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.

---

# SUBMISSIONS OF COMPLIANCE COUNSEL ON REMEDY

---

February 17, 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

## TABLE OF CONTENTS

## PART I - OVERVIEW

1. In its Decision and Order dated January 27, 2010 (the "Decision") the Board concluded that THESL's policy of refusing to provide a bulk meter connection to new condominiums in the City of Toronto was in breach of the certain enforceable provisions under the *Electricity Act, 1998* (the "Electricity Act") and the Distribution System Code ("DSC").

2. The Board, in its Decision and Order, invited submissions on the appropriate remedy relating to the foregoing breaches. These are the written submissions of Compliance Counsel on remedy. Included is a proposed order for the Board's consideration (see Tab 1) (the "Proposed Order"), the terms of which have been agreed to by Compliance Counsel and THESL.

## PART II - LAW AND ARGUMENT

### A. The Board's Authority under Section 112.3

3. Subsection 112.3(1) of the OEB Act permits the Board to take such action as it may specify to remedy a contravention that has occurred or prevent a contravention or further contravention of the enforceable provisions:

> 112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,
>
> (a) remedy a contravention that has occurred; or
>
> (b) prevent a contravention or further contravention of the enforceable provision.
>
> Notice of Intention to Make an Order For Compliance under Section 112.3 of the *Ontario Energy Board Act, 1998*, dated August 4, 2009 ("Notice of Compliance"). Exhibit A-1 of Compliance Counsel Pre-Filed Evidence (Ex. K.1.1).
>
> *Ontario Energy Act, 1998*, c. 15, Sched. B, s. 112.3 (the "OEB Act"). Tab 1 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

4. Subsection 112.3(1) is not prescriptive regarding the remedies that the Board may order. Rather, it is broadly worded to provide the Board with the necessary flexibility to fashion an appropriate order to address three important objectives: compliance, remediation and prevention. In *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, the Supreme Court of Canada considered the purpose of a broadly worded provision of the Canada Labour Code:

> The breadth of the remedial section gives a clear indication that it was the intention of Parliament that the [Canada Labour Relations Board] should be given the necessary flexibility to fashion remedies which will best address the entire spectrum of problems and of factual situations which it must confront ... The section now gives the Board both the flexibility and the authority to create the innovative remedies which are needed to counteract breaches of the [Canada Labour Code] and to fulfil its purposes and objectives.
>
> *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 at paras. 64-65 [*Royal Oak*].

**B. Compliance with the Enforceable Provisions**

5. The importance of requiring compliance with the enforceable provisions is readily evident – regulated entities such as THESL must comply with their legal obligations if the regulatory regime created by the legislature and the Board is to be effective. In order to encourage respect for and compliance with the regulatory regime, these obligations should be enforced by a regulator when a party has contravened them.

6. Requiring compliance with the enforceable provisions is consistent with the primary purpose of a regulatory offence. In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, the Supreme Court of Canada noted in the competition context that the aim of regulatory offences is to regulate behaviour in a manner that provides an overall benefit to society:

> [The regulatory offence] is not primarily concerned with values, but with results. While values necessarily underlie all legal prescriptions, the regulatory offence really gives expression to the view that it is expedient

> for the protection of society and for the orderly use and sharing of society's resources that people act in a prescribed manner in prescribed situations, or that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance with rules for the overall benefit of society.
>
> *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at para. 129.

7. Ordering compliance will ensure that THESL abides by the enforceable provisions and will protect the right of THESL's customers to choose a bulk meter connection. A compliance order will also have the corollary effect of encouraging other distributors in Ontario to comply with their obligations under the enforceable provisions.

8. Sections 2 and 3 of the Proposed Order, which require THESL to amend its Conditions of Service, are consistent with the goal of requiring compliance.

**C. Prevention of Further Contraventions**

9. Paragraph 112.3(1)(b) of the OEB Act provides the Board with authority to make an order to prevent "further contravention" of enforceable provisions. This is consistent with the "protective and preventive" aim of regulatory provisions identified by the Supreme Court of Canada in *R. v. Wholesale Travel Group Inc.*:

> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.
>
> *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 219.

10. A preventative order will protect THESL's customers. It may also protect the customers of other distributors by deterring similar misconduct. As the Supreme Court of Canada noted in *Re Cartaway Resources Corp.*, "it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative."

*Re Cartaway Resources Corp.*, 2004 SCC 26 at para. 60.

11. Section 11 of the Proposed Order is designed to prevent further contravention by requiring THESL to inform all condominium corporations and developers of the right to a bulk meter connection with smart sub-metering provided by a licensed smart sub-metering provider. Section 13 requires THESL to connect the building if the customer requests a bulk meter connection.

12. Section 12 of the Proposed Order prohibits THESL from including any additional terms or conditions or requiring any representations or warranties that address "a smart sub-metering system or the actions of the customer in relation to a smart sub-metering system." This is consistent with the Board's finding in the Decision and Order that the evidence of illegal behaviour by exempt distributors was "speculative".

**D. Remedying the Contraventions**

13. In addition to authorizing the Board to order compliance and make preventative orders, subsection 112.3(1) provides the Board with authority to make an order to "remedy a contravention that has occurred". This provision is drafted broadly and confers a large measure of discretion on the Board to determine the appropriate remedy. As the Supreme Court of Canada stated in *Royal Oak*, an administrative tribunal should strive to fulfill the objective of the applicable regulatory regime when exercising that discretion:

> [T]he Board is granted remedial authority for the purpose of ensuring the fulfilment of the objectives of the [Canada Labour Code]. Moreover, the remedies the Board imposes are meant to counteract the consequences of the parties' transgressions which are adverse to the

fulfilment of those objectives. Therefore, an integral part of the Board's remedial duty is to strive to accomplish the Code's purposes.

*Cadillac Fairview Corp. Ltd. v. R.W.D.S.U.*, [1987] O.J. No. 1081 at para. 50 (Div. Ct.).

*Royal Oak, supra* at para. 74.

14. In its Decision and Order, the Board found that THESL's refusal to provide a bulk meter connection to Avonshire and Metrogate effectively denied those parties the ability to have their projects smart sub-metered. The remedy ordered by the Board should restore the right of Avonshire and Metrogate to choose a bulk meter connection. Accordingly, sections 4 through 9 of the Proposed Order require THESL to deliver revised offers to connect to Avonshire and Metrogate and to connect those projects in accordance with the offer if accepted by the developer.

15. Avonshire and Metrogate are likely not the only condominium developers impacted by THESL's contraventions. THESL confirmed that since February 28, 2008 its policy has been to deny bulk meter connections to new condominium projects. Under section 10 of the Proposed Order, it is proposed that any condominium corporations and developers that requested an offer to connect from THESL after February 28, 2008 be notified of the Board's decision in this proceeding.

16. The requirement to notify potentially affected parties is consistent with the practice of the Competition Tribunal in cases that involve anti-competitive behaviour. For example, the Competition Tribunal has required in past orders that a contravening party provide notice of the terms of the remedial order to its existing suppliers and customers. A draft notification letter is included as Schedule "B" to the Proposed Order.

*Competition Act*, R.S.C. 1985, c. C-34, as am., s. 74.1(1)(b).

*Commissioner of Competition v. Enbridge Services Inc.*, 2002 Comp.Trib. 09, Consent Order at para. 15 ["ESI Consent Order"].

*Director of Investigation and Research v. The D & B Companies of Canada Ltd.*, Consolidated Order at s. 6 ["D & B Consolidated Order"].

## E. Monitoring and Reporting

17. Section 14 of the Proposed Order requires THESL to confirm that it has provide notification to all potentially affected parties. The proposed section is consistent with previous orders made by the Board in proceedings under section 112.3 that required the filing of reports detailing a party's implementation of the provisions of the compliance order. Similar monitoring and reporting requirements have been included in orders made by the Competition Tribunal.

Universal Energy Corporation, EB-2009-0005, Order dated January 20, 2009.

Summitt Energy Management, EB-2009-0006, Order dated January 30, 2009.

ESI Consent Order, *supra* at para. 18.

D & B Consolidated Order, *supra* at s. 7.

## PART III - ORDER REQUESTED

18. For the foregoing reasons, Compliance Counsel request that the Board issue an order in the form of the Proposed Order provided.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

P Duffy /pc:
Glenn Zacher

P Duffy /pc:
Patrick G. Duffy

P Duffy /pc:
Maureen Helt

**SCHEDULE "A"**
**DOCUMENTS**

| Tab # | Document |
|---|---|
| 1 | Proposed Order |
| 2 | *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369. |
| 3 | *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425. |
| 4 | Powersteam Conditions of Service, s. 2.3.7.7. |
| 5 | *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. |
| 6 | *Re Cartaway Resources Corp.*, 2004 SCC 26. |
| 7 | *Cadillac Fairview Corp. Ltd. v. R.W.D.S.U.*, [1987] O.J. No. 1081 at para. 50 (Div. Ct.). |
| 8 | *Competition Act*, R.S.C. 1985, c. C-34, as am., s. 74.1(1)(b). |
| 9 | *Commissioner of Competition v. Enbridge Services Inc.*, 2002 Comp.Trib. 09, Consent Order. |
| 10 | *Director of Investigation and Research v. The D & B Companies of Canada Ltd.*, Consolidated Order. |
| 11 | Universal Energy Corporation, EB-2009-0005, Order dated January 20, 2009. |
| 12 | Summitt Energy Management, EB-2009-0006, Order dated January 30, 2009. |

TAB 1

**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.

**ORDER**

**WHEREAS** the Ontario Energy Board (the "Board"), by its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act"), intended to make an Order under section 112.3 of the Act requiring Toronto Hydro-Electric System Limited ("THESL") to comply with a number of enforceable provisions as defined in section 112.1 of the Act;

**AND WHEREAS** the Board provided THESL with a Notice of Intention to Make an Order for Compliance under Section 112.3 of the *Ontario Energy Board Act, 1998* dated August 4, 2009 (the "Notice of Compliance") and THESL requested on August 17, 2009 that the Board hold a hearing on these matters;

**AND WHEREAS** the Board's Compliance Counsel and THESL filed pre-filed evidence and responses to interrogatories with the Board, and presented the evidence of the witnesses and the submissions of counsel at a hearing before the Board on January 5 and 7, 2010;

**AND WHEREAS** the Board issued a Decision and Order dated January 27, 2010 finding that THESL had breached section 28 of the *Electricity Act, 1998* (the "Electricity Act") and sections 2.4.6, 3.1.1 and 5.1.9 of the Distribution System Code (the "DSC") and inviting submissions on the appropriate remedy relating to the breaches of the enforceable provisions;

**AND WHEREAS** the Board received written submissions from Compliance Counsel and THESL, as well as the intervenors the Smart Sub-Metering Working Group and the Electricity Distributors Association, and heard the submissions of counsel relating to remedy on February 18, 2010;

**AND WHEREAS** the Board has issued a Decision and Order addressing the issue of remedy on this date;

**THE BOARD ORDERS THAT:**

**Definitions**

1. In this order:

   (a) "condominium corporation" means a corporation created or continued under the *Condominium Act, 1998*;

   (b) "condominium developer" means 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*;

   (c) "smart metering" means the situation in which a licensed distributor individually meters every condominium unit (and the condominium's common areas) with a smart meter; and

   (d) "smart sub-metering" means the situation in which a licensed distributor provides service to the condominium's bulk (master) meter and then a separate person (the smart sub-meter provider on behalf of the condominium corporation) allocates that bill to the individual units and the common areas through the smart sub-metering system.

**Amendment of THESL's Conditions of Service**

2. THESL shall amend section 2.3.7.1.1 of its Conditions of Service by deleting the entirety of the current section and replacing it with the language set forth in Schedule "A" to this Order.

3. THESL shall file with the Board a copy of its amended Conditions of Service within 10 days of the date of this Order.

**Revised Offer to Connect for Avonshire**

4. Within 10 days of the date of this Order, THESL shall provide a revised offer to connect to the Residences of Avonshire Inc.'s ("Avonshire") project at Highway 401 and Sheppard Avenue that contemplates a bulk-metered connection to THESL's distribution system so that individual condominium units will be smart sub-metered by a licensed smart sub-metering provider.

5. The offer to connect provided by THESL under paragraph 4 of this Order shall be subject to THESL's standard terms and conditions and, subject to paragraph 4, shall not include any additional terms or conditions, or require any representations or warranties from Avonshire, that addresses a smart sub-metering system or the actions of Avonshire in relation to a smart sub-metering system.

6. If Avonshire accepts the offer to connect provided under paragraph 4 of this Order, THESL shall, in a timely manner consistent with Avonshire's construction schedule, provide for the metering configuration specified in the executed offer to connect.

**Revised Offer to Connect for Metrogate**

7. Within 10 days of the issuance of this Order, THESL shall provide a revised offer to connect to Metrogate Inc.'s ("Metrogate") project in Scarborough that contemplates a bulk-metered connection to THESL's distribution system so that individual condominium units will be smart sub-metered by a licensed smart sub-metering provider.

8. The offer to connect provided by THESL under paragraph 7 of this Order shall be subject to THESL's standards and conditions and, subject to paragraph 7, shall not include any additional terms or conditions, or require any representations or warranties from Metrogate, that addresses a smart sub-metering system or the actions of Metrogate in relation to a smart sub-metering system.

9. If Metrogate accepts the offer to connect provided under paragraph 7 of this Order, THESL shall, in a timely manner consistent with Metrogate's construction schedule, provide for the metering configuration specified in the executed offer to connect.

**Other Requests to Connect**

10. Within 30 days of the date of this Order, THESL shall provide all condominium corporations and developers that requested an offer to connect from THESL after February 28, 2008 with a letter in the form attached as Schedule "B" and a copy of this Order.

11. THESL shall include the statement set forth in Schedule "C" to this Order in all offers to connect provided to a condominium corporation or developer. When requested to do so by the board of directors of a condominium corporation or by the developer of a condominium building, THESL shall provide an offer to connect based on a bulk meter configuration to facilitate sub-metering in accordance with THESL's Conditions of Service and its standard terms and conditions.

12. Any offer to connect provided by THESL under paragraph 11 of this Order shall be subject to THESL's terms and conditions and, subject to paragraph 11, shall not include any additional terms or conditions, or require any representations or warranties from the customer, that addresses a smart sub-metering system or the actions of the customer in relation to a smart sub-metering system.

13. If a condominium corporation or developer accepts an offer to connect provided under paragraph 11 of this Order, THESL shall, in a timely manner consistent with the

customer's construction schedule, provide for the metering configuration specified in the executed offer to connect.

**Monitoring and Reporting**

14. Within 45 days of the date of this Order, THESL shall file with the Board a sworn affidavit listing all of the condominium corporations and developers that requested an offer to connect from THESL after February 28, 2008. The affidavit shall identify the customers that were provided with the letter required under section 10 and for any customer that did not receive a letter, provide a detailed explanation as to why the customer did not receive such a letter. THESL shall, upon the request of the Board, provide copies of any such letters and proof of delivery.

**General**

15. In the event of a dispute over the terms of this Order, including the interpretation of any of the provisions of this Order, THESL or Compliance Counsel may apply to the Board to adjudicate the dispute.

16. Nothing herein is intended to limit any rights or remedies that a person, including a condominium corporation or developer, may have with respect to the matters in this proceeding.

17. A failure to comply with the provisions of this Order by THESL shall be deemed to be a breach of an enforceable provision under Part VII.1 of the Act and may result in the commencement of enforcement proceedings by the Board.

18. This order applies to the successors and assigns of THESL.

**DATED** at Toronto, ●, 2010.

## SCHEDULE "A"

### 2.3.7.1.1 Metering Requirements for Multi-Unit Residential Rental Buildings and Condominiums

Developers of new multi-unit residential rental buildings and condominiums (collectively, "MURBs"), or boards of directors of condominiums, may choose to have Toronto Hydro install smart suite metering, or to have Toronto Hydro install a bulk interval meter for the purpose of enabling smart sub-metering by a licensed sub-metering service provider.

**Installation of Smart Metering by Toronto Hydro**

Upon the request of a MURB developer or a condominium board of directors, Toronto Hydro will install smart metering that meets the functional specification of Ontario Regulation 425/06 – Criteria and Requirements for Meters and Metering Equipment, Systems and Technology (suite metering). In that case, each separate residential and commercial unit, as well as common areas, will become direct individual customers of Toronto Hydro, with the common area accounts held by the developer, condominium corporation or the landlord as the case may be.

The MURB developer or condominium board of directors may choose an Alternative Bid for the installation of suite metering. In that case, the MURB developer, landlord or condominium board of directors is required to:

(i) select and hire a qualified contractor;

(ii) ensure all contestable work is done in accordance with Toronto Hydro's technical standards and specifications: and

(iii) assume full responsibility for the installation and warranty all aspects for a period of 2 years from date of commissioning.

Where the MURB developer or condominium board of directors transfers the metering facilities installed under the alternative bid option to Toronto Hydro, and provided Toronto Hydro has inspected and approved the facilities installed, Toronto Hydro shall pay the condominium corporation, landlord or developer a transfer price. The transfer price shall be the lower of the cost to the MURB developer or condominium board of directors to install the metering facilities or Toronto Hydro's fully allocated cost to install the metering facilities.

**Common Area Metering**

Where units in a MURB are to be suite metered, the responsible party (MURB developer, condominium board of directors, or landlord) shall enter into a contract with Toronto Hydro for the supply of electrical energy for all common or shared services. Common or

shared services typically include lighting of all common areas shared by the tenants, or unit owners, and common services such as heating, air conditioning, water heating, elevators, and common laundry facilities. In such cases, consumption for all common areas will be separately metered.

**Installation of Bulk Interval Metering by Toronto Hydro**

Where bulk interval metering is supplied by Toronto Hydro to an exempt distributor for the purpose of enabling sub-metering, the responsible party (i.e., the developer, condominium corporation, or landlord, but not the sub-metering provider) shall enter into a contract with Toronto Hydro for the supply of electrical energy to the building.

SCHEDULE "B"

Dear **[Sir/Madam]**:

RE: Ontario Energy Board Proceeding EB-2009-0308.

I write to you in respect of **[customer's]** request for an offer to connect to Toronto Hydro's distribution system for a condominium building at **[address]**.

At the time of your request for an offer to connect, section 2.3.7.1.1 of Toronto Hydro's Conditions of Service provided that each unit in the building be individually metered by Toronto Hydro and that each unit owner become a separate customer of Toronto Hydro. The offer to connect provided to you by Toronto Hydro dated **[date]** was based on this configuration.

The Ontario Energy Board in proceeding EB-2009-0308 determined that Toronto Hydro's policy did not meet certain requirements of the *Electricity Act, 1998* and the Board's *Distribution System Code*. The Ontario Energy Board has ordered Toronto Hydro to amend section 2.3.7.1.1 of its Conditions of Service. A copy of the Board's Order attaching the amended section 2.3.7.1.1 is enclosed.

Under the amended section 2.3.7.1.1, the customer has a right to choose whether to have individual units of an existing or new multiunit condominium building individually metered by Toronto Hydro or smart sub-metered by an alternative licensed service provider.

If Toronto Hydro has not yet installed smart meters for each unit and you wish to have your building smart sub-metered by an alternative service provider, please contact Toronto Hydro at **[contact details]**. Toronto Hydro will provide you with a revised offer to connect based on a bulk metered configuration that will allow you to retain an alternative service provider to smart sub-meter individual units in the building, subject to Toronto Hydro's standard terms and conditions.

Yours truly,

●

●, Toronto Hydro-Electric System Limited

## SCHEDULE "C"

Under section 2.3.7.1.1 of Toronto Hydro's Conditions of Service, the customer may choose to have Toronto Hydro install smart suite metering, or to have Toronto Hydro install a bulk interval meter for the purpose of enabling smart sub-metering by a licensed sub-metering service provider.

This offer to connect has been prepared on the basis of **[individual metering by Toronto Hydro / smart sub-metering by an alternative licensed service provider]**.

**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.

**EB-2009-0308**



**ORDER**

**STIKEMAN ELLIOTT LLP**
Barristers & Solicitors
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

17

**TAB 2**

*Indexed as:*

# Royal Oak Mines Inc. v. Canada (Labour Relations Board)

**Royal Oak Mines Inc., appellant;**
**v.**
**Canada Labour Relations Board and Canadian Association of Smelter and Allied Workers (CASAW), Local No. 4, respondents.**

[1996] 1 S.C.R. 369

[1996] S.C.J. No. 14

File No.: 24169.

Supreme Court of Canada

1995: October 30 / 1996: February 22.

**Present: Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Major JJ.**

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Labour law - Tribunals - Judicial review - Jurisdiction - Remedy - Labour Board requiring employer to table last offer - Issues in dispute subject to limited bargaining period before imposition of binding arbitration - Whether Board's decision going to jurisdiction and so requiring a correct decision - If decision within Board's jurisdiction, whether remedy patently unreasonable - Canada Labour Code, R.S.C., 1985, c. L-2, s. 99(2).

Labour law - Collective bargaining - Duty to bargain in good faith -- Employer refusing to consider re-instatement of employees discharged for picket-line violence - Whether employer failing to bargain in good faith - Whether Board's finding of failure to bargain in good faith patently unreasonable.

Labour law - Collective agreements - Allegation of imposed agreement - Labour Board requiring employer to table last offer - Issues in dispute subject to limited bargaining period before imposition of binding arbitration - Whether Board had jurisdiction to make remedy ordered - If so, whether remedy patently unreasonable.

The unionized workers of Royal Oak Mines voted overwhelmingly to reject a tentative agreement put forward by the appellant. A bitter and violent 18-month strike, which affected the whole com-

munity, occurred. Various attempts to effect a settlement were made during the strike, from the appointment of an industrial commission to the naming of very experienced mediators. The Canada Labour Relations Board, on an application made by the union, unanimously found that the appellant employer had failed to bargain in good faith. The employer refused to bargain until the certification issue had been resolved. Further the employer wished to impose a probationary period on all returning strikers. Despite the employer's position on these issues the Board's finding was based on the employer's refusal to negotiate until the issue of re-instatement and discipline of several employees accused of picket-line violence had been resolved. In light of the long history of intransigence and the bitterness of the parties the Board directed the appellant employer to tender the tentative agreement which it had put forward earlier (and which had been rejected) with the exception of four issues about which the appellant employer had changed its position. The parties were given 30 days of bargaining to settle those issues and, if they remained unresolved, then compulsory mediation was to be imposed. At issue is the jurisdiction of the Board to make this order.

Held (Sopinka, McLachlin and Major JJ. dissenting): The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier and Cory JJ.: Several factors should be taken into consideration in determining whether the scope of remedial orders should be left to the Board or whether the section went to jurisdiction rendering the Board's decision reviewable by the courts if it was not correct: (a) the wording of the enactment conferring jurisdiction on the tribunal; (b) the purpose of the statute creating the tribunal; (c) the reason for the tribunal's existence; (d) the area of expertise of the tribunal's members; and (e) the nature of the problem before the tribunal. Deference should be accorded by the courts to remedial orders made by the Board. Once it has been established by the provisions of the empowering legislation that the Board does, in fact, have the jurisdiction to order certain remedies, the question of which of these remedies the Board chooses to impose in any given situation is a question within the Board's jurisdiction.

The legislation gave the Board a wide and flexible remedial role. The wording of s. 99(2) of the Canada Labour Code (the "Code") did not place precise limits on the Board's jurisdiction and the fact that the Board could fashion equitable remedies indicated that Parliament intended the Board to have wide remedial powers. Furthermore, a broad privative clause in s. 22(1) provided that both the Board's decisions and orders were final.

The Board's decision fell within its jurisdiction and must not be interfered with unless it is patently unreasonable. Several factors indicate that the patently unreasonable standard should be followed, as opposed to the correctness standard going to jurisdiction: (a) the presence of a clear and strongly worded privative clause; (b) the provisions of the Code demonstrating the decision to be one falling within the board's jurisdiction; (c) the finding of lack of good faith (essentially a finding of fact to be left to the Board); (d) the Board's expertise and experience in dealing with precisely this type of question; and (e) the courts' high degree of deference to the decisions of labour relations boards.

The duty to bargain in good faith was breached in three ways. First, the appellant refused to bargain with the respondent union, the exclusive bargaining agent of the employees, pending the outcome of a competing employee association's certification application. The employer is obliged to recognize the certified union and bargain exclusively with it. Second, the appellant's demand for a probationary clause for all returning employees breached this duty - attempts to penalize those who had participated in a lawful union activity undermines the operation and basic principles of the labour relations statute. Third, the appellant failed to bargain in good faith when it refused to agree to a provi-

sion for any type of arbitration or consideration of questions arising from its discharge of several employees. This outright refusal to discuss this issue completely blocked the bargaining process.

The duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a Board looking to comparable standards and practices within the particular industry. This latter part of the duty prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.

The Code granted the Board jurisdiction to decide whether the appellant failed to bargain in good faith. Its decision should not be set aside by the courts unless patently unreasonable. That decision, given the overwhelming evidence supporting the Board's finding that the appellant breached its duty to bargain in good faith by imposing an unreasonable condition to the collective bargaining process, was not unreasonable.

The remedy directed by the Board was not patently unreasonable; rather, it was eminently sensible and appropriate in the circumstances. A remedial order will be considered patently unreasonable where: (1) the remedy is punitive in nature; (2) the remedy granted infringes the Charter; (3) there is no rational connection between the breach, its consequences, and the remedy; (4) the remedy contradicts the objects and purposes of the Code. A rational connection did indeed exist between the breach, its consequences and the remedy and the remedy affirmed the objects and purposes of the Code.

The Board did not exceed its powers by imposing closure on the parties instead of allowing them to arrive at a settlement themselves. Section 99(2) grants the Board remedial authority for the purpose of ensuring the fulfilment of the objectives of the Code.

Free collective bargaining is fundamental to the Code and labour relations and as a general rule should be permitted to function. Nonetheless, situations will arise when that principle can no longer be permitted to dominate a situation. A Board will be justified in exercising its experience and special skill in order to fashion a remedy where: the dispute has been bitter and lengthy; the parties have been intransigent and their positions intractable; one of the parties has not been bargaining in good faith and this failure has frustrated the formation of a collective bargaining agreement; and a community is suffering as a result of the strike. This will be true even if the consequence of the remedy is to put an end to free collective bargaining. This follows in part because it is the lack of good faith bargaining by a party which is frustrating the bargaining process and in part because of the other principles and factors the Board is required to consider pursuant to the provision of the Code.

In the circumstances, it was appropriate that the Board fashion a remedy. This strike had been bitter and long. The intractable position of appellant that it would not consider some form of due process for dismissed employees put an end to any possibility of true bargaining and was properly found to constitute lack of good faith. The community was obviously suffering. The remedy put forward did not impose a collective agreement. Rather the Board used the tentative agreement drafted and put forward by the appellant as its last offer as a basis for the bulk of its remedy. The four matters on which there was no agreement were left to the parties for a further 30 days' bargaining and became subject to binding arbitration only in the event of failed negotiations. Once the basic statutory ground rules have been broken by a party, the parties can no longer expect to have the same unbri-

dled freedom to bargain. Given the past history of the parties' intransigence, no other solution was feasible. Indeed, the fact that the Board applied its experience and skill to design a remedy that was eminently fair and sensible was beneficial to both parties and the community.

The Board did not impose the tentative agreement or the additional terms and conditions on the parties without first ensuring that all the other options which could realistically be expected to bring an end to the dispute had been exhausted. Given appellant's lack of cooperation and good faith bargaining and the damage to the community which the parties' dispute had caused, the Board properly exercised its discretion to impose a remedy which would put an end to the impasse.

The remedial order directly related to the effect of the failure to bargain in good faith and in so far as was possible complied with the aims and objects of the Code. The remedy struck an appropriate balance between the public interest and the interests of the parties and was beyond reproach. The order made came within the Board's jurisdiction. Therefore applying the appropriate degree of deference, the order was not patently unreasonable and could not be set aside. Had it been necessary to so find, the order would have met the standard of correctness.

Section 80 of the Code, which empowers the Board to impose a first contract, applies to a situation completely different from that addressed by s. 99(2). Section 99(2) need not be read restrictively as a result of the provisions of s. 80.

Per Lamer C.J.: The Board's finding that the employer had failed to bargain in good faith as required by s. 50(a) of the Code fell within its specialized jurisdiction, and this finding was not patently unreasonable under the circumstances. As well, the Board's choice of remedial order, directing the employer to table an offer with a number of imperative terms, fell within its specialized competence given the broad equitable discretion delegated by s. 99(2). In light of the bitter and intractable nature of this dispute, the Board's affirmative remedial order was not patently unreasonable. Such an extraordinary order, while justified in these circumstances, runs against the established grain of federal and provincial labour codes by overriding the cherished principle of "free collective bargaining" which underlies both federal and provincial labour codes. In the absence of exceptional and compelling circumstances such as those prevailing in this case, it will normally be patently unreasonable for a labour board to impose such an invasive remedial order in light of the core value of free collective bargaining enshrined in the Code.

Per Sopinka, McLachlin and Major JJ. (dissenting): The question of whether a particular party has been guilty of bad faith bargaining is a finding of fact within the particular expertise of the Board and must be upheld unless it is found to be patently unreasonable. Section 50(a)(i) and (ii) of the Code, taken together with ss. 98 and 99, clearly clothes the Board with the authority to determine whether a particular party has bargained in good faith and whether a party has made "every reasonable effort to enter into a collective agreement". In addition, the Board is protected by a clear and strongly worded privative clause in s. 22(1). The Board's decision on this issue can only be set aside if patently unreasonable.

Three considerations, taken collectively, indicate that the Board's finding of bad faith should not be interfered with on a standard of patent unreasonableness: (1) the position characterized as unreasonable by the Board concerned a non-monetary issue; (2) the appellant was insisting on the objectively unreasonable position to the point of impasse; and (3) this finding of bad faith was found in the context of the Board's correct finding that the appellant was bargaining in bad faith by making resolution of the issue a precondition to any further bargaining.

The question of the Board's power to grant a particular form of remedy is a question of jurisdiction. Section 99(2) grants jurisdiction and is the sole source of the Board's authority to order remedies beyond the simple "compliance orders" provided for in s. 99(1). It authorizes the Board to make "equitable" orders to remedy the consequences of breaches of the Code and grants jurisdiction to make orders that the Board would otherwise not have the power to make. The true effect of the Board's order must be determined in deciding whether the Board's order was within the jurisdiction granted under s. 92(2). The order not only required the appellant to table an offer but also set out in detail many of the specific terms that the offer had to contain. The inclusion of clauses unrelated to the alleged "bad faith" forced the conclusion that the Board's order constituted the imposition of a full collective agreement.

The wording of s. 99(2) clearly imposes at least two limitations on the remedies which can be granted under the authority of this section: (1) a rational connection must exist between the breach of the Code, a consequence which is adverse to the fulfilment of the objectives of the Code, and the remedy; and (2) the remedy must ensure the fulfilment of the objectives of the Code. Even if the "requisite nexus" between the breach, the consequences and the remedy is set as low as "a rational connection", the nexus is missing in this case. The fundamental purpose of the Code is the constructive settlement of labour disputes by the parties to the dispute through the medium of "free collective bargaining". Other important objectives mentioned in the preamble are only to be achieved by the promotion of free collective bargaining.

The breach which caused the Board's intervention was the appellant's bad faith bargaining regarding the claims of dismissed employees. The Board did not hold that this bad faith bargaining caused the parties not to reach a collective agreement. Rather it held that the consequence of the failures of both parties to bargain in good faith over the course of the negotiations was that no collective agreement had been reached. The fact that the historic failures of both parties to bargain in good faith over the long course of negotiations led to the lack of a collective agreement does not justify the imposition of the complete terms of a collective agreement on one of those parties which happens to now be in breach of its good faith bargaining duty in only one particular respect.

Section 99(2) requires that the consequence which the Board seeks to remedy be one adverse to the objects of the Code. The Board incorrectly concluded that the failure to reach a collective agreement was adverse to the objects of the Code. The objects of the Code are the encouragement of free collective bargaining and the constructive settlement of disputes by the parties through the collective bargaining process. The obligations of the bargaining parties under the Code are to bargain in good faith and to "make every reasonable effort". Parties are not required to reach an agreement. It is perfectly consistent with the objects of the Code for parties to negotiate to impasse provided that the good faith obligation is met.

Binding mediation and arbitration may be effective mechanisms for resolving disputes but they are mechanisms to be chosen by the parties as an alternative to free collective bargaining. The Board does not have jurisdiction to impose binding arbitration on the parties where the parties have opted to resolve their dispute through free collective bargaining. The Board's order not only lacked the requisite nexus to the breach of the Code but was also antithetical to the Code's objects.

The Board's duty, when a party breaches its obligation to bargain in good faith during free collective bargaining, is to ensure that the party properly exercises that obligation. The Board is not to deprive the party of any further opportunity to participate in the bargaining process. The conclusion the parties were not likely to resolve certain issues on their own did not justify the Board's imposing an

had to be realistic enough to acknowledge that on some of the matters in dispute, "the parties are not likely ever to come to an agreement on their own". Therefore, taking into account this prediction, the unfortunate bargaining history and the effect of the dispute on the community, the Board was correct in recognizing that a more effective remedy was required.

**64** Section 99(2) of the Canada Labour Code gives the Board jurisdiction to require an employer "to do or refrain from doing any thing that it is equitable to require the employer . . . to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of [the] objectives" of the Code. (Emphasis added.) The duty of the parties to bargain in good faith and make every reasonable effort to reach an agreement is an important precondition to achieving the larger purposes of the Code. The appellant was found by the Board to have failed to comply with this duty. Accordingly, the Board had authority to remedy the effects of that violation. It is significant that the wording "to do or refrain from doing" bestows broad powers on the Board which enables it to impose both positive and negative duties on the party in breach.

**65** The breadth of the remedial section gives a clear indication that it was the intention of Parliament that the Board should be given the necessary flexibility to fashion remedies which will best address the entire spectrum of problems and of factual situations which it must confront. It is noteworthy that the section was amended in 1978. Prior to that date, the Code allowed the Board to impose only those remedies which were specifically enumerated. Section 189 (now s. 99(2)) was added in 1978. This provision authorizes the Board to make orders based on the principles of equity. The section now gives the Board both the flexibility and the authority to create the innovative remedies which are needed to counteract breaches of the Code and to fulfil its purposes and objectives. The granting of such a broad discretion to the Board demonstrates that Parliament wished the courts to defer to the Board's experience and expertise in making remedial orders so long as they were not patently unreasonable.

(1) The Appellant's Objections to the Board's Order

**66** The appellant's prime objection to the Board's remedial order is based on the premise that the Board imposed a collective agreement on the parties, and that in so doing, the Board exceeded its remedial jurisdiction. I cannot accept this contention. The Board did not impose a collective agreement. Instead, the Board made its best effort to identify what the appellant's last offer to the Union had been. The tentative agreement offered by the appellant and thus acceptable to the appellant in April 1992 was the last identifiable proposal put forward by the appellant. While the Union had initially rejected this agreement by an overwhelming majority, the membership had subsequently reconsidered the offer and was prepared to accept it. Therefore, the Board used this tentative agreement, drafted by the appellant, on terms which the appellant was obviously willing to accept as the foundation of its order. The Board ordered the appellant to offer this agreement to the Union, at which time the Union could decide whether or not to ratify it. The Board recognized that the appellant had changed its position regarding some aspects of the tentative agreement. On these, the Board directed the parties to bargain for 30 days and if they failed to reach agreement, they were to be subject to binding arbitration.

**67** It cannot be said that the requirement of the Board that the employer tender the tentative agreement subject to the issues to be negotiated constituted the imposition of a collective agreement. A board is ordinarily acting within its remedial authority in ordering a party to present once

TAB 3

*Indexed as:*

# Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)

**Thomson Newspapers Limited, Brian W. Slaight, Peter T. Bogart and Paul E. Weeks, appellants;**

**v.**

**Director of Investigation and Research, Combines Investigation Act, Restrictive Trade Practices Commission and the Attorney General of Canada, respondents; and**

**The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick and the Attorney General for Alberta, interveners.**

[1990] 1 S.C.R. 425

[1990] S.C.J. No. 23

File No.: 20228.

Supreme Court of Canada

1988: November 1 / 1990: March 29.

**Present: Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (336 paras.)

*Constitutional law -- Charter of Rights -- Fundamental justice -- Self-incrimination -- Right to remain silent -- Derivative evidence -- Combines investigation -- Corporation suspected of predatory pricing -- Corporate officers ordered to testify under oath and to produce documents pursuant to s. 17 of the Combines Investigation Act -- Failure to comply with a s. 17 order subject to legal consequences -- Whether s. 7 of the Canadian Charter of Rights and Freedoms can be invoked -- Whether s. 17 infringes s. 7 of the Charter -- If so, whether s. 17 justifiable under s. 1 of the Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(c), 13.*

*Constitutional law -- Charter of Rights -- Unreasonable search and seizure -- Combines*

*investigation -- Corporation suspected of predatory pricing -- Corporate officers ordered to testify under oath and to produce documents pursuant to s. 17 of the Combines Investigation Act -- Whether s. 17 infringes s. 8 of the [page426] Canadian Charter of Rights and Freedoms -- If so, whether s. 17 justifiable under s. 1 of the Charter.*

*Combines -- Investigation -- Corporation suspected of predatory pricing -- Corporate officers ordered to testify under oath and to produce documents pursuant to s. 17 of the Combines Investigation Act -- Whether s. 17 infringes the guarantee to fundamental justice in s. 7 of the Canadian Charter of Rights and Freedoms or the guarantee against unreasonable search and seizure in s. 8 of the Charter.*

*Evidence -- Self-incrimination -- Derivative evidence -- Documentary evidence -- Real evidence -- Corporate officers ordered to testify under oath and to produce documents pursuant to s. 17 of the Combines Investigation Act -- Whether complete immunity against the use of derivative evidence required by the principles of fundamental justice -- Whether protection against self-incrimination under s. 7 of the Canadian Charter of Rights and Freedoms limited to "testimonial evidence" -- Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 17, 20(2) -- Canada Evidence Act, R.S.C. 1970, c. E-10, s. 5.*

The corporate appellant and several of its officers, the individual appellants, were served with orders to appear before the Restrictive Trade Practices Commission to be examined under oath and to produce documents. The orders were issued pursuant to s. 17 of the Combines Investigation Act (the "Act") in connection with an inquiry to determine if there was evidence that the corporation had committed the offence of predatory pricing contrary to s. 34(1)(c) of the Act. A person who refuses to comply with a s. 17 order can be punished by the Commission pursuant to s. 17(3). A refusal may also constitute an offence under the Act. The appellants applied to the Ontario High Court for a declaration that s. 17 and the orders were inconsistent with the guarantee to fundamental justice in s. 7 of the Canadian Charter of Rights and Freedoms and the guarantee against unreasonable search or seizure in s. 8 of the Charter. The High Court allowed the application in part holding that s. 17 of the Act violated s. 8 but not s. 7. The decision was appealed by the appellants and cross-appealed [page427] by the respondents. The Court of Appeal held that s. 17 did not violate either section.

Held (Lamer and Sopinka JJ. dissenting in part and Wilson J. dissenting): The appeal should be dismissed.

| | |
|---|---|
| Question: | Is section 17 of the Combines Investigation Actinconsistent with the provisions of ss. 7 and 8of the Canadian Charter of Rights and Freedoms,and therefore of no force or effect? |
| Answer: | No. Lamer J. would not reply as regards s. 7and would answer yes as regards s. 8. WilsonJ. would answer yes. Sopinka J. would answeryes as regards s. 7 to the extent only that itauthorizes an order to be made for anexamination under oath of a person, |

and wouldanswer no as regards s. 8.

Section 7 of the Charter

Per La Forest J.: Section 17 of the Act does not contravene s. 7 of the Charter. Section 7 may, in certain contexts, provide residual protection to the interests protected by specific provisions of the Charter. It does so in the case of s. 11(c) which protects a person charged from being compelled to be a witness in proceedings against that person and s. 13 which protects a witness against self-incrimination, but s. 7 does not give an absolute right to silence or a generalized right against self-incrimination on the American model.

The power conferred by s. 17 of the Act to compel any person to give oral testimony constitutes a deprivation of liberty but such compulsion, in itself, does not violate the principles of fundamental justice. The right of an accused or a suspect to remain silent, while extending beyond the trial itself, does not extend to those who are ordered to testify in a proceeding such as that provided by s. 17 of the Act. The power to compel testimony is important to the overall effectiveness of the investigative machinery established by the Act. An absolute right to refuse to answer questions in a s. 17 inquiry would represent a dangerous and unnecessary imbalance between the rights of the individual and the community's legitimate interest in discovering the truth about the existence of practices against which the Act was designed to protect the public. The section 17 inquiries are inquisitorial rather than adversarial in nature. They are investigations in which no final determination as to criminal liability is reached. The right to prevent the [page428] subsequent use of compelled self-incriminating testimony protects an individual from being "conscripted against himself" without simultaneously denying an investigator's access to relevant information. It strikes a just and proper balance between the interests of the individual and the state -- an important factor that must be taken into account in defining the content of the principles of fundamental justice. While a corporation cannot avail itself of the protection offered by s. 7 of the Charter, and in respect of the right against compelled self-incrimination, is incapable of being forced to testify against itself, the right against self-incrimination is still available to those who are compelled to give testimony as the representatives of a corporation. Regardless of whether they give testimony in their representative or personal capacities, those who are compelled to testify under s. 17 are subjected to a direct and real violation of their own liberty.

While the admission of compelled testimony is prohibited, complete immunity against the use of derivative evidence is not required by the principles of fundamental justice. The use of derivative evidence obtained as a result of the s. 17 power in subsequent trials would not generally affect the fairness of those trials. Derivative evidence, because of its independent existence, can be found independently of the compelled testimony. There is thus nothing unfair in admitting relevant evidence of this kind against a person if it would have been found or appreciated apart from that person's compelled testimony under s. 17, a proposition consistent with the cases under s. 24(2) of the Charter. If the evidence would not have been found or appreciated apart from such compelled testimony, it should, in the exercise of the trial judge's discretion to exclude unfair evidence, be

excluded since its admission would violate the principles of fundamental justice. The admission of the derivative evidence would in these circumstances tend to render the trial process unfair; the accused would have to answer a case that he was forced to make stronger than it would otherwise have been. Unfairness is avoided by its exclusion. It follows that the immunity against use of compelled testimony provided by s. 20(2) of the Act together with the trial judge's power to exclude derivative evidence where appropriate is all that is necessary to satisfy the requirements of the Charter.

Per L'Heureux-Dubé J.: While the constitutionality of s. 17 of the Act is attacked here, one must not lose sight of the fact that corporations cannot claim the protection [page429] of s. 7 of the Charter because they are, on principle, excluded from the ambit of that constitutional guarantee. Section 7 therefore cannot be invoked by the individual appellants acting as representatives of the corporation. To allow them to do so would grant corporations rights which they cannot enjoy. With respect to witnesses qua individuals, an order to testify under s. 17 of the Act may constitute a violation of their rights of "liberty and security of the person" within the meaning of s. 7 of the Charter, but such violation would be effected in accordance with the principles of fundamental justice. Under section 7, "fundamental justice" requires a protection coextensive with the individual's testimonial participation in the investigation. Use immunity satisfies this requirement and such protection is afforded by s. 20(2) of the Act. This protection serves the end of preventing the state from using incriminating evidence which was obtained by the individual himself, while at the same time tailoring the protection to what our system considers to be the appropriate boundary of fairness in the criminal process.

Fundamental justice under s. 7 does not afford witnesses any constitutional "right to remain silent" nor does it require a constitutional immunity over derivative evidence. The "right to remain silent" enjoyed by an accused -- namely, the right to refuse to testify -- does not extend to witnesses in proceedings such as the one set up by s. 17 of the Act. Individuals called as witnesses in a s. 17 investigation are not charged with an offence. The mere possibility that the witnesses might later be prosecuted does not change their status as witnesses. Finally, derivative evidence, which consists mainly of real evidence, cannot be assimilated to self-incriminating evidence and does not go to the fairness of the judicial process which is what, in the end, fundamental justice is all about.

A subpoena duces tecum issued under s. 17 of the Act does not infringe s. 7 of the Charter. No claim can be advanced by, or on behalf of the corporation, under this constitutional provision. As far as the appellant individuals qua individuals are concerned, assuming that a subpoena deprives them of their "liberty or security of the person", fundamental justice under s. 7 does not extend protection over corporate books and records. Like section 13 of the Charter, the s. 7 residual protection against self-incrimination is limited to "testimonial evidence". Moreover, an order requiring an individual or the officer of a corporation to produce documents does [page430] not involve the fabrication of evidence; the individual or officer acts as a "mere conduit" for the delivery of pre-existing records. Thus, there is no suggestion that the use of such evidence in a subsequent trial would affect the fairness of the proceedings.

Per Lamer J.: Section 7 of the Charter can be invoked in this case because human beings as well as a corporation are directly involved. The specific enumerations in ss. 11(c) and 13 of the Charter are not necessarily exhaustive of the protection afforded by s. 7, and do not prevent residual content being given to s. 7. Assuming that it is a principle of fundamental justice that a witness may refuse to give an incriminating answer, it could be argued that s. 17 of the Act violates s. 7 to the extent that it enables the Commissioner to punish for contempt a witness "who refuses to answer a question on the ground that it may tend to incriminate him". However, it is s. 20(2) of the Act, and not s. 17, which took away the common law right to refuse to give incriminatory answers, and which brings the refusal to answer within contempt and triggers the violation. If section 20(2) of the Act and s. 5(1) of the Canada Evidence Act -- a similar provision -- did not exist, a witness's liberty would not be put in jeopardy by s. 17. A challenge under s. 52 of the Constitution Act, 1982 grounded on s. 7 of the Charter must attack the law that allegedly limits the principles of fundamental justice. It is the limits prescribed by law to the principles of fundamental justice that must be justified under s. 1 of the Charter, and it is the law that imposes these limits that must be put on trial. Here, the appellants challenged the wrong section. A section 1 analysis of s. 17 of the Act would be in fact a s. 1 analysis of s. 20 and would lead this Court into inferentially pronouncing upon s. 5(1) of the Canada Evidence Act. This Court, therefore, should not pronounce upon the s. 7 issue without a direct challenge to the constitutional validity of s. 20(2) of the Act and s. 5(1) of the Canada Evidence Act.

Per Wilson J. (dissenting): Section 7 of the Charter, which is confined to the protection of human beings and has no application to corporations, can be successfully invoked in this case because three individuals as well as a corporation are named as parties. If section 17 is [page431] found to be of no force or effect, this finding applies, of course, to corporations as well as human beings.

Section 17 of the Act violates the individual appellants' right to liberty and security of the person within the meaning of s. 7 of the Charter. Section 17 compels an individual to appear at proceedings against his will and to testify on pain of punishment if he refuses. The evidence given by the individual may later be used to build a case against him in a subsequent criminal prosecution. The state-imposed compulsion, linked as it is to the criminal process, touches not only upon that individual's reasonable expectation of privacy but also upon his physical integrity. The fact that the s. 17 procedure is in itself "investigatory" as opposed to "prosecutorial" is irrelevant when a criminal prosecution is a potential consequence of the s. 17 investigation. Further, the fact that the individual may challenge the proceedings by way of judicial review or under s. 17(3) is also irrelevant in determining whether the right to liberty and security of the person has been violated.

The violation of the individual appellants' right to liberty and security of the person was not in accordance with the principles of fundamental justice. Section 7 of the Charter protects a suspect in a subsequent proceeding against the use of evidence derived from testimony given by him in an earlier proceeding -- a protection not available under ss. 11(c) and 13 of the Charter. Where a person's right to life, liberty and security of the person is either violated or threatened, the principles of fundamental justice require that such evidence not be used in order to conscript the person

against himself. Section 17, therefore, violates s. 7 to the extent that it compels suspects to testify in an investigatory proceeding, which is in effect a criminal investigation, so as to build up a case against themselves through their own self-incriminating testimony and evidence derived from such testimony. Section 20(2) of the Act provides no greater protection than s. 5(2) of the Canada Evidence Act and does not protect a suspect against the use of the derivative evidence in a subsequent criminal prosecution.

Section 17 of the Act cannot be saved under s. 1 of the Charter. The effective investigation of suspected criminal and quasi-criminal activity and the monitoring of the economic activity in Canada are two legislative objectives of sufficient importance to warrant infringement of individual rights and freedoms. Society has a [page432] very real interest in controlling crime and in ensuring the stability of the market-place. The means chosen to achieve these objectives, however, are not "reasonable and demonstrably justified". While compelling individuals to appear and testify regarding their business activities is a rational way of monitoring compliance with the Act, s. 17 does not interfere with the individual appellants' s. 7 rights as little as possible. There is no evidence in this case to suggest that the government's objectives would be frustrated if individuals compelled to testify were afforded derivative use protection or that the enforcement of the Act will be drastically impaired if derivative use protection is given to persons testifying under s. 17.

Per Sopinka J. (dissenting): The provisions of s. 17 of the Act relating to oral testimony violate the right to remain silent and contravene s. 7 of the Charter. While the privilege against self-incrimination is limited to the right of an individual to resist testimony as a witness in a legal proceeding, the right of a suspect or an accused to remain silent operates both at the investigative stage of the criminal process and at the trial stage. The testimonial aspect of the right to remain silent is specifically included in s. 11(c) of the Charter. The right of a suspect to remain silent during the investigative stage, which has the status of a principle of fundamental justice, is included in s. 7. This section is the repository of many of our basic rights which are not otherwise specifically enumerated. The right to remain silent, therefore, may not be reduced, truncated or thinned out by federal or provincial action. For the purpose of this appeal, the right to remain silent is a right not to be compelled to answer questions or otherwise communicate with police officers or others whose function it is to investigate the commission of criminal offences. The protection afforded by the right is not designed to protect the individual from the police qua police but from the police as investigators of criminal activity. It protects the individual against the affront to dignity and privacy which results if crime enforcement agencies are allowed to conscript the suspect against himself. Since this right is protected by the Charter, it follows that the provinces or the federal government cannot transfer the investigative function, which is normally carried out by the police, to other agents who are empowered by statute to force suspects or potential suspects to testify. In the field of anti-competitive crime, the police work is carried out largely, if not exclusively, by the Director of Investigation and Research and his staff. Although s. 17 has other purposes, an important one is to aid the Director and his staff in investigating specific crimes. To this extent, the hearing officer is a policeman armed [page433] with a subpoena. Parliament has not separated out of s. 17 its use for different purposes, many of which would not violate the right to

remain silent. Accordingly, the whole of the provision relating to the compelling of testimony violates s. 7. For the reasons given by Wilson J., this violation could not be justified under s. 1 of the Charter and s. 17, to the extent of the inconsistency with s. 7, must be struck down.

The provisions of s. 17 of the Act relating to the production of documents do not contravene s. 7 of the Charter. While the right to remain silent and the privilege against self-incrimination protect a suspect from compelled testimony, they do not protect him from compelled production of documents. The question relating to the communicative aspects arising out of such production does not need to be decided in this case.

Section 8 of the Charter

Per La Forest J.: Section 17 of the Act does not infringe s. 8 of the Charter. The essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent. An order to produce documents under s. 17, therefore, constitutes a seizure within the meaning of s. 8. But a s. 17 seizure is not unreasonable. The Act, though supported by penal sanctions, is essentially regulatory in nature, and hence part of our administrative law. It is aimed at the regulation of the economy and business with a view to the preservation of the competitive conditions which are crucial to the operation of a free market economy. The conduct prohibited by the Act is conduct which is made criminal for strictly instrumental reasons, and the use of criminal sanctions, including imprisonment, are necessary to induce compliance with the Act. As the discovery of violations to the Act will often require access to information as to the internal affairs of business organizations, the s. 17 power to compel the production of documents is important to the overall effectiveness of the investigative machinery established by the Act and does not constitute an unreasonable intrusion on privacy. Business records and documents will normally be the only records and documents that can lawfully be demanded under that section. There is only a relatively low expectation of privacy in respect of these documents since they are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. Section 17 does not infringe on [page434] this limited expectation of privacy. This does not mean that there is no limitation to the potential scope of an order to produce documents which can be validly issued under s. 17. The material sought in the order must be relevant to the inquiry in progress in light of its nature and purpose. There is no requirement that relevancy to a lawful inquiry be determined before the subpoena is issued; it is sufficient if its relevancy can be challenged by way of judicial review. This opportunity to challenge the relevancy of any particular use of s. 17, by way of judicial review, provides adequate guarantee against potential abuse of the power s. 17 confers. No evidence of any such abuse is apparent in this case.

The stringent standards of reasonableness articulated in Hunter, and usually applicable to criminal investigations, were inappropriate to determine the reasonableness of a seizure under s. 17 in light of the limited scope of the s. 17 power to order the production of documents and the limited privacy interests with regard to these documents. The application of the Hunter standards would severally hamper and perhaps render impossible the effective investigation of anti-competitive offences.

Per L'Heureux-Dubé J.: A subpoena duces tecum under s. 17 of the Act does not infringe s. 8 of the Charter. While a subpoena duces tecum issued under s. 17 may be considered a "seizure" within the meaning of s. 8, the "seizure" contemplated by s. 17 is reasonable. The Act is a complex scheme of economic regulation aimed at eradicating practices that impair free competition in the market-place and s. 17 is part of the administrative machinery which was established in order to promote the Act's purpose. Because the Act's administrative machinery and enforcement provisions are part of a regulatory scheme, the reasonableness of the subpoena duces tecum issued under s. 17 must be assessed taking into account a number of factors, including the importance of the Act's underlying purpose, the necessity of impairing privacy interests, and the absence of other, less onerous, alternatives. These factors indicate clearly that public interest in the freedom and protection of citizens in the market-place prevails over the minimal infringement of the privacy interests of those required to disclose information of an economic nature. First, the legislative purpose of the Act serves important socio-economic interests. Second, the existence of a mechanism [page435] of discovery is necessary in order to properly serve the regulatory objective of the legislation. Third, as a means chosen to bring about the legislative end, the subpoena is significantly less intrusive than other alternatives. In addition, in the case of corporations, their privacy interest is relatively low with respect to requests for economic information. Fourth, while there is no express condition precedent to the issuance of the subpoena, the order can be contested and reviewed before an impartial judicial officer (s. 17(3)). The review provides a safeguard to ensure that s. 17 orders are issued for the sole purpose of advancing the regulatory aim of the Act. A subpoena duces tecum issued under s. 17 does not, therefore, constitute an "unreasonable seizure" within the meaning of s. 8 of the Charter.

An order to testify under s. 17 of the Act does not infringe s. 8 of the Charter. To hold that an order to testify constitutes a "seizure", presumably a "seizure" of one's thoughts, would be to stretch that word beyond any meaning. The word "seizure" under s. 8 should be restricted to tangible things.

Per Sopinka J.: An order under s. 17 requiring the production of documents does not constitute a seizure within the meaning of s. 8 of the Charter. The persons served with an order for production under s. 17 have the opportunity to challenge the validity and the extent of the demand before producing the documents. This opportunity for review before the documents are produced goes to the existence of a seizure. This factor bears directly on the extent of governmental intrusion. A mere demand which is not yet enforceable is, in this age of pan-governmental activity, a minimal intrusion. This minimal intrusion cannot be tantamount to a seizure. If a definition of "seizure" that is over-inclusive is adopted, a wholesale departure from the standards articulated in Hunter will be necessary. A more restrictive interpretation is thus preferable reserving the application of the Hunter standards for those state intrusions which are truly out of keeping with what individuals have come to expect as a routine fact of daily life in a modern state.

Per Lamer and Wilson JJ. (dissenting): Sections 17(1) and 17(4) violate the right to be secure against unreasonable seizure enshrined in s. 8 of the Charter. A seizure under s. 8 is the taking by a public authority of a thing belonging to a person against that person's will. Applying a purposive

interpretation of s. 8, the compulsory [page436] production of documents in a criminal or quasi-criminal law context falls within that definition. Whether the public authority "takes" the documents or compels the person to hand them over, the impact on the person's right to privacy in the documents is the same. Sections 17(1) and 17(4), therefore, constitute a seizure within the meaning of s. 8, and this seizure is unreasonable because it does not meet the test of reasonableness set forth in Hunter. The possibility of an individual's challenging the s. 17 order before a judge, prior to giving up possession of the documents, either by way of an application for review or by way of s. 17(3) does not meet the concerns underlying the Hunter criteria. Only the sophisticated will be aware of this procedure. Most people will respond forthwith to the authority's demand. Nor does it meet the requirement of reasonable and probable grounds. The Hunter criteria are not hard and fast rules which must be adhered to in all cases under all forms of legislation -- what may be reasonable in the regulatory or civil context may not be reasonable in a criminal or quasi-criminal context. Nevertheless, the more akin the legislation is to traditional criminal law, the less likely it is that departures from the Hunter criteria will be countenanced.

Sections 17(1) and 17(4) of the Act cannot be saved under s. 1 of the Charter. In the absence of any evidence to show that the objectives of the Act would be frustrated by adherence to the Hunter criteria, it is impossible to conclude that the s. 8 right of the appellants was minimally impaired.

**Cases Cited**

By La Forest J.

Distinguished: Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; R. v. Amway Corp., [1989] 1 S.C.R. 21; considered: R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627; General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641; R. v. Collins, [1987] 1 S.C.R. 265; R. v. Black, [1989] 2 S.C.R. 138; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); referred to: R. v. Dyment, [1988] 2 S.C.R. 417; Re Alberta Human Rights Commission and Alberta Blue Cross Plan (1983), 1 D.L.R. (4th) 301; R. v. Rao (1984), 46 O.R. (2d) 80; Re Belgoma Transportation Ltd. and Director of Employment Standards (1985), 51 O.R. (2d) 509; R. v. Quesnel [page437] (1985), 12 O.A.C. 165; Bertram S. Miller Ltd. v. R., [1986] 3 F.C. 291; R. v. Bichel, [1986] 5 W.W.R. 261; Attorney General of Canada v. Canadian National Transportation Ltd., [1983] 2 S.C.R. 206; R. v. Wetmore, [1983] 2 S.C.R. 284; R. v. Chiasson (1982), 135 D.L.R. (3d) 499 (N.B.C.A.), aff'd [1984] 1 S.C.R. 266; R. v. Morgentaler, [1988] 1 S.C.R. 30; Hale v. Henkel, 201 U.S. 43 (1906); Wilson v. United States, 221 U.S. 361 (1911); United States v. Morton Salt Co., 338 U.S. 632 (1950); Irvine v. Canada (Restrictive Trade Practices Commission), [1987] 1 S.C.R. 181; Federal Trade Commission v. Texaco, Inc., 555 F.2d 862 (1977); People v. Allen, 103 N.E.2d 92 (1952); Federal Trade Commission v. Tuttle, 244 F.2d 605 (1957); Adams v. Federal Trade Commission, 296 F.2d 861 (1961); People v. Dorr, 265 N.E.2d 601 (1971); Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924); R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Beare, [1988] 2 S.C.R. 387; R. v. Corbett, [1988] 1 S.C.R. 670; R. v. Jones, [1986] 2 S.C.R. 284;

will upon others.

**128** The conduct regulated or prohibited by the Act is not conduct which is by its very nature morally or socially reprehensible. It is instead conduct we wish to discourage because of our desire to maintain an economic system which is at once productive and consistent with our values of individual liberty. It is, in short, not conduct which would be generally regarded as by its very nature criminal and worthy of criminal sanction. It is conduct which is only criminal in the sense that it is in fact prohibited by law. One's view of whether it should be so proscribed is likely to be functional or utilitarian, in the sense that it will be based on an assessment of the desirability of the economic goals to which combines legislation is directed or its potential effectiveness in achieving those goals. It is conduct which is made criminal for strictly instrumental reasons.

**129** The Act is thus not concerned with "real crimes" but with what has been called "regulatory" or "public welfare" offences. The distinction is clearly made by the Law Reform Commission of Canada in Criminal Responsibility for Group Action (Working Paper 16, 1976), at pp. 11-12. After having defined real crimes as those concerned with the reinforcement of society's fundamental values, the Commission says, at p. 12, that a regulatory offence

[page511]

> is not primarily concerned with values, but with results. While values necessarily underlie all legal prescriptions, the regulatory offence really gives expression to the view that it is expedient for the protection of society and for the orderly use and sharing of society's resources that people act in a prescribed manner in prescribed situations, or that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance with rules for the overall benefit of society.

**130** The regulatory nature of the offences defined in the Act is made clear by even a cursory consideration of the secondary literature on Canadian competition law. That literature concerns itself with the question of whether Canada should have anti-combines legislation as much as with the sufficiency and details of the legislation. The potential effectiveness of combines legislation in achieving the goals I have referred to, and the possible ill-effects the pursuit of these goals may have on our international competitiveness, have been much debated. It is difficult to imagine a similarly pragmatic and instrumental debate in respect of the offences, such as murder, assault, or theft, which we would immediately and unhesitatingly regard as concerned with criminal behaviour and deserving of punishment.

**131** In the judicial sphere, the regulatory character of the Act has recently been recognized by this Court. In General Motors of Canada Ltd. v. City National Leasing, supra, the Court considered

TAB 4

| DATE: | | | SECTION: |
|---|---|---|---|
| Q1 - 2010 | | New | 2.0 Distribution Activities (General) |
| | X | Revised | |
| NUMBER: | NAME: | | |
| 2.3 | Conveyance of Electricity | | |

PowerStream may, at its discretion, require that a **Customer** with two or more **buildings** at one location, be metered by means of a PowerStream owned central metering installation. The **Customer** shall be required to pay PowerStream for the labour and material charges.

2.3.7.7 Multi-Unit Residential Suite (**Condominiums**) **Buildings**

Under Ontario Regulation 442/07, all new multiunit condominium buildings must be either individually metered by the licensed distributor or smart sub-metered by an alternative licensed service provider. For existing condominiums the installation of individual smart meters or smart sub-meters is at the discretion of the condominium's board of directors.

Where individual units of an existing or new multiunit condominium building are individually metered by PowerStream, each unit will become a residential customer of PowerStream and each unit and the common areas must have a separate account with PowerStream.

Where an existing or new multiunit condominium building is sub-metered by an alternative licensed service provider, the condominium continues to be the customer of PowerStream and will receive a single bill based on the measurement of the bulk (master) meter. The condominium corporation, which is responsible for the distribution of electricity on the consumer side of the bulk (master) meter, is an exempt distributor under section 4.0.1 of Ontario Regulation 161/99—Definitions and Exemptions (made under the Act). The smart sub-metering provider will then issue a bill to each unit and the common areas based on the consumption of the unit or common area.

Where all units within a multiunit building are individually metered, the building owner shall provide a secure meter room or suitable enclosure within the building for the installation of a sub metering system.

This room or enclosure will have adequate lighting, a 120 volt outlet and a dedicated analog telephone line for meter interrogation purposes.

The building owner may opt for individual self-contained meters attached to individual bases, to a load centre as defined in the PowerStream Standards or a Sub-metered system.

2.3.7.8 Main Switch & Meter Installation for Industrial/Commercial **Buildings**

The metering provision and arrangement for service mains in excess of 200 A shall be submitted to PowerStream for approval before the **building** construction begins.

The **Customer's** main switch immediately preceding the meter and/or meters shall be installed as per **OESC** standards and the meter base at a height of not more than 1.8 metres and not less than 1.5 metres from the centre line of the meter base from the finished floor of the electrical room and shall permit the sealing and padlocking of:

TAB 5

*Indexed as:*

**R. v. Wholesale Travel Group Inc.**

**The Wholesale Travel Group Inc., appellant;**
**v.**
**Her Majesty The Queen, respondent, and**
**The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Attorney General for Alberta, Ellis-Don Limited and Rocco Morra, interveners.**
**And between**
**Her Majesty The Queen, appellant;**
**v.**
**The Wholesale Travel Group Inc., respondent, and**
**The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Attorney General for Alberta, Ellis-Don Limited and Rocco Morra, interveners.**

[1991] 3 S.C.R. 154

[1991] S.C.J. No. 79

File Nos.: 21779, 21786.

Supreme Court of Canada

1991: February 18 / 1991: October 24.

**Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (249 paras.)

[page155]

*Constitutional law -- Charter of Rights -- Fundamental justice -- Regulatory provisions -- Strict liability -- Corporation charged with misleading advertising under Competition Act -- Conviction possible without fault on part of regulated party -- Imprisonment possible penalty on breach of provisions -- Whether ss. 36(1)(a) and 37.3(2) of Competition Act infringe s. 7 of Charter -- If so, whether infringement justifiable under s. 1 of Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d) -- Competition Act, R.S.C. 1970, c. C-23, ss. 36(1)(a), 37.3(2).*

*Constitutional law -- Charter of Rights -- Presumption of innocence -- Reverse onus provisions -- Corporation charged with misleading advertising under Competition Act -- Statutory defences comprising defence of due diligence coupled with timely retraction -- Statutory defences to be established by accused on balance of probabilities -- Whether reverse onus infringes s. 11(d) of Charter -- If so, whether infringement justifiable under s. 1 of Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d) -- Competition Act, R.S.C. 1970, c. C-23, ss. 36(1)(a), 37.3(2).*

*Constitutional law -- Charter of Rights -- Corporations -- Standing -- Corporation charged with misleading advertising under Competition Act -- Whether corporation has standing to challenge validly of federal legislation under ss. 7 and 11(d) of Charter -- If so, whether a corporation entitled to benefit from a finding that federal legislation unconstitutional -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d) -- Competition Act, R.S.C. 1970, c. C-23, ss. 36(1)(a), 37.3(2).*

Wholesale Travel Group Inc. (a travel agency) was charged with false or misleading advertising, contrary to s. 36(1)(a) of the Competition Act. The advertisements referred to vacations at "wholesale prices" but the advertised "wholesale price" was not the price at which Wholesale Travel acquired its vacation packages. The Crown elected to proceed by way of summary conviction and the accused pleaded not guilty. At the outset of the trial, the accused brought a motion for a declaration that ss. 36(1)(a) and 37.3(2) of the Competition Act were inconsistent with ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms and were, therefore, of [page156] no force or effect. Section 36(1)(a) created the offence and s. 37.3(2) set forth a statutory defence. This defence, which was to be established by the accused (s. 37.3(2)), included essentially the common law defence of due diligence (s. 37.3(2)(a) and (b)) coupled with the requirement of a timely retraction (s. 37.3(2)(c) and (d)).

The trial judge held that ss. 36(1)(a) and 37.3(2) were inconsistent with ss. 7 and 11(d) and could not be upheld under s. 1 of the Charter and dismissed the charges. The Supreme Court of Ontario, on appeal, found impugned provisions constitutional and remitted the case to the Provincial Court. The Ontario Court of Appeal allowed the appeal in part. The majority held that s. 37.3(2)(c) and (d) of the Competition Act were severable from the rest of s. 37.3(2) and declared them to be of no force or effect. The majority further held that the words "he establishes that" in s. 37.3(2) were severable and declared them to be of no force or effect. Both Wholesale Travel and the Crown appealed.

The constitutional questions stated here queried: (1) whether s. 37.3(2) of the Competition Act in whole or in part violated ss. 7 or 11(d) of the Charter; (2) whether s. 36(1)(a), in and of itself or when read in combination with s. 37.3(2), violated ss. 7 or 11(d) of the Charter; and (3) if either were answered in the affirmative, whether the impugned provision was saved by s. 1 of the Charter? An issue not encompassed by the constitutional questions was whether a corporation had "standing"

to challenge the constitutionality of these statutory provisions under the Charter and, if so, was a corporation entitled to benefit from a finding that the provisions violated a human being's constitutional rights.

Held: The appeal by Wholesale should be dismissed.

Held (Lamer C.J., La Forest, Sopinka and McLachlin JJ. dissenting in the result): The Crown's appeal should be allowed.

The issues are decided as follows:

1. It is not an infringement of s. 7 of the Charter to create an offence for which the mens rea component is negligence, so that a due diligence defence (s. 37.3(2)(a) and (b)) is available. Unanimous.

[page157]

2. The timely retraction provisions (s. 37.3(2)(c) and (d)) infringe s. 7, are not justified under s. 1, and are accordingly unconstitutional. Unanimous.

3. (a) On a majority reasoning by Lamer C.J. (and La Forest, Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ.), the reverse onus provision ("he establishes that" in s. 37.3(2)) infringes s. 11(d) of the Charter; L'Heureux-Dubé and Cory JJ. (dissenting on this issue) would find no infringement, and would in any event, have found an infringement justified under s. 1.

(b) Per Gonthier, Stevenson and Iacobucci JJ.: The provision is justified under s. 1 of the Charter.

(c) Per Lamer C.J. and La Forest, Sopinka and McLachlin JJ. (dissenting on this issue): The provision is not justified under s. 1 of the Charter.

(d) Per L'Heureux-Dubé, Gonthier, Cory, Stevenson and Iacobucci JJ. (Lamer C.J. and La Forest, Sopinka and McLachlin JJ. dissenting in the result): The reverse onus provision is constitutional.

4. The matter is therefore remitted to trial on the bases that:

(a) a negligence mens rea regulatory offence is constitutional;

(b) the timely retraction provisions are unconstitutional; and

(c) the reverse onus provision is constitutional.

...

I. Standing

Per Lamer C.J. and La Forest and Sopinka JJ.: Wholesale Travel has standing to challenge the constitutionality of the false/misleading advertising provisions under ss. 7 and 11(d) of the Charter and may benefit the finding that these provisions are unconstitutional. However, this is not to say that if the same provisions were enacted so as to apply exclusively to corporations, a corporation would be entitled to raise the Charter arguments which have been raised in the case at bar. Sections 36(1) and 37.3(2) of the Competition Act encompass both individual and corporate accused. If the [page158] provisions violate an individual's Charter rights they must be struck down (to the extent of the in-

consistency) and cannot apply to any accused, whether corporate or individual. If the provisions in question applied only to corporations, the Charter analysis would be very different.

Per Gonthier, Stevenson and Iacobucci JJ.: The conclusions of Lamer C.J. on standing were agreed with.

Per McLachlin J.: It was not necessary to consider the application of the Charter to a provision dealing with corporations only.

II. Sections 7 and 11(d) of the Charter

Per Lamer C.J. and Sopinka J.: Section 37.3(2)(c) and (d) infringes s. 7 of the Charter and the words "he establishes that" in s. 37.3(2) infringe the presumption of innocence in s. 11(d) of the Charter.

The offence of false/misleading advertising is punishable by imprisonment. The offence therefore must not be one of absolute liability and must command at least a fault requirement of negligence, in that at least a defence of due diligence must always be open to an accused.

While there are some offences for which the special stigma attaching to conviction is such that subjective mens rea is necessary in order to establish the moral blameworthiness which justifies the stigma and sentence, the offence of false/misleading advertising is not such an offence.

The issue here centred on the fault requirement constitutionally required where an accused faces possible imprisonment. An element of subjective mens rea is not always required by s. 7 of the Charter. Whether a fault requirement higher than this constitutional minimum of negligence ought to be adopted where an accused faces possible imprisonment or conviction of any offence under the Criminal Code is a question of public policy which must be determined by Parliament.

The inclusion of the word "and" after s. 37.3(2)(c) clearly indicates that all four components of s. 37.3(2) must be established for the accused to be acquitted. If a situation could arise where an accused would be unable to establish all four components of s. 37.3(2) but had [page159] nonetheless been duly diligent (i.e., not negligent), the constitutionally required element of negligence is not fulfilled by the statutory defence contained in s. 37.3(2).

The additional requirement of "timely retraction" in paras. (c) and (d) means that the statutory defence is considerably more narrow than the common law defence of due diligence and could result in the conviction of an accused who was not negligent. The consequence of paras. (c) and (d) is to remove the constitutionally required fault level in the false/misleading advertising provisions and s. 7 of the Charter is therefore offended.

Whether this offence (or the Act generally) is better characterized as "criminal" or "regulatory" is not the issue. A person whose liberty has been restricted by way of imprisonment has lost no less liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. It is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the principles of fundamental justice. These principles do not take on a different meaning simply because the offence can be labelled as "regulatory". A regulatory context may well influence the Charter analysis in particular cases but negligence nevertheless is the minimum level of fault which will accord with s. 7 of the Charter whenever a conviction gives rise to imprisonment.

The presumption of innocence is protected expressly by s. 11(d) and inferentially by s. 7 because this presumption is a principle of fundamental justice. Section 11(d) requires, where a person faces penal consequences, that the individual be proven guilty beyond a reasonable doubt, the state bear the burden of proof, and that the prosecution be carried out lawfully. Section 11(d) is offended if an accused may be convicted notwithstanding a reasonable doubt on an essential element of the offence. The real concern, therefore, is not that the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists.

The words "he establishes that" in s. 37.3(2) require the accused to prove the two elements set out on a balance of probabilities and failure to so prove either element will result in conviction. The absence of due diligence [page160] is necessary for conviction and yet an accused could be convicted under s. 37.3(2) notwithstanding a reasonable doubt as to whether or not the accused was duly diligent. The impugned words therefore infringe s. 11(d).

Since constitutional difficulties arise only from the operation of s. 37.3(2)(c) and (d) and from the words "he establishes that" in s. 37.3(2), s. 36(1)(a) raises no constitutional problem either by itself or in combination with the remainder of s. 37.3(2).

Per La Forest J.: Substantial agreement was expressed for the reasons of Lamer C.J. Nevertheless, there is a broad divide between true criminal law and regulatory offences. The possible imposition of a term of imprisonment necessitates much stricter requirements to conform with the principles of fundamental justice than mere monetary penalties. In the regulatory context here, a requirement that a reasonable doubt be raised by the accused that he or she exercised due diligence meets the requirements of fundamental justice under s. 7 of the Charter. A requirement that the accused prove such diligence on the balance of probabilities goes too far. The same holds true under s. 1 if the issue is approached in terms of s. 11(d).

The requirement of due diligence is sufficient for Charter purposes for regulatory offences and some criminal offences having a significant regulatory base. However, a lower level of mens rea than criminal negligence should not be accepted for most criminal cases.

Per McLachlin J.: The modified due diligence defence embodied in s. 37.3(2)(c) and (d) permits conviction in the absence of even the minimum fault of negligence and so infringes s. 7 of the Charter. The requirement of s. 37.3(2) that the accused establish due diligence on a balance of probabilities, through the inclusion of the phrase "he establishes that", permits conviction despite a reasonable doubt as to an essential element of the offence. Combined with the sanction of imprisonment, the application of this onus violates s. 11 (d) of the Charter. When the offending provision in s. 37.3(2)(c) and (d) is removed, along with the phrase "he establishes that" in s. 37.3(2), the remaining provision at issue, s. 36(1)(a), does not infringe the Charter.

[page161]

Per L'Heureux-Dubé and Cory JJ.: Strict liability offences, as exemplified in this case by the combination of s. 36(1)(a) and s. 37.3(2)(a) and (b) of the Competition Act, do not infringe either s. 7 or s. 11(d) of the Charter. Neither the absence of a mens rea requirement nor the imposition of an onus on the accused to establish due diligence on a balance of probabilities offends the Charter rights of those accused of regulatory offences.

The common law has long acknowledged a distinction between truly criminal conduct and conduct, otherwise lawful, which is prohibited in the public interest. Regulatory offences and crimes embody different concepts of fault. The mens rea requirement is not required in regulatory offences. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence imports a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than failure to meet a prescribed standard of care.

The Competition Act is regulatory in character. Here, the offence did not focus on dishonesty but rather on the harmful consequences of otherwise lawful conduct. Conviction would only suggest that the defendant has made a representation to the public which was in fact misleading and that the defendant was unable to establish the exercise of due diligence in preventing the error. This connotes a fault element of negligence rather than one involving moral turpitude.

The Charter is to be interpreted in light of the context in which the claim arises. The rights asserted by the appellant must be considered in light of the regulatory context, acknowledging that a Charter right may have different scope and implications in a regulatory context than in a truly criminal one. Under this contextual approach, constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences. Rather, the content of the Charter right must be determined only after an examination of all relevant factors and in light of the essential differences between the two classes of prohibited activity. The appellant's claim must also be considered and weighed [page162] in light of the realities of a modern industrial society, where the regulation of innumerable activities is essential for the benefit of all. It is vital that the fundamentally important role of regulatory legislation in the protection of individuals and groups in Canadian society today be recognized and accepted.

The distinction between criminal and regulatory offences and their differential treatment for Charter purposes is in some ways explained by a "licensing argument" and by the vulnerability of those being protected by the regulatory measures. The regulated person chose to enter the regulated field and accordingly can be taken to have known of, in most cases, and to have accepted certain terms and conditions of entry. The nature of the conduct will largely determine if the licensing argument should apply. The procedural and substantive protections a person can reasonably expect may vary depending upon the activity that brings that person into contact with the state. The extent of Charter protection may differ depending upon whether the activity in question is regulatory or criminal in nature. Vulnerability is also a component in the contextual approach to Charter interpretation and should be considered whenever regulatory legislation is subject to Charter challenge.

The principles of fundamental justice referred to in s. 7 of the Charter prohibit the imposition of penal liability and punishment without proof of fault. The level of fault constitutionally required for every type of offence, however, has not been determined and will vary with the nature of the offence and the penalties available upon conviction. It has only been established that where imprisonment is available as a penalty, absolute liability cannot be imposed since it removes the fault element entirely and, in so doing, permits the punishment of the morally innocent.

Section 7 requires proof of mens rea in connection with true crimes. With respect to regulatory offences, however, proof of negligence satisfies the s. 7 fault requirement. Although the element of fault may not be removed completely, the demands of s. 7 will be met in the regulatory context

where liability is imposed for [page163] conduct which breaches the standard of reasonable care required of those operating in the regulated field.

Mens rea and negligence are both fault elements which provide a basis for the imposition of liability. Mens rea focuses on the mental state of the accused and requires proof of a positive state of mind such as intent, recklessness or wilful blindness. Negligence, on the other hand, measures the conduct of the accused on the basis of an objective standard, irrespective of the accused's subjective mental state. Where negligence is the basis of liability, the question is not what the accused intended but rather whether the accused exercised reasonable care. The application of the contextual approach suggests that negligence is an acceptable basis of liability in the regulatory context which fully meets the fault requirement in s. 7 of the Charter. To place regulatory offences in a separate category from criminal offences, with a lower fault standard, does not violate the principles of fundamental justice under s. 7 by allowing the defendant to go to jail without having had the protection of proof of mens rea by the Crown which is available in criminal prosecutions.

Governments must have the ability to enforce a standard of reasonable care in activities affecting public welfare. The laudable objectives served by regulatory legislation should not be thwarted by the application of principles developed in another context. The tremendous importance of regulatory legislation in modern Canadian industrial society requires that courts be wary of interfering unduly with the regulatory role of government through the application of inflexible standards.

The government cannot adequately monitor every industry so as to be able to prove actual intent or mens rea in each case. It can, as a practical matter, do no more than to demonstrate that it has set reasonable standards to be met by persons in the regulated sphere, and to prove beyond a reasonable doubt that there has been a breach of those standards by the regulated defendant. The regulated person is taken to be aware of and to have accepted the imposition of a certain objective standard of conduct as a pre-condition engaging the regulated activity. It misses the mark to speak in terms of the "unfairness" of an attenuated fault requirement because [page164] the standard of reasonable care has been accepted by the regulated actor upon entering the regulated sphere.

Strict liability offences accordingly do not violate s. 7 of the Charter. The requirements of s. 7 are met in the regulatory context by the imposition of liability based on a negligence standard.

The imposition of a reverse persuasive onus on the accused to establish due diligence on a balance of probabilities does not run counter to the presumption of innocence, notwithstanding the fact that the same reversal of onus would violate s. 11(d) in the criminal context. The section 11(d) standard which has been developed and applied in the criminal context should not be applied to regulatory offences. The importance of regulatory legislation and its enforcement strongly supports the use of a contextual approach in the interpretation of the s. 11(d) right as applied to regulatory offences. Quite simply, the enforcement of regulatory offences would be rendered virtually impossible if the Crown were required to prove negligence beyond a reasonable doubt. The means of proof of reasonable care will be peculiarly within the knowledge and ability of the regulated accused. Only the accused will be in a position to bring forward evidence relevant to the question of due diligence. There is a practical difference between requiring the accused to prove due diligence on a balance of probabilities and requiring only that the accused raise a reasonable doubt as to the exercise of due diligence. The presumption of innocence for a regulated accused is not meaningless because the Crown must still prove the actus reus. Fault is presumed from the bringing about of the proscribed result and the onus shifts to the defendant to establish reasonable care on a balance of probabilities.

The availability of imprisonment does not alter the conclusion that strict liability does not violate either ss. 7 or 11(d) of the Charter. The Charter does not guarantee an absolute right to liberty; rather, it guarantees the right not to be deprived of liberty except in accordance with the principles of fundamental justice. It is whether the principles of fundamental justice have been violated, not the availability of imprisonment, which is the determinative consideration. There is a difference or variation between what the principles of fundamental justice require in regard to true crimes and what they require in the regulatory context. Imprisonment is not [page165] unreasonable, given the danger that can accrue to the public from breaches of regulatory statutes, and can be challenged under s. 12 of the Charter if grossly disproportionate to the offence committed.

Section 37.3(2)(c) and (d) imposes an obligation on the accused to make a timely retraction as a precondition to relying on the defence of due diligence. Conviction therefore may be required in some circumstances where there is no fault on the part of the accused. Even where an accused can establish the absence of negligence in the making of misleading representations, paras. (c) and (d) nonetheless require conviction if the accused has failed to make a timely prompt correction or retraction. In these circumstances, the accused would be deprived of the defence of due diligence and the offence would be tantamount to absolute liability, and thereby violate s. 7.

Section 37.3(2)(a) and (b) put forward the common law defence of due diligence. They do not violate s. 7 of the Charter because of the removal of the mens rea requirement in strict liability offences. Where imprisonment is available as a penalty for breach of a statute, s. 7 of the Charter requires a proof of fault before liability can be imposed. Fault in the regulatory context should be imposed on the basis of negligence.

The imposition in strict liability offences of a reverse persuasive onus on the accused to establish due diligence is proper and permissible and does not constitute a violation of the s. 11(d) presumption of innocence. Section 37.3(2)(a) and (b) do not violate s. 11(d) of the Charter.

Per Gonthier, Stevenson and Iacobucci JJ.: Section 37.3(2)(c) and (d) infringe s. 7 of the Charter. The section 11(d) presumption of innocence has a different scope and meaning in relation to public welfare or regulatory offences as opposed to criminal offences.

The reverse onus on the accused to establish due diligence on a balance of probabilities (via the words "he establishes that" in s. 37.3(2)) infringes s. 11(d) (but is justified under s. 1 of the Charter).

III. Section 1 of the Charter

Per Gonthier, Stevenson and Iacobucci JJ.: Section 37.3(2)(c) and (d) is not justified under s. 1.

[page166]

The reverse onus provision is justified under s. 1 of the Charter. The objective of convicting those guilty of false or misleading advertising and of avoiding loss of convictions because of evidentiary problems because the facts are in the hands of the accused warrants overriding the right guaranteed by s. 11(d) of the Charter.

There is a rational connection between the desired objective and the means chosen to attain it. The alternative means by use of a mandatory presumption of negligence would not achieve the objective as effectively nor would it go a long way in achieving the objective. In practice it would be virtually

impossible for the Crown to prove public welfare offences and would effectively prevent governments from seeking to implement public policy through prosecution.

Given that those regulated choose to participate in these regulated activities, and accordingly have accepted the attendant responsibilities, and taking into account the fundamental importance of the legislative objective and the fact that the means chosen impair the right guaranteed by s. 11(d) as little as is reasonably possible, the effects of the reverse onus on the presumption of innocence are proportional to the objective.

Per L'Heureux-Dubé and Cory JJ.: Sections 36(1)(a) and 37.3(2)(a) and (b) do not infringe either s. 7 or s. 11(d) of the Charter and would have been justified under s. 1 had there been a Charter infringement.

Section 37.3(2)(c) and (d) violate s. 7 of the Charter and cannot be justified under s. 1 of the Charter. Assuming that there is a rational connection between the requirement of corrective advertising and the legislative objective of seeking to prevent the harm resulting from misleading representations, there is no proportionality between means and ends. The impugned provisions do not constitute a minimal impairment of the rights of the accused. Further, the availability of imprisonment as a sanction far outweighs the importance of the regulatory objective in correcting false advertising after the fact.

Per Lamer C.J. and Sopinka J. (dissenting in the result): Section 37.3(2)(c) and (d) are not justified under s. 1. Section 37.3(2)(c) and (d) were enacted to prevent false/misleading advertisers from benefiting from advertising and to protect consumers from the detrimental effects of advertising. This is sufficiently important to warrant overriding constitutionally protected rights. The means chosen were rationally connected to this objective. [page167] The modified due diligence defence embodied in paras. (c) and (d), however, does not fall within the constitutionally acceptable range. These paragraphs may "catch" even those who have been duly diligent in preventing false advertising. Alternative means could achieve the objective of encouraging advertisers to undertake corrective advertising without convicting the innocent.

An absolute liability component to the offence of false advertising would perhaps be more effective in facilitating convictions than would the alternatives proposed. Parliament, however, could have retained the absolute liability component and, at the same time, infringed Charter rights to a much lesser extent, had it not combined this with the possibility of imprisonment.

The reverse onus provision is not justified under s. 1. The reverse onus provision was intended to facilitate the convictions of false/misleading advertisers. This is a "pressing and substantial objective". The means chosen are rationally connected to this objective. The provision, however, does not infringe constitutionally protected rights as little as is reasonably possible. Parliament could have employed alternative means which would have resulted in a lesser impairment.

Per McLachlin J.: The infringements caused by s. 37.3(2)(c) and (d) and the reverse onus provision cannot be justified under s. 1.

**Cases Cited**

By Cory J.

Considered: Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; R. v. Vaillancourt, [1987] 2 S.C.R. 636; R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299; Lambert v. California, 355 U.S. 225

establish due diligence was consistent with s. 11(d) reverse onus decisions of this Court, since it did not require the accused to disprove an essential element of the offence. I would note that the Court of Appeal decision was rendered prior to the release of this Court's reasons in Keegstra, supra, which clearly rejected for the purposes of s. 11(d) the distinction between defences and elements of the offence.

**119** Wholesale Travel and the Crown both appealed from the decision of the Court of Appeal. Wholesale Travel argues first that the Court of Appeal ought to have declared the entire legislative scheme invalid rather than merely striking out the offending words from s. 37.3(2). In the alternative, Wholesale Travel submits that the Court of Appeal should have held that s. 7 of the Charter requires the Crown to prove subjective intent or wilful blindness with respect to the alleged falsity of the advertisement rather than requiring only that the Crown establish a lack of due diligence. The Crown's appeal challenges the Court [page216] of Appeal's conclusion regarding the constitutional validity of the impugned provisions.

Issues

**120** On July 26, 1990 Chief Justice Lamer stated the following constitutional questions:

1. Does s. 37.3(2) of the Competition Act, R.S.C. 1970, c. C-23, as amended, in whole or in part violate ss. 7 or 11(d) of the Canadian Charter of Rights and Freedoms?
2. Does s. 36(1)(a) of the Competition Act, in and of itself or when read in combination with s. 37.3(2) of the Competition Act, violate ss. 7 or 11(d) of the Charter?
3. If either question 1 or question 2 is answered in the affirmative, is (are) the impugned provision(s) saved by s. 1 of the Charter?

I

Regulatory Offences and Strict Liability

A. The Distinction Between Crimes and Regulatory Offences

**121** The common law has long acknowledged a distinction between truly criminal conduct and conduct, otherwise lawful, which is prohibited in the public interest. Earlier, the designations mala in se and mala prohibita were utilized; today prohibited acts are generally classified as either crimes or regulatory offences.

**122** While some regulatory legislation such as that pertaining to the content of food and drink dates back to the Middle Ages, the number and significance of regulatory offences increased greatly with the onset of the Industrial Revolution. Unfettered industrialization had led to abuses. Regulations were therefore enacted to protect the vulnerable -- particularly the children, men and women who laboured long hours in dangerous and unhealthy surroundings. Without these regulations many would have died. It later became necessary [page217] to regulate the manufactured products themselves and, still later, the discharge of effluent resulting from the manufacturing process. There is no doubt that regulatory offences were originally and still are designed to protect those who are unable to protect themselves.

**123** English courts have for many years supported and given effect to the policy objectives animating regulatory legislation. In Sherras v. De Rutzen, [1895] 1 Q.B. 918, at p. 922, it was held

that, while the mens rea presumption applied to true crimes because of the fault and moral culpability which they imply, that same presumption did not apply to offences "which ... are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty". This case illustrates the essential distinction in the legal treatment of regulatory as opposed to criminal offences -- namely, the removal of the mens rea requirement.

**124** The distinction between true crimes and regulatory offences was recognized in Canadian law prior to the adoption of the Charter. In R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5, at p. 13, Ritchie J. referred to "a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public" which are not subject to the common law presumption of mens rea as an essential element to be proven by the Crown.

**125** R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299, affirmed the distinction between regulatory offences and true crimes. There, on behalf of a unanimous Court, Justice Dickson (as he then was) recognized public welfare offences as a distinct class. He held (at pp. 1302-3) that such offences, although enforced as penal laws through the machinery of the criminal law, "are in substance of a civil nature and might well be regarded as a branch of administrative [page218] law to which traditional principles of criminal law have but limited application."

**126** The Sault Ste. Marie case recognized strict liability as a middle ground between full mens rea and absolute liability. Where the offence is one of strict liability, the Crown is required to prove neither mens rea nor negligence; conviction may follow merely upon proof beyond a reasonable doubt of the proscribed act. However, it is open to the defendant to avoid liability by proving on a balance of probabilities that all due care was taken. This is the hallmark of the strict liability offence: the defence of due diligence.

**127** Thus, Sault Ste. Marie not only affirmed the distinction between regulatory and criminal offences, but also subdivided regulatory offences into categories of strict and absolute liability. The new category of strict liability represented a compromise which acknowledged the importance and essential objectives of regulatory offences but at the same time sought to mitigate the harshness of absolute liability which was found, at p. 1311, to "violate[s] fundamental principles of penal liability".

The Rationale for the Distinction

**128** It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being [page219] imposed upon members of society, especially those who are particularly vulnerable.

**129** The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn

and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

**130** It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

**131** That is the theory but, like all theories, its application is difficult. For example, is the single mother who steals a loaf of bread to sustain her family more blameworthy than the employer who, through negligence, breaches regulations and thereby exposes his employees to dangerous working conditions, or the manufacturer who, as a result of negligence, sells dangerous products or pollutes the air and waters by its plant? At this stage it is sufficient to bear in mind that those who breach regulations may inflict serious harm on large segments of society. Therefore, the characterization of an offence as regulatory should [page220] not be thought to make light of either the potential harm to the vulnerable or the responsibility of those subject to regulation to ensure that the proscribed harm does not occur. It should also be remembered that, as social values change, the degree of moral blameworthiness attaching to certain conduct may change as well.

**132** Nevertheless there remains, in my view, a sound basis for distinguishing between regulatory and criminal offences. The distinction has concrete theoretical and practical underpinnings and has proven to be a necessary and workable concept in our law. Since Sault Ste. Marie, this Court has reaffirmed the distinction. Most recently, in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at pp. 510-11, Justice La Forest adopted the following statement of the Law Reform Commission of Canada (Criminal Responsibility for Group Action, Working Paper 16, 1976, at p. 12):

> [The regulatory offence] is not primarily concerned with values, but with results. While values necessarily underlie all legal prescriptions, the regulatory offence really gives expression to the view that it is expedient for the protection of society and for the orderly use and sharing of society's resources that people act in a prescribed manner in prescribed situations, or that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance with rules for the overall benefit of society.

B. The Fundamental Importance of Regulatory Offences in Canadian Society

**133** Regulatory measures are the primary mechanisms employed by governments in Canada to implement public policy objectives. What is ultimately at stake in this appeal is the ability of federal and provincial [page221] governments to pursue social ends through the enactment and enforcement of public welfare legislation.

**134** Some indication of the prevalence of regulatory offences in Canada is provided by a 1974 estimate by the Law Reform Commission of Canada (see "The Size of the Problem", in Studies in Strict Liability). The Commission estimated that there were, at that time, approximately 20,000 regulatory offences in an average province, plus an additional 20,000 regulatory offences at the fed-

eral level. By 1983, the Commission's estimate of the federal total had reached 97,000. There is every reason to believe that the number of public welfare offences at both levels of government has continued to increase.

**135** Statistics such as these make it obvious that government policy in Canada is pursued principally through regulation. It is through regulatory legislation that the community seeks to implement its larger objectives and to govern itself and the conduct of its members. The ability of the government effectively to regulate potentially harmful conduct must be maintained.

**136** It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry into this world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted. On rising, we use various forms of energy whose safe distribution and use are governed by regulation. The trains, buses and other vehicles that get us to work are regulated for our safety. The food we eat and the beverages we drink are subject to regulation for the protection of our health.

**137** In short, regulation is absolutely essential for our protection and well being as individuals, and for the effective functioning of society. It is properly present [page222] throughout our lives. The more complex the activity, the greater the need for and the greater our reliance upon regulation and its enforcement. For example, most people would have no idea what regulations are required for air transport or how they should be enforced. Of necessity, society relies on government regulation for its safety.

II

The Offence in the Present Case

Competition Legislation Generally

**138** The offence of misleading advertising with which Wholesale Travel is charged is found in the Act. This Act, like its predecessor, the Combines Investigation Act, is aimed at regulating unacceptable business activity. In General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641, Dickson C.J. held that the Act embodied a complex scheme of economic regulation, the purpose of which is to eliminate activities that reduce competition in the marketplace.

**139** The nature and purpose of the Act was considered in greater detail in Thomson Newspapers Ltd., supra. La Forest J. pointed out that the Act is aimed at regulating the economy and business with a view to preserving competitive conditions which are crucial to the operation of a free market economy. He observed that the Act was not concerned with "real crimes" but with regulatory or public welfare offences. He put the position this way, at p. 510:

> At bottom, the Act is really aimed at the regulation of the economy and business, with a view to the preservation of the competitive conditions which are crucial to the operation of a free market economy. This goal has obvious implications for Canada's material prosperity. It also has broad political overtones in that it is aimed at preventing concentration of power .... It must be remembered that private organizations can be just as oppressive as the state when they gain such a dominant [page223] position within their sphere of operations that they can effectively force their will upon others.

**TAB 6**

*Indexed as:*

# Cartaway Resources Corp. (Re)

**Executive Director of the British Columbia Securities Commission, appellant;**
**v.**
**Robert Arthur Hartvikson and Blayne Barry Johnson, respondents, and**
**Ontario Securities Commission, intervener.**

[2004] 1 S.C.R. 672

[2004] S.C.J. No. 22

2004 SCC 26

File No.: 29472.

Supreme Court of Canada

Heard: November 7, 2003;
Judgment: April 22, 2004.

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

(75 paras.)

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

**Catchwords:**

*Administrative law -- Judicial review -- Standard of review -- Securities Commission -- Commission imposing maximum administrative penalty -- Standard of review applicable to Commission's decision -- Securities Act, R.S.B.C. 1996, c. 418.*

*Securities -- Securities Commission -- Enforcement -- Administrative penalty -- Principles Commission must consider in imposing administrative penalty in public interest -- General deterrence --*

*Commission imposing maximum administrative penalty against two securities brokers for breach of prospectus requirement -- Whether general deterrence appropriate factor in assessing penalty in public interest -- Whether Commission must consider settlement agreements entered into by its Executive Director with other brokers in assessing sanctions -- Securities Act, R.S.B.C. 1996, c. 418, s. 162.*

*Securities -- Securities Commission -- Appeal of Commission decision -- Commission imposing maximum [page673] administrative penalty against two securities brokers for breach of prospectus requirement -- Whether Court of Appeal erred in reducing penalty -- Whether penalty matter should have been referred back to Commission -- Securities Act, R.S.B.C. 1996, c. 418, art. 167(3).*

*Practice -- Parties -- Substitution of party.*

*Summary:*

*The respondents orchestrated the purchase of C Corp. and funnelled some mining claims into it through a shelf company. Without disclosing to investors the material change in C Corp.'s business to a mining exploration firm, they entered into a private placement, which they split among friends and other brokers of a registered investment firm. Following an investigation, a notice of hearing before the B.C. Securities Commission was issued against the respondents, the other brokers involved and the firm with respect to their conduct in relation to C Corp. Prior to the conclusion of the hearing, the firm and the other brokers entered into settlement agreements with the Executive Director, but none was reached with the respondents. The Commission found that the respondents had breached the prospectus requirement of the B.C. Securities Act (s. 61) by splitting the private placement, and thereby relying on a prospectus exemption to which they were not entitled. The Commission further found that it was in the public interest to impose the maximum administrative penalty of $100,000 under s. 162 of the Act. The majority of the Court of Appeal held that the imposition of the maximum penalty for the breach of s. 61 was unreasonable in the circumstances and substituted a penalty of $10,000 each for the respondents.*

*Held: The appeal should be allowed and the Commission's order restored.*

*The balance of factors in the pragmatic and functional analysis pointed towards the reasonableness standard of review and away from the more exacting standard of correctness. The focus should be on the reasonableness of the decision or the order, not on whether it was a tolerable deviation from a preferred outcome. The reviewing court must ask whether there was a rational basis for the Commission's decision in light of the statutory framework and the circumstances.*

*The Commission's interpretation of s. 162 of the Securities Act was reasonable. Section 162 is triggered [page674] by a breach of the Act and, in formulating an order that protects the public interest, the Commission may take into account the context surrounding the breach. General deterrence is an appropriate factor to consider, albeit not the only one, in formulating a penalty in the public interest. Since general deterrence is both prospective and preventative in orientation, it falls squarely within the public interest jurisdiction of securities commissions to maintain investor confidence in the capital markets. The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission. Protecting the public interest will require a*

*different remedial emphasis according to the circumstances. Courts should review the order globally to determine whether it is reasonable. No one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest. Here, the imposition of the maximum penalty was rationally connected to the respondents' conduct globally. The Commission weighed the aggravating and mitigating factors and determined the appropriate penalty. The respondents were the primary movers behind the control group's deceitful conduct. They were the leading players in breaching s. 61 of the Act. It does not appear on the face of the Commission's reasons for making the order under s. 162 that it gave unreasonable weight to general deterrence. While settlement agreements between the Executive Director and the other brokers were a relevant factor, they were not dispositive or binding on the Commission, particularly where the conduct of the respondents and the other brokers is missing the required parity. The respondents' deceitful conduct and leadership roles justified the imposition of a higher penalty than that imposed on their confederates. Accordingly, the Court of Appeal erred in holding that the Commission's order was unreasonable.*

*Had the Commission's order been unreasonable, it would have been unnecessary for the Court of Appeal to refer the question of appropriate sanctions back to the Commission. Section 167(3) of the Act is permissive and, on an ordinary construction, its wording would permit the Court of Appeal to direct the Commission to order a particular penalty. The Court of Appeal may also itself substitute the appropriate penalty pursuant to s. 9(8)(b) of the Court of Appeal Act.*

*While the Commission itself appeared as a party in the courts below, the Executive Director was properly [page675] substituted as a party in this Court under Rule 18(5) of the Rules of the Supreme Court of Canada. The Executive Director merely sought to comply with a recent decision of the B.C. Court of Appeal which held that the Executive Director is the proper party on an interlocutory appeal on the merits of a procedural decision by the Commission. The substitution did not cause the respondents prejudice.*

**Cases Cited**

Considered: Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132, 2001 SCC 37; referred to: British Columbia (Securities Commission) v. Pacific International Securities Inc. (2002), 2 B.C.L.R. (4th) 114, 2002 BCCA 421; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301; Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20; Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; R. v. M. (C.A.), [1996] 1 S.C.R. 500; R. v. Morrisey, [2000] 2 S.C.R. 90, 2000 SCC 39; R. v. Wismayer (1997), 115 C.C.C. (3d) 18; United States v. Matthews, 787 F.2d 38 (1986); Hretchka v. Attorney General of British Columbia, [1972] S.C.R. 119.

**Statutes and Regulations Cited**

Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 9(8)(b).

Rules of the Supreme Court of Canada, SOR/2002-156, rr. 8(1), 18(5).

**46** Although courts are regularly called on to interpret and apply general questions of law and engage in statutory interpretation, courts have less expertise relative to securities commissions in determining what is in the public interest in the regulation of financial markets. The courts also have less expertise than securities commissions in interpreting their constituent statutes given the broad policy context within which securities commissions operate: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336.

[page693]

**47** A reviewing court must consider the general purpose of the statute and the particular provision under consideration with an eye to discerning the intent of the legislature: *Dr. Q, supra*, at para. 30. The adjudicative function of the Commission in enforcement proceedings under s. 162 would generally call for less deference. In the present case the Commission is called upon to adjudicate a bipolar dispute rather than exercise a pure policy decision. Nevertheless, the Commission also plays a principal role in policy development, in the management of a complex securities regulation scheme and in reconciling the interests of a number of different groups and in protecting the public: *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, at pp. 313-14. This calls for some deference by the reviewing court: *Pezim, supra*, at p. 591 .

**48** The interpretation of s. 162 is a question of statutory construction of the Commission's enabling statute. As I stated above, the application of s. 162 requires the determination of when an order is in the public interest, and this calls for the Commission to apply its expertise. Although the Commission's interpretation of s. 162 is not binding on future Commission decisions, once the Commission finds that it can take general deterrence into account, it is unlikely to break from this practice in the future. It therefore has some precedential value. On the whole, the nature of the question militates in favour of deference.

**49** The balance of factors in the pragmatic and functional analysis point towards the standard of review of reasonableness and away from the more exacting standard of correctness. The reviewing court must therefore ask whether there is a rational basis for the decision of the Commission in light of the statutory framework and the circumstances of the case. Do the reasons as a whole support the decision (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 56)? Specifically, is it reasonable for the Commission [page694] to consider general deterrence in determining whether a sanction under s. 162 would be in the public interest?

**50** In applying the standard of reasonableness, the reviewing court should not determine whether it agrees with the determination of the tribunal. Such a conclusion is irrelevant: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 80. The focus should be on the reasonableness of the decision or the order, not on whether it was a tolerable deviation from a preferred outcome.

**51** In my view, the Commission's interpretation of s. 162 was reasonable.

C. *General Deterrence*

**52** Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also

target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C. C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.

**53** General deterrence as an aim of sentencing in criminal law is well established: see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 56; *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39, at paras. 44 and 46. One of its earliest proponents was Jeremy Bentham. In his view, where the same result cannot be achieved through other modes of punishment and the net benefit to society outweighs the harm imposed on the offender, a deterrent penalty should be imposed and tailored in order to discourage others from committing the same offence. He assumes that citizens are rational actors, who will adjust their conduct according to the disincentives [page695] of deterrent penalties: A. Ashworth, *Sentencing and Criminal Justice* (3rd ed. 2003), at p. 64. Similarly, law and economic theorists such as R. A. Posner view deterrent penalties as a kind of pricing system: "An Economic Theory of the Criminal Law" (1985), 85 *Colum. L. Rev.* 1193.

**54** However, general deterrence is not without its critics. In the criminal context, commentators and courts have expressed doubts as to the effectiveness of imprisonment as a general deterrent: *R. v. Wismayer* (1997), 115 C.C.C. (3d) 18 (Ont. C.A.), at p. 36; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) (Archambault Report), at pp. 136-37.

**55** In this appeal we are asked whether it is reasonable to decide that general deterrence has a role to play in the policing of capital markets. The conventional view is that participants in capital markets are rational actors. This is probably more true of market systems than it is of social behaviour. It is therefore reasonable to assume, particularly with reference to the expertise of the Commission in regulating capital markets, that general deterrence has a proper role to play in determining whether to make orders in the public interest and, if they choose to do so, the severity of those orders.

**56** This approach is consonant with United States securities jurisprudence, which accepts that general deterrence may be a consideration in imposing penalties for fraudulent behaviour. The rationale is that the public interest demands appropriate sanctions to secure compliance with the rules, regulations and policies of the Securities and Exchange Commission ("SEC"): see, e.g., *United States v. Matthews*, 787 F.2d 38 (2d Cir. 1986), at p. 47. Civil penalties are increasingly important to the SEC for a number of reasons, including general deterrence: see R. G. Ryan, "Securities [page696] Enforcement: Civil Penalties in SEC Enforcement Cases: A Rising Tide" (2003), 17 *Insights* 17.

**57** The Commission imposed the financial penalty on Hartvikson and Johnson under s. 162 of the Act, which provides that if the Commission finds after a hearing that a person has acted contrary to the Act, regulations or a decision of the Commission, and it is in the public interest to make such an order, it may impose a fine of no more than $100,000:

> **162** If the commission, after a hearing,
>
> (a) determines that a person has contravened
>
> (i) a provision of this Act or of the regulations, or

(ii) a decision, whether or not the decision has been filed under section 163, and

(b) considers it to be in the public interest to make the order

the commission may order the person to pay the commission an administrative penalty of not more than $100 000.

The Commission considered it to be in the public interest to levy the maximum fine for Hartvikson and Johnson's breach of s. 61.

**58** "Public interest" is not defined in the Act. This Court considered the scope of a securities commission's public interest jurisdiction in *Asbestos, supra*. At issue in *Asbestos* was the Ontario Securities Commission's jurisdiction to intervene in Ontario's capital markets, for purposes of protection and prevention, if it is in the public interest to do so pursuant to s. 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5. This Court held that the discretion to act in the public interest is not unlimited. In exercising its discretion the Commission should consider "the protection of investors and the efficiency of, and public confidence in, capital markets generally" (*Asbestos, supra*, at para. 45). Because s. 127 is regulatory, its sanctions are not remedial or punitive, but rather are preventative in nature and prospective in application. As a result, this Court held that s. 127 could not be used to redress misconduct alleged to have caused [page697] harm to private parties or individuals: *Asbestos, supra*, at paras. 41-45. It should be observed that our Court was not considering the function of general deterrence in the exercise of the jurisdiction of a securities commission to impose fines and administrative penalties nor denying that general deterrence might play a role in this respect.

**59** Braidwood J.A. understood *Asbestos, supra*, to foreclose the imposition of public interest penalties for the purpose of general deterrence. With respect, Braidwood J.A.'s interpretation was mistaken.

**60** In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos, supra*, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others" (para. 125).

**61** The *Oxford English Dictionary* (2nd ed. 1989), vol. XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as [page698] a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.

**62** It may well be that the regulation of market behaviour only works effectively when securities commissions impose *ex post* sanctions that deter forward-looking market participants from engaging in similar wrongdoing. That is a matter that falls squarely within the expertise of securities

commissions, which have a special responsibility in protecting the public from being defrauded and preserving confidence in our capital markets.

D. *The Commission's Order Was Reasonable*

**63** Further, it was reasonable in all the circumstances for the Commission to conclude that general deterrence applies in respect of Hartvikson and Johnson's conduct. While a specific breach of the Act is required to trigger the application of s. 162, unlike s. 161, the penalty that the Commission ultimately imposes should take into account the entire context, as well as the preservation of the public interest. The public interest must be satisfied under both ss. 161 and 162, and is not restricted to situations where the Commission imposes a ban on market participation under s. 161. Where conduct could be addressed under the two sections, the Commission may use both provisions to craft the order that is most in the public interest.

**64** The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission. Protecting the public interest will require a different remedial emphasis according to the circumstances. Courts should review the order globally to determine whether it is reasonable. No one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest. Nevertheless, unreasonable weight given to a particular factor, including general deterrence, will [page699] render the order itself unreasonable. Iacobucci J. in *Pezim, supra*, at p. 607, suggested that an example of such unreasonableness would be the exercise of the Commission's discretion in a manner that was capricious or vexatious.

**65** In my opinion, increasing the amount of the fine is not a "vexatious or capricious" exercise of the Commission's discretion but sends a clear message to other actors in the British Columbia securities market that a breach of s. 61 will be dealt with severely, and it is rational to assume that this conduct will accordingly be deterred. The Commission stressed the seriousness of the respondents' conduct and the damage done to the integrity of the capital markets, and found that when making an order that is in the public interest, "[w]e are obliged to take whatever remedial steps we determine are appropriate to maintain the public's confidence in the fairness of our markets" (para. 14).

**66** The Commission's order was also a reasonable one globally. The Commission weighed the aggravating and mitigating factors and determined the appropriate penalty. Hartvikson and Johnson were the primary movers behind the control group's deceitful conduct. They were the leading players in breaching s. 61 of the Act. It does not appear on the face of the Commission's reasons for making the order under s. 162 that it gave unreasonable weight to general deterrence.

**67** The respondents argued that the Commission erred in not giving appropriate weight to the settlements reached by the other members of the control group. I disagree.

**68** In my view, settlement agreements arrived at by co-respondents and the Executive Director are not binding on the Commission in determining the appropriate penalty for other co-respondents, although such settlements are among the relevant factors in assessing the appropriate penalty under s. 162. There is no support in the Act to find that [page700] settlements between a party against whom enforcement proceedings are brought and the Executive Director are binding as precedent upon the Commission. Indeed, such an approach would unduly fetter the Commission's mandate to make orders in the public interest. Nor, in light of the discount accorded settlements, do they necessarily reflect the appropriate penalty in all cases.

TAB 7

*Indexed as:*

# Cadillac Fairview Corp. Ltd. v. R.W.D.S.U.

**Re Cadillac Fairview Corp. Ltd. et al. and Retail, Wholesale & Department Store Union et al.**

[1987] O.J. No. 1081

62 O.R. (2d) 337

45 D.L.R. (4th) 401

24 O.A.C. 61

29 Admin. L.R. 210

88 CLLC 12016

88 CLLC para. 14,005 at 12016

7 A.C.W.S. (3d) 136

Ontario
High Court of Justice, Divisional Court

**Van Camp, Gray and Bowlby JJ.**

November 30, 1987.

**Counsel:**

William J. McNaughton and J. Gregory Richards, for applicants.

Paul J.J. Cavalluzzo, for respondent, Retail, Wholesale and Department Store Union AFL-CIO-CLC.

Stephen T. Goudge, Q.C., for respondent, Ontario Labour Relations Board.

---

The judgment of the court was delivered by

1 **GRAY J.**:-- This is an application by Cadillac Fairview Corporation Limited and T.E.C. Leaseholds Limited for judicial review of decisions and directions of the Ontario Labour Relations Board dated June 12, 1985, and November 13, 1985. By these decisions the board found the applicants to be persons "acting on behalf of" the employer, the T. Eaton Company Limited, and, by their conduct, to be in breach of s. 64 of the Labour Relations Act, R.S.O. 1980, c. 228. These decisions also contain findings and orders against Eaton's. However, those aspects of the decisions and directions dealing with Eaton's are not under review. The decisions and directions are sought to be quashed only in so far as they affect the applicants.

2 The issues on this application may be summarized as follows:

1. Did the board err in law by finding the applicants to be persons "acting on behalf of" the employer within the meaning of s. 64 of the Labour Relations Act?
2. If such an error was committed, was it of a "jurisdictional" nature so as to deprive the board of the protection of the privative clauses found at ss. 106(1) and 108 of the Act, and so as to require intervention by this court?
3. Did the board exceed its remedial jurisdiction in directing the applicants to permit the respondent access to their property for purposes of their campaign to organize Eaton's employees?

Background

3 The complaints before the board arose out of the circumstances surrounding the respondent's unsuccessful attempt to organize the employees of Eaton's at its "flagship" store in the Eaton's Centre.

4 The Centre is a large retail and commercial complex with over 300 stores and two office towers. It occupies a large part of a city block extending from Dundas St. in the north to Queen St. in the south. It is bordered on the east by Yonge St. and on the west, proximately, by Bay St. Eaton's is located at the north end of the complex.

5 As noted by the board, the unusual feature of the Eaton's store is that none of the employee access points abut public property; rather, all are contained within the private property of the Centre itself. One of these entrances is through the St. James Mews at the north-west corner of the mall. The other more popular entrance is also at the north end, but at the level of "two-below" the ground floor. The two-below entrance is at one end of the Dundas Mall lobby in a semi-enclosed area. At the other end of the lobby is the exit from the northbound subway. In the middle of the lobby is the escalator coming down from "one-below", where the exit from the southbound subway is located.

6 The head leasehold interest in the land comprising the Eaton's Centre is held by the applicant T.E.C. Leaseholds Limited. The ownership of T.E.C. is made up as follows:

60% Cadillac Fairview

20% Toronto-Dominion Bank

20% Eaton's

7 The Board of Directors of T.E.C. is comprised of 11 members: seven from Cadillac Fairview; two from the Toronto-Dominion Bank; and two from Eaton's. All of the officers of T.E.C. are from Cadillac Fairview. Day-to-day management and control of the Centre rests solely with Cadillac

Fairview and the security personnel in the Centre are in the employ of Cadillac Fairview. Eaton's, along with the other stores in the Centre, are tenants of T.E.C. Eaton's employs more than 3,000 at the Centre, over half of whom are part-time.

**8** In March, 1984, the respondent commenced an organizing campaign for the support of Eaton's employees. The campaign began with distributions of literature on Eaton's premises both by Eaton's employees and by non-employee organizers. Initial distributions were followed by meetings at various off-premises locations. Throughout this initial period correspondence was exchanged between Eaton's and the respondent, with both sides expressing dissatisfaction as to the conduct of the other. Eaton's objected to the respondent's "unauthorized" entry onto their premises and to the "unauthorized" solicitation of its employees during business hours. The latter was deemed by Eaton's to be an unlawful interference and disruption of its business. By letter dated May 18, 1984, Eaton's advised the respondent that all future entry onto their premises for such purposes was prohibited and would be treated as a violation of the Trespass to Property Act, R.S.O. 1980, c. 511. The respondent advised Eaton's that it viewed these allegations of misconduct as being wholly unsubstantiated and suggested that Eaton's was acting in violation of the Labour Relations Act. The respondent added, however, that attendance at Eaton's premises would not be as necessary if Eaton's would supply a list of names and addresses of potential bargaining unit employees. This list does not appear to have been forthcoming and, in any event, the respondent decided to suspend further in-store distributions by non-employee organizers.

**9** At about 9:30 a.m. on June 22, 1984, the respondent stationed its organizers outside the entrance to Eaton's at the level of two-below. Their intention was to distribute a notice of an upcoming meeting to incoming employees. They were shortly interrupted by security personnel from Cadillac Fairview who advised them that they were on Cadillac Fairview property and that solicitation and distribution of leaflets was prohibited. They were then directed outside to the street line.

**10** The next morning members of the respondent were back at the Centre. This time they were distributing union shopping bags to customers at each of the mall entrances to Eaton's. Approximately five minutes after an employee organizer was admonished by the Eaton's Personnel Manager, a security officer from Cadillac Fairview appeared and the organizers were ejected.

**11** The respondent then continued its organizing efforts through mail-outs to the employees for whom it had addresses. This material exhorted employees to join the union and advised them of the names and telephone locals of employee organizers from whom further information could be obtained. This practice earned a written rebuke from Eaton's on the footing that company telephones were not to be used for union business.

**12** Some time in the summer of 1984, the respondent began stationing organizers outside the entrance to Eaton's at the level of two-below. This occurred both prior to opening in the morning and after the close of business in the evening. With the assistance of a view of the premises, the board confirmed the submission of Cadillac Fairview that usage of the two subway entrances and the escalator is heavy and regular at that time. However, the board also determined that the bulk of this traffic turns away from the direction of Eaton's at a distance from the entrance of some 30 to 40 feet. In addition, the board noted that there had been only one complaint by pedestrians of interference from union organizers.

**13** In September, 1984, the respondent decided to carry out further distributions in the mall area to take advantage of the distraction that would be caused by the visit of the Pope. The plan was to

commence distributions outside the store and, when confronted, to retreat to the subway. On these occasions, union supporters were joined by members of an anti-union group called Stop The Union Now (S.T.U.N.).

**14** By the end of September, the applicants had decided to reassert control over their property. They sent a letter to the respondent indicating that all congregating by union and anti- union forces outside the entrance to Eaton's would be prohibited. The union responded by reintroducing its supporters for purposes of further distributions both within and without Eaton's premises. This activity resulted in eviction by Cadillac Fairview security personnel and in employee reprimands by the Eaton's personnel manager.

**15** On October 27, 1984, union supporters reattended at the mall with the support of a city alderman. When approached by Cadillac Fairview security personnel the alderman intervened and the security personnel departed.

**16** Throughout this period the union organizers continued their morning vigil and, upon refusing the request of security personnel to leave the premises, were advised that they could remain so long as they did not impede traffic or distribute leaflets.

**17** Finally, at the end of October, Cadillac Fairview made a decision not to challenge the organizers in any way that might create a media event and deter Christmas shoppers. Accordingly, after an incident on November 9th in which union organizers refused the request of Cadillac Fairview security personnel to stop leaflet distribution, no further preventative action was taken.

**18** In addition to these facts the board considered a letter from the applicant's solicitors directed to the respondent advising of their broad "no-solicitation" policy. The letter states that this policy applies to all malls operated by Cadillac Fairview. It indicates that although there is no written policy as to who may or may not be allowed to solicit or distribute material or use the Eaton's Centre in particular, the practice is to allow charitable, non-profit or public service groups to use the Centre at specific times and locations. Other functions directly related to the commercial activities of the tenants may also be allowed. The letter lists five classes of permitted non-commercial activities, none of which encompass the conduct of the respondent. All of these activities are designed to foster the image of Cadillac Fairview as a "good corporate citizen". The letter also indicates that all tenants are prohibited from soliciting, canvassing, or peddling in or about the Centre. Should tenants or others attempt such distributions or solicitations they are asked to cease by security personnel.

**19** The board also heard testimony on behalf of Cadillac Fairview as to the manner in which the Centre is operated. It was indicated that the operation of the Centre rests solely within the judgment of Cadillac Fairview and that, although a call from any tenant will be met by the attendance of a security officer, the decision as to whether action will be taken rests solely with the officer or his superior.

**20** One of the respondent's co-ordinators testified that union access to the entrance level at two-below was essential to advise employees of their rights to organize and of upcoming meetings. It was added that not all employees read the newspapers and that the cost of newspaper advertising was prohibitive.

Decision of the board

**21** Section 64 of the Labour Relations Act states:

54e

> 64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

**22** There was no question that the applicants' conduct had interfered with the "formation, selection or administration of a trade union". Accordingly, the board framed the issues in respect of the applicants as follows:

> [C]an Cadillac Fairview be said on the facts before us to be a person acting on behalf of the employer Eaton's when it acted to prohibit certain organizing activities of the complainant, and did it have the requisite intent to constitute an unfair labour practice when it did so?

Decision of the board dated June 12, 1985, Board Record, at p. 181.

**23** The board recognized that the facts relating to both of these issues "were, to a large extent, intertwined". Accordingly, its findings in respect of the question of intent merged with those relating to the issue of whether Cadillac Fairview was "acting on behalf of" Eaton's.

**24** In dealing with these issues, the board took account of the following factors:

1. The 20% holding of T.E.C. in Eaton's;
2. the two seats held by Eaton's on the T.E.C. board of directors;
3. the relationship of landlord and prime tenant between T.E.C. and Eaton's;
4. the finding that Cadillac Fairview pursued an over-all policy that was clearly in line with the desires of Eaton's;
5. the destructive effect of applying the broad no-solicitation policy to the union organizing drive;
6. the finding that Cadillac Fairview lacked a "sustainable business justification" for the application of its broad no- solicitation policy to the organizers stationed at the two- below entrance to Eaton's.

**25** With respect to the last-mentioned factor, the board did not find convincing the evidence of the applicants' management personnel that the policy was pursued independent of the wishes of Eaton's. The board stated:

> Where, however, neither interference, nor, indeed, contact with the shopping public can be shown to exist at all, it becomes more difficult for the landlord to argue that it is acting pursuant to any interest other than that of satisfying the wishes of its tenant (and in this case, its prime tenant in the shopping centre which bears the tenant's name), in restricting, to the extent that it has, the efforts of those seeking to organize the employees of that tenant.

Decision of the board dated June 12, 1985, Board Record, at p. 183.

**26** The board considered the effect of the broad no-solicitation policy as follows:

54C

> The problem is, as with the case of employers, that a broad solicitation policy does not stand on the same legal footing vis-a-vis activities which are specifically protected by statute, and those which are not.

Decision of the board dated June 12, 1985, Board Record, at p. 183.

**27** In the result, the board concluded:

> With respect to the respondent Cadillac Fairview, the Board concludes that its reliance upon a broad no-solicitation policy that interferes with the statutory organizing rights of Eaton's employees, and their access to the complainant at a time and place in the mall where the lack of normal contact with other users of the mall vacates any business justification, is an act done "on behalf of" the employer Eaton's, and in violation of s. 64.

Decision of the board dated June 12, 1985, Board Record, at p. 191.

Standard of review

**28** Decisions of the board are protected by the privative clauses found at ss. 106(1) and 108 of the Act. Courts give effect to such provisions by refusing to interfere with decisions of administrative tribunals unless they are the product of a patently unreasonable interpretation of the relevant statute.

**29** The basis for this functional approach to judicial review is set out in the reasons of Blair J.A. for the Court of Appeal, in Re Ontario Public Service Employees Union and Forer (1985), 52 O.R. (2d) 705 at pp. 719-20, 23 D.L.R. (4th) 97 at p. 112:

> The judicial attitude to tribunals has changed. Restraint has replaced intervention as judicial policy. Courts now recognize the legitimate role of administrative tribunals in the development and execution of economic, social and political policies ordained by the Legislature. Judges also recognize that tribunals bring to bear in their decisions knowledge and expertise in their particular fields beyond the usual experience of the courts. The new judicial attitude towards tribunals is sometimes described as "curial deference".

**30** At p. 721 O.R., p. 113 D.L.R., Blair J.A. quoted with approval the following passage from the reasons of Cory J. in Re Tandy Electronics Ltd. and United Steelworkers of America (1980), 30 O.R. (2d) 29 at p. 42, 115 D.L.R. (3d) 197 at p. 210, 80 C.L.L.C. Paragraph14,017:

> "... a cautious approach must be taken by the Courts when considering whether a tribunal has lost jurisdiction as a result of something it did during the course of a hearing. The Board may well make a mistake. Unless that mistake is patently unreasonable, or so fundamentally erroneous, that it cries aloud for intervention by the reviewing Court, it should not constitute a ground for depriving the Board of the protection of the privative clause."

**31** See also Re City of Ottawa and Ottawa Professional Firefighters' Ass'n, Local 162, Int'l Ass'n of Firefighters (1987), 58 O.R. (2d) 685, 36 D.L.R. (4th) 609.

**32** In Re Syndicat des employes de production du Quebec et de l'Acadie v. Canada Labour Relations Board (1984), 14 D.L.R. (4th) 457, [1984] 2 S.C.R. 412, 84 C.L.L.C. Paragraph14,069 (the "C.B.C." case), Beetz J., speaking for the Supreme Court of Canada, said that the test of patent unreasonableness does not apply to the interpretation of a provision which "describes, limits or lists" the powers of an administrative tribunal. The court went on to quash as incorrect a board order requiring the parties to submit an outstanding grievance to arbitration during the course of an unlawful strike. This was held to be beyond the powers conferred on the board to deal with unlawful strikes by s. 182 of the Canada Labour Code, R.S.C. 1970, c. L-1, which states:

> 182. Where an employer alleges that a trade union has delcared or authorized a strike, or that employees have participated, are participating or are likely to participate in a strike, the effect of which was, is or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful and the Board may, after affording the trade union or employees an opportunity to be heard on the application, make such a declaration and, if the employer so requests, make an order
>
> (a) requiring the trade union to revoke the declaration or authorization to strike and to give notice of such revocation forthwith to the employees to whom it was directed;
>
> (b) enjoining any employee from participating in the strike;
>
> (c) requiring any employee who is participating in the strike to perform the duties of his employment; and
>
> (d) requiring any trade union, of which any employee with respect to whom an order is made under paragraph (b) or (c) is a member, and any officer or representative of that union, forthwith to give notice of any order made under paragraph (b) or (c) to any employee to whom it applies.

**33** More recently, this analysis was applied by the court to overturn a decision of the Quebec Labour Court which had ordered a second arbitration of an employee grievance: Gendron v. Municipalite de la Baie-James, [1986] 1 S.C.R. 401, 66 N.R. 30.

**34** In Blanchard v. Control Data Canada Ltd. (1984), 14 D.L.R. (4th) 289, [1984] 2 S.C.R. 476, 84 C.L.L.C. Paragraph14,070, and Syndicat des professeurs du college de Levis-Lauzon v. College d'enseignement general et professionel de Levis-Lauzon, [1985] 1 S.C.R. 596, 85 C.L.L.C. Paragraph14,028, 59 N.R. 194, the court failed to mention the analysis of Beetz J. in the "C.B.C." case and adopted a restrained approach to the review of arbitral decisions.

**35** In a recent article, Professor Mullan suggests that the results in the "C.B.C." case and Baie-James, supra, may be explained as a product of the conflict between the remedial powers claimed by the tribunal and a second statutorily sanctioned dispute resolution mechanism: Mullan, "The Su-

preme Court of Canada and Jurisdictional Error: Compromising New Brunswick Liquor?" 1 C.J.A.L.P. 71 (1987).

**36** In light of the specific statutory language considered in that case and the approach adopted by the Court of Appeal in Forer, supra, I would exercise caution in the application of the "C.B.C." analysis to the facts of this case.

Decision

**37** The submissions of the applicants deal separately with the board's findings and order.

The board's findings

**38** The applicants challenge the findings of the board on a number of bases. First, it is submitted that the board improperly shifted the onus of proof to the applicants to demonstrate that they lacked the requisite intent for the commission of an unfair labour practice. This is said to be a jurisdictional error of law in that it is alleged to be the product of a "patently unreasonable" interpretation of the Act.

**39** In support of this submission, the applicants refer to s. 89(5) of the Act, which states:

> 89(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

**40** This provision shifts the legal burden of proof in cases of unfair labour practice allegations against employers and employers' organizations. Its object is to relieve the complainant of having to adduce affirmative evidence of an anti-union intent. It contains no reference to persons "acting on behalf of" an employer. Nevertheless, the applicants contend, the board's decision amounts to an application of this provision to them.

**41** For a number of reasons, I find this submission to be untenable. First, it is clear that the board did not rely on s. 89(5) itself to satisfy the requirement of intent in respect of the applicants. Second, it is equally clear that the board did not shift the legal burden of proof to the applicant by reliance on a presumption of intent. In reviewing the relevant portion of the board's reasons, it appears that the words "presumption" and "inference" were used interchangeably to describe a situation in which intent might be arrived at after a consideration of the effects of the impugned conduct, the applicants' explanations and all the circumstances of the case.

**42** Board decision-making by inference is a necessary part of its adjudicative function. In Adams, Canadian Labour Law (1985), at p. 490, the author offers the following explanation for the approach adopted by labour relations boards to the question of intent:

> Since employers are not likely to confess to anti-union animus, tribunals have to rely on circumstantial evidence to draw inferences about [improper] employer motivation.

54i

**43** This approach, which appears to have been adopted by the board in the present case, is both a necessary and pragmatic response to the requirements of the Act.

**44** In reaching its finding of intent, the board sought to balance the interests of the applicants and the respondent union. It has given effect to this balance by requiring a finding of intent for a violation of s. 64 and by weighing the strength of the alleged business justification for applying the no-solicitation policy to the statutorily-protected union activity. This balancing of interests is the kind of activity to which the board, with its industrial relations expertise, is particularly well-suited. It is not the kind of exercise with which this court ought lightly to interfere. Accordingly, I find neither the board's approach nor its decision on the question of intent to be patently unreasonable.

**45** The applicants' second argument suggests that in finding it to be "acting on behalf of the employer", the board has reached a patently unreasonable conclusion. They support this contention by reference to the "direct and uncontradicted" evidence that the applicants were pursuing an independent policy of no-solicitation.

**46** However, as indicated earlier, the board reached this conclusion after due consideration of the six factors referred to earlier, including the evidence of the independent no- solicitation policy. Although this evidence is largely circumstantial and inferential, I would add that it is unlikely to be otherwise. Here again, I find that the board has weighed the evidence and reached a result which cannot be said to be patently unreasonable.

**47** The applicants also argue that the board based its conclusion on "no evidence" and thereby committed a jurisdictional error. However, in light of the requirement that there be a complete absence of evidence before the courts will intervene (Re Keeprite Workers Independent Union and Keeprite Products Ltd. (1980), 29 O.R. (2d) 513, 114 D.L.R. (3d) 162 (C.A.)) this ground of challenge must also fail.

The board's remedy

**48** The applicants' second set of submissions relate to the board's order requiring them to allow the respondent's organizers orderly access to their property at times and places where normal contact with other mall users does not exist.

**49** The board's remedial authority in this case derives from s. 89(4) of the Act which states:

> 89(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

> (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
>
> (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
>
> (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

**50** This provision is drafted in very broad language and confers a large measure of remedial discretion on the board. As such, it is clearly distinguishable from the provision under consideration in C.B.C., supra. It more closely resembles the remedial authority conferred on the Canada Labour Relations Board by s. 189 of the Code, about which Beetz J. had this to say at p. 474 D.L.R., p. 435 S.C.R.: "Though they are not unlimited, these powers are much wider than those the Board has regarding unlawful strikes, and expressly authorize it to itself define the proper remedies ...".

**51** In Re Tandy and United Steelworkers of America, supra, this court considered whether identical language to s. 89(4) contained in its predecessor section allowed the board to make an award of damages. At p. 47 O.R., p. 215 D.L.R., Cory J. stated:

> So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable.

**52** In the present case, the remedy granted by the board is directly related to the breach of the Act not only in kind but in extent. Although the issue has since been rendered moot, the effect of the order would be to specifically reverse the conduct that was found to be in violation of the Act. As I read the order, it is likely that the organizing activities must be confined to that narrow strip of property immediately before the entrance to Eaton's at the level of two-below for perhaps one-half hour each day both before opening and after closing. The remedy, therefore, "flows from the scope, intent and provisions of the Act itself". Its novelty renders it neither unreasonable nor incorrect.

**53** The applicants submit, however, that the order infringes their rights to demand removal of the union organizers pursuant to the provisions of the Trespass to Property Act. Section 2(1) of this Act states:

> 2(1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in activity on premises when the activity is prohibited under this Act; or

(b) does not leave the premises immediately after he is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than $1,000.

**54** I would note that this provision expressly recognizes an exception for persons acting under "a right or authority conferred by law". The applicants seek to support their contention, however, by reference to the decision of the Supreme Court of Canada in Harrison v. Carswell (1975), 62 D.L.R. (3d) 68, 25 C.C.C. (2d) 186, [1976] 2 S.C.R. 200. This decision relates to the ability of a mall owner to invoke an equivalent Manitoba statute against an individual picketing a tenant in support of a lawful strike. It would appear to be distinguishable, however, in that the employee conduct had no prior sanction. It did not arise as the result of an otherwise valid order issued by the Labour Relations Board. I do not read this decision as immunizing a mall owner from the reach of decisions and orders issued pursuant to the terms of the Labour Relations Act. In this connection, I note the following passage from the majority reasons of Dickson J. at p. 83 D.L.R., p. 219 S.C.R.:

> Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law.

(Emphasis added.)

**55** I do not feel that anything further is gained by the applicants' characterization of their rights as those of a third party. Suffice it to say that having been brought within the scope of the Act, they are no longer a third party to the dispute.

**56** Finally, I do not accept the argument of the applicants that s. 11 of the Labour Relations Act impliedly excludes this kind of order. Section 11 states:

> 11. Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

**57** Section 11 is a limited and specific provision designed to deal with an unusual and well-defined employment circumstance. I do not regard it as conclusive of the balance to be drawn in unfair labour practice complaints relating to access involving non-employers.

**58** The application is dismissed with costs payable by the applicants to the respondent union after assessment thereof. The respondent Ontario Labour Relations Board did not seek or ask for costs.

Application dismissed.

TAB 8

# Competition Act
# C-34

## Determination of reviewable conduct and judicial order

**74.1** (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(*a*) not to engage in the conduct or substantially similar reviewable conduct;

(*b*) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(*c*) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, $750,000 and, for each subsequent order, $1,000,000, or

(ii) in the case of a corporation, $10,000,000 and, for each subsequent order, $15,000,000; and

(*d*) in the case of conduct that is reviewable under paragraph 74.01(1)(*a*), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

TAB 9

Competition Tribunal | Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Enbridge Services Inc.*, 2002 Comp.Trib. 09
File no.: CT2001008
Registry document no.: 0008a

IN THE MATTER OF an application by the Commissioner of Competition for a consent order pursuant to sections 79 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF certain practices of anti-competitive acts by Enbridge Services Inc. within certain markets in the province of Ontario;

AND IN THE MATTER OF an abuse of dominant position in the supply of conventional or power vented natural gas fuelled water heaters not used for commercial purposes and related services within certain markets in the province of Ontario.

BETWEEN:

**The Commissioner of Competition**
(applicant)

and

**Enbridge Services Inc.**
(respondent)

Date of hearing: 20020220
Member: McKeown J. (Chairman), Lawrence P. Schwartz and Gerry Solursh
Date of order: 20020220
Order signed by: McKeown J.

**CONSENT ORDER**

**[1]** FURTHER TO the application of the Commissioner of Competition (the "Commissioner") pursuant to sections 79 and 105 of the *Competition Act* (the "Act") R.S.C. 1985, c. C-34, as amended, for a Consent Order prohibiting Enbridge Services Inc. ("ESI") (the "Respondent") from engaging in certain anti-competitive acts and from an order to redress the anti-competitive situation created by these acts;

**[2]** AND UPON READING the Notice of Application dated December 17, 2001, the Statement of Grounds and Material Facts, the Consent Order Impact Statement, the Draft Consent Order and the Consent of the parties, filed herein;

**[3]** AND ON CONSIDERING THAT the Commissioner and the Respondent have reached an agreement which is reflected in the Draft Consent Order;

**[4]** AND ON CONSIDERING THAT the Commissioner is satisfied that, on the basis of the considerations outlined in the Consent Order Impact Statement, the remedies provided herein, if ordered, will be sufficient to eliminate the substantial lessening or prevention of competition in the supply of conventional or power vented natural gas fuelled water heaters not used for commercial purposes ("water heaters") and related services caused by the practice of anti-competitive acts, by the Respondent;

**[5]** AND IT BEING UNDERSTOOD by the parties that the Commissioner has alleged certain material facts, and that, though the Respondent does not accept all of the facts alleged by the Commissioner, the Respondent does not contest the Statement of Grounds and Material Facts or the Consent Order Impact Statement for the purposes of this application or in any proceeding initiated by the Commissioner relating to this Consent Order, including an application to vary or rescind this Order under section 106 of the Act;

**[6]** AND ON THE HEARING of counsel for the parties in respect of this Application;

THE TRIBUNAL ORDERS THAT:

**Definitions**

**[7]** For the purposes hereof:

(a) the term "*water heaters*" means conventional or power vented natural gas fuelled water heaters not used for commercial purposes;

(b) the term "*effective date*" means the effective date of the issuance of the Consent Order;

(c) the term "*existing customers*" refers to customers renting water heaters from ESI prior to the implementation by ESI of the terms of this Consent Order; and

(d) the term "*new customers*" refers to customers for whom ESI has installed new water heaters for rental purposes after the implementation by ESI of the terms of this Consent Order.

For greater certainty, a customer ceases to be an existing customer and becomes a new customer for purposes hereof if ESI replaces the existing customer's rental water heater after the effective date with a new water heater and the customer signs a new rental water heater contract with ESI meeting the terms and conditions of this Consent Order.

**General**

**[8]** Unless otherwise specified, the terms hereof shall apply to existing customers and new customers.

**Disconnection and Return of ESI Rental Water Heaters**

**[9]** The following apply with respect to the disconnection and return of ESI rental water heaters:

(a) ESI shall not prevent others from disconnecting ESI rental water heaters or, if such water heaters are otherwise disconnected, from returning such water heaters;

(b) ESI shall designate sites for the return of ESI rental program water heaters by others and these sites will include all ESI district Heating, Ventilation, Air Conditioning (hereinafter "HVAC") offices and the office locations of ESI's independently operated HVAC franchisees (the "Return Locations"), with returns permitted at a minimum for the hours between 8 a.m. and 6 p.m. Monday through Saturday. Schedule "A" contains a list of the current Return Locations. ESI may change the Return Locations from time to time in the ordinary course of operating its business and may designate additional Return Locations, whether operated by ESI or on ESI's behalf by other parties;

(c) where a customer notifies ESI that he/she intends to return an ESI rental water heater, and there is a Return Location within 20 miles (32 kilometres) of the customer's address then ESI will permit the customer to elect to either:

(i) have a qualified, licenced third party disconnect the water heater and then return the water heater or have the water heater returned (at customer's expense) to a Return Location during its normal hours of operation; or

(ii) request ESI to disconnect and pick-up or pick-up the water heater from the customer's address, in which case ESI subject to subparagraph 9(e)(iii), may charge a disconnection and pick-up charge not to exceed $75.00.

ESI may also offer the customer the option of keeping the water heater, in which case disposal will be the customer's responsibility. However, the customer is not required to accept this alternative;

(d) where a customer notifies ESI that he/she intends to return an ESI rental water heater, and there is not a Return Location within 20 miles (32 kilometres) of the customer's address then ESI will permit the customer to elect either to:

(i) have a qualified, licenced third party disconnect the water heater and then return the water heater or have the water heater returned (at customer's expense) to a Return Location during its normal hours of operation; or

(ii) request ESI to disconnect and pick-up or pick-up the water heater in which case ESI will not assess any disconnection and/or pick-up charge.

In any such case (i.e. where the nearest Return Location is more than 20 miles (32 kilometres) from the customer's address) ESI may also offer the customer the option of keeping the water heater, in which case disposal will be the customer's responsibility. However, if the customer is unwilling to accept this alternative, ESI must pick-up the water heater (as provided for in subparagraph 9(d)(ii));

(e) where ESI is requested by a water heater rental program customer to disconnect and pick-up or pick-up an ESI rental program water heater:

(i) ESI shall perform such service within two (2) weeks following receipt of such request;

(ii) ESI shall not assess water heater rental program customers additional rental charges after the charge for the month during which pick-up took place; and

(iii) if the pick-up is not conducted within two (2) weeks of the customer request, any $75.00 disconnection and pick-up or pick-up charge otherwise contemplated pursuant to subparagraph 9(c)(ii) and further rental charges shall not be imposed;

(f) failure to comply with the time period set out in subparagraph 9(e)(i) shall constitute an immediate breach of this Consent Order subject to ESI providing the Commissioner with adequate written explanation for the failure to comply;

(g) subject to subparagraph 9(c)(ii) hereof, if a customer or another third party returns a disconnected water heater, ESI shall not assess pick-up, administration or other such charges to water heater rental program customers of ESI to disconnect or return water heaters.

**Rental Water Heater Exit Charges, Fees and Penalties**

**[10]** The following apply with respect to rental water heater exit charges, fees and penalties:

(a) subject to paragraph 10(b), ESI shall allow existing customers to cease renting water heaters from ESI without paying any rental exit or cancellation charges, fees, or penalties (collectively "exit charges"), including but not limited to any installation cost recovery or administration charges;

(b) in the case of existing customers who rent water heaters from ESI which were installed prior to the effective date, ESI may apply commercially reasonable and non-discriminatory exit charges until each such water heater is five (5) years old;

(c) ESI shall allow existing customers covered by paragraph 10(b) to exit their water heater rental contract upon notification to ESI with no exit charges applying thereto after such water heater becomes five (5) years old;

(d) ESI contracts with new customers may include an initial rental period of a maximum of five (5) years during which commercially reasonable and non-discriminatory exit charges may apply;

(e) the terms of any contracts entered into in accordance with paragraph 10(d) hereof shall allow, following the completion of the initial five (5) year period or less, such customers to exit their water heater rental contract upon notification to ESI, with no exit charges applying thereto;

(f) exit charges (whether for existing or new customers) are not to exceed $125.00 for any water heater during year one, and are to be reduced by $10.00 after each year from the date of installation of the water heater;

(g) during the period while any existing customer is subject to exit charges as provided for in paragraph 10(b), ESI may not increase the water heater rental charge for such customer other than through percentage increases (if any) reflecting inflation over the period since the last rental rate adjustment; and

(h) ESI contracts entered into in accordance with paragraph 10(d) with new customers shall contain pre-stated rental rates for the initial five (5) year or less contract period during which exit charges may apply. Such rate(s) shall be expressed as a single rate for the entire period or as different rates each to be effective during specified periods of time, or may be based on an expressly stated escalation formula to reflect inflation.

**Buy-Out Price Schedule**

**[11]** The following apply with respect to the Buy-Out Price Schedule:

(a) ESI water heater rental contracts entered into with new customers shall include a fixed Buy-Out Price Schedule ("Schedule") for the rented heaters. A model Schedule respecting new customers is attached hereto and marked as Schedule "B" and shall form an integral part of the Consent Order;

(b) ESI shall provide existing customers with a Schedule for their rented water heaters. A model Schedule respecting existing customers is attached hereto and marked as Schedule "C" and shall form an integral part of the Consent Order. The Buy-Out Price for existing customers will be based on ESI's current retail prices at the time the Schedule is produced and adjusted to eliminate the impact of inflation since the time of installation; and

(c) ESI shall not offer different rental rates or rental water heater Buy-Out Prices to new and existing customers that are renting water heaters of a similar model and age, except to the extent that such differences reflect legitimate differences in the cost of providing service to different groups of customers, based on such factors as location and water conditions.

**Other Water Heater Terms, Conditions and Operations**

**[12]** The following apply with respect to other water heater terms, conditions and operations:

(a) ESI shall not enter into or withdraw from any arrangement, agreements or transaction in regards to water heaters or make any changes to their operations that would be contrary or inconsistent with the intended purpose of this Order, namely, to eliminate anti-competitive behaviour for the ultimate purpose of promoting and protecting competition in the markets affected;

(b) without limiting the generality of paragraph 12(a), ESI's other terms, conditions and operations with respect to the rental of water heaters will not erect undue barriers to entry and to competition in the market for water heaters; and

(c) without limiting the generality of paragraphs 12(a) and 12(b), ESI's rental water heater terms, conditions and operations relating to:

(i) the assessment and recovery of damage to returned water heaters; and

(ii) the limitation of ESI's liability with respect to the disconnection or the return of rental water heaters by others;

shall not create the above mentioned effects.

**Commissioner's Approval**

**[13]** The following apply with respect to the Commissioner's approval:

(a) this Consent Order evidences the Commissioner's acceptance of the terms and conditions applicable to contracts with new and existing customers, all as modified to give effect to the terms of this Consent Order. A copy of those terms and conditions are attached as Schedule "D" and form an integral part of the Consent Order. Any subsequent material changes to such terms and conditions, to the extent such terms and conditions materially affect the matters addressed by this Consent Order, shall be submitted to the Commissioner for approval in advance of their implementation. The Commissioner shall respond definitively within thirty (30) days following the submission by ESI to the Commissioner of any such revised contractual terms and conditions proposed for the ESI water heater rental program;

(b) without limiting the generality of the foregoing, ESI shall submit to the Commissioner for approval the terms and conditions relating to the items referred to in paragraphs 9 and 10 hereof; and

(c) where the Commissioner's approval is sought pursuant to this Consent Order and such approval is not granted or if a decision of the Commissioner is unreasonably delayed or withheld, ESI may apply to the Competition Tribunal for directions.

**Implementation**

**[14]** The following apply with respect to implementation:

(a) within forty-five (45) days of the effective date, ESI shall amend the terms and conditions applying to existing customers to comply with the Consent Order;

(b) within forty-five (45) days of the effective date, ESI shall amend the terms and conditions offered to new customers to comply with the Consent Order; and

(c) within forty-five (45) days of the effective date, ESI shall modify its activities and operations to comply with this Consent Order.

**Notification**

**[15]** The following apply with respect to notification:

(a) subject to paragraph 15(d), within forty-five (45) days following the effective date, ESI shall notify in writing all existing customers concerning the terms of the Consent Order, the terms of which notification shall be subject to consultation and joint agreement between ESI and the Commissioner;

(b) notification for paragraph 15(a) will be by way of bill inserts and press releases the terms of which shall be subject to consultation and joint agreement between ESI and the Commissioner;

(c) ESI may amend the rental water heater terms and conditions for existing customers to implement or which are consistent with the provisions of the Draft Consent Order before the effective date;

(d) any amendments referred to in paragraph 15(c) shall immediately be notified to these customers before they are implemented. Notification will be by way of bill inserts and press releases the terms of which shall be subject to consultation and joint agreement between ESI and the Commissioner. The notification shall include an explanation of the reasons for these changes. Further notification shall be given as is required to give full effect to paragraphs 15(a) and 15(b);

(e) within forty-five (45) days following the effective date, ESI shall notify in writing all of ESI's affiliates, directors, managers, owners, officers, shareholders, agents and employees and to any of its subsidiaries, assignees and their agents and employees in writing of the terms of the Consent Order. The terms of such notification shall be subject to consultation and joint agreement between ESI and the Commissioner. In addition, a copy of the Consent Order shall be provided or made reasonably accessible to such persons. In addition, ESI shall direct such persons to operate and manage the business in accordance with the terms of the Consent Order; and

(f) within sixty (60) days following the effective date, ESI shall provide to the Commissioner a certification by the president of ESI that such notifications and copies required in paragraphs 15(a), 15(b), 15(d), and 15(e) have been sent.

**Application**

**[16]** The Consent Order applies as follows:

(a) ESI shall adhere to all the provisions of the Act and in particular to strictly avoid any act that may be anti-competitive by the recreation of any undue barriers to entry with respect to the ESI water heater rental program as outlined in the aforementioned paragraph 12;

(b) the Consent Order shall bind ESI, as well as, each and every of the present and future affiliates, directors, owners, officers, shareholders, agents and employees and to any of its successors, subsidiaries, assignees and their agents, employees or other person acting for or on behalf of ESI with respect to any matter referred to in this Consent Order;

(c) without limiting the generality of the foregoing, the Consent Order governs any subsequent purchaser, owner or operator of ESI's water heater rental business, whether through purchase or restructuring or a joint venture partner with ESI; and

(d) any contract transferring ownership of ESI or any part thereof in relation to water heaters shall contain a specific written clause indicating the acceptance by such purchaser or joint venture partner of the terms of the Consent Order.

**Communications**

**[17]** While all parties will be consulted on the contents and dissemination of any communications with the media, such as press releases or to the public, the Commissioner shall retain the final decision on his communications. The Parties agree to review the confidentiality restrictions contained in any previous correspondence or discussions with a view to removing restrictions that are no longer appropriate.

**Other Matters**

[18] The following apply with respect to other matters:

(a) nothing in this Consent Order shall be construed as acceptance by the Commissioner of the terms and conditions in the agreements between ESI and its customers existing prior to the effective date and the legal enforceability of such terms and conditions;

(b) ESI understands that the Commissioner has alleged certain material facts concerning ESI's water heater rental program. It is understood that ESI does not necessarily agree with all of the facts so alleged. However, ESI will not contest the Statement of Grounds and Material Facts or the Consent Order Impact Statement for the purposes of this application and any proceeding initiated by the Commissioner relating to this Consent Order, including an application to vary or rescind this Consent Order;

(c) the parties shall be bound by the terms of this Consent Order for a period of ten (10) years following the effective date;

(d) for the purpose of determining or securing compliance with the Consent Order, subject to legally recognized privilege, and upon written request on reasonable notice to ESI, ESI shall provide the Commissioner with:

(i) information relating to the ESI water heater rental program in the possession or under the control of ESI. A signature, under oath, by a senior officer of ESI confirming that all available information, in respect of the above, has been provided to the Commissioner; and/or

(ii) upon five (5) days written notice to ESI and without restraint or interference from it, sufficient opportunity to interview directors, officers, managers or employees of ESI concerning ESI's water heater rental program. Such directors, officers, managers or employees may have counsel present at these interviews;

(e) within three (3) months following the written request in paragraph 18(d) to ESI, the Commissioner shall notify ESI in writing of any objections the Commissioner may have with regard to any information in relation to paragraph 18(d);

(f) ESI agrees to the issuance of a final Consent Order by the Competition Tribunal, on usual terms, covering the matters agreed to herein;

(g) the Competition Tribunal shall retain jurisdiction for the purpose of any application by the Commissioner or ESI to rescind or vary any of the provisions of this Consent Order in the event of a change of circumstances or otherwise; and

(h) in the event of a dispute as to the interpretation or application of this Consent Order, including any decision by the Commissioner pursuant to the Consent Order or breach of this

Consent Order by ESI, the Commissioner or ESI shall be at liberty to apply to the Competition Tribunal for a further Order.

**Notice to the Parties**

[19] The following shall apply with respect to notice to the parties:

(a) notices, reports or other communications required or permitted pursuant to any of the terms of this Order shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the parties at the address or facsimile number below:

(b) if to the Commissioner:

The Commissioner of Competition
Competition Bureau
Place du Portage, Phase I
50 Victoria Street, 21st Floor
Hull, Quebec K1A 0C9

Facsimile: (819) 953-5013

(c) if to the respondent:

Enbridge Services Inc.
500 Consumers Road
North York, Ontario M2J 1P8

Attention: David M. Purdy

Facsimile: (416) 753-7336

Aird & Berlis LLP
Suite 1800, Box 754
181 Bay Street
Toronto, Ontario M5J 2T9

Attention: William G. VanderBurgh

Facsimile: (416) 863-1515

DATED at Toronto, Ontario, this 20th day of February, 2002

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) W.P. McKeown

[20] **SCHEDULE "A"**

***RETURN LOCATIONS***

## Enbridge Services - Water Heater Return Locations

| | |
|---|---|
| Barrie<br>District 11<br>Warehouse 730 | 165 Ferris Lane<br>Barrie, ON L4M 2Y1 |
| Richmond Hill West<br>District 09 | United Thermo Group<br>20 Staffern Dr. #1<br>Concord, ON L4K 2Z7 |
| Richmond Hill East<br>District 10<br>Warehouse 728 | 64 Industrial Road<br>Richmond Hill, ON L4C 2Y1 |
| Durham West<br>District 06<br>Warehouse 720 | 513 Westney Rd. S<br>Ajax, ON L1S 6W8 |
| Durham East<br>District 07 | Perry Mechanical<br>285 Bloor St. W.<br>Oshawa, ON L1H 7L1 |
| Kawarthas<br>District 08<br>Warehouse 724 | 1 Consumers Place<br>P.O. Box 658<br>Peterborough, ON K9J 6Z8 |
| Ottawa West<br>District 16<br>Warehouse 740 | 90 Bill Leathem Drive<br>Nepean, ON K2G 6J2 |
| Ottawa North Valley<br>District 18<br>Warehouse 744 | 115 Woodcrest Drive<br>Pembroke, ON K8A 6Y6 |

| | |
|---|---|
| Ottawa East<br>District 17 | Climec Residential Inc.<br>645 Belfast Rd. #6<br>Ottawa, ON K1G 4V3 |
| Commercial<br>Mass Market<br>District 80 | 6 Leswyn Rd.<br>North York, ON M6A 1K2 |
| Metro East<br>District 05<br>Warehouse 718 | 50 Munham Gate<br>Scarborough, ON M1P 2B4 |
| Metro Northwest<br>District 01<br>Warehouse 710 | 89 Carlingview Drive<br>Toronto, ON M9W 5E4 |
| Metro South Central<br>District 03 | Blue Flame Heating<br>37 Dufflaw Rd.<br>North York, ON M6A 2W2 |
| Metro South West<br>District 02 | Martin Air<br>75 Ingram Dr.<br>North York, M6M 2L7 |
| Mississauga South<br>District 13<br>Warehouse 734 | 950 Burnhamthorpe Rd. W.<br>Mississauga, ON L5C 3B4 |
| Mississauga North<br>District 14 | JRL HVAC INC<br>278 Rutherford Rd. S.<br>Brampton, ON L6W 3K7 |
| Niagara<br>District 20<br>Warehouse 748 | 3401 Schmon Pkwy.<br>P.O. Box 1051<br>Thorold, ON L2V 5V8 |
| Grimsby<br>District 04<br>Warehouse 758 | 189 South Service Rd.<br>Grimsby, ON L3M 4H6 |

| | |
|---|---|
| Hamilton<br>District 24 | Greenal Heating & AC<br>67 Frid Street<br>Unit 16<br>Hamilton, ON L8P 4M3 |
| Halton<br>District 21 | Select Energy<br>4361 Harvester Rd. #27<br>Burlington, ON L7M 6M4 |
| Caledon<br>District 15 | Bramton Sheet Metal<br>180 HWY #7<br>West Bldg. B. North Hall<br>Brampton, ON L6V 1A1 |
| Kitchener<br>District 22 | Columbia Mechanical<br>35 Durward Place<br>Waterloo, ON N2L 4E5 |
| London<br>District 23 | Complete Htg. & Clg. Ltd.<br>1112 Brydges St.<br>London, ON N5W 2B6 |
| Enbridge Business<br>Services | Stannair Conditioning Inc.<br>2645 Skymark Avenue<br>Mississauga, ON L4W 4H2 |

[21] SCHEDULE "B"

*BUY-OUT PRICES [New Customers]*

Selling Prices for Used Installed Residential Water Heaters

Use this table to find the buy-out price if you decide to purchase your rental water heater from Enbridge Home Services.

Simply find the column matching the size and type of your rental water heater and the age of your tank. The age of tank is determined based on the installation date shown on the installer's sticker on your water heater. The type of tank is indicated by the installer's initial at the top of the applicable column.

Prices shown do not include taxes. Applicable taxes will be added to the prices shown.

| WATER HEATER TYPE AND SIZE | | | | | |
|---|---|---|---|---|---|
| AGE OF WATER HEATER (Years) | CV 40 (Conventional 40 Gallon) | CV 50 (Conventional 50 Gallon) | CV 60 (Conventional 60 Gallon) | PV 50 or DV 50 (Power vented or Direct vented 50 gallon) | PV 75 (Power vented 75 gallon) |
| 21-1 Year (Starting Price) | $514 | $547 | $566 | $891 | $1158 |
| 1-2 | 493 | 524 | 543 | 854 | 1110 |
| 2-3 | 469 | 499 | 517 | 814 | 1057 |
| 3-4 | 445 | 473 | 490 | 771 | 1001 |
| 4-5 | 418 | 445 | 461 | 725 | 942 |
| 5-6 | 391 | 415 | 430 | 677 | 880 |
| 6-7 | 361 | 384 | 398 | 626 | 813 |
| 7-8 | 330 | 351 | 363 | 572 | 743 |
| 8-9 | 297 | 315 | 327 | 514 | 668 |
| 9-10 | 262 | 278 | 288 | 453 | 589 |
| 10-11 | 224 | 239 | 247 | 389 | 505 |
| 11-12 | 185 | 197 | 204 | 321 | 416 |
| 12-13 | 143 | 152 | 158 | 248 | 322 |
| 13-14 | 99 | 105 | 109 | 171 | 223 |
| 14-15 | 52 | 55 | 57 | 90 | 117 |
| Over 15 years | 25 | 25 | 25 | 25 | 25 |

**Starting Price**

The price for water heaters less than one year old is equal to the Enbridge Home Services retail sale price for a comparable, installed water heater. This includes an amount to reflect our typical installation charge.

**Age Discount**

The buy-out prices shown are determined by amortizing the Starting Price over the expected useful life of the water heater.[1]

**Remember:**

When you purchase your Enbridge Home Services water heater, our rental arrangement ends. You will be under no obligation to pay rent for subsequent months and you will be responsible for service and maintenance of the water heater.

**Need Help?**

The chart on this table shows prices for almost all types of Enbridge Home Services rental water heaters.[2] If your water heater is not covered, or if you are not sure what type of water heater you have or when it was installed, please call Enbridge Home Services at [1-800 ___-____].

Our rental specialists will also be pleased to answer any questions you may have about your water heater options.

---

[1] The amortization was based on a standard mortgage table with an interest cost of 5.8% and a 15 year term.

[2] The natural gas water heaters included in the buy-out schedule, CV40, CV50, CV60, PV50, DV50, and PV75, represent 1.15 million of ESI's 1.20 million rental water heaters. This represents 96% of ESI's installed rental water heater base.

[22] SCHEDULE "C"

*BUY-OUT PRICES [Existing Customers]*

Selling Prices for Used Installed Residential Water Heaters

Use this table to find the buy-out price if you decide to purchase your rental water heater from Enbridge Home Services.

Simply find the column matching the size and type of your rental water heater and the age of your tank. The age of tank is determined from the installation date shown on the installer's sticker on your water heater.

Prices shown do not include taxes. Applicable taxes will be added to the prices shown.

| WATER HEATER TYPE AND SIZE | | | | | |
|---|---|---|---|---|---|
| AGE OF WATER HEATER (Years) | CV 40 (Conventional 40 Gallon) | CV 50 (Conventional 50 Gallon) | CV 60 (Conventional 60 Gallon) | PV 50 or DV 50 (Power vented or Direct vented 50 gallon) | PV 75 (Power vented 75 gallon) |
| 22-1 Year (Starting Price) | $ 514 | $ 547 | $ 566 | $ 891 | $ 1,158 |
| 1-2 | 475 | 505 | 523 | 824 | 1,070 |
| 2-3 | 440 | 468 | 484 | 762 | 990 |
| 3-4 | 413 | 439 | 454 | 715 | 929 |
| 4-5 | 386 | 410 | 425 | 668 | 868 |
| 5-6 | 351 | 373 | 387 | 609 | 791 |
| 6-7 | 318 | 338 | 350 | 552 | 717 |
| 7-8 | 290 | 308 | 319 | 503 | 653 |
| 8-9 | 256 | 272 | 282 | 444 | 577 |
| 9-10 | 222 | 236 | 244 | 385 | 500 |
| 10-11 | 184 | 196 | 203 | 320 | 415 |
| 11-12 | 145 | 154 | 160 | 252 | 327 |
| 12-13 | 106 | 113 | 117 | 184 | 239 |
| 13-14 | 69 | 73 | 76 | 120 | 155 |
| 14-15 | 34 | 36 | 37 | 59 | 77 |
| Over 15 years | 25 | 25 | 25 | 25 | 25 |

**Starting Price**

The price for water heaters less than one year old is equal to the current average Enbridge Home Services retail sale price for a comparable, installed water heater. This includes an amount to reflect our typical installation charge.

**Age Discount**

The buy-out prices shown are determined by adjusting the Starting Price to eliminate the effect of inflation from the date your water heater was installed.[3] The adjusted price is then amortized over 15 years (the expected useful life of the water heater).[4]

**Remember:**

When you purchase your Enbridge Home Services water heater, our rental arrangement ends. You will be under no obligation to pay rent for subsequent months and you will be responsible for service and maintenance of your water heater.

**Need Help?**

The chart on this table shows prices for almost all types of Enbridge Home Services rental water heaters.[5] If your water heater is not covered, or if you are not sure what type of water heater you have or when it was installed, please call Enbridge Home Services at [1-800 ___-____].

Our rental specialists will also be pleased to answer any questions you may have about your water heater options.

---

[3] Discounting to take into effect the impact of inflation is done using the Ontario Consumer Price Index as determined by Statistics Canada.

[4] The amortization was based on a standard mortgage table with an interest cost of 5.8% and a 15 year term.

[5] The natural gas water heaters included in the buy-out schedule, CV40, CV50, CV60, PV50, DV50, and PV75, represent 1.15 million of ESI's 1.20 million rental water heaters. This represents 96% of ESI's installed rental water heater base.

[23] SCHEDULE "D"

# Rental Water Heater Agreement
# Terms & Conditions

## Our Commitment

The water heater you rent from us is backed fully by Enbridge Services Inc. Our commitment to you, our rental customer, is to provide a reliable, trouble-free water heater. Our commitment includes:

- Repair and maintenance of the water heater with no service charges or parts replacement charges except in the following circumstances:

  (i) if you (or a third party not authorized by us) damage the water heater or if repairs are necessary because of use for which the water heater was not intended;

  (ii) if the water heater requires de-liming, flushing or other repair due to water conditions (we cover only diagnostic work in these situations); or

  (iii) where venting or piping requires cleaning, repair or replacement.

- Our 24-hour per day, 7 days per week emergency phone number.
- A rental arrangement that can be transferred to the next homeowner if you sell your home.
- A buy-out option under which you may elect to purchase your water heater at any time, for a price discounted to take into account the age of the water heater. (See details below.)
- A termination option allowing you to have your water heater removed (see details below).

## Customer Commitment

We will honour our commitment over the useful life[6] of the water heater. In return, you agree that:

- You will pay your rental charges when due, together with interest on any late payments at interest rates we may set, acting reasonably.
- We may change our rental rates from time to time by announcing rate changes in advance in bill inserts. (During any periods while you are subject to removal charges (see below), your rate increases will not exceed a percentage corresponding to the cumulative rate of inflation in Ontario since our last rate increase.)
- You will use your water heater safely and responsibly, and in particular you will:

  (i) ensure that no combustible, hazardous or flammable materials are used or stored near the water heater;

  (ii) ensure that the water heater is not confined in a location where it is difficult to service or remove or where there is inadequate ventilation;

---

[6] Useful life of the rental water heater ends when Enbridge Home Services or its authorized service provider deems the rental water heater cannot be reasonably repaired. (For instance, when there is terminal failure of the internal lining of the tank or when the water heater requiring repair is greater than 15 years old.)

(iii) ensure that vents and openings are kept clear and clean; and

(iv) provide us with access to the water heater whenever reasonably required for purposes of inspection, repair or removal.

- It is your responsibility to ensure that the water heater is located in an area with sufficient drainage in the vicinity and that the drainage is open and unrestricted, and that we will therefore not be responsible for damage caused if the water heater leaks.
- Except as permitted by your buy-out option and termination option under this agreement, you will not permit anyone who has not been authorized by us to service, repair, modify, move or disconnect the water heater.
- You will be responsible for any damage to the water heater if caused by you or unauthorized third parties or by fire, flood, accident or other insurable risks.
- During the term of this agreement the water heater remains our property, does not become a fixture, and you will not tamper with any tag(s) or sticker(s) identifying the water heater as rented equipment.
- If you sell your home, you will advise the purchaser that the water heater is rented pursuant to this agreement. We will permit the purchaser to assume your rights and obligations under this agreement, effective from the date of sale, provided that (i) the purchaser is notified in the agreement of purchase and sale that the water heater is rented and is subject to these terms and conditions, and (ii) you advise us in advance of the purchaser's name and the intended date of sale. We may also accept performance of your obligations (including payment obligations) from other parties (such as tenants), but will not be required to do so.
- We may choose to retain a copy of this document in electronic form only.
- We may inquire about your credit history.
- You agree that we may terminate this agreement and remove the water heater if you fail to meet any of your commitments.
- At the end of the useful life of your present water heater, you are not obligated to rent and we are not obligated to supply replacement equipment, unless we mutually agree at the time.

**Your Buy-out Option**

- You may purchase your rental water heater at any time for the applicable age-reduced price shown on the buy-out schedule attached to this agreement. You may exercise your buy-out option by notifying us in writing or by calling an Enbridge Home Services rental specialist at [ ].
- When you exercise your buy-out option, you accept the water heater in "as is" condition, subject to the balance of any transferable manufacturer's warranty and you assume responsibility for the water heater and its repair and maintenance. You also agree to pay the buy-out price when invoiced by Enbridge Home Services.

**Your Termination Option**

- You may terminate your rental and return your rental water heater to us at any time by notifying us in writing or by calling an Enbridge Home Services rental specialist at [ ]. Depending on the circumstances, there may or may not be charges associated with this termination of your rental as provided for below.
- If you terminate your rental less than five (5) years after the date your rental water heater was installed, you agree to pay a [removal charge/exit fee]. This charge is $125.00 during the first year and declines by $10.00 per year over the next four (4) years. After the fifth year there is no [removal charge/exit fee].
- If you terminate the rental during the useful life of your water heater and do not exercise your buy-out option, you agree to arrange for the safe return of the water heater to us. You have two alternatives:

(i) you may call us and arrange for Enbridge Home Services to disconnect and/or retrieve the water heater; or

(ii) you may have a qualified third party disconnect your rental water heater and then return it safely to a designated Enbridge Home Services location during return hours. (Call Enbridge Home Services for the nearest location for returns.)

- If you choose to disconnect and/or return the water heater yourself or through a third party, you do so at your own risk and you agree that you will accept responsibility for all damages or claims resulting from the disconnection, removal and return of the water heater.
- If you choose to have Enbridge Home Services disconnect, remove or retrieve the rental water heater, in most cases there will be a $75.00 charge for these services. (There is no charge if you are more than 32 km. (20 miles) from an Enbridge return location or if we fail to retrieve your water heater within two weeks of your request or your water heater has been rented for 15 years or more.)
- Your rental (including your obligation to make rental payments for subsequent months) ends upon the return of the water heater in reasonable condition reflecting its age, normal use and local conditions. (If we fail to retrieve the water heater within two weeks of your request, we will not charge rent for subsequent months.)

COUNSEL

For the applicant:

The Commissionner of Competition

Josephine A.L. Palumbo

For the respondent:

Enbridge Services Inc.

David M. Purdy
William G. VanderBurgh
Fred D. Cass

**TAB 10**

CT - 94 / 1

IN THE MATTER OF an application by the Director of Investigation and Research under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain practices by The D & B Companies of Canada Ltd.

BETWEEN:

The Director of Investigation and Research

Applicant

- and -

The D & B Companies of Canada Ltd.

Respondent

- and -

Information Resources, Inc.
Canadian Council of Grocery Distributors

Intervenors

**CONSOLIDATED ORDER**

**Dates of Hearing:**

October 17-21, 24-28, 31, 1994;
November 1, 2, 4, 1994;
April 3, 10-13, 18-21, 25-28, 1995

**Presiding Member:**

The Honourable Mr. Justice William P. McKeown

**Lay Members:**

Dr. Frank Roseman
Mr. Victor L. Clarke

**Counsel for the Applicant:**

**Director of Investigation and Research**

Donald B. Houston
Bruce C. Caughill

**Counsel for the Respondent:**

**The D & B Companies of Canada Ltd.**

John F. Rook, Q.C.
Randal T. Hughes
Lawrence E. Ritchie
Karen B. Groulx

**Counsel for the Intervenors:**

**Information Resources, Inc.**

Calvin S. Goldman, Q.C.
Gavin MacKenzie
Geoffrey P. Cornish

**Canadian Council of Grocery Distributors**

Paul Martin

**COMPETITION TRIBUNAL**

**CONSOLIDATED ORDER**

---

***The Director of Investigation and Research***

*v.*

***The D & B Companies of Canada Ltd.***

UPON APPLICATION by the Director of Investigation and Research ("Director") for an order under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND ON HEARING the evidence and the submissions of counsel for the parties and the intervenors;

AND UPON CONSIDERING THAT the intervenor, Information Resources, Inc. ("IRI") has undertaken to the Tribunal that it will not enter into any exclusive contracts for the retailer scanner data of retailers in Canada if the respondent is so prohibited;

AND FOR THE REASONS issued on this date under separate cover;

THE TRIBUNAL ORDERS THAT:

**Definitions**

1. In this order,

(a) "Retailer" means a grocery or drug retailer only;

(b) "Retailer scanner data" means product identifying information provided on the bar-coded label affixed by a manufacturer to products as well as data input by a retailer of such products, which may include store identification, time of purchase and price, all of which is recorded by the retailer's scanning apparatus;

(c) "Scanner-based" means based in whole or in substantial part on scanner data; and

(d) "Market tracking service" means a service used to monitor the progress and competitive position of a product over time.

**Retailer Contracts**

2. (1) The respondent shall not enter into a contract which precludes or restricts a supplier of retailer scanner data from providing a supplier or potential supplier of a scanner-based market tracking service with access to scanner data or causal data necessary for the provision of that service.

(2) The respondent shall not offer an inducement to a supplier of retailer scanner data to restrict access by a supplier or potential supplier of a scanner-based market tracking service to scanner data or causal data necessary for the provision of that service.

(3) Without limiting the generality of subparagraphs (1) and (2), the respondent shall not enter into a contract with a supplier of retailer scanner data which prescribes or limits the terms upon which the supplier of retailer scanner data may make its scanner data or causal data necessary for the provision of a scanner-based market tracking service available to a supplier or potential supplier of that service.

(4) For a period of 24 months from the date of this order, the respondent shall not enter into a contract with a supplier of retailer scanner data which requires the supplier of retailer scanner data, if it makes its data available to a supplier or potential supplier of a scanner-based market tracking service on more favourable terms, to make those terms available to the respondent.

3. (1) The respondent shall not enforce provisions in the respondent's existing contracts which preclude or restrict a supplier of retailer scanner data from providing access to scanner data or causal data necessary for the provision of a scanner-based market tracking service to a supplier or potential supplier of that service.

(2) Without limiting the generality of subparagraph (1), the respondent shall not enforce the following provisions in its existing contracts:

(a) "exclusivity" provisions which preclude or restrict a supplier of retailer scanner data from making scanner data or causal data necessary for the provision of a scanner-based market tracking service available to a supplier or potential supplier of that service;

(b) "preferred supplier status" provisions which preclude or restrict a supplier of retailer scanner data from making scanner data or causal data necessary for the provision of a scanner-based market tracking service available to a supplier or potential supplier of that service, or which provide for lower payments by the respondent if the data are made available to a supplier or potential supplier of that service; and

(c) provisions which prevent a supplier of retailer scanner data from making scanner data or causal data necessary for the provision of a scanner-based market tracking service available to a supplier or potential supplier of that service on terms as or more favourable than those under which it is made available to the respondent, or which require the supplier of retailer scanner data, if it makes its data available to a supplier or potential supplier of a scanner-based market tracking service on more favourable terms, to make those terms available to the respondent.

**Manufacturer Contracts**

4. (1) The respondent shall not enforce any provisions in its existing contracts for the supply of scanner-based market tracking services which

(a) prevent the customer from giving notice of termination during any "minimum commitment period";

(b) require the customer to give more than eight months notice; or

(c) require the customer to pay a penalty or lose a discount for early termination of its contract with the respondent.

(2) For a period of 18 months from the date of this order, the respondent shall not enter into any contracts for the supply of scanner-based market tracking services which

(a) prevent the customer from giving notice of termination during any "minimum commitment period";

(b) require the customer to give more than eight months notice; or

(c) require the customer to pay a penalty or lose a discount for early termination of its contract with the respondent.

**Historical Scanner Data**

5. (1) This paragraph shall have effect for nine months from the date of this order.

(2) Subject to subparagraph (3), upon the request of a supplier or potential supplier of a scanner-based market tracking service, including IRI, and if directed to do so by a supplier of retailer scanner data which has not retained its own historical scanner data for the relevant period, the respondent shall provide to the supplier or potential supplier of a scanner-based market tracking service the historical scanner data which it has for that supplier of retailer scanner data for the fifteen months prior to the request by the supplier or potential supplier of the service, whether the data are in the form originally received from the retailer or otherwise. The respondent shall be entitled to take reasonable steps to clean up its historical data in order to protect its sample design and related proprietary data.

(3) The respondent need not comply with the request by a supplier or potential supplier of a scanner-based market tracking service if the supplier or potential supplier of the service does not agree:

(a) to pay 50 percent, if only one request is received for the data, or a proportional share, if more than one request is received for the data, of any reasonable, documented costs already incurred by the respondent in cleaning up the historical scanner data where the data are no longer in their original form;

(b) to pay 100 percent of the respondent's reasonable expenses of providing the data to the supplier or potential supplier of the service; and

(c) to pay 100 percent, if only one request is received for the data, or a proportional share, if more than one request is received for the data, of any reasonable, documented costs incurred by the respondent in manipulating or reformatting the historical scanner data in order to mask its sample design prior to providing the data to the supplier or potential supplier of the service.

(4) In the event of a disagreement regarding the terms of this paragraph, the Director or the respondent may apply to the Tribunal for further directions.

**General**

6. The respondent shall forthwith deliver copies of this order to all persons to whom it presently supplies scanner-based market tracking services and to all persons from whom it presently obtains scanner data.

7. (1) For a period of two years from the date of this order, the respondent shall, upon the request of the Director, provide copies of

(a) any contract or proposal pertaining to the supply of retailer scanner data or causal data necessary for the provision of a scanner-based market tracking service, and

(b) any contract, service request, letter of intent or proposal pertaining to the provision of scanner-based market tracking services by the respondent, which may be required by the Director for purposes of monitoring compliance with this order.

(2) The Director shall treat the copies of documents obtained pursuant to this section as confidential.

8. This order applies to the successors and assigns of the respondent.

9. In the event of a dispute, the Director or the respondent may apply to the Tribunal for a further order interpreting any of the provisions of this order.

DATED at Ottawa, this 30th day of August, 1995.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) W.P. McKeown
W.P. McKeown

TAB 11

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

**EB-2009-0005**

**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 an Administrative Penalty against Universal Energy Corporation

## ORDER

**Whereas** pursuant to section 112.5 of the *Ontario Energy Board Act, 1998*, the Board issued a Notice of Intention to Make an Order ("Notice") for the payment of an Administrative Penalty in the amount of $200,000 against Universal Energy Corporation ("Universal") on January 5, 2009;

**And whereas** Universal was informed that it had fifteen days after receiving the Notice to give notice to the Board requiring the Board to hold a hearing and Universal has decided not to request a hearing;

**And whereas upon further review** 3 of the 7 transactions that were identified in paragraph 3 of the Notice have been withdrawn;

**And whereas** Universal has offered to provide the Board with an Assurance of Voluntary Compliance, a copy of which is attached as Appendix A (the "Assurance");

**And whereas** Universal has agreed to pay a reduced amount of $127,500;

**NOW THEREFORE THE BOARD ORDERS THAT:**

Pursuant to section 112.5 of the Act, the Board directs Universal to pay an administrative penalty in the amount of $127,500 by cheque payable to the Ontario Energy Board on or before February 20, 2009.

**DATED** at Toronto, January 20, 2009.

*Original signed by*

Kirsten Walli
Board Secretary

# Assurance of Voluntary Compliance
# Pursuant to s. 112.7 of the
# *Ontario Energy Board Act, 1998*

**Universal Energy Corporation**

**EB-2009-0005**
**January 20, 2009**

## I. INTRODUCTION

By Notice of Intention to Make an Order (the "Notice") under section 112.5 of the *Ontario Energy Board Act, 1998*, (the "Act") for an administrative penalty issued January 5, 2009 the Board announced that it intended to make an order against Universal Energy Corporation ("Universal") to pay an administrative penalty in the amount of $200,000.

Pursuant to s. 112.2(4) Universal was advised that it could, within 15 days after receiving the Notice, give notice to the Board requiring the Board to hold a hearing.

While Universal has addressed many of the issues identified in the Notice and does not agree with all of the allegations contained in the Notice, Universal has agreed to pay a reduced amount of $127,500 and the Board has accepted payment of this reduced amount on, inter alia, the following grounds:

a) Universal has agreed to enter into an Assurance of Voluntary Compliance on the terms contained herein;
b) The vast majority of customer calls and transactions that were the subject of the Notice occurred during the period March – May 2007;
c) The vast majority of the customer calls and transactions that were the subject of the Notice were caught by Universal's Quality Assurance department and did not result in customer enrollments;
d) 3 of the 7 transactions that were identified in paragraph 3 of the Notice have been withdrawn;
e) In response to Board compliance staff's request for remedial action, Universal voluntarily re-trained its customer service representatives, changed its customer scripts as necessary and submitted them to Board staff for review, and offered to contact and agree to cancel affected customers.

## II. ASSURANCE OF VOLUNTARY COMPLIANCE

Universal commits to the following:

1. Any low-volume consumer ("consumer" ) who was supplied electricity as a result of a reaffirmation call completed during the period covered by the Formal Review (March to May 2007) or the Retail Compliance Review (June 2008), in which one of the alleged misleading statements (as specified in paras. 1(a)-(c) and 2(a)-(e) of the Notice) was made, may request cancellation of his or her contract, in which case, the consumer's contract will be cancelled without penalty, the consumer's supply will be returned to the applicable utility's regulated supply and the consumer reimbursed for 100% of the difference between the contract price and the applicable regulated electricity price for the period that Universal had supplied the consumer.

2. For a period of eighteen months, Universal commits to conducting quality assurance audits of all positive reaffirmation calls. These reviews will be conducted in the manner described by Universal in the filings with the Board in response to the Information Request dated August 19, 2008 (Retail Compliance Review), except that Universal will perform the review within a week of the reaffirmation calls. Universal commits to file a quarterly report to the Compliance Office that identifies the volume of positive reaffirmations conducted in the quarter and the results of the quality assurance program, including any remedial actions taken.

3. For a period of eighteen months, Universal commits to report in a quarterly report to the Compliance Office on any disciplinary action taken as the result of its quality assurance audits of all positive reaffirmation calls.

4. For a period of eighteen months, Universal commits to provide to the Board on a confidential basis a copy of all of its reaffirmation scripts and all prepared materials for use by reaffirmation agents (e.g. Q&As and rebuttal scripts), within 3 business days of such reaffirmation scripts and materials being implemented by Universal.

**Dated:** January 20, 2009

**TAB 12**

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

**EB-2009-0006**

**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 an Administrative Penalty against Summitt Energy Management

## ORDER

**Whereas,** this Order supercedes and replaces in its entirety the Order dated January 21, 2009.

**Whereas,** pursuant to section 112.5 of the *Ontario Energy Board Act, 1998* (the "Act"), the Board issued a Notice of Intention to Make an Order for the payment of an Administrative Penalty against Summitt Energy Management ("Summitt") on January 5, 2009.

**And whereas** Summitt has provided the Board with an Assurance of Voluntary Compliance, a copy of which is attached as Appendix A (the "Assurance") and has voluntarily agreed to pay the amount of $70,000.00 to the Board on or before February 20, 2009.

**And whereas,** the Board has determined that the Assurance and the terms set out therein along with the payment of $70,000 settles this matter.

**THEREFORE THE BOARD ORDERS THAT:**

pursuant to s. 112.5 of the Act Summitt pay an administrative penalty in the amount of $70,000 by cheque payable to the Ontario Energy Board on or before February 20, 2009.

Notwithstanding that the date of the herein Order is January 30, 2009 it has effect from January 21, 2009 and operates as if it was issued on such date.

**DATED** at Toronto, January 30, 2009.

*Original signed by*

Kirsten Walli
Board Secretary

# Assurance of Voluntary Compliance Pursuant to s. 112.7 of the *Ontario Energy Board Act, 1998*

**Summitt Energy Management Inc.**

**EB-2009-0006**
**January 20, 2009**

**Table of Contents** **Page**

## I. INTRODUCTION

By Notice of Intention to Make an Order under section 112.5 of the *Ontario Energy Board Act, 1998*, (the "Act") for an administrative penalty, issued January 5, 2009 (the "Notice") the Board announced that it intended to make an order against Summitt Energy Management ("Summitt") to pay an administrative penalty in the amount of $100,000. Pursuant to s. 112.2(4) Summitt was advised that it may, within 15 days after receiving the notice, give notice to the Board requiring the Board to hold a hearing. Summitt has elected not to request a hearing and in order to fully and finally resolve this matter Summitt is prepared to pay an administrative penalty in the amount of $70,000 and enter into this Assurance of Voluntary Compliance.

## II. ASSURANCE OF VOLUNTARY COMPLIANCE

While Summitt has addressed many of the issues identified in the Notice and does not necessarily agree with all of the allegations contained in the Notice, Summitt has agreed to pay a reduced amount of $70,000 and the Board has accepted payment of this reduced amount on, inter alia, the following grounds:

1. If Summitt receives a complaint from a consumer and Summitt is satisfied that the record confirms that the consumer has been supplied energy as a result of a reaffirmation call completed during the period covered by the Formal Review (September 2007 to April 2008) and the Retail Compliance Review (March 28, 2008 to June 13, 2008), and the consumer was offered

a 10 day rescission of the reaffirmation on that reaffirmation call, Summitt will agree with the consumer that the consumer's contract will be terminated, the consumer's supply will be returned to the applicable utility's regulated supply and the consumer reimbursed for 100% of the difference between the contract price and the applicable regulated energy price for the period that Summitt had supplied the consumer.

2. For a period of eighteen months, Summitt commits to conducting quality assurance audits of at least 20% of its reaffirmation calls commencing no later than February 1, 2009. For contracts entered into after that date, the reviews will be conducted in the manner described in the filings with the Board in response to the Information Request dated August 19, 2008 (Retail Compliance Review), except that Summitt will perform them on a weekly basis with respect to the previous week's calls. For a period of eighteen months, Summitt commits to file a quarterly report to the Compliance Office that identifies the volume of positive reaffirmations conducted in the quarter and the results of the quality assurance program, including remedial steps taken.
3. Summitt commits to establishing a reaffirmation agent discipline program (similar to its existing door-to-door agent program), that sets out the discipline and remedial steps taken to correct the issue (i.e. retraining, suspension, termination etc) by no later than February 1, 2009.

4. For a period of eighteen months, Summitt commits to provide to the Board on a confidential basis a copy of its reaffirmation scripts and all prepared materials for reaffirmation agents (e.g. Q&As and rebuttal scripts), within three business days of such reaffirmation scripts and materials being implemented by Summitt.

Dated: January 20, 2009

**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.

**EB-2009-0308**

# WRITTEN SUBMISSIONS OF COMPLIANCE COUNSEL


**STIKEMAN ELLIOTT LLP**
Barristers & Solicitors
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


99