity conservation, including services related to,
>
> (a) the promotion of electricity conservation and the efficient use of electricity;
>
> (b) electricity load management; or
>
> (c) the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources. 2004, c. 23, Sched. B, s. 12

PowerStream and most intervenors argued that these sections clearly indicate that a utility such as PowerStream has the ability to carry out these activities directly through the utility as opposed to a separate subsidiary. I accept this interpretation.

This leaves open the alternative relief sought by the Working Group which is that the activities could be carried out through the utility but through a non-utility account which means that the expenses cannot be recovered in rates.

Anti Competitive Conduct

The Working Group is concerned that if utilities are allowed to carry out these activities through the regulated entity they will be able to subsidize competitive services by monopoly revenues and eliminate competitors.

While the Legislation states that utilities can carry out these activities through the regulated entity, there is no indication that the Legislature intended to promote or condone anti-competitive conduct. I believe that the intent of the legislation was to

promote competitive markets with a large number of suppliers in order to best promote the rapid introduction of this technology. Put differently, utilities were allowed to enter the market directly to promote competition, not lessen it.

The concern of the Working Group is understandable, but is there any evidence of anti-competitive conduct in this case?

The evidence is inconclusive. On the one hand, the Working Group relies upon the differences in capital cost. They argue for example that the cost of the Quadlogic meter used by PowerStream is significantly more expensive than the meter used for most residential customers. That may be, but as PowerStream argues the utility has an obligation to provide service that meets the applicable standards and the standard meter for technical reasons could only be used in about 5% of the units. Moreover, the competitors all use the same meter for the same reasons - it is the most effective equipment to meet the requirements of condominium units.

In addition, as a number of intervenors note, capital costs are just part of the equation. In the case of operating costs, PowerStream is unable to provide a precise allocation. The utility is not able to differentiate the operating costs applicable to condominium units as opposed to other residential units. As a result, the Board is unable to determine whether there has been cross subsidization or any anti-competitive impact.

To be clear, PowerStream is not being accused of predatory pricing. This is not a situation where PowerStream is designing a special rate with a view to eliminating competition. PowerStream is simply applying the existing approved residential rate of $13.23 per month to the residents of the condominium units. This is the rate monopoly customers with smart meters currently pay.

PowerStream and many of the intervenors argue that the residential class is a broad class and there are invariably subsidies flowing between various members of that class. In other words, the Board usually ignores subsidies between members of such a broad rate class. But that principle, with respect, applies to monopoly services.

This is a competitive service and the usual protection for competitors (that utilities provide competitive services through a separate affiliate) is not available given the specific statutory exemption. In the circumstances, it is important that the Board be able to determine if revenues are covering costs.

One solution is to require the utility to segregate the costs and revenues of this particular service. With the proper cost allocation, the Board and the parties will be able to determine if revenues are covering costs. Or put differently, are competitive services being subsidized by monopoly revenues?

Some intervenors argue that if the Board wishes to adopt this approach it should be done in a generic proceeding sometime in the future. The intervenors point to the recent Toronto Hydro decision where the Board adopted that approach in this exact situation. There, the Board stated at page 20:

> *At this time, for the purposes of this Decision, the Board will not consider differentiation in metering costs to be a pivotal consideration in entertaining the separation of the existing residential class or to direct the institution of contributions, capital or otherwise*
>
> *This is an issue that requires consideration in a more generic proceeding with appropriate notice to effected parties, directed towards rate design and cost allocation. (Decision of the Board dated May 15, 2008, EB-2007-0680)*

A generic decision is often the preferred solution but it cannot be an excuse for delay. This is the second time the Board has faced this issue. Moreover, it is not clear that this is necessarily a generic issue. All Ontario utilities will not be providing this service. And, we have heard that other utilities intend to carry out this activity through a separate subsidiary.

This is an important service. Installation of smart meters in individual condominium units offers significant gains in energy conservation. The Legislature has signaled the advantage of competing suppliers and specifically allowed regulated utilities to engage in the service directly. Implicit in this direction is a belief that competing suppliers will promote price competition and improve service quality.

It is also significant that this is a new market with new competitors. It would be unfortunate (and contrary to the public interest) if competitors were disadvantaged or even eliminated in the early days of this market. Repeating what the Board stated in Toronto Hydro is not, in my view, a satisfactory approach.

I accept that utilities such as PowerStream should be entitled to recover the cost of this competitive service in rates and should not be required to conduct the business through a separate subsidiary.

However, as a condition of granting this relief to PowerStream, I would require PowerStream to file within four months, a cost allocation methodology for this new service with estimates of the costs and revenues incurred to date in a manner that will allow the Board and the parties to determine whether revenues are covering costs. The Working Group will then be able to deal with this matter in PowerStream's rate application next year or through a motion for alternative relief in the event the facts warrant further action.

This process will not affect the rate recovery ordered by this decision. The Board has found that PowerStream may recover all of the costs of its condominium smart meters. Those rates are effective May 1, 2009 and run to May 1, 2010.

It may be that revenues are covering costs and there is no basis for any further action let alone a generic proceeding. It's likely that the costs and revenues of this service are similar for all utilities. All utilities have similar residential rates and the cost of installing smart meters in condominiums is not likely to differ from utility to utility in a material fashion. The evidence in this proceeding that both the utility and competitors use virtually identical equipment.

I do not believe that the condition I would attach to the rate order in any way compromises a generic initiative in the event the Board decides to pursue it. In a generic proceeding this information will be required in any event. If the Board elects not to implement a generic proceeding, the competitors will at least have the information necessary to argue the issue in a meaningful fashion.

In my view the competitors are entitled to have their argument heard. It cannot be heard in any meaningful fashion without an accurate accounting of costs and revenues relating to this service. This information is within the complete control of the utility and to date the utility has elected not to provide it.

This is not simply a question of fairness to private interests. There is also an important public interest aspect. The goal here is to encourage conservation. The seven competitors include one of the Province's largest gas distribution utilities, a useful addition to the conservation initiative in electricity markets. There can be little doubt that the entire legislative scheme with respect to this issue is designed to promote increased investment in this activity. I doubt that any of these companies, much less the gas distributors, will make a long-term commitment to this market unless they are confident there will be a level playing field.

The conservation agenda is important to the Board and the Government. Confusion and delay regarding regulatory rules is not helpful. The required cost allocation will ensure that the necessary fact-finding aspect of this issue moves forward on a timely basis.

Contract Exclusivity

The contracts used by PowerStream were placed before the Board. The Working Group argued that on their face the contracts grant PowerStream exclusivity. In other words, once the condominium had entered into a PowerStream agreement they are not free to shift to a competing vendor and the utility has locked up the market.

While the contracts are less than clear on their face, the testimony of the PowerStream witnesses clearly indicates the condominium corporation can choose to exit the contract at any time for another service provider. There are no exit fees and PowerStream, in the event the condominium chooses to terminate the contract, would simply remove the individual sub-metering equipment and deploy it elsewhere. The Board believes however that PowerStream should clarify its contract to clearly indicate the basis on which a condominium corporation can terminate service.

A monopoly utility has inherent advantages in a competitive market such as this. The PowerStream brand itself is a powerful advantage. These are long-term contracts in a newly emerging market. It is not in the public interest to allow a dominant supplier to

lock up the market with long-term exclusive agreements. The PowerStream contract should be amended to clearly state that customers can terminate the contract on 90 days notice without penalty.

The utility agrees that this is the intent of the existing agreement. It is important that customers clearly understand the contract terms. They should not be required to read transcripts or regulations. There is no question that the Board has authority to require amendments to contract terms where those contracts are integral to rate regulated services[1].

DATED at Toronto, July 27, 2009

ONTARIO ENERGY BOARD

Original Signed By

_____
Gordon Kaiser
Presiding Member and Vice-Chair

[1] Re The Interim Contract Carriage Arrangements of Consumers Gas Company Ltd., Northern and Central Gas Corporation, and Union Gas Limited, E.B.R.O. 410, 411, 412, (April 4, 1986) at page 182.