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August 5, 2011

COURIER

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

Dear Ms. Walli:

Re: EB 2011-0087
Application commenced by M. Snopko et al.

Enclosed please find two copies of the Reply Submission and the Book of Authorities of Union Gas Limited with respect to the motion brought by Union Gas Limited in the above-noted proceeding.

Yours truly,

Emily Kirkpatrick

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EK/tm
Enclosures
cc: Donald R. Good

EB-2011-0087

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

AND IN THE MATTER OF an Application by Marie Snopko, Wayne McMurphy, Lyle Knight, and Eldon Knight under section 19 of the *Ontario Energy Board Act*, 1998, S.O. 1998, for an Order of the Board determining that the contracts, filed with the Application, between the Applicants and Union Gas Limited/Ram Petroleums Limited have been terminated;

AND IN THE MATTER OF an Application by Marie Snopko, Wayne McMurphy, Lyle Knight, and Eldon Knight under section 38(2) of the *Ontario Energy Board Act*, 1998, S.O. 1998 for an Order of the Board determining the quantum of compensation the Applicants are entitled to have received from Union Gas Limited and Ram Petroleums Limited.

REPLY SUBMISSION OF UNION GAS LIMITED

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Counsel for Union Gas Limited

EB-2011-0087

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

AND IN THE MATTER OF an Application by Marie Snopko, Wayne McMurphy, Lyle Knight, and Eldon Knight under section 19 of the *Ontario Energy Board Act*, 1998, S.O. 1998, for an Order of the Board determining that the contracts, filed with the Application, between the Applicants and Union Gas Limited/Ram Petroleums Limited have been terminated;

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REPLY SUBMISSION OF UNION GAS LIMITED

1. This is the reply submission of Union Gas Limited ("Union") to the Applicants' Response to Notice of Motion ("Response") dated July 21, 2011.

2. Union repeats and relies on the grounds for the motion set out in its Notice of Motion dated June 22, 2011.

3. In their Response, the Applicants adopt two distinct lines of argument. The first is that this Application raises issues pertaining to the jurisdiction of the Ontario Energy Board ("the Board") on which Union has allegedly taken inconsistent positions in the past. This argument is a red herring and should be disregarded. Quite apart from the fact that the Applicants' allegations have no impact on this motion (other than an admitted attempt to invoke the sympathy of the Board), they are entirely unfounded. As described below, Union's position on the Board's jurisdiction has remained consistent, and the Applicants' argument to the contrary is based solely on their own legal misapprehensions.

4. The second line of argument advanced by the Applicants is that the Board should find, on the basis of a collection of authorities interpreting a now-superceded version of a rule of

Ontario civil procedure, that the issues raised by Union are not amenable to summary judgment. In fact, as outlined below, it is the Applicants who have failed to meet their burden on this summary judgment motion. It is the Applicants who cannot point to any issue that requires a hearing by the Board.

Applicants' Response Contains Baseless Allegations Founded on Legal Misapprehension

5. The Applicants' Response relies heavily on the unfounded and erroneous assertion that Union has repeatedly changed its position with respect to whether the Board has the jurisdiction to determine the issues raised in this Application. This purported change in position forms the basis for a variety of inflammatory accusations by the Applicants, including that Union has deliberately misled the Board in prior proceedings, and that it has engaged in delay tactics designed to prejudice the Applicants.

> Response to Notice of Motion, see paras. 9, 13, 40-41 and 52-53 in particular, Responding Motion Record of the Applicants ("Applicants' Motion Record"), Tab 1

6. Union's position has always been that the Board has exclusive jurisdiction over all issues pertaining to just and equitable compensation contemplated by s. 38 of the *Ontario Energy Board Act* ("the Act"). This position has been maintained throughout the proceedings referred to by the Applicants in their Response. The Applicants' erroneous arguments to the contrary appear to be based on their own misapprehension of the distinction between the concepts of "jurisdiction" and "standing".

Distinction Between Jurisdiction and Standing.

7. "Jurisdiction" refers to the authority of a court or tribunal to make an inquiry into a certain subject matter. The authority of an administrative tribunal (such as the Board) over a particular subject matter is to found in the tribunal's authorizing statute.

> *Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 59, Book of Authorities of Union Gas Limited ("Union BOA"), Tab 1
>
> *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* (1993), 85 BCLR (2d) 85, para. 12, Union BOA, Tab 2

8. By contrast, "standing" refers to the legal entitlement of a person or entity to invoke the jurisdiction of a court or tribunal. Whether or not a person or entity has standing before a given court or tribunal depends in part on whether their case raises any issue in respect of which the court or tribunal can grant any relief.

> *Saanich Inlet Preservation Society v. Cowichan Valley (Regional District)* (1983), 44 BCLR 121, para. 1, Union BOA, Tab 3

9. In the 2000[1] Application to the Board brought by Lambton County landowners (including the Applicant Snopko and the father of the Applicant McMurphy) for just and equitable compensation (RP-2000-0005), an issue of standing was raised. In that proceeding, Union admitted that the Board had jurisdiction over issues concerning just and equitable compensation. It argued however, that, where parties had existing compensation agreements with Union, the validity of which were not in dispute, those parties had no issues that fell within the scope of s. 38(2) or (3) of the Act. Accordingly, Union argued that those parties had no standing before the Board.

> Affidavit of Bill Wachsmuth ("Wachsmuth Affidavit"), paras. 26-31 and Exhibits V-X, Motion Record of Union Gas Limited ("Union Motion Record"), Tabs 2 and 2(V)-(X)
>
> Transcript, RP-2000-0005, June 12, 2003, paras. 127-128, Union BOA, Tab 4

10. In its Decision on standing, the Board confirmed Union's position.

> Decision and Order, RP-2000-0005, September 10, 2003, Union Motion Record, Tab 2(Y)

11. In the Applicants' 2008 action before the Ontario Superior Court of Justice, Union took the position that the Ontario courts had no jurisdiction to make inquiries into questions that amounted to issues of just and equitable compensation, because the jurisdiction over this subject matter lay exclusively with the Board by virtue of s. 38(3) of the Act. Both Justice Desotti and the Court of Appeal confirmed this position and dismissed the Applicants' action.

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[1] In their Response (see para. 5), the Applicants mistakenly identify this proceeding as occurring in 2004. The Application was commenced in 2000, and the Board's decision on standing, referred to in the Response, was issued on September 10, 2003.

Snopko v. Union Gas Ltd., 2009 CarswellOnt 9447 (Ont. S.C.J.), paras. 8 and 9, Union BOA, Tab 5

Snopko v. Union Gas Ltd., 2010 ONCA 248, paras. 24-26, Book of Authorities of the Applicants ("Applicants' BOA"), Tab 9

12. The Applicants conflate the concepts of jurisdiction and standing, and therefore wrongly conclude that the outcomes of the 2000 Board proceeding and the Applicants' civil action are somehow incompatible. They are not. As Union has argued throughout, and as the Courts and the Board have confirmed, the Board has exclusive jurisdiction to deal with just and equitable compensation under the Act, but no person has standing to raise an issue of just and equitable compensation under the Act where that person is a party to an existing, unchallenged agreement dealing with compensation.

13. Union's position on the jurisdiction of the Board has remained consistent throughout its dealings with the Applicants, and has been endorsed by both the Board and the Courts. The Applicants' assertion to the contrary is entirely without foundation, as are their various inflammatory allegations with respect to Union's purported bad faith on this issue.

The Applicants Rely on Obsolete Authorities for Summary Judgment and, in Any Event, Identify No Issue Requiring a Hearing

14. In their Response, the Applicants argue that the issues that Union has identified as being appropriate for summary judgment ought not to be disposed of in that way. The basis for their argument is a collection of jurisprudence addressing a now-outdated version of rule 20 of the Ontario *Rules of Civil Procedure*, and the Applicants' own bald assertion that "it is clear that... each of the issues Union wishes to dismiss... raise [sic] a triable issue."

Response, paras. 30-38, Applicants' Motion Record, Tab 1

15. The purpose of the summary judgment procedure under rule 20 (on a motion by a defendant) is to remove from the process leading to trial any claims in respect of which it is clearly demonstrated that a trial is unnecessary. The procedure is a recognition that where a trial would serve no purpose, to require a defendant to submit to the inconvenience, expense and delay associated with a trial would be a failure of procedural justice.

Dawson v. Rexcraft Storage & Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at 269, para. 20, Union BOA, Tab 6

Ford Motor Co. of Canada Ltd. v. Ontario Municipal Employees Retirement Board (1997), 36 O.R. (3d) 384 (C.A.), paras. 44-45, Union BOA, Tab 7

Rule 20 Authorities Cited by the Applicants Are Out of Date

16. In 2010, rule 20 was overhauled to considerably expand the scope of summary judgment before Ontario Courts. In their Response, the Applicants fail to acknowledge this significant change. Instead, each and every one of the cases they rely on is a case interpreting the pre-2010 version of the rule.

17. It is clear that several of these cases are no longer good authority for the propositions on which the Applicants rely. For example, the Applicants cite *Aguonie v. Galion Solid Waste Material Inc.* for the proposition that "the court will never assess credibility, weigh the evidence, or find the facts." This proposition has clearly been overturned by the very wording of the post-2010 version of rule 20: "the judge may exercise any of the following powers... (1) Weighing the evidence... (2) Evaluating the credibility of a deponent... (3) Drawing any reasonable inference from the evidence."

Response, para. 32, Applicants' Motion Record, Tab 1

Rules of Civil Procedure, R. 20.04(2.1), Applicants' BOA, Tab 1

18. In light of the considerable expansion of rule 20, it is respectfully submitted that the Board should exercise caution in accepting any of the outdated interpretations of that rule offered by the Applicants in their Response.

In Any Event, the Applicants Cannot Even Identify a Genuine Issue for Trial

19. However, the real problem the Applicants face goes well beyond their reliance on outdated authorities. The Applicants' real problem is that they can point to no genuine issue for trial among the issues Union has identified as being appropriate for summary judgment.

20. On a summary judgment motion, an adjudicator must determine whether there is a genuine issue of material fact that requires a trial for its resolution. In doing so, the

adjudicator must take a "hard look" at the evidence, based on each party putting "its best foot forward". A responding party (the Applicants in this case) cannot rely solely on allegations or denials in their evidence, but must set out specific facts showing that there is a genuine issue requiring a trial.

> *Cuthbert v. TD Canada Trust*, 2010 ONSC 830, paras. 11-12, Union BOA, Tab 8
>
> *Rules of Civil Procedure*, R. 20.02(2), Union BOA, Tab 9

21. Despite the Applicants' bald assertion that "each of the issues Union wishes to dismiss... raise [sic] a triable issue", they have not pointed to any evidence of such an issue. As set out in further detail below, all of the issues raised by Union in its Notice of Motion can and should be dismissed.

No Genuine Issue Concerning Time Limitations on Decades-Old Claims

22. In its Notice of Motion, Union asks that the Board summarily dismiss the Applicants' claim as it pertains to agreements entered into by the Applicants between 1976 and 1993, and as it pertains to actions taken by Union at various times prior to 1995.

> Notice of Motion, paras. 19-25, Union Motion Record, Tab 1

23. Allowing the Applicants to bring these claims, after the Applicants spent well over a decade choosing not to bring them, would cause harms to be realized that limitation periods are intended to guard against. These include (a) the entitlement of potential defendants to "peace and repose" after a reasonable period of time; (b) evidentiary concerns with stale and unreliable testimony and lost documents; and (c) the economic consequences to those who provide goods and services of possible future liability of a magnitude unknown, the costs of which are ultimately passed on to the consumer.

> Graeme Mew, *The Law of Limitations*, 2nd Ed., Markham: LexisNexis Canada Inc., 2004, pp. 12-13, Union BOA, Tab 10

24. In their Response, the Applicants attempt to circumvent the problem of their decades-old claims by arguing (1) that they were not required to bring their claim until after the issue of jurisdiction in this case was settled by the Court of Appeal; (2) that the delay in

bringing their claim was Union's fault; and (3) that there is some unspecified "discoverability" issue in this case. As set out below, each of these arguments is entirely meritless on its face.

Response, paras. 39-43, Applicants' Motion Record, Tab 1

25. **Suggestion that the Applicants Could Wait Until the Court of Appeal's Decision to Bring their Claim is Wrong in Law.** The Applicants argue that "[s]ince the issue of jurisdiction respecting this matter has only been finally settled by the Court of Appeal as of April 7, 2010, the Applicants are well within limitation periods to bring their Application."

Response, para. 39, Applicants' Motion Record, Tab 1

26. The Applicants' argument amounts to this: because they brought a potentially out-of-time claim, in the wrong forum, the clock should not be deemed to have started running on this Application until the Courts properly rejected the Applicants' claim on jurisdictional grounds.

27. The first problem with this argument is that it ignores the fact that the Applicants' civil claim before the Superior Court of Justice and the Court of Appeal was, itself, arguably brought outside the applicable limitation period.[2] When viewed in light of this fact, the Applicants' argument is clearly incorrect: they are arguing that the Ontario Courts' determinations that the Applicants picked the wrong forum for their claim has the effect of foreclosing Union's ability to argue in this Application (as it did throughout the Ontario court proceedings) that the Applicants' claims are out of time.

28. Put simply, it cannot be the case that an applicant can re-start a limitation clock in one forum by bringing a claim (incorrectly) in another.

29. The Applicants' second problem is that their argument in this regard is that it is wrong in law. The very argument being advanced by the Applicants has been considered and

[2] This issue was raised and argued by Union at both levels of the Ontario Courts. Both Justice Desotti and the Court of Appeal determined that there was no need to determine this issue because the case could be dismissed on the basis of the jurisdiction issue.

rejected by other Ontario administrative tribunals, who have held that "the fact that [an] applicant was pursuing a remedy in another forum is no excuse for not bringing [a] complaint earlier." Where, as here, there has been extreme, undue delay in bringing a claim, an applicant's argument that they were busy pursuing other remedies will not be sufficient.

> *Chrysler Canada Ltd.*, [1997] O.L.R.D. No. 2605, para. 24, Union BOA, Tab 11
>
> *Missisauga (City)*, [2005] O.L.R.D. No. 152, para. 9, Union BOA, Tab 12

30. **Suggestion that the Delay is Union's Fault is Based on Legal Misapprehension.** The Applicants argue that the decades-long delay in bringing their claims before the Board was caused or materially contributed to by Union's purported change in position on the issue of the Board's jurisdiction over this matter.

> Response, para. 40, Applicants' Motion Record, Tab 1

31. The first problem with this argument is that it ignores the fact that, when the issue of standing was argued in 2003[3], the actions that the Applicants complain of were already years past, and the contracts that the Applicants refer to had been in place for well over a decade. Even if the Applicants could make out a plausible case with respect of Union's purported change in position, it would not assist them in explaining away these significant delays that had already occurred by 2003.

32. Secondly, as described in detail above, the Applicants cannot make out any plausible case with respect to Union's purported change in position. As set out above, Union's position on the jurisdiction of the Board has remained consistent, and the Applicants' confusion in this regard is based on their own conflation of the concepts of "jurisdiction" and "standing". Union cannot be responsible for delays caused by the Applicants as they launched arguments on these points before the Board and before the Courts, only to have Union's position confirmed at every instance.

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[3] See footnote 1 regarding the timing of the 2000 Board Proceeding.

33. **Any Possible "Discoverability" Issue is Refuted by the Applicants' Own Admitted Facts.** The Applicants' final attempt to circumvent the limitation period issue in this case is to argue that, for some unspecified reason, "the discoverability rule is very much at issue in this case."

34. Quite apart from the fact that a bald assertion that "the discoverability rule is at issue" cannot meet the Applicants' burden of "putting their best foot forward", and "setting out specific facts" on summary judgment, there are admitted facts in this case establishing that the principle of discoverability cannot possibly be in effect.

35. The principle of discoverability refers to the concept (now entrenched in the Ontario *Limitations Act*) that clock should not start running on a limitation period until a claimant knew or ought to have known about their claim.

> Graeme Mews, *The Law of Limitations*, *supra*, p. 48, Union BOA, Tab 10
>
> *Limitations Act*, (2002), SO 2002, c 24, Sch. B, s. 5, Union BOA, Tab 13

36. In the present Application, there is no dispute that the Applicants have known of the issues they raise for at least a decade. The Applicants' own record in this case is replete with examples demonstrating their awareness of their purported claims against Union and their assertions of these purported claims.

37. For example, the very wording of the Applicants' Application admits that that "[s]ince 1994… the Applicants have on several occasions approached Union to resolve the oil product issue to no avail".

> Application, para. 30(c)
>
> See also Letter from John Snopko to Union dated October 25, 2004, Union Motion Record, Tab 2(DD)

38. Similarly, in their Response to this very motion, the Applicants admit to having brought an Application in 2000[4] that raised "essentially...the same issues and requested remedies as the current Application".

Response, para. 5, Applicants' Motion Record, Tab 1

39. On the basis of facts admitted by the Applicants, themselves, they were aware of the issues raised by this action by 2000 (and likely significantly earlier). There is no discoverability issue in this case.

No Genuine Issue Concerning Effect of the Designation Order

40. On this motion, Union asks that the Applicants' requested relief in respect of contracts entered into prior to 1993 (the "Pre-1993 Agreements") be dismissed, because those contracts no longer form the basis for the relationship between Union and the Applicants.

41. As set out in Union's Notice of Motion, since the Board's Designation Order, Union has had the right to "inject gas into, store gas in and remove gas from" the Applicants' properties, and to "enter into and upon the land in the area and use the land...". The Applicants have not denied (and cannot deny) that these rights are clearly granted by the Designation Order.

Notice of Motion, para. 31, Union Motion Record, Tab 1

Wachsmuth Affidavit, paras. 21-22 and Exhibits P-S, Union Motion Record, Tabs 2 and 2(P)-(S)

42. The rights granted by the Designation Order mean that, even if the Applicants could demonstrate that Union has breached the Pre-1993 Agreements (which is denied), it would not assist them. Since 1993, Union has had the right to conduct gas operations on the Applicants' land regardless of whether a contract exists (or has been breached, or has been terminated). Accordingly, the claims by the Applicants in respect of these contracts are futile – they can result in no practical relief, and should not be considered.

Canada v. Solosky, [1980] 1 S.C.R. 821 at 833, Union BOA, Tab 14

[4] See footnote 1 regarding timing of 2000 proceeding.

Terrasses Zarolega Inc. v. Quebec (Olympic Installations Board), [1981] 1 S.C.R. 94 at 106, Union BOA, Tab 15

43. In their Response, the Applicants attempt to avoid the clear effect of the Designation Order by arguing (1) that Union's futility argument is "not relevant to most of the Applicants' issues set out in their Application" and is therefore "not an appropriate basis for summary judgement [sic]"; and (2) that "the effect of the Designation Order is limited" by alleged failures by Union to abide by the conditions set out in the Order. As set out below, both of these arguments are meritless.

44. **The Futility Argument is Highly Relevant and, in Any Event, Can Be the Basis for Partial Summary Judgment.** Union's argument concerning the futility of the Applicants' claims extends to all claims for relief based on the Pre-1993 Agreements. The Applicants' position that this argument is "not relevant to most of the Applicants' issues" is somewhat confusing given that the Pre-1993 Agreements, and their alleged termination, is a cornerstone of their Application. Indeed, it is the validity of these contracts that the Applicants argue should be a separate, bifurcated issue, determined before the Board considers the Applicants' entitlement to compensation.

Response, para. 48, Applicants' Motion Record, Tab 1

Application, paras. 1(a), 2, 20-24

45. In any event, whether or not the Applicants' claims in respect of the Pre-1993 Agreements form a significant portion of their claim does not have any effect on whether the futility issue is a proper basis for summary judgment. There is no requirement that summary judgment deal with all parts of a given claim. In fact, the Ontario *Rules of Civil Procedure* specifically contemplate that a summary judgment motion may deal with only part of a claim.

Rules of Civil Procedure, R. 20.01, Union BOA, Tab 16

46. Partial summary judgment is available to a defendant where it is demonstrated that there is no genuine issue for trial in respect of a discrete claim made among others within an action, where the elimination of the claim would shorten trial in a meaningful way or eliminate the need for a trial altogether. The elimination of such discrete claims is

conducive to procedural justice in saving the defendant the time, inconvenience and expense that would otherwise be incurred in dealing with the claim.

Ford Motor Co. of Canada Ltd., *supra*, paras. 42-46, Union BOA, Tab 7

47. **Union's Alleged Non-Compliance with the Designation Order is not an Issue Before the Board.** The Applicants' argument that "the effect of the Designation Order is limited" by alleged failures by Union to abide by the conditions set out in the Order is an attempt to muddy the issues on this motion in the hopes of conjuring up a triable issue. It should not be permitted to succeed.

48. Quite apart from the fact that the Applicants offer no evidence of any failure by Union to abide by the conditions of the Designation Order (and therefore cannot possibly meet their burden of "putting their best foot forward" and "setting out specific facts"), Union's compliance with the Designation Order is not an issue properly before the Board on this Application or this motion.

49. If the Applicants wished to challenge the Designation Order on the basis that Union has failed on comply with it, they would be free to do so by making an application to amend or revoke the designation of the Edys Mills Pool pursuant to s. 36.1(1)(b) of the Act.

Ontario Energy Board Act, s. 36.1(1)(b), Union BOA, Tab 17

50. The Applicants have not brought any such application to amend or revoke the designation of the Edys Mills Pool. Accordingly, the validity of Designation Order remains unchallenged and there can be no basis to suggest that its effect is "limited".

51. With the Designation Order in full effect, the only conclusion that can be drawn is that the relief sought by the Applicants in respect of the Pre-1993 Agreements is futile and should be dismissed.

No Genuine Issue Concerning Existing, Unchallenged Agreements

52. On this motion, Union seeks to have the Applicants' claims struck as they pertain to:

(a) any compensation the Knights were/are entitled to for the period 1999-2013;

(b) any compensation Snopko and McMurphy were entitled to for the period 1999-2008; and

(c) any compensation Snopko was/is entitled to in respect of roadways on her property.

Notice of Motion, para. 34, Union Motion Record, Tab 1

53. These issues are the subject of various agreements between Union and the Applicants that continue to govern the compensation owed by Union to the Applicants (the "Compensation Agreements"). Included among the Compensation Agreements is the 2004 Compensation Order, which all of the Applicants accepted, and which expressly settled any and all claims which were, or could have been, raised in the 2000 Board proceeding for the years 1999-2008.

54. Contrary to the Applicants' assertion, Union's claim that the Applicants are precluded from seeking relief in respect of these issues is not "another way of claiming that the Board lacks jurisdiction in the matter". Once again, the Applicants are confusing the concepts of jurisdiction and standing.[5] Union's position is that, while the Board has jurisdiction over just and equitable compensation within the scope of s. 38 of the Act, the Applicants have no standing to claim for just and equitable compensation where they are already parties to existing, unchallenged compensation agreements.

55. Union's position in this regard should be uncontentious. That was precisely the holding in the Board's Decision on standing in the RP-2000-0005 case to which the Applicants refer repeatedly in their Response. In that case, the Board held: "consistent with previous Board decisions, an owner of storage rights who has a valid agreement with Union is not eligible to obtain an order of the Board regarding compensation for the storage rights which are covered by the agreement."

Decision and Order, RP-2000-0005, September 10, 2003, para. 43 (emphasis added), Union Motion Record, Tab 2(Y)

See also *Bentpath Pool Landowners*, E.B.O 64(1) & (2), para. 184,

[5] See *supra*, paras. 7-13.

Union BOA, Tab 18

56. In an attempt to overcome this clear precedent, the Applicants argue in their Response that "the Applicants' [sic] have requested the Board to declare that all contracts between the Applicants and the Respondents have terminated", and that "a terminated agreement cannot bind the parties."

Response, para. 53, Applicants' Motion Record, Tab 1

57. There are at least two problems with the Applicants' argument in this regard. The first is that, contrary to their assertion in para. 53, the Applicants have not requested a declaration that the Compensation Agreements have been terminated. In fact, in the section of their Application entitled "All contracts between the parties have been terminated", the Applicants refer only to certain of the Pre-1993 Agreements, not to any of the Compensation Agreements.

Application, paras. 20-24

58. Secondly, and fatally to the Applicants' position on this motion, they have not pleaded or put forward any evidence that any of the Compensation Agreements has been breached, terminated, or otherwise invalidated. Despite the Applicants' burden to "put their best foot forward" and "set out specific facts", the only evidence on this motion is that the Compensation Agreements were valid and subsisting during their terms, and, where those terms are not yet expired, continue to be valid and subsisting.

Wachsmuth Affidavit, paras. 23, 32-42, 43-44 and Exhibits T and Z-PP, Union Motion Record, Tabs 2, 2(T) and 2(Z)-(PP)

Supplementary Affidavit of Bill Wachsmuth, paras. 1-2 and Exhibit A, Union Motion Record, Tabs 3 and 3(A)

59. In these circumstances, the well-established authorities holding that an existing agreement precludes a party from seeking relief pursuant to s. 38(2) clearly apply. The Applicants can have no standing in respect of the issues covered by the Compensation Agreements.

Decision and Order, RP-2000-0005, September 10, 2003, para. 43 (emphasis added), Union Motion Record, Tab 2(Y)

Bentpath Pool Landowners, supra, para. 184, Union BOA, Tab 18

Summary

60. Contrary to the Applicants' various claims, there is no genuine issue for trial in respect of the four categories of issues that Union identifies in its Notice of Motion:

(a) issues that the Plaintiffs have been aware of since at least 2000 and chose not to act on before bringing this Application in 2011;

(b) issues pertaining to the interpretation and validity of the Pre-1993 Agreements, all of which have been superceded by the Designation Order;

(c) issues pertaining to the Applicants' rights to just and equitable compensation that are covered by existing, unchallenged Compensation Agreements between the parties; and

(d) any issue raised by the Application (Union contends there are none) that, properly interpreted, falls outside the Board's jurisdiction to grant just and equitable relief under s. 38.

61. For clarity, it is Union's position that the only issues on this Application that should be permitted to proceed to a hearing are:

(a) whether, pursuant to s. 38(2) of the Act, the Applicant Snopko is entitled to additional compensation (beyond the level already provided to her) for the period since 2009;

(b) if the answer to (a) is affirmative, what the level of additional compensation is;

(c) whether, pursuant to s. 38(2) of the Act, the Applicant McMurphy is entitled to additional compensation (beyond the level already provided to him) for the period since 2009; and

(d) if the answer to (c) is affirmative, what the level of additional compensation is.

62. Accordingly, Union asks the Board to:

(a) dismiss the Application for a determination in respect of the Pre-1993 Contracts;

(b) dismiss the Application for a determination of the quantum of compensation owed to the Applicants, except with respect to the periods subsequent to 2009 for which an Applicant had/has no contractual agreement with Union regarding the quantum of compensation owed, and except to the extent that the Applicant seeks only just and equitable compensation pursuant to s. 38(2) of the *Ontario Energy Board Act.*

August 5, 2011

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EB-2011-0087

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BOOK OF AUTHORITIES OF UNION GAS LIMITED

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SUPREME COURT OF CANADA

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

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BETWEEN:

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

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

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

David Dunsmuir *Appellant*

v.

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

Indexed as: Dunsmuir *v.* New Brunswick

Neutral citation: 2008 SCC 9.

File No.: 31459.

2007: May 15; 2008: March 7.

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

on appeal from the court of appeal for new brunswick

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

two standards: correctness and reasonableness.

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

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

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

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

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

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

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

Held: The appeal should be dismissed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

delivered by

BASTARACHE AND LEBEL JJ. —

I. Introduction

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

A. *Facts*

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

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

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

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

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

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

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

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

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

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

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

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

B. *Decisions of the Adjudicator*

(1) Preliminary Ruling (January 10, 2005)

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

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

such a determination.

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

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

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

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

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

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

C. *Judicial History*

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

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

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

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

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

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

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

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27

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

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

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

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

II. Issues

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

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

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

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

A. *Judicial Review*

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Reconsidering the Standards of Judicial Review*

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

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

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

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

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

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

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

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

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

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

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

[41] As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E.*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15, at paras. 101-3). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see

C.U.P.E. v. Ontario (Minister of Labour)). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

[42] Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E.*, at para. 108:

> In the end, the essential question remains the same under both standards:

> was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness . . . .

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at paras. 40-41, *per* LeBel J.

C. *Two Standards of Review*

[43] The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonbless and Correctness

[44] As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 *U.T.L.J.* 581). However, the analytical

problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

[45] We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

[46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that

come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that

the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

[49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision

maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

[51] Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[52] The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative

clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

[53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[55] A consideration of the following factors will lead to the conclusion that the

decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

- The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[57] An exhaustive review is not required in every case to determine the proper

standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

[58] For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60.

[59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found

to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[60] As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

[61] Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC

14; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39.

[62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[63] The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

[64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. *Application*

[65] Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

[66] The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

[67] The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of . . . an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of

injunction, judicial review, or otherwise, to question, review, prohibit or restrain . . . an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

[68] The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *Alberta Union of Provincial Employees v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

[69] The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding settlements of disputes also imply that a reasonableness review is

appropriate.

[70] Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

[71] Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

[72] While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

[73] The adjudicator considered the New Brunswick Court of Appeal decision in *Chalmers (Dr. Everett) Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to . . . disciplinary action resulting in discharge, suspension or a financial penalty"

(s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), by simply stating that cause is not alleged" (*ibid.* (emphasis added)). The adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

[74] The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was

fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

[75] The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. The employees subject to the *PSLRA* are usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

[76] The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set

aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue — whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

[77] Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, in his view, lack of due process and a breach of procedural fairness.

[78] The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural

fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. *Duty of Fairness*

[79] Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

[80] This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

[81] We are of the view that the principles established in *Knight* relating to the

applicability of a duty of fairness in the context of public employment merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

[82] This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

[83] In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law.

As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

[84] Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* to consider procedural fairness. The respondent argues that allowing adjudicators to consider procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

[85] In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66, a case which involved the summary dismissal of the chief constable of Brighton. The

House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

[86] The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

[87] Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735). In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual . . . . [p. 653]

(See also *Baker*, at para. 20.)

[88] In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Director of Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

[89] The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months'

notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'" and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

[90] From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

[91] *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to

procedural fairness depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural protections depending on the characterization of the public employee's legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790; *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151; *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83; *Hanis v. Teevan* (1998), 111 O.A.C. 91; *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (C.A.)).

[92] In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes such a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.
>
> (Wade and Forsyth, at pp. 532-33)

[93] Lord Wilberforce noted that attempting to separate office holders from

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.
>
> (*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (H.L.), at p. 1294)

[94] There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (Q.B.), aff'd (1991), 118 N.B.R. (2d) 306 (C.A.)). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40).

[95] Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and

could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.

[96] *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

[97] The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

[98] If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

[99] First, historically, offices were viewed as a form of property, and thus could be recovered by the office holder who was removed contrary to the principles of natural justice. Employees who were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

[100] A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675;

Malloch, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

[101] A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. 2004), at p. 1192 "pleasure appointment"). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

[102] In our view, the existence of a contract of employment, not the public employee's status as an office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

[103] Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's

position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment. [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

[104] Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example,

in the context of collective agreements: *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 94 L.A.C. (4th) 56). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

[105] In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 95. But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

[106] Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract

out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

[107] Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

[108] It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v.*

Baldwin, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

[109] In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

[110] In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

[111] It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

[112] In our view, the distinction between office holder and contractual employee for the purposes of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

[113] The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. Following *Wells*, it is assumed that

most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

[114] The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

[115] The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g.

New Brunswick *Interpretation Act*, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

[116] A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. *Conclusion*

[117] In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four

months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

[118] We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

The following are the reasons delivered by

[119] BINNIE J. — I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

[120] However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole.
>
> . . .
>
> . . . The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

[121] The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although now it is to be called the "standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

> What's in a name? that which we call a rose
> By any other name would smell as sweet;
>
> (*Romeo and Juliet*, Act II, Scene ii)

[122] I am emboldened by my colleagues' insistence that "a holistic approach is

needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by practical considerations: for example, a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

[123] Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

[124] On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 14:2210.

[125] Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion "has the right to be wrong". This reflects an unduly court-centred view of the universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. *Limits on the Allocation of Decision Making*

[126] It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

[127] Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not

independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

[128] Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers . This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

> where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of

general law should be left to judges.

[129] Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. Hansard is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52.

B. *Reasonableness of Outcome*

[130] At this point, judicial review shifts gears. When the applicant for judicial review

challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

[131] In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087 (emphasis deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation . . . ?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (para. 53), and *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. *The Need to Reappraise the Approach to Judicial Review*

[132] The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making. The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

[133] People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost

to the applicant. If the challenge is unsuccessful, the unhappy applicant may also face a substantial bill of costs from the successful government agency. A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D. *Standards of Review*

[134] My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is

incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has been declared by the Court to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. *Degrees of Deference*

[135] The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

[136] A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision-making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in

the administrative decision. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, or policy decisions arising out of decisions of major administrative tribunals, as in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

[137] Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a professional body, given the task of determining an appropriate sanction for a member's misconduct (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20).

[138] In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

[139] The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense.

[140] That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

[141] Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially

underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. *Multiple Aspects of Administrative Decisions*

[142] Mention should be made of a further feature that also reflects the complexity of the subject matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on

which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11). In the jargon of the judicial review bar, this is known as "segmentation".

G. *The Existence of a Privative Clause*

[143] The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of

outcome on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. *A Broader Reappraisal*

[144] "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

[145] The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

[146] The going-in presumption should be that the standard of review of any

administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

[147] An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

[148] When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test of *irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the

Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

[149] Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter, and* an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.

I. *Judging "Reasonableness"*

[150] I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

[151] This, of course, is the nub of the difficulty. My colleagues write:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making

> process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate": *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public

purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

[152] Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Law Society of New Brunswick v. Ryan*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

[153] The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

[154] It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

[155] That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. *Application to This Case*

[156] Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the

legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's interpretation of his "home turf" statutory framework.

[157] Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

The reasons of Deschamps, Charron and Rothstein JJ. were delivered by

[158] DESCHAMPS J. — The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

[159] By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

[160] The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

[161] Questions before the courts have consistently been identified as either questions

of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology — "palpable and overriding error" versus "unreasonable decision" — does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

[162] Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, and the particular context of administrative decision making can make judicial review different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

[163] However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to overstep its delegated powers. Moreover, if such a body is asked to interpret laws

in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

[164] The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

[165] In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

[166] In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an

appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

[167] I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying intervention should not be more complex in the administrative law context than in the criminal and civil law contexts.

[168] In the case at bar, the adjudicator was asked to adjudicate the grievance of a

non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

[169] It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said:

> An employee to whom section 20 of the *Civil Service Act* and section 100.1 of the *PSLR Act* apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons. [p. 5]

[170] The employer's common law right to dismiss without cause is not alluded to in

this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

[171] This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

[172] In this case, the Court has been given both an opportunity and the responsibility

to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

[173] On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1

> **20** Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

> **92(1)** Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

(*a*) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or

(*b*) disciplinary action resulting in discharge, suspension or a financial penalty,

and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended

97(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.

. . .

100.1(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a grievance with respect to discharge, suspension or a financial penalty.

100.1(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.

. . .

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

. . .

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Appeal dismissed.

Solicitors for the appellant: Stewart McKelvey, Fredericton.

Solicitor for the respondent: Attorney General of New Brunswick, Fredericton.

No. CA015910
Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

OMINECA ENTERPRISES LTD.

PETITIONER
(APPELLANT)

AND:

MINISTER OF FORESTS and
THE APPEAL BOARD APPOINTED PURSUANT
TO THE FOREST ACT BY ORDER IN COUNCIL
NUMBER 349 DATED MARCH 6, 1992

RESPONDENTS
(RESPONDENTS)

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Gibbs
The Honourable Madam Justice Prowse

Stephen H. Tick	Counsel for the Appellant
Angela R. Westmacott	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia September 13, 1993
Place and Date of Judgment:	Vancouver, British Columbia November 18, 1993

Written Reasons by:
The Honourable Mr. Justice Gibbs (pp. 1-18)

Concurred in by:
The Honourable Madam Justice Prowse

Dissenting Reasons by:
The Honourable Chief Justice McEachern (pp. 19-30)

Court of Appeal for British Columbia

No. CA015910
Vancouver Registry

OMINECA ENTERPRISES LTD.

v.

MINISTER OF FORESTS and THE APPEAL BOARD APPOINTED PURSUANT TO THE FOREST ACT BY ORDER IN COUNCIL NUMBER 349 DATED MARCH 6, 1992

Reasons for Judgment of The Honourable Mr. Justice Gibbs:

1 This appeal concerns the right, or otherwise, of an Appeal Board appointed by the Lieutenant Governor in Council under s. 156(2) of the ***Forest Act***, R.S.B.C., 1979, Chap. 140 to have the assistance of counsel in the conduct of a hearing. The merits of the dispute between Omineca and the Minister of Forests are not in issue in this appeal.

2 The dispute originated with the cancellation by a regional manager of two timber sale harvesting licenses held by Omineca. Omineca exercised a statutory right of appeal to the chief forester and lost. Omineca exercised a further statutory right of appeal to a board appointed under s. 156(2) of the Act:

> 156.(2) The Lieutenant Governor in Council shall, within 21 days after service of the notice of appeal under subsection (1),
>
> (a) appoint not more than 3 persons to the appeal board and establish its terms of reference; and
>
> (b) fix the remuneration each person is to receive for each day he is engaged in the appeal.

3 A few days before the date set for the hearing Omineca learned that a Mr. R. B. Webster had been appointed as board counsel. By letter to Mr. Webster, Omineca's counsel protested both the propriety and the legality of the appointment:

> We are adamantly opposed to the Appeal Board having legal representation.
>
> We understand that you have been retained by the Appeal Board to be their lawyer and you are being paid by the Attorney General. Counsel for the Ministry of Forests works for the Attorney General.
>
> When my clients heard about this, they were aghast. They perceived that the government has two separate lawyers arrayed against them. They understand why the Ministry has a lawyer but they do not understand why the Appeal Board has a lawyer whose advice they would follow over the argument of opposing counsel.
>
> I do not think the Forest Act allows for the Appeal Board to hire counsel. I also do not think I should have to convince you of Omineca's position either on procedure or the merits when you are not appointed to the Appeal Board.

4 In his reply Mr. Webster explained his limited role. The explanation is in accord with the limits traditionally associated with the office of counsel to an administrative tribunal:

> Please be advised that I do not take any instructions from the Attorney General but only from the Appeal Board.
>
> I consider generally my role to be strictly impartial and to attempt to ensure the credibility and integrity of the appeal and to attempt to ensure it is conducted in a fair and legally correct manner.

5 It is common ground that Mr. Webster is an independent practitioner, that he was appointed by the Attorney General and that payment for his services would be from the general revenue fund on the authority of the Attorney General. There is an explanation of the policy and practice concerning legal advice to an "administrative tribunal of government" in an affidavit by the chief solicitor for the Ministry filed in the court below:

> 3. In any case where there is a perceived conflict of interest or duty in the provision of legal services by the Ministry of Attorney General to a public officer or administrative tribunal of government, it is the policy of the Attorney General to retain independent ad hoc legal counsel to provide legal advice to that public officer or tribunal. The Ministry of Attorney makes the necessary administrative arrangements to retain legal counsel on behalf of the public officer or tribunal. The Attorney General's responsibilities are two-fold:
>
> a) To ensure that the public officer or tribunal obtains independent legal counsel; and
> b) To ensure that the legal services are obtained in accordance with standard billing practices.
>
> 4. Where, as in this case, there is a perceived conflict of interest or duty, ad hoc counsel retained by the Attorney General take their instructions on all matters except billing procedure directly from the public officer or tribunal.
>
> 5. In the appeal commenced by Omineca Enterprises Ltd. from the decision of the Chief Forester dated September 10, 1991, Mr. Webster was retained to act on behalf of the Appeal Board by the Ministry of Attorney General. The specific instructions provided to Mr. Webster on billing are set out in the Ministry's retainer letter dated March 31, 1992, which is attached hereto and marked as Exhibit "A" to this my Affidavit.

6 When the Appeal Board hearing convened Mr. Tick, counsel for Omineca, protested at length about any participation by Mr. Webster. The chairman explained why the Board felt it necessary to have Mr. Webster's assistance:

> The person in the Ministry of Forests who appointed this Board gave us the understanding that we have the authority to engage counsel. And I have been on many boards where counsel has been engaged and acted for the Board in an interpretive role, particularly procedural.
>
> We got a very skimpy briefing on what points are at issue here. It's clear from what we did get that it has been long-lasting, and it has gone in and out of the courts more than once. And quite a bit of the argument seems to be, again from the material available to us, questions of procedure, which we are not necessarily equipped -- like a judge would be, who is clearly a successful man of the law for years before he got the appointment -- to try to sit in judgment of procedural matters. And so we asked for the assistance of Mr. Webster on the strength that he has no prior connection with this issue.
>
> And I will stand by that, Mr. Tick. The authority for us comes from the Minister and the authority to hire Mr. Webster, from my point of view, comes from the Minister.

7 After hearing submissions from Mr. Tick, Mr. Webster, and Mr. Manning for the Ministry of Forests, the chairman reiterated the intention of the Board to proceed with the assistance of Mr. Webster "on procedural matters":

> THE CHAIRMAN: I understand what you're saying, but I do feel that our original reasons for asking for

> counsel, in light of the history of this case and in terms of time and the issues that have gone back and forth -- largely on procedural matters, which we are not that well-grounded in as a court judge would be from a lifetime in the law -- that I would reiterate our desire and intention to retain Mr. Webster's advice to us on procedural matters.
>
> I wonder if we can proceed to the Appellant's points.

8 Mr. Tick then requested an adjournment on the ground that the issue was "jurisdictional" in nature and that Omineca wished "to test this where it should be tested" before proceeding. The Board recessed with Mr. Webster to consider its position and returned in due course and granted the adjournment.

It is important to note that the entire debate before the Appeal Board dealt with the procedural matter of Mr. Webster's participation in the hearing in the limited role defined by him and by the chairman. No mention was made of the merits of the dispute between Omineca and the Minister of Forests. Neither was any mention made of the jurisdiction of the Board over the subject matter of the dispute.

9 Omineca appealed to the Supreme Court under s. 156(8) of the ***Forest Act*** and by way of petition under the ***Judicial Review Procedure Act***, R.S.B.C., 1979, Chap. 209. The trial judge ordered that "as Omineca's complaint was a preliminary objection going to

jurisdiction it should be addressed through the petition for judicial review". And so the matter proceeded in the court below and no objection was raised in this Court to the order made by the trial judge in that regard.

10 It would appear from the trial judge's reasons that the same two grounds of appeal were advanced to him as were advanced in this Court: jurisdiction; and reasonable apprehension of bias. As to the first, the trial judge concluded, correctly in my view, that the Board, like any other administrative tribunal, had the power to retain counsel for advice providing the role of counsel was "consistent with the principles of fairness and natural justice":

> The cases and the commentaries appear to me to provide overwhelming support for the proposition that an administrative tribunal is entitled to retain legal counsel for advice during a hearing or appeal process, providing the role of counsel is confined within limits that are, both in fact and appearance, consistent with principles of fairness and natural justice.

11 I note that in that passage the trial judge wisely refrained from using the word "jurisdiction" and spoke instead of fairness and natural justice in the prospective sense thereby putting the case into the proper context. I do not see this as a jurisdiction case. I think that the Omineca submissions confuse administration with jurisdiction and practice with substance.

12 *Black's Law Dictionary*, 5th Ed. refers to the word "jurisdiction" as "a term of large and comprehensive import". Several examples of the meaning are given. The two which most closely reflect the meaning attached to the word in administrative law are: "the authority by which courts and judicial officers take cognizance of and decide cases"; and "the right and power of a court to adjudicate concerning the subject matter in a given case". The authority of an administrative tribunal over a particular subject matter is to be found in the authorizing statute. Here it is the ***Forest Act*** and the jurisdiction is over a determination by the chief forester on an appeal from a determination by a regional manager. That jurisdiction has not, so far, been challenged in this case and that is the reason for my conclusion that this is not a jurisdiction case.

13 Omineca rests its "jurisdictional" argument on the absence of any affirmative statutory authority to retain the services of counsel, and upon an inference to be drawn from the wording of s. 156(4) of the ***Forest Act***. I am unable to find merit in either argument.

14 The first argument, carried to its logical conclusion, would have it that the court will confine an administrative tribunal strictly to that degree of procedural and administrative discretion as is affirmatively conferred by statute. There is no case

authority to support such a far reaching proposition. Indeed, the long standing principle is to the contrary. It is well stated at p. 841 of ***Cedarville Tree Services Ltd. and Labourers' International Union*** (1971), 3 O.R. 832 (Ont.C.A.):

> It is clear to me that under the *Labour Relations Act* the Board is master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the Act, but with respect to all questions of procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be just and convenient in the particular circumstances of the case before it.

15 For a more recent restatement of the principle see ***Prassad v. Minister of Employment and Immigration***, [1989] 1 S.C.R. 560 per Sopinka, J. at p. 568:

> We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.

16 I am satisfied that the retainer of Mr. Webster at the Board's request to assist in the proper conduct of the hearing was a question of procedure for the Board in respect of the exercise of

its statutory jurisdiction. I am equally satisfied that the matter is "in relation to the Board's procedure". It follows that there being no specific rules laid down other than in s. 156(4) and (5) of the ***Forest Act*** it was open to the Board, unless prohibited directly or indirectly by those sub-sections, to seek and obtain the procedural assistance that it felt it would require.

17 Omineca contends that there is such a prohibition in that on the wording of s. 156(4) only the persons therein identified can address the Board and that, therefore, by necessary implication Mr. Webster cannot participate in the hearing in the intended advisory capacity or, indeed, in any capacity. Section 156(4) provides:

> 156.(4) The appeal board within 30 days after its appointment shall convene a hearing in which the regional manager, district manager or a forest officer and the appellant may make submissions.

18 In my opinion, the argument is founded upon errors in construction. The language of the sub-section is not language of exclusion. It is directory in the sense that <u>at a minimum</u> the parties to the dispute must be given the opportunity to be heard. It does not go so far as to say, directly or by implication, that <u>only</u> the parties to the dispute can make submissions. Moreover, in my opinion, in the context of ss. 154 to 157 of the Act, the appeal sections, the word "submissions" is intended to refer to

submissions on the merits and not to every evidentiary or procedural argument which might arise during the course of a hearing, although as a matter of procedural fairness the parties to the dispute would have a right also to be heard on "non-merits" matters.

19 In summary, I am satisfied that the retainer of Mr. Webster is a procedural as opposed to a jurisdictional matter and, accordingly, a matter within the discretionary power of the Board; that there is nothing in the statute which limits that discretion; and that, therefore, this ground of appeal fails.

20 The other branch of the appeal focuses on the concept of reasonable apprehension of bias. In the court below the trial judge quoted the test from ***Committee for Justice and Liberty v. National Energy Board***, [1978] 1 S.C.R. 369 and then said:

> Applying that test here, and making allowance for the strongly adversarial nature of the proceedings, I do not think a reasonable appellant in the position of Omineca could realistically apprehend that counsel's advice to the Board would be unfairly influenced by the manner in which he was paid for his services. The government has a legitimate interest in controlling the cost of legal services which does not intrude on the independence of counsel without clear evidence of such an impact that is entirely absent here.
>
> Nor do I think that there is anything necessarily suspicious in the Ministry's involvement in the selection of counsel. Major administrative tribunals may have sufficient continuity and volume of work to retain their

> own counsel, but bodies like the Appeal Board here involve infrequent ad hoc appointments of lay people who may lack the necessary familiarity with law and lawyers to select appropriate counsel. The Attorney General's Ministry may be in the best position to arrange the retainer in such circumstances. In my opinion, the Attorney General's involvement in the retainer of counsel to the Board does not compromise counsel's independence.

21 While I agree with the trial judge's reasoning and with his conclusion, I respectfully disagree with the apparent assumption that this is a reasonable apprehension of bias case. In my opinion it is not, because the alleged bias here is not against the decision maker but against the process. At p. 349 of ***Bennett v. British Columbia Securities Commission*** (1992), 94 D.L.R. (4th) 339 a division of this Court pointed out that the essence of a plea of bias is that the decision maker will not be able to bring an impartial mind to bear on the merits of the dispute:

> We wish to add one further observation and that is as to the target of a bias allegation. Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here.

22 No allegation of bias, real or apprehended, is made in this case against any of the Board members. Neither is there an allegation of bias against Mr. Webster. The closest that Omineca's factum comes to Mr. Webster in that respect is an assertion of

"reasonable apprehension of bias relating to the lawyer for the Appeal Board".

23 It is apparent that Omineca does not refer to reasonable apprehension of bias in the sense in which it is normally understood, as in ***Committee for Justice and Liberty v. National Energy Board*** and like cases. What Omineca intends the expression to mean is that the process is so biased against it that a reasonable person would apprehend that it will not be accorded natural justice, viz. the third ground in the petition:

> 3. The Appeal Board breached the rules of natural justice by retaining a lawyer paid by the Attorney General thereby creating a reasonable apprehension of bias against the Petitioner; and

24 The fourth ground is also a natural justice ground:

> 4. The Appeal Board breached the rules of natural justice by preventing the Petitioner a reasonable opportunity to present its case without intervention by a lawyer retained by the Appeal Board but paid by the Attorney General.

25 It is the extent of government involvement in the process that is at the root of Omineca's apprehensions but, except for the retainer of Mr. Webster, all of the government involvement is affirmatively sanctioned by statute. Omineca appeared to recognize

that reality and that is no doubt why, in para. 17 of its factum, it zeroed in on the appointment of Mr. Webster:

> 17. The reaction of the informed person thinking it through is obvious. Why does the government need two lawyers? They are stacking the deck against Omineca. Opposing lawyers should be able to fully argue all the issues. Why does the Appeal Board need to have a lawyer, paid by government, to interpose his advice. It is a set-up!

26 Of course, the government does not have two lawyers. No question has arisen as to the integrity of Mr. Webster or of any of the Board members. All are clearly conscious of Mr. Webster's function. Until some event occurs which demonstrates that the limits on the function have been transgressed the court must, in my opinion, accept that during the course of the hearing the proprieties will be observed and that Mr. Webster will act only in the capacity of counsel to the Board. Moreover, in law the Board is charged with the duty impartially to decide the issues between the parties on the merits. In my opinion, the court must also accept at this stage that the Board will conscientiously discharge that duty regardless of who the paymaster might be.

27 As for why the Board needs a lawyer, I would have thought that to be perfectly plain from the chairman's remarks: " It's clear that...it has gone in and out of the courts more than once...we are not necessarily equipped...to try to sit in judgment of procedural

matters"; "...in the light of the history of this case and in terms of time and the issues that have gone back and forth...largely on procedural matters, which we are not that well grounded in..." Throughout the hearing the role of opposing parties will necessarily be partisan. Given the apparent background and the possible procedural pitfalls there is nothing sinister or prejudicial in the Board seeking the assistance and guidance of an impartial counsel.

28 There is another aspect to the natural justice ground. It is that the allegations are premature. Omineca has not yet been denied anything going to the merits or even going to procedure, other than the termination of Mr. Webster's retainer. Except to the extent that reasonable apprehension of bias is an ingredient of natural justice, not a single one of the cases cited in argument, aside from ***Committee for Justice & Liberty v. National Energy Board***, upholds a denial of natural justice plea based upon events preceding the commencement of the hearing. That is not surprising since the party raising the plea will be obliged to point to some event or record to support it and, in the normal course, that kind of evidence will only emerge during or after the hearing. The only event Omineca can point to here is that Mr. Webster accompanied the Board when it retired to consider its position in respect to the adjournment application. I will return to that event in due course.

29 I include the *audi alteram partem* rule in my classification of premature allegations even though it was not a ground set out separately in the petition or specifically argued in this Court. It does receive some attention in ***Consolidated-Bathurst Packaging v. International Woodworkers of America***, [1990] 1 S.C.R. 282, cited to the court by the respondent, so perhaps it deserves some attention here although it need not be extensive. The maxim is defined in*Black's Law Dictionary* in these words: "Hear the other side; hear both sides. No man should be condemned unheard." There is a lengthy discussion of the rights of a party flowing from the maxim at pp. 197 to 241 of *Principles of Administrative Law*, Jones & de Villars, Carswell, 1985. It is sufficient for purposes of these reasons to note that none of the rights there discussed has yet been denied to Omineca. It may be appropriate also to emphasize that s. 156(4) of the Act goes some way towards assuring the parties of those rights in that it requires the Board to conduct a hearing at which the parties are to be afforded the opportunity to make submissions. And s. 156(3) imposes on the Minister of Forests a duty to serve the appellant (Omineca) with notice of the appointment of the Board and the Board's terms of reference.

30 Returning to the retirement to consider adjournment, given the heightened sensitivities of Omineca it may have been more prudent not to include Mr. Webster. However, Omineca obtained what it wanted and so cannot claim prejudice arising. And it is

understandable that the Board might wish to have the assistance of counsel while discussing the options open to it as well as the administrative or housekeeping consequences of an adjournment. We do not know what matters were discussed but we do know that the subject matter of the dispute between Omineca and the Minister of Forests had not yet been reached. There are, therefore, no grounds for concluding that the private discussion had adverse impact upon Omineca's cause.

31 Furthermore, the act of retiring to consider adjournment was, in my opinion, trivial and unimportant when compared to conduct which has passed muster in other reported cases. See: ***IWA v. Consolidated Bathurst***, and ***Canadian Pacific Limited v. Town of Carlyle*** (1987), 4 W.W.R. 232 (Sask.C.A.). It is not of sufficient substance or reality to form a foundation for a natural justice or procedural fairness or *audi alteram partem* challenge.

32 It follows from all of the above that, in my opinion, none of the Omineca arguments has sufficient weight or merit to warrant interfering with the trial judge's decision.

33 There are some concluding statements in ***Pasiechnyk v. Procrane Inc.*** (1992), 3 W.W.R. 374 (Sask. C.A.) about participation by a board

counsel which express the same conclusions as I have reached about Mr. Webster's role. In ***Pasiechnyk*** board counsel, a Mr. Bennett, appeared on a motion before the board challenging its jurisdiction and filed a brief of law upholding the challenged jurisdiction. The appellants contended that participation by Mr. Bennett was fatal to the process. At the end of a fairly lengthy review of the law Cameron, J.A., for the court, said this:

> So long as the board is still able to perform its duty -- to hear the parties out fully, with a mind open to persuasion, to consider their positions carefully, and to decide the matters at issue in light of the facts as it fairly finds them and according to the law as it conscientiously takes it to be -- there can be no complaint. And we can see no reason for supposing the board cannot or will not do just that as it gets down to the specifics of the matter.
>
> We might add this though as well. The board is free to dissociate itself from Mr. Bennett and his brief should it think it necessary to do so to avoid bias or the appearance of bias. Mr. Bennett is not a member of the board, and it is not essential for it to rely on his advice. It is open to it, if need be, to take other or additional legal advice.

34 Substituting the name of Mr. Webster, for that of Mr. Bennett, these words reflect, in summary form, my view of this case.

35 I would dismiss the appeal.

"The Honourable Mr. Justice Gibbs"

I AGREE: "The Honourable Madam Justice Prowse"

Reasons for Judgment of Chief Justice McEachern

36 A Regional Manager of the Ministry of Forests cancelled two timber sale harvesting licenses pursuant to the ***Forest Act***, R.S.B.C. 1979, c. 140. The Petitioner ("Omineca") appealed the cancellations to the Chief Forester, who dismissed the appeal and upheld the cancellations.

37 Section 156 of the ***Forest Act*** provides for a further appeal to a three person appeal board to be established for such purpose by the Lieutenant Governor in Council who is also empowered to establish the terms of reference and the per diem remuneration payable to each appointee. Section 156(4) provides:

> (4) The appeal board within 30 days after its appointment shall convene a hearing in which the regional manager, district manager or a forest officer and the appellant may make submissions.
>
> (my underlining)

38 The underlined provision for making submissions featured prominently in Mr. Tick's argument in this Court.

39 The board is also authorized to receive and examine evidence under oath or otherwise whether or not it would be admissible in a court, and to make such examination of records and inquiries as it considers necessary.

40 At some early stage, the Ministry of the Attorney General appointed Mr. Spencer Manning, a barrister, to represent what he described as the Ministry of Forests. I assume this included the Chief Forester, who was the real Respondent.

41 The appeal board, comprising three foresters, requested that the Ministry of Attorney General appoint legal counsel to assist it. This was done when Mr. Webster, a barrister, was appointed as counsel to the board. In a letter of appointment, the Ministry advised Mr. Webster of his appointment in part as follows:

> I am writing to confirm that you are retained on behalf of the Ministry of Attorney General, which provides legal services to Government, to act in the above matter.

42 Omineca immediately objected to the right of such counsel to participate in the appeal. In a letter to Mr. Webster, with a copy to the Ministry of the Attorney General, Mr. Tick said:

> We are adamantly opposed to the Appeal Board having legal representation.
>
> We understand that you have been retained by the Appeal Board to be their lawyer and you are being paid by the Attorney General. Counsel for the Ministry of Forests works for the Attorney General.
>
> When my clients heard about this, they were aghast. They perceived that the government has two separate lawyers arrayed against them. They understand why the Ministry has a lawyer but they do not understand why the Appeal Board has a lawyer whose advice they would follow over the argument of opposing counsel.

> I do not think the Forest Act allows for the Appeal Board to hire counsel. I also do not think I should have to convince you of Omineca's position either on procedure or the merits when you are not appointed to the Appeal Board.

43 Mr. Webster replied:

> In response to your letter dated April 2, 1992.
>
> Please be advised that I do not take any instructions from the Attorney General but only from the Appeal Board.
>
> I consider generally my role to be strictly impartial and to attempt to ensure the credibility and integrity of the appeal and to attempt to ensure it is conducted in a fair and legally correct manner.

44 At the opening of the hearing, after the members of the board had been sworn, Mr. Tick immediately objected to the board having counsel at the hearing, and sought to call Mr. Webster as the first witness. After a brief adjournment, Mr. Manning objected to Mr. Webster being called as a witness, arguing that the statute gave the board an absolute discretion about what evidence it would accept, and he submitted it would be "inappropriate" for Mr. Webster to give evidence.

45 Mr. Webster then advised the board that it should hear both sides as Mr. Tick had not described what evidence he proposed to adduce from himself, and he added that possibly the board would wish to reserve its decision on this question.

46 Mr. Tick then explained that his purpose was to find out what Mr. Webster knew about the case because he wished to continue his objection that the board did not need, and did not have the right, to have a lawyer at the hearing. He also argued that the fact that Mr. Webster was appointed and would be paid by the Ministry of the Attorney General amounted to a "battery of lawyers" acting for the government.

47 On this question Mr. Manning at first deferred to Mr. Webster, and the latter then made a submission to the board. He argued that the Attorney General has a right to appoint counsel and suggested this was to "prevent various tribunals from going off and obliging . . . the Crown to pay." He assured the board that he "considered his role to be strictly impartial, and to assist the Appeal Board in ensuring that this is a fair and full hearing, and to help you by directing you to the relevant law, or assisting counsel in directing you to the relevant law, so that your decision is legally correct." He said that his precise role would remain to be determined as the hearing progressed. He added that with senior and experienced counsel representing the parties, it was unlikely that he would have anything to do at all.

48 Mr. Manning then submitted that the board had a common law right to counsel regardless of any specific statutory authority, and he otherwise adopted Mr. Webster's submission.

49 Mr. Tick then pointed out what he described as the irony of Mr. Webster saying that he was going to be neutral, and then making submissions contrary to Mr. Tick's submissions.

50 The Chairman then ruled that the board proposed to continue to retain Mr. Webster as its counsel and asked Mr. Tick to proceed with his presentation. Mr. Tick then asked for an adjournment so that he could test the right of the board to retain counsel. The Chairman then asked Mr. Manning for his views on adjournment and he enquired if the other members of the board agreed with the Chairman's ruling. One of the members of the board asked for a recess.

51 It appears that the board then recessed and conferred with Mr. Webster. When the board reconvened the Chairman indicated that his ruling was that of the board. The proceedings were then adjourned generally to permit the ruling of the board to be challenged.

52 Omineca accordingly brought an appeal to the Supreme Court where it was dismissed by a judge in chambers, hence this appeal. The chambers judge referred to s. 2 of the ***Attorney General Act***, R.S.B.C. 1979, C.23 which provides for the regulation and conduct of all litigation for and against the Crown or any ministry, and ***Committee for Justice and Liberty v. National Energy Board***, [1978] 1 S.C.R. 369, and summarized his conclusions in these terms:

> Applying that test here, and making allowance for the strongly adversarial nature of the proceedings, I do not think a reasonable appellant in the position of Omineca could realistically apprehend that counsel's advice to the Board would be unfairly influenced by the manner in which he was paid for his services. The government has a legitimate interest in controlling the cost of legal services which does not intrude on the independence of counsel without clear evidence of such an impact that is entirely absent here.
>
> Nor do I think that there is anything necessarily suspicious in the Ministry's involvement in the selection of counsel. Major administrative tribunals may have sufficient continuity and volume of work to retain their own counsel, but bodies like the Appeal Board here involve infrequent *ad hoc* appointments of lay people who may lack the necessary familiarity with law and lawyers to select appropriate counsel. The Attorney General's Ministry may be in the best position to arrange the retainer in such circumstances. In my opinion, the Attorney General's involvement in the retainer of counsel to the Board does not compromise counsel's independence.

53 I agree with counsel that no question arises about the independence or integrity of counsel. One of the great and often unrecognized strengths of Canadian society is the existence of an independent bar. Because of that independence, lawyers are available to represent popular and unpopular interests, and to stand fearlessly between the state and its citizens.

54 Similarly, there is no legal basis for a finding of bias on the part of the tribunal. The finding of independence on the part of counsel precludes any such finding against Mr. Webster, even if bias on the part of someone other than the tribunal were legally relevant.

55 What is really in question in this case is the operation of the principle *audi alteram partem*. I say that because it must be assumed that the Legislature intended the appeal process involved in this case to be a fair one conducted in accordance with the principles that govern the fair conduct of administrative adjudication.

56 *Audi alteram partem*, which means hearing both sides fairly, describes a duty to act judicially. The rights that arise out of this duty are: the right to notice, the right to a hearing, (although not necessarily an oral hearing), the right to know the case to be met and to answer it, the right to cross-examine witnesses (if any), the right to counsel, and the right to a decision on the record of the hearing: ***D. Jones & A. de Villars, Principles of Administrative Law***, (Toronto: Carswell, 1985) c. 8 at 197-241; ***Hundal v. Superintendent of Motor Vehicles*** (1985), 32 M.V.R. 197 (B.C.C.A.); ***Murphy v. Dowhaniuk*** (1986), 22 Admin. L.R. 81 (B.C.C.A.); ***R. v. Canada Labour Relations Board*** (1971), 18 D.L.R. (3d) 226 (Man. C.A.).

57 In addition, in ***Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America***, [1990] 1 S.C.R. 282 at 323, (per Gonthier J.), it was observed that:

> Independence is an essential ingredient of the capacity to act fairly and judicially and any procedure or practice which

> unduly reduces this capacity must surely be contrary to the rules of natural justice.

58 In ***Consolidated-Bathurst***, the Court had occasion to explore the permissible limits of outside influence on an administrative tribunal. The Court held that consultation by a tribunal with the "full board" was in accord with natural justice, and particularly the *audi alteram partem* rule, provided that the full board meet only to discuss policy issues. The independence that the Court required for a tribunal was "not absence of influence but rather the freedom to decide according to one's own conscience and opinions."

59 In ***Tremblay v. Quebec (C.A.S.)***, [1992] 1 S.C.R. 952 the Court dealt with an administrative consultation process that did interfere with this freedom: "plenary meetings," with outside consultation, could involve mechanisms that exerted systemic pressure on tribunal members to conform.

60 In ***Venczel v. Assn. of Architects (Ontario)*** (1990), 45 Admin. L.R. 288 (Ont. Div. Ct.) the tribunal retained a lawyer, as it was empowered by statute to do. The lawyer, however, participated to a large extent in the hearing as a tribunal member. The Court stated:

> In our view, it is intolerable that a man faced with a disciplinary hearing should have to face not only the discipline committee that has been provided for by the

> legislature but, in addition, counsel hired by it who runs the hearing, makes decisions for the committee, and makes those decisions without even consulting the committee. A person facing such a hearing would not know whether he has been tried by the committee appointed under the ***Act*** or by someone hired to assist it.

The Court was clearly concerned that the independence of the tribunal to "run the show" and decide the case before it had been compromised.

61 In ***Khan v. College of Physicians and Surgeons*** (1990), 48 Admin. L.R. 118 (Ont. Div. Ct.) counsel to a disciplinary committee reviewed the committee's draft decision supposedly to provide "journalistic and administrative assistance." The Court said at p. 145:

> [I]t is difficult to see how a lawyer trained as he is and whose role is counsel for the committee can distinguish between charges that are made for journalistic and administrative reasons and those that are made for legal reasons. ... [I]t is unlikely that a lawyer with the best of intentions can confine his advice to be only of journalistic and administrative assistance.

62 In my view, the circumstances of the case are calculated to permit counsel for the board to interfere with its decisional processes. Although a hearing on the merits has not been held yet, the transcript discloses that Mr. Webster has already conferred privately with the board and may have convinced it to continue his role in the hearing notwithstanding Omineca's objection. I add that the objection to Mr. Webster's participation in the hearing

was not confined to private consultation. The very fact that Omineca would have to meet two submissions, which might be cumulative although not always the same, also smacks of unfairness and is not contemplated by the Statute establishing the appeal board process.

63 There is a further ground on which Omineca is entitled to succeed on the question of Mr. Webster's private access to the board. Such submissions are *ex parte*, and should, on that basis, not be heard by a court or tribunal.

64 In ***Kane v. Board of Governors of U.B.C.***, [1980] 1 S.C.R. 145, the Supreme Court of Canada spoke to this issue at pp. 113-14:

> It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses or, *a fortiori*, hear evidence in the absence of a party whose conduct is impugned and under scrutiny.

65 In that case, the university president, who had suspended the appellant, was present during the administrative tribunal's private deliberations and he answered factual questions. The Court quashed the suspension, holding that the appellant should have been given an opportunity to respond to the information that the president had furnished.

66 Ms. Westmacott relied heavily upon ***Consolidated-Bathurst*** in her able submissions. In that case, however, it was held that members of a panel of the Labour Relations Board could confer privately with non-panel colleagues on the Board as "[t]he rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members." Such consultation, however, was limited to policy questions, and the decisional responsibility remained strictly with the members of the panel who conducted the hearing.

67 In this case, I regard the board's lawyer to be more like a party potentially adverse to Omineca than a disinterested colleague with whom the board might confer for limited institutional purposes.

68 I therefore conclude that the board is not entitled to the assistance of Mr. Webster at any stage of the actual hearing or decisional stage on the grounds that such would breach both the *audi alteram partem* rule and the prohibition against hearing *ex parte* submissions.

69 This is not to say that the board may not retain a lawyer employed by the Crown to assist it in making physical arrangements for the hearing or other matters that do not offend against the principles I have mentioned.

70 I would allow the appeal accordingly.

"The Honourable Chief Justice McEachern"

Court of Appeal for British Columbia
Saanich Inlet Preservation Society v. Cowichan Valley (Regional District)
Date: 1983-05-17

S. M. Johnson, for appellant Cowichan Valley Regional District.

J. Ince, for respondent Saanich Inlet Preservation Society.

J. Arvay, for Attorney General of British Columbia, intervenor.

(Vancouver No. CA821304)

17th May 1983. The judgment of the court was delivered by

[1] HUTCHEON J.A.:— This appeal concerns "the legal entitlement of [Saanich Inlet Preservation Society] to invoke the jurisdiction of the Court". The quoted words are those of the definition given to "standing" by the Australia Law Reform Commission. In this particular case, the society seeks to invoke the jurisdiction of the court under the Judicial Review Procedure Act, R.S.B.C. 1979, c. 209. When the application of the society came on for hearing, Wallace J. [[1982] B.C.W.L.D. 142] heard a number of preliminary objections including the objection that neither the society nor the other petitioner, Mrs. Gogel, had standing. Subject to compliance with conditions relating to amendments and to service, the judge granted standing to the society. As will appear, I am uncertain whether he intended his ruling to determine the question of standing in the judicial review proceeding.

[2] From this order, Cowichan Valley Regional District appealed. On the appeal, the Attorney General intervened on the question of standing. Earlier, the request from the society to the Attorney General to bring the proceedings in his own name against the regional district had been refused by the Attorney General.

[3] The society seeks the judicial review of two by-laws, 578 and 579. The by-laws rezone certain lands of approximately 50 acres and amend an official settlement plan. The lands rezoned were intended to be used for a "tank farm" by Chevron Canada Ltd. for the storage of oil products. After the public hearing on 24th November 1980 and the approval of the Minister of Municipal Affairs, the by-laws received fourth and final reading on 28th October 1981. The petition was filed 17th November 1981.

[4] In addition to the Judicial Review Procedure Act, the petitioners invoked ss. 313 and 315 of the Municipal Act, R.S.B.C. 1979, c. 290. The application under s. 315 was withdrawn at the commencement of the hearing. In respect of the application under s. 313, the judge held that he was bound by the decision of MacKinnon J. in *Little v. Cowichan*

Valley Regional Dist. (1981), 16M.P.L.R. 39, 124D.L.R. (3d) 190 (B.C.S.C), to rule that the section did not apply to a regional district. In *Valcourt v. Capital Regional Dist.*, 41 B.C.L.R. 1, [1983] 2 W.W.R. 125, 20 M.P.L.R. 213, 142 D.L.R. (3d) 561, the Court of Appeal held that s. 313 did apply to a regional district, thus overruling the decision in *Little v. Cowichan Valley Regional Dist.* However, there has been no appeal in the present case on this point.

[5] Since the hearing, Mrs. Gogel has withdrawn as a petitioner. The only person remaining in that capacity is the society.

[6] The petition was defective in that it failed to set out, as required by s. 14 of the Judicial Review Procedure Act, the ground on which the relief was sought. The judge gave the petitioner liberty to amend and there is an appeal by the regional district against that order. At the hearing, counsel for the society (who was not counsel on the appeal) refused the judge's invitation to apply to amend. Wisely, that position was abandoned and the society did amend the petition to set out grounds. The direction of the trial judge was one within his power and, moreover, I think he pursued the right course in allowing the society to choose between amending its petition or having its defective petition dismissed. I would dismiss the appeal of the regional district against that part of the order.

[7] At the hearing on this appeal, there was no evidence of the composition of the society. Counsel at the hearing took the position that he was not obliged to give any information about the members of the society. Mr. Ince, for the society on the appeal, was of the opinion that he could not supplement the material. When it was indicated to him that the lack of evidence led to the inference that the society was a mere sham, Mr. Ince sought leave to file affidavit material to fill the void.

[8] I would give leave to the society to file the affidavits relating to membership of the society. The affidavit of Mr. Leo Serettes, the president of the society, deposes that the society has 134 members, 59 of whom reside in electoral area "C" (Cobble Hill) and 63 in area "A" which adjoins area "C". Without some evidence of the composition of the membership of the society, I agree with the submission of Mr. Johnson, counsel for the regional district, that in this case the society had no right to invoke the jurisdiction of the court.

[9] The trial judge does not appear to have made a decision on standing for the purposes of the Judicial Review Procedure Act. As I read his judgment, he held that the society and Mrs. Gogel had the status to apply to quash the by-laws under s. 313 of the Municipal Act as "a person interested in a bylaw". Since he dismissed the application of

the petitioners under s. 313, I am not clear how the granting of standing for the purposes of s. 313 was intended to apply to the Judicial Review Procedure Act, but Mr. Ince for the society relied upon the finding of status under s. 313. His submission was that the legislature's standing requirement set out in s. 313 of the Municipal Act should apply to the standing requirement of the Judicial Review Procedure Act.

[10] Section 313 reads as follows:

> 313. The Supreme Court, on application of an elector of a municipality or of a person interested in a bylaw of its council, may set aside the bylaw in whole or in part for illegality and award costs for or against the municipality according to the result of the application. This section does not apply to a security issuing bylaw providing for the issue of debenture or other evidence of indebtedness to a regional district or to the Municipal Finance Authority of British Columbia.

[11] Mr. Arvay, counsel for the Attorney General, submitted that there is a dual test when the ground for review is a denial of a right to be heard:

(a) Did the petitioner have a right to be heard; and

(b) If so, is the petitioner sufficiently affected by the decision.

In addition, Mr. Arvay submitted that the society could not have standing if its only claim was as a representative of its members.

[12] The grounds alleged in the amended petition are much wider than that of a denial of a right to be heard. This is what appears in the amended petition:

> 1) The grounds upon which the application by the Petitioner for an Order for Judicial Review of the exercise of statutory power by the Respondent with respect to By-Law No. 578, and setting aside the said By-Law pursuant to the Judicial Review Procedure Act are:
>
> (a) The Respondent failed to give written notice to all adjoining land-owners that the said lands were being rezoned from Agricultural to Industrial, contrary to the common law rules of natural justice or procedural fairness.
>
> (b) The Respondent failed to give written notice to all adjoining land-owners that the said lands being rezoned from Agricultural to Industrial were to be subject to a Public Hearing, contrary to the common law rules of natural justice or procedural fairness.
>
> (c) The Respondent failed to make available to the Petitioner or to the Public copies of a four (4) volume Environmental Impact Assessment Report which the Respondent included in its decision-making process, in passing By-Law No. 578; contrary to the common law rules of natural justice or procedural fairness.
>
> (d) That on October 28, 1981, at the fourth and final reading of By-Law No. 578, the Respondents' Chairman read out a Report which was meant to influence the final vote, and which was read at such a time that it could not be questioned or challenged by the Petitioner or other interested parties, contrary to the common law rules of natural justice or procedural fairness.

The same assertions are made in regard to by-law 579.

[13] In my view, the approach relied upon by Mr. Ince — that is, for the purposes of the judicial review, to use the test provided by s. 313 — is the correct one. We are concerned with the powers and duties of the regional district and with alleged breaches or failure of those duties. The powers and duties are found in the Municipal Act. It would be an unusual result if the test for standing for the purposes of judicial review were more stringent than those for an attack on the by-law under s. 313.

[14] In *Sunshine Hills Property Owners Assn. v. Delta*, [1977] 6 W.W.R. 749, 80 D.L.R. (3d) 692 (B.C.S.C), Macdonald J. held that an association made up of residents of the Sunshine Hills subdivision, and whose objects included the promotion of community development and social welfare, was "a person interested in a bylaw".

[15] That decision was followed by Proudfoot J. in *Re Victoria Waterfront Enhancement Soc. and Victoria* (1980), 117 D.L.R. (3d) 77, reversed on other grounds 15 M.P.L.R. 161, 131 D.L.R. (3d) 509 (B.C.C.A.). There are no decisions to the contrary in this province in which the Municipal Act was involved. Standing was refused in *Islands Protection Soc. v. R.*, 11 B.C.L.R. 372, [1979] 4 W.W.R. 1, 98 D.L.R. (3d) 504 (S.C.), and in *Re Village Bay Preservation Soc. and Mayne Airfield Inc.* (1982), 136 D.L.R. (3d) 729 (B.C.S.C.). Those cases were based on the Forest Act, 1978 (B.C.), c. 23 [now R.S.B.C. 1979, c. 140], and the Agricultural Land Commission Act, 1973 (B.C.), c. 46 [title am. 1977, c. 73, s. 1; now R.S.B.C. 1979, c. 9], respectively.

[16] It is not necessary, in this case, to pass upon the correctness of those two decisions because each statute must be examined in the light of the powers and duties of the body whose activity is in question, and in the light of the allegations made by the party seeking a review in the courts. Decisions relating to standing under one statute may not be of much assistance to the decision concerning another statute. Likewise, it should be said that cases such as *Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225, and Mm. *of Justice of Can. v. Borowski*, [1982] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 24 C.R. (3d) 352, 24 C.P.C. 62, 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588, 12 Sask. R. 420, 39 N.R. 331, in which the constitutional validity of legislation is challenged, call for quite different legal considerations.

[17] Guidance of a general nature has been afforded by the judgments in *Inland Revenue Commrs. v. Nat. Fed. of Self-Employed and Small Businesses*, [1981] 2 All E.R.

93 (H.L.). That case was one of judicial review, and the test of standing was then set out in R.S.C. Ord. 53 dating from 1977:

> The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

[18] R.S.C. Ord. 53 now appears as s. 31 of the Supreme Court Act, 1981 (in force 1st January 1982). There is no such test in the Judicial Review Procedure Act which is silent on the question of standing. I have said that for the purpose of the present proceeding the test should be that provided by s. 313 of the Municipal Act: a person interested in the by-law. To my mind, the phrase "sufficient interest" used in R.S.C. Ord. 53 does not involve any different requirements.

[19] Lord Diplock said at p. 103:

> The rules as to "standing" for the purpose of applying for prerogative orders, like most of English public law, are not to be found in any statute. They were made by judges; by judges they can be changed, and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities that have been taking place continuously, sometimes slowly, sometimes swiftly, since the rules were originally propounded. Those changes have been particularly rapid since the 1939-45 war. Any judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today.

[20] Lord Fraser of Tullybelton said at p. 108:

> On what principle, then, is the sufficiency of interest to be judged? All are agreed that a direct financial or legal interest is not now required, and that the requirement of a legal specific interest laid down in *R. v. Lewisham Union*, [1897] 1 Q.B. 498 (Div. Ct.), is no longer applicable. There is also general agreement that a mere busybody does not have a sufficient interest. The difficulty is, in between those extremes, to distinguish between the desire of the busybody to interfere in other people's affairs and the interest of the person affected by or having a reasonable concern with the matter to which the application relates. In the present case that matter is an alleged failure by the Revenue to perform the duty imposed on them by statute.
>
> The correct approach in such a case is, in my opinion, to look at the statute under which the duty arises, and to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission.

[21] With those passages as guidance, I think, with respect, that the decisions in *Sunshine Hills Property Owners Assn.*, supra, and *Re Victoria Waterfront Enhancement Soc*, supra, were correct decisions on the facts of those cases. The judge, in each case, having been satisfied that the applicant was not a mere busybody, but represented a group of individuals having a reasonable concern with the by-law, granted standing.

[22] Mr. Arvay's submission that the society could not have standing if its only claim was as a representative of its members was not supported by any authority. I note that in the *Nat. Fed.* case it was the National Federation, representing its 50,000 members, that was the applicant. The proceeding began in the Divisional Court, went to the Court of Appeal [[1980] Q.B. 407, [1980] 2 All E.R. 378], and then to the House of Lords. In none of those places was there any suggestion that the National Federation was not properly in court on the ground that the application could only be made by one or more of its members. Indeed, Ackner L.J. in the Court of Appeal said at p. 399:

> Since, for the purpose of deciding this preliminary issue, it has been accepted that we should assume that the Board acted unlawfully because they have no dispensing power, then the body of taxpayers *represented by the federation* can reasonably assert a genuine grievance. (The italics are Hutcheon J.A.'s.)

[23] I find no legal reason to deny standing to a society that consists of members who have a legitimate interest in the subject matter of an order, resolution or by-law of a body that is subject to judicial review.

[24] It is not necessary in this case to consider whether a different test is applicable in an action instituted by a writ of summons. Such a distinction was drawn recently by Warner J. in *Barrs v. Bethell*, [1982] 1 All E.R. 106, and by Lord Denning M.R. in *O'Reilly v. Mackman*, [1982] 3 All E.R. 680 at 689 (C.A.).

[25] I turn, then, to the facts of the present case. The grounds for relief include an allegation that adjoining land owners were not given notice of the intention to rezone or of the intention to hold a public hearing; an allegation that the regional district failed to make available to the petitioner and to the public copies of a report; and an allegation that at a final reading of the by-laws a report was read without an opportunity being given the petitioner and others to challenge its content. Those grounds which are now set out in the petition were not before Wallace J.

[26] The grounds now alleged, if supported, may justify the intervention of the court. In their present form they are described in quite general terms and, in my view, it is premature to rule that the link between those grounds, on the one hand, and the society and its members, on the other hand, is such that standing should be granted. The regional district ought to have the opportunity, if it wishes, to cross-examine one or two representative deponents on the issue of standing.

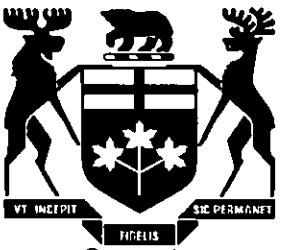
[27] The issue of standing should be referred back to the Supreme Court for further consideration when the petition comes on for hearing on its merits or at such time as the

Supreme Court may direct. The issue should be considered and decided having regard for the grounds set out in the petition and for any cross-examination that may be conducted in relation to the issue. In my opinion, the judge who reconsiders the issue should not feel constrained by the prior order of Wallace J. since that order dealt with standing only in relation to proceedings under the Municipal Act and not in relation to proceedings under the Judicial Review Procedure Act.

[28] Because of the lack of evidence of the membership of the society and the defective nature of the petition, I would make an order that the regional district recover the costs of the application below, and of the appeal, from the society.

[29] For the reasons that I have given, I would dismiss this appeal with costs, however, to the regional district. There should be no order for costs for or against the intervenor.

Appeal dismissed.



ONTARIO ENERGY BOARD

Volume: 1

12 JUNE 2003

BEFORE:

A. C. SPOEL	PRESIDING MEMBER
B. SMITH	MEMBER

RP-2000-0005

IN THE MATTER OF the *Ontario Energy Board Act, 1998, S.O. 1998, c.15 Schedule B*; AND IN THE MATTER OF an Application by the landowners in the Amended Application for just and equitable compensation in respect of gas or oil rights or the right to store gas under section 38(3) of the *Ontario Energy Board Act*; AND IN THE MATTER OF an Application by the landowners in pools being the subject of proceedings in Board file RP-1999-0047 (Century Pools Phase II) pursuant to the Board's order of February 2, 2000, for just and equitable compensation for the Century Pools Phase II development under section 38(2) of the *Ontario Energy Board Act*.

RP-2000-0005

12 JUNE 2003

HEARING HELD AT TORONTO, ONTARIO

APPEARANCES

STEVE McCANN	Board Counsel
ZORA CRNOJACKI	Board Staff
ROMAN CHYCHOTA	Board Staff
PAUL VOGEL	LCSA
EMMALENE LANG	On her own behalf
DOUGLAS SULMAN	Union Gas Limited

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--- Upon commencing at 9:30 a.m.

MS. SPOEL: Good morning. Welcome, everybody.

This is a hearing under the *Ontario Energy Board Act*. The file number is RP-2000-005. My name is Cathy Spoel and I'm the presiding Board member today, and with me is Mr. Brock Smith.

This matter today is dealing with the question of the status of certain applicants and prospective applicants in the broader hearing to determine compensation for gas storage -- gas storage --

[Technical difficulty]

MS. SPOEL: Sorry, is that better?

The purpose of today's hearing is determine the status of certain --

MR. McCANN: I think the technician is trying to assist you, Madam Chair. Maybe we could just take a couple of seconds to sort this out, because otherwise we're going to get off to a less-than-optimal start.

MS. SPOEL: I'll try again.

The purpose of today's proceeding is to --

[Technical difficulty]

MR. McCANN: Let's just take a second and get this sorted out here.

MS. SPOEL: Thanks. Third try. Try again? Can everyone hear me now? Great.

The purpose of today's proceeding is to determine the status of certain --

[Technical difficulty]

MS. SPOEL: Let me try this, okay. I hope we're not going to have this problem all day.

We're here to determine the status of certain applicants and prospective applicants for -- it's off again.

MR. McCANN: Can I make the suggestion, Madam Chair, that we take a five-minute break and sort this out because otherwise things are not going to go well.

MS. SPOEL: We'll retire for five minutes and see if we can get things working.

MR. McCANN: All rise.

--- Recess taken at 9:34 a.m.

--- On resuming at 9:40 a.m.

MS. SPOEL: Thank you. Please be seated.

The purpose of today's proceeding is to determine the status of certain applicants and prospective applicants to participate as such in the proceeding to determine compensation for gas storage and related issues. We will not be dealing with any specific matters of compensation at today's proceeding. We're simply dealing with the question of whether or not certain applicants whose status has been objected to by Union Gas will be entitled to participate as applicants in the main proceeding, which will be scheduled at a later date.

Our understanding is that today's proceeding is intended to proceed on the basis of oral argument only; that the evidence has been prefiled by both Union Gas and the applicants. I understand most of the applicants are represented by the law firm of Cohen Highley, except Mrs. Lang who is here to represent herself; is that correct?

MR. VOGEL: That's correct, Madam Chair.

MS. SPOEL: Thank you.

Before we proceed with any preliminary matters, could I have appearances, please.

APPEARANCES:

MR. McCANN: I'm Steve McCann, appearing for the Ontario Energy Board today.

MR. VOGEL: I'm Paul Vogel, and I represent the Lambton County Storage Association, LCSA, applicants. With me is Robyn Marttila, an associate, and Cheryl Dusten, a student in our office.

MS. SPOEL: Thank you. Could you at some point provide the court reporter with spellings of those names.

MR. VOGEL: Yes, I will.

MS. SPOEL: Thank you.

MR. SULMAN: Good morning, Madam Chair. My name is Douglas Sulman, and I represent Union Gas in this proceeding. And I have provided my spelling, my counsel sheet, I guess.

MS. SPOEL: Thank you, Mr. Sulman.

And are there any other appearances?

MS. LANG: My name is Emmalene Lang; I represent myself.

MS. SPOEL: Thank you, Mrs. Lang.

All right. Are there any preliminary matters? Mr. Sulman, I understand you've filed some updated material.

PRELIMINARY MATTERS:

MR. SULMAN: Thank you, Madam Chair, we have. Maybe I can run through them in coordination perhaps with Mr. McCann, and I can give some names.

First, Karen Fournie -- for the record, we had initially objected to several applicants, and with facts that we've later learned, we sent letters. But I think for the purposes of the record it might be good if we set out who we now do not object to.

And Karen Fournie, by letter of May 2nd, we have agreed that she is -- should have standing. The question of standing, of course, is not up to us to determine, it's up to the Board. But for our purposes we no longer object to Karen Fournie having standing for both -- she has an expired amending agreement so she would have standing in that regard, and she also has an expired roadway agreement so she would have standing in that regard. And we don't object to Karen Fournie in that regard.

You'll recall from our evidence that William Thomas - that would be paragraph 34 of our evidence for the purposes of the transcript - he had applied to be both an applicant and an observer. And I understand now that he simply -- he wishes to be an applicant for purpose of additional storage payment. And we're content that he be an applicant, subject, of course, to the Board's ruling.

Douglas Henderson and David Byers. In paragraph 35 of our evidence, we had objected because we said they don't have any agreements with Union Gas and hence aren't properly before you. And we do not object to them attending as observers and observing the proceedings.

Neil Coke was -- we initially objected to Neil Coke. That was, in part, because of the fact that we didn't believe he had any ownership interest. But what has occurred since that time is that Mrs. Miller, who did have ownership interest, is now deceased. Mr. Coke is a grandson of Mrs. Miller and I believe he's now the property owner. So we don't have any objection there. And I should say that we have sent a letter indicating also that. 60

We objected to Wilf Allaer, in paragraph 32 of our evidence, and that was because we had understood that Annie Harris had retained the storage rights. We've subsequently learned that it's not the storage rights that she has retained but rather a stream of revenue. The legal rights are held by the Allaers; the stream of revenue by way of a life interest in the revenue only, not in the mineral rights, is reserved by Ms. Harris, so the Allaers are the proper applicants. 61

Sadly, I will tell you that Olive Vansickle passed away on Tuesday, and I believe that one Larry Vansickle is listed as an applicant. The difficulty with that is, during her lifetime I suppose she was his representative or agent, I don't know. There was never a power of attorney filed so we didn't have that proper documentation. But I just bring this forward because at some point in time -- at the end of the day, not at this hearing but at the end of the day, if there's an order, there will be a list of applicants who will then be -- there will be orders as to what they receive or don't receive. But if they receive something, you'll need the actual names. The difficulty is going to be that it will probably be the estate of, and there isn't an estate representative at this time. 62

And I should tell you that given the number of owners that are involved and the passage of time since the beginning of this proceeding, you're going to face that on an ongoing basis. People do pass away, properties are transferred, and we simply -- there's no way of keeping up with that until the end. 63

MS. SPOEL: Mr. Sulman, you don't have any objection, however, that this is more of a matter of keeping the appropriate records and making sure that the determination at the end of the case is flexible enough or appropriately worded so as to take into account transfers or estates or representatives intervening through the passage of time. I take it that you don't have any objection to the status of whoever the property owner -- the legal property owner might be, or legal representative being an applicant in this case, with respect to this particular asset or right or whatever? 64

MR. SULMAN: I think that's a very fair comment. And at this point we're content that Mr. Vansickle appears a representative of the estate of Olive Vansickle. Our concern is at some point in time - and this is just an example, Olive Vansickle; there may be others that occur before ultimately there's a hearing - there's a practical problem that you don't want to pay the cheques to the wrong people. And when there's an estate, you want to know who is getting the cheques otherwise you have -- you can imagine the objections you may get from beneficiaries. 65

That's not an issue for today. I just wanted to bring forward that this -- the objection to Larry Vansickle, we're prepared to let him proceed as the estate representative. And if there's some evidence at a later point in time that he's not the appropriate estate representative, or there's an administrator appointed, whatever, that would be up to the applicants to let us know, I think. And there may be other changes, as I say, as we go through. 66

67 Those are all the preliminary matters that we had from that perspective, changes from the time of our evidence till now.

68 MR. McCANN: And I would just note that Mr. Sulman has made reference to a letter that he wrote to the Board on June the 6th with some attachments which are the basis for the updates that he's given us this morning. All those have exhibit numbers and are in the exhibit list.

69 Perhaps that's a good moment to just note that we do have an exhibit list. I don't know whether -- oh, okay, sorry, which we will distribute to the parties here today and their representatives. I think it's up to date as of yesterday, and we'll give exhibit numbers to material that's introduced today.

70 I don't know whether Mr. Vogel had any preliminary remarks.

71 MR. VOGEL: Just one preliminary matter, Madam Chair.

72 We have delivered a supplementary volume which contains some legal authorities that we may be referring to, and I'd request that that be made as an exhibit to this proceeding as well.

73 MS. SPOEL: I don't think it's actually our practice to mark books of authorities and legal argument as exhibits per se. We've received it; we have copies of it.

74 MR. VOGEL: Yes. It's entirely up to Board practice.

75 MR. McCANN: I think that's right. We've certainly received it. I don't think we would typically give it an exhibit number, though.

76 MS. SPOEL: We try to keep the line between evidence and argument defined, at least to an extent. We try not to mark things that aren't evidence as exhibits.

77 MR. VOGEL: No, that's fine.

78 MS. SPOEL: we have received it. Thank you very much.

79 MR. VOGEL: Thank you.

80 MR. McCANN: Can I just ensure that Mrs. Lang has been given a copy of that document. Yes, she has.

81 MS. SPOEL: Mrs. Lang, have you any preliminary issues to raise? We'll deal in a moment with the procedure we intend to follow today.

82 MS. LANG: No, thank you, I'm fine.

83 MS. SPOEL: Thank you.

84 MR. SULMAN: Madam Chair, now that I have the exhibit list, which I didn't have before, we did send a -- this is not a brief of authorities, but we did send a document brief to all the -- on June 9th, which you have before you in a black binder. We sent it to everyone, I trust. It says, "All perspective applicants." I don't think that has been given an exhibit number, nor do I --

85 MR. McCANN: We've certainly received that as well, Mr. Sulman.

86 MS. SPOEL: Yes, we have a copy of that, Mr. Sulman. My understanding is that everything that's in that document brief has already been filed, as the affidavit attached to it suggests that everything in it has been already filed with the Board in some other form -- in the same form but in some other bundle of documents.

87 MR. McCANN: I think to be fair, Mr. Sulman's covering letter indicates that the majority of documents have been filed.

88 MS. SPOEL: Well, then, maybe we should give this an exhibit number, then.

89 MR. McCANN: Maybe that would be the safe course. I'm not sure where we -- if you could just continue and we'll interject at some convenient point with what the exhibit number actually is, because we just need to catch up with the system.

90 MS. SPOEL: Thank you.

91 All right. If those are all the preliminary matters, I'd just like to quickly review how we propose to proceed today, and I understand this order has been discussed with the parties.

92 First of all, as it is Union Gas who is objecting to the status of certain applicants and prospective applicants, Union will proceed first with a general argument on matters relating to standing. Mrs. Lang will then make her presentation. Union will have an opportunity to reply to Mrs. Lang's presentation. Then the applicants' counsel, the remaining applicants' counsel, Mr. Vogel, will have an opportunity to respond to Union's argument on standing. Then we'll proceed to the specific issues, again with Union proceeding first with respect to specific individual applicants. And it would be very helpful, to the extent counsel can do this, to group applicants by issue and relate them back, if they can, to the general standing principles. I'm sure you can appreciate that it becomes confusing for us. We'll do that first with the gas issues and then with the roadway issues. And then the applicants will have an opportunity to respond to all of that, followed by any reply from Union.

93 If that's acceptable, I think we will turn it over to you, Mr. Sulman.

GENERAL ARGUMENT ON STANDING BY MR. SULMAN:

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95

MR. SULMAN: Thank you, Madam Chair. I hope I'm able to, in my later presentation, follow, and I think I can by -- certainly by pool and certainly by area.

96

I don't intend to repeat our written evidence that's been filed, but I think it may be helpful to understand why we're here today to consider a little history, and I will be somewhat brief with that.

97

Lambton County was the center of the first oil production in North America, and the local names, and I don't know whether you passed them along the way, but Oil City, Oil Springs, and Petrolia really affirm that reputation. In the early years of the oil boom, in the mid-1800s, Lambton County and Lambton County Natural Gas was, to say the least, an unwelcomed and unappreciated discovery for speculators looking for oil.

98

As the Lambton County oil field protection levels dropped and the gushers were gone and the oil boom ended in this area, speculators and the wildcatters moved on to greener pastures or, I guess in the oil industry, more appropriately, blacker pastures.

99

The oil business, they left here and first went to Northern Ohio, Pennsylvania, where the Rockefeller fortunes were made, and then on to Texas and Oklahoma and Louisiana. However, oil production continued in Lambton County, and that may be an issue at some point today or in later proceedings.

100

But what's essential also is that those in that oil business understood that there were vast, untapped quantities of natural gas reserves underground in Lambton County, in neighbouring Kent, which really isn't the subject matter of this hearing, both of which were situated on an old prehistoric sea. And that's where we get to the reefs that have resulted in underground natural gas storage.

101

So the natural gas production industry grew up in Lambton County and exceeded the oil production in this area, while the oil production continued and continues even today, and we'll see some discussion perhaps in that regard. But as the industry grew, so did the customary business practices, and that's what, in part, we're here for today.

102

The potential gas producer would approach, and continues to approach, landowners seeking to obtain the right to explore, produce -- and produce natural gas below the surface of the lands which have traditionally been owned by farmers. Lands agents from various companies - but early on they were principally Imperial Oil, which you'll see in the filings Imperial Oil agreements; and later Union Gas; Tecumseh Gas, which has sort of morphed into Consumers and now Enbridge; Ram Petroleums; Michigan Oil; McClure Oil, to name a few, and those are documents that are throughout - they would acquire from the landowners what at law is known as a profit a prendre, which is a right to enter the lands and remove a natural substance that is existing in the lands, in this case natural gas; in other instances, it would be oil or salt or gravel or precious metals, all which are collectively referred to usually as mineral rights.

103 Landowners owned the land in fee simple, and do, for the most part, still, and they have what is often called in law a bundle of rights. And they can lease, they can sell or otherwise dispose of some of those rights, all of those rights, or maintain some of those rights. And that's what you'll see in the documents that we'll refer to throughout.

104 Classically you'll find in these proceedings, these contractual business practices, a land owner keeps some of the service rights, leases yet others; may sell some subsurface rights -- surface rights, excuse me, and will lease subsurface rights, such as the right to store natural gas. And they may, in fact, retain the right to produce oil in certain instances.

105 These agreements go by various names, and as you see the documentation you'll wonder why it isn't all identical. They go by various names: Natural gas agreements, gas leases, gas lease agreements, storage agreements; roadway agreements, sometimes called sometimes easements. The terminology you see when you look through these documents is, in part, dependent upon the era in which the agreements are entered into and, in part, determined by the company that was involved. Imperial may have used one form, Union another, McClure yet another.

106 All these agreements provided a benefit for the landowner as he or she was able to tap into a new revenue source which he or she would not otherwise be able to achieve, because exploration and production involves geological and technological expertise, and a great amount of capital. And so while -- to the land owner, while accessing this new revenue source, the land owner was still able to receive his primary revenue from farming.

107 Now, the customary business practice in the early years was to enter into production agreements similar to the oil agreements, and that's why I take you back to the oil which are based upon that profit a prendre concept in law; the taking of an existing natural substance from the land, and the right to enter to do that.

108 But it all changed in or about 1940. The geologists were developing a method of injecting natural gas from another source into a depleted natural gas reserve and then extracting it again and going through that cycle of injection, extraction, injection, extraction. And that's when the storage industry was born. But that's a different concept than profit a prendre because you're not extracting an existing natural resource or mineral.

109 The advent of the Panhandle Eastern Pipeline bringing gas from Oklahoma to Lambton County, principally Dawn Township where the early wells were, via Detroit provided the opportunity to store natural gas in the summer when the demand was low and extract it in the winter when the demand was high. And that's where the storage industry began.

110 Now, in the 1960s, and I'll get us to this century soon, the 1960s saw three things happening in the storage gas industry in Lambton County. The first was an expanded development of natural gas storage to several pools. The second was the formation of the Lambton County Ratepayers, Landowners and Gas Consumers Association, which is sort of the grandfather of the Lambton County Storage Association that's here today. And thirdly, the Langford Committee, the government of Ontario struck the Langford Committee on oil and gas resources from which the Ontario govern-

ment developed the regulation of the storage business, which is why we're here today, and from which came the section 38 that governs our proceedings here today, which at an earlier time was section 21. And I guess I'm just old enough that I'm still used to section 21.

111 Union Gas about that time became the largest storage company when it combined its gas storage rights under documents that it has with some of the landowners with the majority of the Imperial Oil gas leases that you'll see as you go through, or gas rights.

112 You'll see, as we address, and I think Mrs. Lang has one of them, you'll see that you have Union Gas leases that date back to the early 1950s, and in other cases you'll see that they are Imperial leases. The Langford Committee recommended, and the government placed under their jurisdiction the jurisdiction of your predecessor board, the Ontario Fuel Board, for the first time, the power to actually designate gas storage areas. So they had a mandatory power, which is the designation.

113 But despite the presentations that were made to the Langford Committee, and those presentations were saying, Look, you should control contracts, you should have uniform contracts because they're all over the map, from different companies and different eras. The government decided not to do that and said that contracts should be respected; our role would be one of regulating, and it will be regulating through the Ontario Energy Board. And they left to the individuals and companies in Lambton County and Kent County and elsewhere the right to make their own agreements in accordance with the customary practice that had developed first in the oil industry and then in the natural gas industry.

114 And that's what you have before you today, is contracts between individuals and companies without interference by the government or regulators.

115 So Union and land agents and others entered into agreements with landowners over time, and the Ontario Energy Board, as now amended, operates under section 38 which I'll briefly read to you, because it's the essence of everything we're doing here.

116 Section 38(1) reads:

117 "The Board by order may authorise a person to inject gas into, store gas in and remove gas from a designated storage area, and to enter into and upon the land in the area and use the land for that purpose."

118 And of course all the applicants that are before you are in designated storage areas, some of them having been designated as early as the 1960s. So that's the mandatory provision.

119 Section 38.2 is the section that deals with compensation, and here's the key to it all:

"Subject to any agreement with respect thereto..." in other words, any contract that has been reached, and that's what the -- all the prior cases of the Board, particularly the Bentpath case have indicated and set although not precedent, direction to you.

"Subject to any agreement with respect thereto, the person authorised by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for damage necessarily resulting from the exercise of the authority given by the order."

So in other words, you can make an agreement and that resolves the issue; if there is no agreement, then you look to paragraph 38.3, which says:

"No action or other proceedings lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board."

Only when we you get to that hurdle, failing agreement, shall an amount be determined by the Board.

Section 38 has a bit of history. It was to keep people from going to the court. This goes back to the Langford Committee. This Board was set up as having jurisdiction to determine disputes between landowners and storage companies when there is not agreement, when there is not a contract in place, rather than having proceedings going to the court.

So that's what section 38 is about. And it's from this section that the Board derives all its authority to hear this application, the applications that may ultimately be before you at some future point in time. Well, they are before you, but depending on who has standing and what applicants may be there.

This phase of the hearing is called to determine which landowners who seek to become applicants in the proceeding are entitled to be granted status as applicants, or granted standing for the various different types of compensation sought, be it storage rights, roadways or residual gas. And I'll address those in the later argument specifically, as you've requested.

Clearly put, to be granted standing, an applicant must be an owner of lands. And that's why I had some confusion about Mr. Vansickle earlier, and we may throughout the proceedings have that. He must first be an owner of lands or have gas or oil rights or storage rights in a Board-designated area; and either have no agreement for compensation in respect of those rights or have an agreement which has a provision allowing for Board determination of compensation. And that is what you'll find throughout these proceedings referred to often as amending agreements. So there are agree-

ments under section 38, the predecessor section 21. But there are subsequent agreements that allow -- called amending agreements, that allow for determination of compensation by the Board.

131 It's Union's position that any potential applicant who does not fall within the provisions of section 38 of the *Act* does not have a right to attend these proceedings. This is not a new or novel position, neither is it draconian. It is a time-honoured practice of this Board, and it's supported in the Bentpath case, which is E.B.O. 64(1) and 64(2), in which the Board held a similar hearing to the one that we're holding today, to determine standing.

132 In that hearing it concluded that those landowners who had no agreements would have standing; those who had agreements would have no standing; and one landowner, whose name is Achiel Kimpe, would also have standing because they rule on a matter -- he pled non est factum, in other words to laypeople, he pled that he didn't have an agreement. He signed an agreement but he said, I didn't know what I was signing at the time because I have limited comprehension in English, and so I didn't know what it was about. And the Board took the time to go through and apply the legal principles and ruled that he had -- that in fact there was no agreement because of the principle of non est factum.

133 Just for a moment I would ask you -- well, I can read it to you, but I will tell you the reference. It is at the -- the Bentpath decision is found at tab 16 of our document brief. I don't know if we have an exhibit number yet on that.

134 MR. McCANN: Yes we do. Maybe I can just introduce that. We've given that document, the document brief of Union Gas Limited, the exhibit number of B.7.1.2.

135 EXHIBIT NO. B.7.1.2: DOCUMENT BRIEF OF UNION GAS LIMITED

136 MR. SULMAN: Thank you. So at tab 16 of that exhibit, page 84, and you can either -- I can read it to you, but I think it's pretty easy to access. Tab 16, page 84 of the decision of this Board in E.B.O. 64(1) and (2), from July 16th, 1982, so about 21 years ago. And this was a decision on standing. The Board said:

137 "Those landowners that have agreements have no standing before this Board in this proceeding, and Union is legally required only to pay the amount of compensation required by such agreements."

138 And that's, in a nutshell, our position today. Generally, Union, you'll find, has not objected to potential applicants in the Oil City and Bluewater Pools who have not accepted Union's first offer after designation and before injection, under section 38 of the *Act*. But Union objects to those who have signed binding agreements, have taken payments, and now come forward to seek further additional compensation.

139 It's Union's position that the sanctity of contracts in the storage business, the oil and gas business, is vitally important. If written agreements are not upheld, then it throws the storage business and in fact the natural gas business into chaos. Stability disappears, and any incentive to resolve matters

by contract between parties without constant application to the Board requiring determination by the Board, all that dissolves. And not only does the principle of sanctity of contracts provide business and economic efficiency for Union and the landowners and its customers, but for all other companies in the natural gas storage business.

140 If Union's landowner contracts, if there's no sanctity of contract for those contracts, then the same applies to all other storage companies. Well, I guess there is only one at this point in time. But all other storage companies. There's only one other large one. And that affects the rates of all customers, consumers, and farmers in Ontario. In other words, it is adverse to the public interest to abrogate contracts and to destroy the sanctity of contracts that have been entered into over years.

141 This hearing is ultimately, when we get to the final hearing, it is ultimately a private compensation dispute. It's not a generic hearing on what compensation amounts or methodologies might be appropriate for all Lambton County. But an abrogation of contracts could lead exactly to that. This is a private compensation dispute, not a generic hearing. But open the contracts and that's what it becomes, and then others should be -- may want to participate.

142 In May 2000 this Board designated certain pools, namely, Oil City, Bluewater, Mandaumin, which throughout these proceedings may be referred to as the Century II Pools. In that hearing, the Board - and that was a designation hearing brought under section 38(1) that I referred to earlier - the Board determined that a compensation application that has been brought by certain pool landowners, most of whom are now represented by Mr. Vogel, would be deferred to a hearing specifically for compensation under section 38.2. And that's part of this proceeding, but it's only part.

143 I respectfully suggest the Board should be careful on this issue as it arises because all the Board did at that time, by Board order, was defer the compensation portion of the hearing. It didn't in any way rule or prejudge who would be entitled to standing in that ultimate compensation hearing. And there may be some argument, and I know in my friend's written evidence, there is some suggestion that by the Board deferring the compensation portion of that hearing, or actually the 38(2) application, that you somehow had some inalienable right as a landowner to open everything up and be heard. All the Board did was defer -- was separate the designation portion from the compensation portion, and said there will be a compensation portion in a hearing at a later time. That's what this whole application is about.

144 But as part of the compensation hearing, there is a standing phase of it, and that's the same thing that happened in the Bentpath case. There was a standing portion first and then a compensation where ultimately amounts were dealt with.

145 But there's no estoppel, if you will, to put it in some legal framework, by the -- that is, Union isn't estopped from saying, We object to certain standing. It was the Board's order that deferred the compensation to another time. Simply by deferring it, you don't -- I'm afraid what the argument might be, and maybe I'm pre-anticipating, is that, Look, you've told us it would all go to a compensation hearing. You now can't say to us, Some of you can't attend with standing as an applicant. And that was never what the Board's ruling was. It was everything goes to compensation; you can argue all those issues at that point in time.

146 So ultimately some of the landowners have now entered agreements with Union and they are not seeking standing here today. There are a greater number -- just so we can put it in perspective. There are a greater number of landowners in Lambton County than those who are applicants in this proceeding. Many have settled. And of those who have not settled and are applicants, we're seeking to object to their standing, although very few, as you can see. Some people did sign agreements and are nonetheless still seeking standing, and those we object to. That's what it comes down to.

147 The Bentpath decision of July 1982 has greatly affected Union's activities and set the precedent for everything that's been done in storage compensation since that time. In its decision, once again I will read it to you, I know you've had it turned up, that paragraph that I read to you goes on further. It says:

148 "For obvious reasons it is desirable that all landowners in a pool be treated equally and the Board would encourage Union to adopt a uniform treatment for all landowners in the Bentpath Pool."

149 Not all Lambton County, the Bentpath Pool. All the Board said at that time was, Okay, we're going to determine compensation to some. Make sure it's equal to everybody in the Bentpath Pool. The Board said:

150 "It recognizes, however, it does not have the jurisdiction to order Union to" even compensate owners in the Bentpath Pool the same.

151 However, what happened was Union not only compensated the owners in the Bentpath Pool the same, in accordance with what they perceived as the Board's direction, they went one further. And that's how we get to what we're at now.

152 They put in place a policy for the uniform treatment of all the Bentpath Pool owners, and then they went out and tried to create a uniform treatment of all pool owners, again despite the fact that they weren't required to do so. And they did it in the spirit of the then wording of the *Act*. As I say, I'm just old enough to get back to section 21, which used to read "just, fair and equitable," now it reads "just and equitable." And they did that not only in the spirit of the *Act*, but also because they were trying to improve landowner relations at that point in time.

153 So it embarked on a landowner negotiation period and entered into further agreements called amending agreements, and that's what you'll find throughout this proceeding. These amending agreements, that is, those who signed them, amended the agreements under the then section 21 of the *Act* to bring compensation levels up in accordance with the consumer price index.

154 I emphasise it wasn't a change in compensation methodology, only the amount. And you've got to also remember that this was post-1982, which was the Bentpath decision, and what it did was -- what these amending agreements and bringing compensation levels up to the consumer price index did was recognise inflation, which, as you'll recall in the 1980s, was rampant and on a run-away level. And so that's what amending agreements -- that was the theory behind amending agreements. So when you see these amending agreements, Why did Union do this, it was arising out of the Bent-

path and out of hope to put in place some way of dealing with inflation and improve landowner relationships.

155 Now, I should tell you, there was no contractual obligation on the part of Union to do any of that. And more importantly, when you look in the Lambton County natural gas wider business, the other large storage company did not do that, and does not do that. They have no amending agreements. They gratuitously, after Union makes their arrangements, traditionally and customarily, they gratuitously raise their landowners also. But they have no contractual obligation to do that. We do by amending agreement. And when people don't have amending agreements, we have no obligation to do that. But that's why there are amending agreements in place.

156 And these amending agreements are generally, originally, 10 years in term. The ones that are signed more recently have a shorter term. I think it's simply the evolution of the contractual practices in the natural gas field. Some have been renewed; some have expired. And we'll discuss those throughout. But it's Union's position that those parties with expired amending agreements are entitled to status before this Board, because what the amending agreement, put simply again, does is it allows for a person to seek a change in their compensation. It did change the compensation. And then when it expires, they're in a position where compensation falls back under section 38(2).

157 So that's our position. They have status. Those with agreements that have not expired do not have status. They have an agreement under section 38.

158 This is a statutory Board whose jurisdiction is dependent upon that statute. And it's my respectful submission that there's no right to simply come before the Board because you don't like the deal you got. You have to be here under section 38.

159 Because you have a new theory of compensation or a new methodology of compensation theory, unless you're in a position under section 38(2) because you either, A, don't have an agreement, or you have an agreement that's expired, that you can't simply come because you want to. Your right to be here is dependent upon section 38 of the statute.

160 Because a landowner may have a tentative negotiation session or a landowners communication meeting with Union Gas, there doesn't spring from that attendance a right to seek compensation under section 38. And you'll hear some argument in that regard, I believe.

161 There is no right to standing simply because you don't like the agreement you've entered into or because you believe that the circumstances in the marketplace have changed. You've got to be here because there is a right within the agreement to reopen the agreement, or that you don't have an agreement at all under section 38. And to do otherwise strikes at the sanctity of all contracts and results in all storage contracts properly being reopened, or the opportunity to reopen them.

162 And not only these but every contract that's in Lambton County for storage, and probably on an ongoing basis. Every time there's a change in circumstances, I think I'll bring an application. Contracts are there for a reason.

163 Those are my general comments. I've not read back to you, and I wouldn't presume to do that, read back the words of the prefiled evidence. Although at this time we'll adopt them as our position at this time. I'll address Union's specific issues on each landowner at the appropriate point in the schedule, as you've indicated, and they will be specific to each individual landowner and each topic, whether it be residual gas, roadways, or storage rights.

164 Those are our initial comments, and if I can answer any questions, I'd be pleased to do so.

165 MS. SPOEL: Mr. Sulman, can I just ask, referring to the amending agreements, and I'll deal with that -- I expect you'll deal with this more later in your specific comments, but just as a general issue.

166 If you have a landowner who has an amending agreement that's going to expire next year, let's say - I don't know if any of them do, but you referred to some of them being 10 years, some of them being 5, whatever - those who have relatively current amending agreements, I assume those agreements will expire at some point in time. They are not in perpetuity; is that correct?

167 MR. SULMAN: That's generally correct. Let's say for the majority that's correct.

168 MS. SPOEL: Let's just deal with that particular case. Is it Union's position that -- let's say before this hearing, this process has been going on for a couple of years, that if someone's agreement expires next fall, let's say, and we haven't issued an order yet in this case, would that person then have the right to join in as a new applicant because their agreement has now expired? And I don't know if anyone is in that situation. I'm just raising this as a general question.

169 MR. SULMAN: I think that's -- let me get the time frames right. If this proceeding is not -- I shouldn't say finally determined, but not finally determined by the Board, in any event. I mean I don't want to consider what would happen if there's all sorts of levels of appeal, but let's say it's not finally determined by a Board order. Anybody whose agreement expired during -- from now to that point in time certainly would have the right or the option to come forward as an applicant.

170 Now, I say "the option". Remember, people have the right to negotiate their own deals; that's what contracts are all about, give and take and agreement. But if they were to expire -- you can't do anticipatory expiration, if you will. So if someone says, Well, you know, my agreement is going to expire in 2005, why don't you just consider me too. That's where we have a problem, because anything can happen between this order and 2005. They may like the order and say, Okay, I'll now settle. I know which way the wind is blowing.

171 MS. SPOEL: I don't know what Union's practice will be. But assuming that you were to follow a similar approach to what -- that Union were to follow a similar approach to that followed following the Bentpath decision, which is, in fact, to offer the other owners in the pool the same terms as the ones who were parties to the hearing, if you were to follow that approach following the disposition of this case, which would be an option open to Union - I won't comment whether you would be required to do so or not, but certainly that would be an option - if one of those owners whose agreement happened not to have expired in that interim period felt that they might provide something

useful to this hearing, are you saying that because of the timing of it they have to -- they don't have an opportunity to be heard about what the compensation in the future should be. They have to put up to whatever this Board decides without them having an opportunity to provide us with their input into it. Is that essentially your position?

172

MR. SULMAN: Yes, that is -- that's essentially our position because they would not be entitled technically to standing. They may have all sorts of things they want to tell you or give you input, but so might that other storage company, so might other landowners, so might customers. That's the fear; is that, in trying to be generous in that regard, it opens up this whole thing past a private compensation situation. They have no -- they have an agreement in place. There may be others who have all sorts of wonderful things to tell you that might be helpful too.

173

The reality is, the decision that comes out of this ultimate hearing will give a strong indication to anybody who has an agreement in place and about to expire, and they're ably represented by counsel -- those who already have expired agreements are ably represented by counsel. And the beauty of it is for that person who's maybe two years out before they have an expiration, is that they now know what the Board has ruled and they know then what -- whether they want to come back and make an application or whether they want to accept the compensation levels that have been decided by this Board.

174

So they don't need to come forward and give you -- our position is that they don't have a right to do that, because they can only come here if they have a right under section 38. They can come and observe.

175

MS. SPOEL: So you're saying that the Board has no jurisdiction, in effect, to give a person party status, whether we call them an applicant or some other kind of party, that they cannot be a party to this proceeding unless they fit narrowly within the requirements of section 38 of the *OEB Act*.

176

MR. SULMAN: They cannot be an applicant, because an applicant brings with it certain -- the status of applicant brings with it certain rights and certain obligations. They would, at the end of the day, assuming that there's an order that sets out compensation, an applicant, all the names will have to be listed with the amount that they get, based on their rights and their acreage, et cetera. You are would not be -- respectfully, you would not be in a position, nor have jurisdiction to order us to pay someone who has a contract already. That's what the Bentpath case says.

177

But that doesn't mean they couldn't attend as an observer, or if there's some other status short of applicant. But they certainly aren't entitled to be an applicant because it brings with them the obligation to pay costs if they lose, and we determined that in a -- we had all that debate in 2000 in this same hearing, and we had agreement.

178

So there comes with it a -- being an applicant, a benefit, but also a potential burden, if they don't act reasonably in their -- in their presentation.

179

So I would say those people are not entitled to be applicants in this proceeding. But I wouldn't -- I don't think they are in any way being prejudiced. They've got an agreement in place, and they'll see

what this order is and either -- there will be efficiency in the storage industry in Lambton County because they've entered agreements, or the numbers will be so few that they will be able to make applications as they see fit. But in all likelihood that won't be the case. They'll rely on the order.

180 The other issue you brought up was would you -- if Union followed the same trend that it has. I won't set policy here, but you know what the history is. And as long as there's a reasonable amount, that's what history has been.

181 MS. SPOEL: Thank you.

182 Mrs. Lang, I think it's your opportunity now.

183 MS. LANG: Thank you.

184 MS. SPOEL: You'll want to press the little green button on the microphone to make it work when you're ready to go. At the bottom, underneath the word "micro" there's a fairly big button.

185 **PRESENTATION ON STANDING BY MRS. LANG:**

186 MS. LANG: Madam Chair, I would like to thank the Energy Board for this opportunity to speak today.

187 My name is Emmalene Lang, the holder of an oil and gas grant signed by my mother and Union in 1951. I inherited this property. I'm the owner of the mineral rights and the gas and oil grant.

188 Now, my case is unique, and this is why I am acting alone. In brief, the oil and gas grant gave Union the right to drill for, produce, and store natural gas. The oil and gas grant in 1951 does not include residual gas. The ownership of the residual gas remaining in the cavern after production ceased was not given to Union. The lessors have never at any time, in any way, given up or relinquished to Union the ownership of their residual gas.

189 We will be asking the Energy Board to make a ruling to that effect, and to order a payment for residual gas to be paid down to 0 pressure. The following is a short historical review of how events unfolded.

190 In 1951 Union drilled a well on our property after my mother had signed the lease. It was the first drilling in the area and was within sight of our own little private gas well. Union was in partnership with Imperial Oil, and they were searching for both oil and gas. Natural gas was found.

191 In the years 1951 to 1960, there was gas reduction. We were paid $700 annually; $200 for the lease and 500 for production. This was in accordance with our signed gas and oil grant of 1951.

192 From 1955 to 1960 there were agreements; firstly, the unit operating agreement, and then further storage agreements, storage amending agreements. All these agreements were signed by other landowners in the pool. None were signed by my family.

193 In 1960 production ceased. Union had mapped out a storage grid and the Ontario Fuel Board declared Waubuno as a designated gas storage area. In 1960 Union used their storage grid map to calculate how many acres each farmer had in the pool, then offered to pay each farmer an annual gas storage rental for each acre that was held in the pool. This was called the unit storage agreement, which is still the backbone of all present storage agreements.

194 Union had been unable to extract all the gas from the cavern during production. There was some residual gas left in the cavern. The signing of the unit storage agreement, the unit agreement, and the payment for residual gas went hand in glove, part and parcel, of the same deal. Union paid each farmer outright for his residual gas. This was calculated on a per-acre basis, using a formula based on volume and pressure. All other landowners in the pool signed the storage agreement and received the residual gas payments. You see, it went hand in glove.

195 My parents did not sign so they did not receive the residual gas payment. Union kept paying my parents their usual $700 annual production payment while arguments and negotiations were going on, and my parents kept taking the annual $700 cheques without prejudice. They did not choose to accept this as total payment. As the oil and gas grant of 1951 states, it was a lease payment for the right to store gas.

196 My parents kept refusing to sign the agreement, and Union kept paying them $700 annually for production, even though production had ceased. In this way the lease was kept alive for Union and the familiar payments were taken without prejudice by my parents as a continuation of the previous payments.

197 A state of limbo ensued. Several documents referred to this long-standing dispute, to this state of limbo. It was a stalemate for everyone concerned, an impasse, a long impasse. The matter has never settled.

198 I wish to list some documents to show existence of this dispute, which is recognised by Union.

199 The first item is an indenture of Union and Imperial. When they split up, they discussed at great length the dispute -- the disputed lease number 14335, which Union held with my mother. Both Union and Imperial "acknowledge that certain payments in lease number" that, in the name of Isobel McBean Young are under dispute by the lessor, and at final determination of the dispute, Imperial shall then make settlement with Union."

200 The second item, Mr. McGee and O'Connor from Union in 1985 saying, "Mrs. Young continued to accept rental payments of $700."

This statement shows the $700 annual payment as rent only, and this is what I've said before. We accepted the $700 as rent because it was in the original lease. There's a long sentence there. 201

Next item. In 1990 Mr. Hunter of Union Gas urges me to sign the unit storage amending agreement and postpone "historical disputes." 202

Next item. David Lowe from Union in 1993 tells me that, this is important, "ownership of the residual gas still resides with you under the provisions of the petroleum and natural gas lease and grant." He wants me, in 1993, to sign the storage amending agreement, and Union would make "suitable acknowledgement of the outstanding matter of residual gas payment." This is 40 years already. 203

So it can be seen that all along the line there has been a dispute about residual gas, and a procrastination from Union about paying for the residual gas on a stand-alone basis. 204

Each cycle of the cavern changes the physical gas in the whole cavern. However, no matter how often this occurs, the gas at the lowest pressure, whether it's called residual gas or cushion gas, which is necessary in the storage business - cushion gas is necessary - it all remains mine. And the value of the space is enhanced every time Union borrows and replaces, borrows and replaces. In their storage operations, it's borrowing and replacing. They don't own it, but they borrow it and replace it. They use the space. 205

Next I would like to present my response to Union's evidence. Now, I did prefile a response. I'd like to add to that because I missed something, please? 206

MS. SPOEL: Certainly. 207

MS. LANG: Thank you. And I made a horrible faux pas in typing my first response, I used the word "lessee" instead of "lessor", and should have stuck with plain English and said the residual gas belongs to me, okay? 208

[Applause] 209

MS. LANG: I would like first to refer to page 2, paragraph 6, of Union's response -- Union's evidence, this black book, binder. I hope I can get to this. This is regarding section 38 of the *Energy Board Act*. Section 38, this is in paragraph 6, page 2, everybody. 210

I see a list of concerns which would allow me to come before the Board to get corrected. Paragraph 6, item 2(a) does apply to me because I am seeking just and equitable compensation in respect of gas which, in my case - which in my case - is residual gas. 211

Next item. On the very last page of your book, and I missed it at first, my name is missing. On table 1, page 5 of 5, under the column "Standing for Payment for Residual Gas to 0 PSI," I want to make 212

sure everyone knows that this is exactly why I am here today. Compensation for the full amount of residual gas down to 0 PSI. Do you see that column at the end? Actually, I think that's where I should fit, perhaps.

213 Now, back one page, page 4 of 5, my name is in entered and challenged under "Standing for Additional Compensation for Storage Lease Agreement." Well, I don't really have a storage lease agreement, so let's postpone that until after the residual gas is paid for. Once I signed -- once I receive payment for my residual gas, then I'll be very, very happy to sign all these agreements that I've missed out on all these years, and I'll be on a level playing field and Union will be happy. Everybody should be the same, okay?

214 Next item. On page 3, paragraph 10, item D, "Compensation for Loss of Commercially recoverable Gas Production, hereinafter called Residual Gas." I would like to feel that I am qualified under that point to be allowed to be a participant.

215 Now, on this item, on page 9, paragraph 28, the last line of paragraph 28, Union states they have no objections to someone who did not accept Union's offer of compensation at the time the pool became a DSA. Union did, indeed, make us an offer. We did not accept it.

216 Next point. On page 10, paragraph 33, where they deal specifically with me, Union paid, and continues to pay, total compensation of a formula based on previous volumes of gas produced despite the fact that gas has not been produced since the early 1960s. Union is using the term -- this is my answer. Union is using the term "total compensation of $702" to claim that it absolves them from all past, present, and future disputes.

217 Other Union documentation refers to the same payments as paying Mrs. Young a total rental of $700 per year, and has continued to do so. This is storage rental and has nothing to do with any residual gas payment. Strictly payments covered in original lease for gas storage.

218 Also in that same paragraph, line 5, "Mrs. Lang's family chose to continue with the agreement." I take exception to any statement by Union that my family chose to continue with the status quo. The status quo continued all by itself, without any choosing. There were many disagreements going on and everyone thought that sooner or later some kind of settlement would be made. It never was.

219 In my original submission I state that Union and I have a mutual problem. The problem I have with Union is that they won't pay me for my residual gas. The problem that Union has with me is that I won't sign their agreements, nor will I accept their annual $700 rental cheques. I haven't accepted them for 17 years.

220 Every other landowner in the Waubuno Pool has received compensation for their residual gas. There is no term in my oil and gas grant that precludes me from coming before the Board to claim compensation for the same thing that everybody else in the pool has received.

This has been a long stalemate. I'm just done. It's a long-standing dispute. No agreements other than the original lease were made; legal, casual, verbal, or implied. Nothing. No choices made. We didn't choose. Just stuck at an impasse. 221

Union has a copy of my father's death notice in their files. I think they know -- I think I know what they were thinking. Union offered my parents a settlement, the same as they offered the other landowners of the Waubuno Pool. My parents did not accept the offers. They felt Union had too much the upper hand and were pressing too hard. They felt that landowners, mainly farmers, needed to work together with the help of their own experts to assure that a fair and equitable settlement was reached. Time has proven their instincts to be correct, as evidenced by this hearing today. 222

I thank you most sincerely for your patience and attentiveness. 223

[Applause] 224

MS. SPOEL: Thank you, Mrs. Lang. 225

I think before we proceed, this would be a good time to take a short break. I have about approximately 10 to 11. Let's resume at -- we'll resume at about five past 11, if that's acceptable. 226

--- Recess taken at 10:50 a.m. 227

--- On resuming at 11:05 a.m. 228

MS. SPOEL: Mr. Sulman, I think it's back to you, in our order of presentation here, to respond to Mrs. Lang's comments. 229

REPLY ARGUMENT TO MRS. LANG'S PRESENTATION ON STANDING BY MR. SULMAN: 230

MR. SULMAN: Thank you, Madam Chair. 231

I would suggest that we go to our document brief again, the black binder exhibit, and turn to tab 15. What we've tried to do there is put in one place for you the -- for all of us, the documents, that is, the agreement of lease that Mrs. Lang referred to from 1951. You'll find that at the top -- at the top it's tab 15.1, and behind that you'll find 15.2, which is the unit operation agreement that Mrs. Lang referred to. Just so we've got those documents before us. 232

I think Mrs. Lang had - maybe I can deal with one issue first - indicated that in our index, the appendix to the chart, we had not listed her with regard to residual gas. We can correct that and put residual gas and then list beside it "challenged", if that's of any assistance. But I don't -- just to clarify that, she brought that up. We have not done that. I think we have an N/A or something beside it, or 233

we may not have it at all. Oh, we don't have a column where she's listed. So we can do that, but I can put on the record that, yes, we obviously oppose or challenge the residual gas.

234

That brings me to the first point. I did a little history lesson at the beginning of our general comments, and I knew it might come in handy later. Residual gas that we're talking about, the question, what is residual gas. Residual gas, in our submission, and in experience in the natural gas industry, is really -- you're not going to find it in the agreement of lease and you're not going to find it in the unit operating agreement that are under tab 15 and 16. Residual gas is a term of art. And everybody doesn't agree on what residual gas is, but let's -- I'll tell you from our perspective and experience what residual gas is.

235

It's, in effect, a proxy or in lieu of gas that -- when a pool has gone into production, gas that is not produced down to an abandonment pressure of 50 pounds per square inch. Other gas, in theory, which could also be called residual gas, remains in that pool, this is the Waubuno Pool in this case. All the other pools you're hearing about, there's gas below 50 pounds per square inch. It's not economically producible and the industry, a common practice in the industry, there's general agreement that gas is not produced down to that level. And when you go to storage, what "residual gas payments", and I put those in quotation remarks for the record, it's a payment in lieu of the gas that would otherwise have been produced down to 50 pounds had production continued, okay? That's the one payment.

236

And what Mrs. Lang is saying is, I want to be paid down to O, I want all the gas that could possibly be in there. And even down to 0, I'm not sure that's all the gas that could possibly be in the little holes that are in the reefs that make up storage poles. Do you want me to -- if you have a question, I'd be happy --

237

MS. SPOEL: I'm just wondering, Mr. Sulman, whether a -- I'm hearing -- dealing with standing, or the status to bring this application is the place to get into a discussion of differing views of what residual gas is and whether or not there's anything -- I understand your position. I think you're coming to the position that there's nothing for Mrs. Lang to be compensated for. But I wonder whether that's a matter that deals with the substance of the hearing, which certainly would be a legitimate issue for you to raise, or whether that's a matter that deals with standing. Because, of course, we're not hearing any evidence today, and I'm not sure that we have a record that would allow the Board to make that kind of a determination based on the documents we have before us now. And if it's something that's going to require more, then I think it's not really a matter -- not necessarily a matter for standing. Just because someone gets standing doesn't necessarily mean at the end of the day they're going to get compensation. It's not an automatic thing. The question is are they even allowed to talk to us about compensation. That's the question for a standing hearing. And if there's a difference of views, then I think those are more appropriately debated within the real context of the application.

238

MR. SULMAN: I'm not going there, and certainly with that direction I won't. All I wanted to explain was what residual gas is. But what I was about to say is in 1951 it was not a term of art, and this is a 1951 agreement. You don't -- and as Mrs. Lang points out, there is no payment for the words "residual gas" because they weren't a term of art in 1951. As I explained, that's in the very early years of the storage development industry in Lambton County, well, in the world. It is -- you won't find it

anywhere in her agreement; you won't find it in the unit operation agreement that she says is, and we agree, the backbone of a lot of storage operations.

239 Her position is that she was treated differently, that she's unique and treated differently. I wanted to first point out that the agreement of lease that Mrs. Lang has is the same form of agreement of lease that the Waubuno Pool owners all have. And it's not unique to Waubuno Pool. In fact, there are other pool owners, and I won't ask you to turn them all up, but Sandersons, who are also -- and the estate of Arthur Sanderson, likewise has an agreement, that is, the same terms, same agreement. That's found in, I believe, tab 4 of our documents. In tab 5 of our documents you find Christopher Robinson who has the same form of lease that Mrs. Lang has. These are not particularly unique. They started in 1950s, that form, and carried through into the 1960s.

240 And so we agree that what occurred is Mrs. Young, Mrs. Lang's mother, Isobel McBean Young, signed an agreement of lease. I think that -- so now I'll give you our interpretation of what happened after that.

241 Mrs. Lang's mother, Mrs. Young, has an agreement -- Mrs. Lang's position is that it's a rental agreement, and a rental agreement only. That is not the Union Gas position. It is an agreement covering both rental -- both oil and gas production and storage, which it says clearly, and I'll read that to you in a moment; and it also has methodology for the payment of -- for gas itself.

242 So let me sort of walk you through that and try to explain where that leads you. So we take the position this agreement of lease covers all those issues, and it is an agreement under what is now section 38. Unfortunately, back in 1951 they didn't number these paragraphs, so I would take you down about -- almost a quarter of the way on the page, and it looks like there's a little bullet. I'm not sure whether that -- I think that's probably the perforations from the registration office at the time. But it says, it's the first little perforation that says: "The rights hereby granted ..." Can you all find that one?

243 "The rights hereby granted shall continue for a term of 20 years from the date hereof and so long thereafter as any of the said substances is or are produced in paying quantities...or so long as any of the part thereof are used for underground storage of gas as aforesaid."

244 And It goes on to say:

245 "In order to provide for the storage gas underground and for the purposes of protecting the said gas so stored, the Lessee shall have the right at any time, and from time to time, to determine that any lands covered by grants or leases held by it shall be a storage area."

246 You see, this is prior to the Langford report that I referred to. Prior to that mandatory regulation of designating storage areas, there was a regulation that was passed by the Ontario government, assuming that we have the same -- had the same system back then as we had then, it was probably an order in council, that recognised all those existing storage areas and designated them on block. But back in 1951 that wasn't the case.

"Should the lands above described at any time be included in any such storage area and notice be given notice as aforesaid them the rights and privileges granted by this Indenture, as same exist at the time of said notice, and subject to all covenants and conditions, including the amount then being paid as rental, at that time binding upon the Lessee, shall continue as long as gas is being stored in the designated part thereof... The Lessee shall pay to the landowner $100 per year per well for each well drilled for the storage of gas during the term of this lease and any extension thereof."

That's the portion that deals with the rental payment for storage. Now, it's a little unique here because it was supposed to be $100, but you look down further and you can see some handwriting; I guess that's the only way to describe it. "This lease shall be nul and void." You can see that probably three-quarters of the way down the page. It scratches out the 100 and makes 200. So when Mrs. Lang says that she was being paid $700 - and I say paid; she isn't cashing cheques of late, but she's been paid $700 - that's 200 of that $700, and that's the rental portion. Okay.

Now, what also happens is there's a payment on gas flow, and that's down where you see -- a little over halfway down where there's a zero and then 500 mcf per day. And what happened was that Mrs. Lang - Mrs. Young, first, and then subsequently Mrs. Lang - Mrs. Young was being paid $500 per year based on well flow, a producing well flowing over 5,000 Mcf per day. Do you see that portion?

MS. SPOEL: Yes.

MR. SULMAN: Okay. The well stopped flowing when it went out of production a long, long time ago, when this went to storage in 1960.

MS. LANG: 1960.

MR. SULMAN: But she continued to be paid for gas. That's what the flow of gas is. That's what the well flow -- well producing is. That's for payment of gas, based on gas volumes. They were continued to be paid at $500 a year. Not for the rental of the lands, as you saw before, but rather based on gas flow, which stopped. Yes?

MS. SPOEL: Sorry, I'm just looking back at my notes, and my notes from Mrs. Lang's presentation, I think she concedes or conceded that the lease payment included the right to store gas as well as to produce it.

MR. SULMAN: Right.

MS. SPOEL: So I don't think there's an issue there. I think her issue is whether or not she ever received any compensation for the residual gas. The fact that it includes -- and again, this may be a legitimate question, but I don't know that -- perhaps it would be helpful if you could direct your remarks to the specific issue of, does this cover any residual gas, not does it cover storage. Because she has conceded that it does, in fact, cover storage.

257 MR. SULMAN: That's right. The $200 is the rental for storage; the $500 -- residual gas is a proxy, that's why I went through that, residual gas is a proxy for gas that is not being produced. That's all residual gas is. We could call it anything; we could call it brown cow. But it's called residual gas. All it is is a proxy. Whatever term of art we want to apply, it's a proxy for gas that is not produced because you go to storage.

258 This is a payment for gas, and she's continuing to be paid for gas not produced when it went to storage, and it was paid right from 1960 -- well, it was paid before that and was continued to be paid after it was not produced, on an ongoing basis -- well, it's still paid. It's just not accepted any more.

259 MR. SMITH: Is it, in essence, your position that that is the payment for residual gas?

260 MR. SULMAN: Yes. There wasn't any residual gas known in the industry in 1951. All you do is get paid for gas that isn't produced, okay? That's what residual gas --

261 MR. SMITH: Was that ever acknowledged in some way?

262 MR. SULMAN: I'll get to that, and I'll correct something that you heard earlier.

263 Then the unit operation agreement was offered to every other landowner. And once again, they don't call it residual gas because, once again, there's a complicated formula on page 2 of document 50.2 under that tab. And I won't walk you through that because not only would that take a long time, but it's not the clearest statement in the world. But it never, at any point, says "residual gas". All this is is, again, a payment on a royalty basis for gas produced for the lands which can't be produced any more because it's going to go to storage.

264 The other landowners in the pool were paid on that methodology. She's being paid on the methodology under the prior agreement, once again, not called residual gas under either one.

265 I would point out at this point, Mrs. Lang is asking to be paid down to 0 pounds per square inch. You will recall she said, I want -- and she said, I want to be treated like the other landowners in the pool. As you can see, there is an agreement, and the abandonment pressure is 50 pounds per square inch. So she wants to be paid a little bit better than the others, it appears.

266 That's not a major point. I just want to clarify that they were paid under that paragraph -- once again, it wasn't called residual gas, and that is their payment for what is now called residual gas. Residual gas, we have to put in our mind, is only a proxy or an amount paid in lieu of gas that could otherwise be produced down to an abandonment pressure, and that's 50 pounds per square inch generally in the industry.

267 So our position is that, yes, her predecessor was paid down to that -- was paid what is now called residual gas.

268 And once again I'll come back to my general comments and tie this into it. It's a contractual arrangement that was reached between Isobel Young and Union Gas of Canada Limited. Both parties have changed names by now, but the predecessor title to both.

269 The contract is still valid, and in fact that's what one of the paragraphs I read you, so long as the underground storage is being used, this contract is valid.

270 Now, when we said that she chose, Mrs. Young chose, well, I guess we could frame it differently. Mrs. Young entered into an agreement with Union Gas of Canada Limited. She was offered another agreement, which is the unit operating agreement, which would have had a different methodology and formula for the payment of residual gas, but she chose not to do that. And people have the right to contract and make their own decisions.

271 She was offered -- let's move us a little forward. Mrs. Lang spoke about her dealings with Mr. Lowe and, she said, Mr. John Hunter. I'll take you back to my general argument. That's the period of time subsequent to the Bentpath decision when Union Gas was pursuing amending agreements, general amending agreements. And she was -- by this time, Mrs. Lang owns the property and Mrs. Young has passed away, I believe, by the mid-1980s. And that's what she was offered again, and once again chose, did not choose, chose not -- chose not to accept an amending agreement, I guess, is one way to put it, which would have had her being treated the same as others in the pool. But she did not chose to accept that agreement.

272 So she has the original agreement, that is, Mrs. Lang has the original agreement that her mother entered into that is still valid, still in place. And before I -- before we think, in 1951, you didn't get paid much. I won't -- do you have a question?

273 MS. SPOEL: I just want to try and clarify this again, Mr. Sulman.

274 Your position, I understand it, is that because payments were made under the -- that your bottom line, it seems to me right now, is that the 1951 agreement, because she's never voluntarily entered into another -- never been able to voluntarily enter into another agreement with Union Gas, that she is now precluded forever from doing anything other than trying to negotiate with you; she may not ever come to this Board in respect of that agreement because of an agreement signed in 1951. Is that your position?

275 That agreement, seems to me, regarding storage rights, not the gas payments but the storage rights -- sorry, not the production payments, to be in perpetuity, and that therefore she can never reopen it. Is that essentially Union's position on this?

276 MR. SULMAN: Unless there's a provision within the contract to reopen a contract, you don't have an inalienable right to reopen contracts because you don't like the provisions or things change; that's right.

277

MS. SPOEL: And is there any issue in your mind about the question of whether it's a valid contract given that portions of it seem to be in perpetuity? Is there a question?

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MR. SULMAN: The vesting -- I mean perpetuity -- I've had a case on the rule against perpetuities under these agreements. It's a vesting issue, and it had already vested, it vested within the 21-year period, so there's no issue on that. Most of the natural gas contracts are in perpetuity, but they've already vested. So I don't know whether that's where we're going. A rule against perpetuity takes me back to about -- I don't want to remember how long that takes me back, but it's first year law school. And I don't think that's an issue.

279

It's our position that this is a valid contract. It deals with storage rights. That's the only agreement for storage rights. There's been others -- well, it doesn't matter. Whatever without-prejudice negotiations that have gone on in the 52 years since this agreement was entered into are somewhat irrelevant to us here today because there's a valid agreement. They didn't reach another agreement.

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MS. SPOEL: Just so I make sure I'm clear. Union's position is that if there is a valid agreement, it doesn't matter when it was entered into, it doesn't matter what the terms are, there is no way that a landowner ever has the right, or an owner of those rights, ever has the right to come to this Board to seek some other arrangement. They only have the opportunity to do so if they can negotiate -- the only other opportunity to change the arrangements if they can negotiate it voluntarily with Union Gas. Am I correct in that? I just want to make sure I understand your position.

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MR. SULMAN: That is -- that's correct, and that's exactly the position of the other large storage company who has never entered into amending agreements. They still rely on all these --

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MS. SPOEL: They're not a party here today, so what their position is is not really -- they may or may not be right or wrong, but they're not here today. I'm asking what Union Gas's position is with respect to these old agreements; that your position is that it cannot ever be the subject of an application before this Board. If someone wants to change it, it has to be done through negotiation with Union Gas. And even if those negotiations fail, there is never going to be an opportunity to reopen it.

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MR. SULMAN: Unless there is a -- now, there are some agreements that have provisions in them that allow that.

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MS. SPOEL: I'm talking about one like this, Mrs. Lang's in particular and others like it, where there is -- where it says it continues, just for those words, continues for as long as the storage conditions; that your position is that there is no opportunity to reopen that unless it is done so on a voluntary basis.

285

MR. SULMAN: That's right. That's exactly our position. A contract's a contract.

286

MS. SPOEL: Thank you.

MR. SULMAN: And I would point out that the decision that Mrs. Young made in 19 -- well, I guess in 1951, and I won't go into this in much detail, but it is a -- it was in fact -- it was a business decision that people are allowed to make. Individuals have the right to enter into contracts or not enter into contracts. And for at least 40 years, this was an excellent deal; it was more than the other people in the pool were getting paid. It was only subsequent to that that one seeks to change the deal.

And people are allowed to make -- that's the whole essence of our position, is that people have freedom of contract. They enter into those contracts. If they benefit from the contracts, then they can't at a later point in time say, Gee, I did, really well, better than everyone else under the contract; and now I'm not so I'd like another shot at it, please. That's our position with regard to the sanctity of contracts. They're entered into freely, and they're in place.

So that's our position with regard to Mrs. Lang's contract. We believe that there is a residual gas payment in it already. It's not called that; we clearly admit that. In 1951 the term of art wasn't used, and it wasn't used in the unit operation agreements.

Now, Mrs. Lang referred to and read you an excerpt from a letter she said came from Mr. Lowe back in 1993.

MS. LANG: 1993.

MR. SULMAN: And here's what she read to you. She said, "As a consequence" -- I think maybe she went further, started with:

"An offer equivalent to that, accepted by the other landowners, was extended in 1960 and rejected by your parents."

That's the unit operation agreement. And then she read:

"As a consequence, the ownership of the residual gas still resides with you under the provisions of the petroleum and natural gas lease and grant."

You recall her reading that to you. But what she didn't read was the next sentence, which says:

"This gas cannot be retrieved until the resumption of production at the conclusion of storage operations."

It's quite true that there is gas below 50 pounds. That gas remains the gas of the landowner. And if storage operations cease, they can remove the gas. And that's all Mr. Lowe was saying in that letter. You have to put it in the full context of the full paragraph. Of course in his letter he also went on to explain the fact --

299 MS. SPOEL: Mr. Sulman, I think we're straying into the evidence here. I mean, if she doesn't have standing, what Mr. Lowe said or didn't say, or what his letters say or didn't say, frankly, is completely irrelevant.

300 MR. SULMAN: I'm only responding to --

301 MS. SPOEL: I understand that. Mrs. Lang made a presentation, we've heard it. But let's try and -- we'd like to get this done today. Let's try and stick to the status issues, not the evidence that may or may not be relevant if she does, in fact, end up having standing.

302 MR. SULMAN: Thank you, Madam Chair. I think it's my obligation to respond and give you the full picture when there's a partial quote given to you. Otherwise you might interpret that residual gas -- that Union had admitted that residual gas was owing to her. That's not what he said, okay? So now you have the full picture; I don't need to go further than that.

303 I think in conclusion it's simply that you have our position: A contract is a contract and it's in place. And it covers - and that's the important part - it covers the concept of residual gas, although those terms of art didn't exist. That's our total position on Mrs. Lang.

304 I should tell you, because Mrs. Lang is here, not only did she do a wonderful presentation, but the relationship with Mrs. Lang has been, for the most part, a very cordial one. There's agreement to disagree, but I don't think it can be characterised as anything other than a rather cordial, professional relationship, from any of the documents that I can see. I don't think they agree, but it hasn't been anything but that.

305 Is that relatively fair?

306 MS. LANG: Yes.

307 MS. SPOEL: Thank you, Mr. Sulman.

308 MR. SULMAN: Okay, thank you.

309 MS. SPOEL: I'm glad to hear that you can relate cordially -- Union Gas can relate cordially with people with whom it's having disagreements with. The Board appreciates that.

310 MR. SULMAN: I didn't say everybody. They try, they try. And remember, this is -- and I would point out, this is not a snapshot in time; this is a 50-some-odd-year relationship.

311 MS. SPOEL: Okay. I think that our proposal next is to -- that it's Mr. Vogel's opportunity to respond to Union's position on the general standing issues. Is that correct?

REPLY ARGUMENT ON STANDING BY MR. VOGEL:

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MR. VOGEL: Thank you, Madam Chair, Mr. Smith.

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In response to Union's challenge...

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MS. SPOEL: Can I just have a moment, please. Thank you.

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MR. VOGEL: In response to Union's challenge, the LCSA applicants have delivered a volume of reply evidence which includes the principles that LCSA submits that the Board should apply in determining entitlement to standing of the individual LCSA applicants on this application.

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Before I review those principles with you, I should perhaps address Mr. Sulman's comments to you suggesting the relevance of the Bentpath decision to this hearing.

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As you've heard from Mr. Sulman, Union's position seems to be that any landowner who has entered into an agreement with Union, where that agreement doesn't specifically include provision for periodic review, either by negotiation or by this Board, that the Board doesn't have jurisdiction to review any of those agreements; and he relies on the Bentpath decision that he's referred you to.

319

I won't take you back there. But if you do review the whole of that decision, what you'll observe is that the attack that was made by the landowners in the Bentpath decision, and what was considered by the Board in that decision, was strictly limited to certain common law pleas advanced by the landowners and their solicitor in that proceeding. Specifically, as Mr. Sulman told you, there was a plea raised of non est factum, that is, the landowners saying, I didn't understand what I was doing. The Board also addresses in its decision an issue of an unconscionability, but those are common law pleas.

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The attack here - this is important - goes beyond whatever attack was made in the Bentpath decision, and it's not based on those common law pleas. The attack which is being made on the agreements here is based on certain minimum threshold requirements that, in my submission, the Board has prescribed in other proceedings, and specifically the 1964 reference and in the Bentpath decision itself. So it's based on minimum threshold requirements that the Board has prescribed in those proceedings for what constitutes just and equitable compensation. And giving the words of section 38 their plain and ordinary meaning. And you'll see, in reviewing the Bentpath decision, that was not a position advanced or argument made by the landowners in that proceeding and was not considered by the Board in that proceeding.

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What I'm proposing to do with you this morning is to outline briefly the three principles that I submit to you, on behalf of the LCSA applicants, are relevant to your determination of standing in this proceeding, and then I propose to discuss each of those principles with you.

322 The first principle that I submit to you is that for the purposes of section 38, it is not, as Mr. Sulman suggested, any agreement which would prevent the Board from exercising its jurisdiction, but it is only an agreement which meets the minimum threshold requirements for just and equitable compensation that have been prescribed by this Board in other proceedings.

323 The second principle, I submit to you, that is relevant to standing in this proceeding is that under the Board's own Rules of Practice and Procedure, those rules contemplate that persons who have a substantial interest in a proceeding will be entitled to participate in that proceeding. And therefore my submissions to you today will be that those landowners who have a substantial interest in the outcome of this proceeding, either because this proceeding will, in practicable terms, as Mr. Sulman have told you -- may, in practicable terms, as Mr. Sulman told you, determine what compensation they receive; or even for those landowners who are party to a -- what Mr. Sulman has described as an amending agreement which may expire, as, Madam Chair, you pointed out, before the termination of this proceeding. Anywhere where a landowner is going to be substantially affected by the result of this proceeding, I submit to you that under the Board's Rules of Practice and Procedure that landowner should have status.

324 The third principle I submit to you that applies to the Century Pools Phase II pools, which are Bluewater, Oil City, and Mandaumin, is that the Board has already determined, with Union's agreement in the Century Pools Phase II application, that all of the compensation issues in Century Pools -- Century Pools Phase II and relevant to the Century Pools Phase II landowners would be determined on this section 38 application and therefore all of those Century Pools Phase II landowners should have standing on this application.

325 So those are the three principles that I submit the Board should, in its consideration, apply to the standing challenges that Union has raised here. And if I can just deal, then, with each one of those in the order that I've given them to you.

326 The first principle being under section 38, then, that it's only an agreement which meets these minimum threshold requirements for just and equitable compensation which would preclude the Board exercising its jurisdiction to review those agreements.

327 I take you to the volume of authorities that have been filed on behalf of LCSA. If you turn to tab 1 in those authorities, you'll find there reproduced section 38 of the *Ontario Energy Board Act*. And looking at the plain wording of section 38 of the *Ontario Energy Board Act*, and specifically section 38(2) dealing with compensation, the statutory right to compensation in section 38(2), which you'll see under both (a) and (b), is just and equitable compensation both for storage rights and for damage resulting from storage operations.

328 As Mr. Sulman emphasised in his submissions to you, the first part of 38(2) is critical. It is "subject to any agreement with respect thereto," "with respect thereto". With respect to what? It's with respect to just and equitable compensation under sub (a) and (b), okay? That wording is critical. "Subject to any agreement with respect thereto," the answer to that question, what can only be the just and equitable compensation that's referred to in sub (a) and (b).

329 So my submission to you is that it's clear that it is only an agreement with respect to just and equitable compensation which is relevant to the statutory right of compensation that is set out in section 38.

330 Similarly, if you look at section 38(3), again it says "failing agreement". Well, failing agreement on what? Compensation payable under this section is what subsection (3) says. And the compensation payable under this section is just and equitable compensation under subsection (2).

331 So my submission to you is that it's only an agreement that this Board is satisfied provides for just and equitable compensation, that is, an agreement for the purpose of section 38(3) that would preclude a determination of the Board of that issue.

332 And that, Madam Chair, Mr. Smith, of course begs the question, what is just and equitable compensation? And that's what this whole application is about.

333 LCSA, on this application, has taken the position that the compensation which is being paid currently is not just and equitable compensation, either in respect of storage rights or in respect of the damages. And it's asserted, LCSA, the applicants, have asserted a right of participation in Union's profit pools and damages which take into account things that aren't presently taken into account with respect to damages, including affect on farming operations and productivity and social impacts.

334 I don't propose to go into those issues today, Madam Chair. But for the purposes of determining standing on this application, in my submission, it is sufficient for the Board to determine that the leases and amending agreements upon which Union relies to challenge standing don't meet the minimum threshold requirements that have been prescribed by the Board in these other proceedings.

335 And I think the most efficient way of me dealing with this is, if you could turn to paragraphs 5 and 6 in the volume of reply evidence.

336 Firstly, in section 5(d), which is at page 4 in the reply evidence, there's reference in that subparagraph to the 1964 reference. Again, I'm not going to take you to that decision; you're probably familiar with it, or it's certainly available to you. But the Board determined on that reference, as a fundamental principle of compensating for storage rights, that the compensation payable to landowners should be reviewed at periodic intervals so that the landowners would receive the benefit of what the Board describes in that decision as the increasing "use and usefulness" of storage.

337 So one of the principles of storage operation -- of storage compensation, going right back to this 1964 reference, is that compensation paid to landowners should be reviewable at periodic intervals to ensure that they receive the benefit of an increasing use and usefulness of storage. If you have the opportunity to review that decision, you'll see that that that use and usefulness of storage is one of the principles that's specifically set out there.

338 Secondly, in paragraph 5(e) I've made reference again to the Bentpath decision, and the provision in that decision for fair, just, and equitable compensation to include taking into account changing circumstances.

339 The relevant portion of that decision, I think the best way to do this is in paragraph 6, I've excerpted for you the relevant portion of that decision. And what the Board addresses there is uniform treatment of landowners and the requirement there for adjustments over time as part of just and equitable compensation.

340 You'll see that the Board there is referring to, in the first paragraph, uniform treatment of landowners, and then in the second paragraph it goes on to say:

341 "...Union later responded voluntarily to the Board's 1964 report by increasing rates to all pools it operated for storage in accordance with the Board's recommendations."

342 And then goes on to talk about the same compensation to all landowners.

343 So in response, then, to Union's position that it's only those landowners whose leases or amending agreements expressly contain some provision entitling this Board to review compensation, my submission to you is that that agreement, that type of agreement in itself does not comply with the minimum threshold requirements prescribed by the Board for reviewability and for equivalence.

344 For Union to take the position before you, Madam Chair, today that this Board does not have jurisdiction to review agreements unless there's some express provision in it authorising the Board to review, and that an agreement, you know, going back to 1950 is binding and non-reviewable by this Board, in my submission, does not meet the minimum threshold requirement for just and equitable compensation prescribed by the Board in the '64 reference and the Bentpath case for reviewability and for equivalence.

345 MR. SMITH: Could I, before we lose it, just go back to paragraph D that you referred to, the 1964 reference. You mentioned the decision involving -- or calling for review of compensation at regular intervals, or words to that effect. I don't see those words in your quote here. Are they in the decision? The quote doesn't seem to refer to regular intervals.

346 MR. VOGEL: I have a copy of it; I can certainly produce it for you. But the Board -- what the Board does on that reference is it sets out certain principles which should apply to the compensation of landowners for storage, and one of the principles that it talks about is giving the landowners the benefit of the increasing use and usefulness of storage. And the way the Board says that can be accomplished is by a periodic review which will effect that purpose.

347 MR. SMITH: Thank you.

348 MR. VOGEL: My final submission to you is that the silence of some of these agreements that are the basis of Union's challenge with respect to its right of periodic review of compensation, either by negotiation or by arbitration before the Board, my submission to you is that that silence should not be interpreted, as asserted by Union, as somehow prejudicing the right of these landowners to come before the Board where the agreement itself doesn't meet these minimum threshold requirements for just and equitable compensation.

349 And in fact if there is no provision in these agreements expressly authorising application to the Board, in my submission, such a provision should be implied, it should be implicit in the agreement. And the basis for that submission really comes from cases in the expropriation law area which say that, in interpreting the statutory restriction on the landowners rights which results from expropriation, the court should strictly interpret what rights have been given to the expropriating authority in favour of the landowner.

350 I'm not going to talk to you about a lot of law today, but if you want the principle, it's at tab 2 in the volume of legal authorities.

351 And if you look at -- this is a case called -- it's a leading case out of the Supreme Court of Canada in a case called Dell Holdings Limited. And I put it to you that expropriation -- that Union's position with respect to the storage rights is, in essence, an expropriation, although not accomplished under the *Expropriation Act* and therefore the same principles should apply.

352 If you look at paragraph 20 of the report of that decision, the Supreme Court of Canada, in enunciating the principles that should apply, said:

353 "The expropriation of property is one of the ultimate exercise of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected."

354 So if there is any ambiguity, I submit there's not, but if there were any ambiguity in this statute, section 38, and how it should be applied with respect to what agreements are being talked about, in my submission, it should be interpreted in a manner favourable to the landowners and in favour of granting them the status that they seek in this proceeding.

355 The second relevant principle there that I refer you to is in paragraph 27, which says:

356 "The words of the section should be given their natural and ordinary meaning in the context of the clear purpose of the legislation to provide fair indemnity to the expropriated owner for losses suffered as a result of the expropriation."

357 My submission to you was the taking of fair -- the natural and ordinary meaning of the words in section 38; and the purpose of section 38, which is to ensure that landowners get fair and equitable

compensation, that the words should be interpreted according to their natural and ordinary meaning to give effect to that statutory right of compensation.

358 Now, as Mr. Sulman also mentioned in his submissions to you this morning, it is the fact...

359 Before I move on to that, the other submission I would make to you with respect to this issue of statutory interpretation is that to interpret section 38, as Mr. Sulman has submitted to you, that is, that any agreement would preclude the Board from exercising its jurisdiction to determine whether it was just and equitable compensation that was being paid, in my submission, to interpret the agreement in that way is contrary to the very public policy which is being expressed in the section, which is to ensure that landowners get fair and equitable compensation. And that as a matter of law, this Board should not interpret section 38 in a manner which is contrary to public policy. And to the extent that the agreements were in contravention of that public policy, they should not be given effect.

360 The support for that submission is at tab 3 in the materials, in the authorities. It's a case called Still and M.N.R., which is a decision under the Federal Court of Appeal.

361 Specifically, at paragraph 48, you'll see in the last portion of paragraph 48 in that decision, the court states the principle as:

362 "...where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so."

363 If, in fact, it was necessary to interpret the agreements as Mr. Sulman has submitted to you, and I suggest to you it's not, but if it were, my submission to you would be that the Board should not give effect to the agreement for that purpose, because it's contrary to the very public policy establishing section 38, which is to ensure that landowners do get fair and equitable compensation.

364 As Mr. Sulman did note in his submissions to you, Union has, in fact, regardless of the form of landowner agreement, recognised this threshold prerequisite established by the Board in their reference and the Bentpath decision for reviewability and equivalence by paying landowners, regardless of their type of agreement, by paying these landowners equivalent compensation.

365 And as Union stated in its evidence, as Mr. Sulman expressed to you this morning, that's not because they are recognising the contractual obligation to do so. Why is it? Because they recognise that threshold prerequisites that have been prescribed by this Board in the '64 reference and the Bentpath decision that say fair and equitable compensation requires reviewability; fair and equitable compensation requires equivalence. In my submission, that's why Union has adopted that practice.

366 The result of that has been that -- turning back to the reply evidence, if you turn to tab A in the reply evidence, you'll find a letter which is dated September the 23rd, 1998, which Union extended to all of the landowners in all of its Lambton County Pools, and it wrote to them at that time, on the expiry of one of the forms of the many agreements, asking each of the pools in Lambton County to appoint a representative to undertake negotiations on behalf of the landowners within that pool, and certainly including landowners in some of the pools to which Union now objects, like the Edy's Mills Pool.

367 And at that time, in connection with those negotiations under tab B, you'll see the form of agreement that Union entered into with this representative group of landowners, representing the interest of all of the landowners in all of these pools, that it was going to undertake these negotiations with them as a joint bargaining unit, and specifically said that it was not going to enter into individual agreements with individual landowners. That negotiation, of course, resulted in what you'll find at tab C, which is the offer of settlement that Union made to the landowners which was rejected by the LCSA and which has resulted in us being before you today.

368 So the situation, in my submission to you, is that for many years Union has, in fact, paid equivalent compensation to landowners in response to what the Board had to say in the '64 reference and the Bentpath case. And Union extended this invitation under the 1990 amending agreement to all of these landowners to undertake these negotiations with it; agreed to deal with them as a joint bargaining unit.

369 Union acknowledges that in the form of amending agreement under which these negotiations were conducted, there is a clause there which says, if you're not successful, you may apply to the Board; that's acknowledged in Union's evidence which is before you. And so my submission to you is it's only now, after the negotiations were not successful, that Union is purporting to rely some of these old agreements and old amending agreements to deny the opportunity of landowners coming before this Board where, for many years, they've been -- acknowledged a requirement to treat them with equivalence and have, in fact, expressly undertaken negotiations with them or their representatives under those forms of amending agreements.

370 And my submission to you is, then, that Mr. Sulman mentioned the word "estoppel" this morning, my submission to you is that there is a form of legally recognised estoppel which does come into play here, and that Union should be estopped from taking the position which it does where these landowners have continued in their participation in LCSA and brought this application.

371 The document of estoppel, a convenient statement of it you'll find in the references at tab 4, Halsbury's Laws of England. And if you look at paragraph 955 in that excerpt there, you'll find a statement of the doctrine, it's called estoppel in pais, which is estoppel through conduct. The doctrine is:

372 "Where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such repre-

sentation and thereby altered his position his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be."

373 Well, my submission to you is that Union asked these landowners to participate in their negotiations as part of the joint bargaining unit. It represented to them that it would not enter into individual agreements. And the agreement under which the negotiations were conducted provides expressly for application to the Board in any event that negotiations failed, and that's why these landowners are before you. And Union should be estopped at this point from taking a position to the contrary.

374 Mr. Sulman's primary basis, it appears, for the submissions that he made to you this morning are, A, sanctity of contract and, B, interference with the storage industry. And he has submitted to you that that is why the Board should interpret these agreements, so that if there isn't express in them for any application to the Board, the Board should not allow landowners to come before the Board.

375 In my submission, that rings hollow, those reasons ring hollow, given the fact that Union, by its own admission, has been paying equivalent compensation regardless of the form of agreement to these landowners for years. So there isn't going to be this opening of the flood gates to hundreds of applications, and there isn't going to be this kind of disruption in the industry that Mr. Sulman suggested to you which would result from all of the landowners being treated equivalently, because historically, going back to the Bentpath decision and even before that as noted by the Board in the Bentpath decision, Union has been doing that in any event.

376 So those are my submissions with respect to the application and the first general principle which should apply in connection with this standing hearing.

377 The second principle, then, is that under the Board's Rules of Practice and Procedure, those rules contemplate that persons who do have a substantial interest in the outcome of the proceeding before the Board will be entitled to participate in those proceedings and therefore the landowners who have a substantial interest in the outcome of this proceeding should be allow the to participant.

378 The basis for that submission, as I've said, are the Board's own rules. If you look under tab 5, I have excerpted certain portions of the Board's rules which clearly indicate the determination of status - now, this is dealing with intervenors, but, in my submission, the same principles apply - dealing with the interest of intervenors -- or dealing with the application for intervenor status in Rule 27. It's clearly that the interest of the intervenor which is to dictate whether or not somebody is an intervenor, and further over at Rule 29, in making a decision about intervenor status, the Board is to determine whether somebody has a substantial interest in the proceeding.

379 So clearly the criteria with respect to participation in proceedings before the Board is interest-based. It is whether or not the person who is coming before the Board, who wants to make a case to the Board, has a substantial interest in the outcome of the Board.

380 And under their general rule, Rule 1.01, which is at the first page of that excerpt, of course, the Board, in applying these rules, is to do so "to secure the most expeditious, just, and least expensive determination on its merits of every proceeding before the Board."

381 For your further reference by way of analogy, I have reproduced for you under tab 6 what is the equivalent rule from the Ontario Rules of Civil Procedure, Rule 5.02(1), which establishes the criteria under which people are required to participate in court proceedings; that is, where "claims to relief arising out of" the same occurrence or "series of transactions or occurrences." You'll note that we're dealing, by and large, with standard form contracts in this case. "Common question of law and fact" arise and "convenient administration of justice."

382 Well, here, Madam Chair, you have a situation whereby the criteria, or because of the criteria established by the Board in these earlier proceedings, Union has adopted this practice of many years of paying equivalent compensation. And my submission to you is that where this proceeding is going to determine what those people, regardless of what contract they may or may not be party to, where those people are going to -- their compensation may well be affected by the result of this proceeding; or where, for any other reason - and we'll get to that and we'll get to it in good time - that they can show they have a substantial interest in how this proceeding is determined, that they should be entitled to come before the Board and participate as applicants on the proceeding, particularly where the claim being advanced for those people is identical - identical - to the claim which is being advanced on all those other applicants, hundreds of them, to whom Union does not object.

383 MS. SPOEL: Mr. Vogel, you referred to intervenors. Is there any difference in your mind whether the various challenged parties have applicant status or intervenor status in the case?

384 MR. VOGEL: There is, Madam Chair, and the distinction is this:

385 What is at stake on this application is just and equitable compensation, and whether the agreements, as presently constituted, are providing just and equitable compensation or whether there should be a fresh approach taken, as suggested in the amended application, to compensation for landowners.

386 An intervenor would not be entitled legally to the benefit of any order the Board might make in response to this application; therefore, it's critical, if those landowners are to receive just and equitable compensation, that they be joined as applicants in this matter.

387 The third principle, as I indicated to you, applies only to the Century Pools Phase II pools, Bluewater, Oil City, and Mandaumin. And essentially the principle is set out in paragraph 11 of the -- or the basis for the application of that principle is set out in paragraph 11 of the reply evidence, and it amounts, really, to this: that in Century Pools Phase II, the Board already determined, with Union's agreement, that all of the compensation issues in Century Pools Phase II would be determined on this application. Therefore, I've submitted to you that, on the proper application of this principle, all Century Pools Phase II landowners should have standing on the application.

388 The basis for this submission is if you turn to tab F in that volume, what you'll find there is a notice of motion that Union brought in Century Pools Phase II, and this was in response to the evidence which had been filed by LCSA in that proceeding. If you look at the grounds for the motion on page 2, Union's position at that time, this is a position that Union took in Century Pools Phase II. Paragraph 5:

389 "Landowners' claims to increased compensation would be more properly and fairly dealt with in a separate proceeding."

390 Paragraph 6:

391 "For example, landowners who have an interest in these matters who are not parties to these proceedings should properly have an opportunity to participate in any proceedings that deal with the appropriate levels of, and basis for storage compensation."

392 So that was a motion that Union brought. There was then a cross-motion brought by LCSA, and that's at the next tab, tab G. And if you look at the order that was requested at that time on page 2 of that document, LCSA was requesting that the Board determine fair and equitable compensation for all of the LCSA landowners on the Century Pools Phase II application, under paragraph 1; or, alternatively, adjourning those compensation issues to be heard together or consecutively with this pending application that we're on here today. So that was the cross-motion in response to Union's motion that LCSA brought in Century Pools Phase II.

393 We then appeared before the Board on February 2nd, 2000. And Union was represented by other counsel at the time, not Mr. Sulman. And you'll see that in dealing with that alternative, that is -- this is on page 10 of the transcript there:

394 "...compensation issues" in Century Pools Phase II "to be heard together consecutively with the Lambton County Storage Association's pending application..."

395 This is Union's counsel, Mr. Leslie, who says, "we agree with that alternative." Now, there is no qualification there; there are no conditions being proposed. What was proposed is that the compensation issues which had been raised by LCSA on behalf of all of the Century Pools Phase II LCSA landowners, the proposal that was before the Board at that time in response to a suggestion which actually came from Union was that those should be set over to this application for hearing. And Mr. Leslie said, "we agree with that alternative." Okay? No conditions, no qualifications, depends on status, depends on anything else. It didn't depend on anything. What he said was, "we agree with that alternative."

396 In fact, if you look over the page, he continues on with his submissions. That's, in fact, "what our proposal," he's referring to the Union proposal, "contemplates that you will do that. You will consolidate the compensation issues in these proceedings with the larger application that Mr. Vogel has brought so that they can be dealt with at one time."

That's on page 45.

397

And so in addressing those positions, at page 52, you'll see that the Board said that:

398

"...the issue of the amount of compensation to be paid to landowners affected by the" Century Pools Phase II "proceeding be dealt with, together with the LCSA's pending section 38(3) application for fair and equitable compensation for all LCSA's landowners..."

399

Again, no qualification, no conditions. It was those landowners in Century Pools Phase II who are entitled to have those compensation issues determined here, and that's why they are before you.

400

In terms of what compensation issues we were talking about, the next page is the document which was filed as an exhibit reflecting the agreement between the parties in Century Pools Phase II. And if you return to page 8, paragraph 10, of that exhibit, you'll see that the compensation issues from Century Pools Phase II which were put over to this application to be determined by this Board were the per acres payment, the storage wellheads, the inside/outside acres, the payment of residual gas/ oil down to O, market price for residual gas, and permanent roadways, et cetera.

401

So all of the issues that are raised and advanced by LCSA in the amended application were directed by order of the Board to be heard in this application.

402

Again, at the hearing of Century Pools Phase II, the transcript is at the next tab, tab J, that's what the parties put to the Board and that's what the Board directed at that time. You'll see on page 11, the Board was advised of the settlement of some of the issues and then "compensation issues in accordance with the Board's direction last week have been not resolved as part of this hearing, but rather are to be addressed in the context of LCSA's pending section 38 application."

403

And in the decision with reasons, which is at tab K, the Board deals with that and says in paragraph 1.2.8:

404

"The Board ordered that the issue of the amount of compensation to be paid to landowners affected by this proceeding be dealt with together with the LCSA section 38 application for fair and equitable compensation for all LCSA landowners within Union's territory."

405

So my submission to you is throughout that whole Century Pools Phase II proceeding, there was never any condition or qualification stipulated by Union or imposed by the Board or understood by the parties that there would be any restriction on what Union agreed to, in fact proposed itself and agreed to; and the result of that, in my submission, is that all Century Pools Phase II landowners have the right to participate on this application before this Board with respect to all of the compensation issues on Century Pools Phase II, which are the ones that are listed in the settlement document which was filed with the Board at that time.

406

So those are my submissions in general with respect to the principles that the Board should apply to these standing issues. I do have additional submissions with respect to the individual applicants, and I certainly will apply these general principles to the individual applicants in those submissions. 407

But other than any questions that the Board may have, those are my submissions at this time. 408

MS. SPOEL: Thank you, Mr. Vogel. I don't think we have any questions at the moment. 409

What I suggest we do - it's approximately 12:30 now - is take a lunch break until 1:45. Maybe we should make it 1:30. Is that adequate time, if we have an hour? 410

MR. VOGEL: That's fine for us, yes. 411

MS. SPOEL: We'll make it 1:30. Is that acceptable for you? 412

MR. SULMAN: I think 1:45 would be more appropriate. It might even shorten the afternoon, because these submissions you've heard so far, may be more likely than what -- when we deal with the specific properties. Because we've laid out our positions now and I think we're sort of following the properties, saying this applies to this, this applies to this, this applies to this. 413

MS. SPOEL: I was hoping that we might be able to use lunch break to try to consolidate things a little bit. So perhaps we will take -- we'll go to 1:45 and we'll start promptly at 1:45. 414

MR. VOGEL: If you want to know from our side of the table where we're going with this, you may have seen tab N in the reply evidence. In tab N, I've taken these same principles and applied them in a chart form to each of the individual applicants which Union has raise the objection. So as Mr. Sulman says, the argument this afternoon may be somewhat for foreshortened because, really, it's all in the chart. 415

MS. SPOEL: Thank you, Mr. Vogel. That's very helpful. 416

We'll rise now until 1:45 and resume promptly then. Are there any other matters before we break? 417

MR. VOGEL: No, Madam Chair. 418

MR. SULMAN: No, thank you. 419

MS. SPOEL: Thank you. 420

--- Luncheon recess taken at 12:30 p.m. 421

422 --- On resuming at 1:45 p.m.

423 MS. SPOEL: Thank you. Please be seated.

424 Mr. Sulman, I think we're back to you on the individual issues.

425 MR. SULMAN: Thank you, Madam Chair.

426 **ARGUMENT BY MR. SULMAN AND RESPONSE BY MR. VOGEL ON INDIVIDUAL APPLICANTS BY POOL, STORAGE RIGHTS, AND RESIDUAL GAS STANDING:**

427 MR. SULMAN: I hope I'm following the procedure properly. It's a little unique. So if I'm not, just stop me.

428 I would suggest that what we are doing, then, is turning to the Bentpath East Pool, and doing it on a pool-by-pool basis. I'll complete Bentpath East and then Mr. Vogel will speak to Bentpath East, and then I'll move on to Bickford. I'm going to do it in alphabetical order, by pool. I think I'm going to do it by alphabetical order, then, of the individuals in the pool so it makes it sort of easy to follow.

429 I know that -- well, I'll start from there, and I'll tell you who they are as we go along. It will all unfold on the transcript, I'm sure.

430 So Bentpath East Pool, the applicants from Bentpath East Pool are Douglas and Judith McLachlin, and I -- while I'm not sure that it's helpful to you, you can maybe comment on this, Madam Chair, Mr. Smith, whether it's helpful to you to get the reference on the transcript for the actual location in the prefiled evidence, not for this -- thank you. I won't do that each time if it's of no assistance. I find it difficult to figure out what set of coloured binds it is in so...

431 MS. SPOEL: I think the best thing would be to go through, and if we actually need to look at specific documentation at the time, we'll ask you where we can find it; otherwise we'll be spending the whole afternoon flipping back and forth. I think just carry on and we'll try and -- we'll let you know if we need more.

432 MR. SULMAN: Okay. What I have done, that's why I assembled the document brief so we wouldn't have to go into those big binders, and what I'll do is give you a reference, if it's in Mr. Vogel's reply evidence, rather than going into those big binders; or if it's something that we've pulled forward from the binders, to make it more convenient. Maybe that's the easy way to do it.

433 So McLachlin in the Bentpath East Pool, it's Douglas and Judith McLachlin. That reference is at tab O of the reply evidence, and it is an amending agreement that we've talked about earlier today. The amending agreement is dated April 10th, 1996. It's a 10-year agreement, and that amending agreement does not allow for renegotiation of rental rates until 2006.

434 The references, for purposes of the record, are -- you've got the amending agreement; it's made the 16th of September, 1996, at least that's what it appears. And paragraph 2, it's a 10-year term, just for purposes of the record.

435 So our position is that there is an outstanding agreement, pursuant to section 38. I won't repeat that every time. And it does not allow for Board-ordered compensation in that amending agreement, which is of fairly recent nature. There is no negotiation or arbitration set out in it.

436 But what it does have is what I'll refer to as a favoured-nations clause. And perhaps this is the part where you may want to turn it up. It is at paragraph 1, and you can see it's the second sentence at paragraph 1. "If all or any part..." that would be the last part of the fourth line after the words "current payment".

437 "If all or any part of the Lands are included in a designated gas storage area during the term hereof the current payment will be adjusted to the then current payment for identical rights of other storage pool landowners."

438 So the McLachlins in Bentpath East Pool have a valid and subsisting agreement in place, therefore don't, in our submission, have a right to be here as an applicant. You've heard other suggestions on -- while they may have an interest, it's our submission on this one that they ought not to be an applicant because it brings with it, as we discussed earlier, certain burdens and benefits. But they could well be an observer in this proceeding.

439 And in the alternative, if you were to adopt part of what my friend said earlier today in referring you to the rules, the best they could be would be an intervenor, but not an applicant. An applicant, at the end of the day, means that you would be ordering their compensation, and that's not where this group falls. They may well have an interest, they may well be affected, but they have a favoured-nations clause and they are in a good position. No matter what happens here, they will get at least that amount.

440 So that's our position on the McLachlins. And at best they could be, in my submission, an observer. But in the alternative, should you find that they should have some higher status than that, they could be an intervenor. And that's -- I said this might be a bit briefer. That's our submission on the McLachlins.

441 MS. SPOEL: Now, I guess according to our procedure, it's over to you, Mr. Vogel. Perhaps as we go through these, Mr. Sulman, if you don't mind, if there are any others, as you go through pool by pool, if there are any others where your argument is going to be the same - there may be other agreements in here with identical wording; I can't say I've been through them in sufficient detail to be able to say whether there are or not - you can indicate that it's the same argument as with respect to the McLachlins, or whichever others there are, so we don't need to --

442 MR. SULMAN: Actually, I think we'll find that when we get to roadway agreements and we will find that probably when we get to Mandaumin.

443 MS. SPOEL: Thank you.

444 MR. SULMAN: There's a lot similar. But others are unique.

445 MR. VOGEL: Thank you, Madam Chair.

446 As I pointed out before the lunch break, LCSA's position, responding to Union's challenge, is summarised at tab N in the reply evidence, and that's probably the most efficient way of dealing with this.

447 What you'll find at tab N is a schedule that we put together indicating the challenged landowners, the basis for Union's objection, and you'll see in the right-hand column LCSA's response to that.

448 So dealing with Bentpath East and Douglas and Judith McLachlin, and applying the general principles that I submitted to you this morning, as Mr. Sulman has acknowledged, the relevant lease and amending documents here, while they don't contain a specific provision authorising application to the Board, neither do they contain a specific provision precluding application to the Board.

449 My submission to you, based on the principles I enunciated this morning, is that these people have a statutory right to just and equitable compensation. And looking at their lease and amending document that Mr. Sulman just took us to, the lease and amending document don't provide for periodic review by negotiation or Board review of compensation, and don't provide for equivalence during the term of the agreement to be adjusted to what landowners are receiving -- other landowners are receiving from time to time.

450 So, in my submission, you don't have here an agreement that meets those minimum threshold prerequisites that the Board has defined for just and equitable compensation and therefore you don't have an agreement which would preclude the Board's consideration of that issue under section 38.

451 With respect to the application of the second principle, as Mr. Sulman has pointed out to you, in paragraph 1 of the amending agreement it does say that, on designation, these landowners are to be -- "receive compensation adjusted to the then current payment for identical rights of other storage pool landowners." So in the amending agreement itself, there is provision for these people to be compensated identically to other landowners. That, in my submission, gives them a substantial interest in the outcome of this proceeding and accordingly, under the second principle that I enunciated, they have a substantial interest in the outcome and should be granted standing here.

452 Those are my submissions with respect to the McLachlins.

453 MS. SPOEL: Thank you, Mr. Vogel.

454 MR. SULMAN: I wonder -- I guess I should ask when I do the next one if there are any questions at the end, and then I'll go on from there. Is that how you --

455 MS. SPOEL: Well, I think you can take it that if we have specific questions --

456 MR. SULMAN: I'll hear them.

457 MS. SPOEL: -- you'll hear them.

458 MR. SULMAN: Okay. I'll proceed, then, to Bickford. The Bickford Pool, the only parties that we are -- the only parties that we're objecting to standing on are the William G. and I think it's Joy Evleen or Evleen Joy Robson. That, for purposes of reference, that is found at tab 2, that agreement is found at tab 2 of our document brief.

459 This is a gas storage lease agreement. It is not in Robson's name, but you'll find that throughout because obviously there are -- predecessors of title will have signed agreements. This is an agreement that's signed with the Director, the *Veterans' Land Act*, because it's the 1960s.

460 This agreement is a gas storage lease agreement. It does not provide for renegotiation of rates. It doesn't deny -- it doesn't say that you can't have -- it does not say that -- I forget how my friend has framed this because I'm just puzzled by it. But there is no provision in the contract for renegotiation of rates. I guess what his position is, neither does it deny that there can be renegotiation of rates. But contracts don't usually have provisions to the negative, because you'd be denying -- the mind boggles at how many things you might have to have a negative provision in for. So, no, it doesn't have that, and it isn't logical to have such a provision in any contract.

461 There was an amending agreement offered. There is no amending agreement accepted. So when that happens, you're back at the original agreement, and that's what the case is here. The only lease signed is the original document. There is no amending agreement.

462 Our position on that -- in that particular situation is that the contract is valid, and it's the only contract there is. You can try to negotiate with people, but it's the -- it's as simple as you can lead a horse to water, but you can't necessarily get an agreement signed -- a new agreement signed after negotiation. Sometimes negotiations don't result in agreements. You shouldn't be penalised for negotiating. Therefore, you fall back to the agreement that's there, and that's the gas storage lease agreement.

463 That's our position with Robson. There is no agreement between the 1960 agreement, and the contract is in place.

464 MR. VOGEL: The contract to which Mr. Sulman refers, you'll note, is dated October 17th, 1960. It's actually between the Director, the *Veterans' Land Act* and the company. It provides for an acreage rental of $5 per acre.

My submission again simply is that these people have a statutory right to just and equitable compensation. They're party to an agreement that doesn't contain provision for periodic review, either by negotiation or by the Board; doesn't provide for equivalence, the threshold prerequisites which have been defined by the Board. Therefore, it's not an agreement for purposes of section 38 which would preclude the Board considering those issues. 465

And for these people, and I didn't mention this specifically with respect to the McLachlins, and I won't keep repeating this, but all of these people, remember, have been receiving equivalent compensation over the years; all of them were part of this joint bargaining unit at Union's invitation; participated in those negotiations, and now wish to participate in the arbitration before the Board which results under the provisions of the agreement under which those negotiations took place. 466

My submission is, for all of those reasons, they should have standing. 467

MS. SPOEL: Thank you. 468

Mr. Vogel -- sorry, Mr. Sulman. 469

MR. SULMAN: The next pool we move to is the Booth Creek Pool. In Booth Creek, the first landowner -- landowners are Brenda and Daniel McLachlin. And that document is found at page 3 -- tab 3 of our document brief. Excuse me. 470

You'll see on the agreement it says "Sanderson, Donald and Audrey; that's because they are predecessor of title. We'll get to another Sanderson later, in fact the next group. 471

But it's my understanding that this document is the original document. I don't see an amending agreement filed under our tab. But I'm advised that the situation is the same here; that there is an amending agreement which does not allow -- and I won't go through the whole thing again. It's the same situation I just described. It's an amending agreement that has not expired. It will expire, but it has not expired. And when it expires, these parties will have certain rights. 472

Now, I have to go through this a little bit further. If you'll give me just a moment. 473

My friend has attached the amending agreement at tab P, so that would take us from -- what we did was there wasn't the original agreement and so to keep the record straight, we attached the original agreement with predecessor in title, the Sandersons. Then you turn to tab P of my friend's agreement -- documents, and you'll finding a amending agreement. And this amending agreement has not expired. 474

And this is a little unique. This amending agreement provides that there can be renegotiation of rates. But in the event that you do not reach an agreement, then there's an appendix I that you turn to, which is -- it's labelled page 6 in my friend's documents, the word "page 6", appendix I. 475

476 What it provides for is that either party can apply for an arbitration. Now, it does not -- this is not contemplated as an application to the Ontario Energy Board, as you'll find in some other documents, but rather an arbitration. So reading the strict words of the amending agreement, right now the amending agreement is in place so they're not -- these parties do not properly have standing before this Board. And even when they do, when the amending agreement does expire, they will have a right to arbitration, private arbitration. And that's what appendix I sets out, the terms of arbitration.

477 It reads:

478 "Failing a negotiated agreement, any dispute under Items 2, 3, 4 and 5 of the Amending Agreement Schedule of Payments concerning the establishing of prices for..." it says production of natural gas leases, but gas storage is what we're interested in here "...Wells and Acreage adjacent to a designated gas storage area held in common as described in Items 2, 3, 4 and 5 respectively, shall be submitted to arbitration."

479 The key to all this, in my view, and I know it's somewhat different than my friend's, is that individuals have the right to contract, and the Board has always recognised that, and they have different forms of contract. And here what is just and equitable to one may not be to another, and what they, in the freedom of their ability to contract because in individual circumstances, there's different things that people want. Here they have agreed to a private arbitration provision in the contract.

480 And so it's somewhat different than others that you'll see, but our position remains that they contracted, that's an agreement under section 38(2), and they have a private right to arbitration when it comes due, which it hasn't. This is a 19 -- filed in 1998. Well, it says it's the agreement dated November 18th, 1998, but effective as of the 6th of May, 1999, is how it's titled at the top of the amending agreement. So this is an agreement that has not expired. And when it does expire, the remedy is not before this Board but rather private arbitration.

481 So we take the position they have no standing.

482 MR. McCANN: Sorry to interject here. For the sake of clarity, is there an expiry provision in this amending agreement? Does it have an expiry term? I couldn't locate it.

483 MR. SULMAN: It doesn't appear to, it doesn't expire.

484 MR. McCANN: I'm sorry, but if you go to -- I'm not quite clear on paragraph 6, "Renegotiation of Rates" suggests that "On or before --" maybe I'm treading on your ground, Mr. Vogel, I don't know. It says:

485 "On or before December 31, 1998, items 2, 3, 4 and 5 above will be renegotiated between the parties. In any event that the parties cannot agree on compensation at that time, payments in the amount of the then current payment will continue until such time as settlement is reached or either party applies for an arbitration procedure."

I guess I'm just wanting to clarify, Mr. Sulman, what you mean when you say on the expiry of the agreement, the right to arbitration, or the possibility of arbitration arises. That isn't quite the way I read paragraph 6 of the amending agreement.

MR. SULMAN: Give me a moment.

MR. McCANN: Sure.

MR. SULMAN: So, again, renegotiation -- back again to answer, I guess, Mr. McCann's question. Paragraph 6 is what you're referring to, Mr. McCann?

MR. McCANN: That's correct.

MR. SULMAN: It suggested that the renegotiation of rates set out there may not be applicable in that it says "on or before December 31, 1998," and the agreement is in fact made effective as of 6 May 1999, okay? So that question of whether the rates stay in effect for the term to whatever date is irrelevant here since the date of the agreement is after December 31st, 1998.

MR. McCANN: Okay.

MR. SULMAN: But the question, I guess, should be does that preclude them from relying on appendix 1. And these people have been paid, as Mr. Vogel pointed out, have been paid a rate that's equivalent to other rates. Not the rate that's set out here.

MS. SPOEL: Mr. Sulman, if I can also interject here. It seems to me that in paragraph 6 there was an intention that the agreement would have an expiry date, because it says "Such new rates will remain in effect for the remaining term of the agreement to December 31," and then it's blank. And I assume that there was some intention to fill in some other year in that space, but this copy of the agreement doesn't seem to have that in there. Do you know what the status of this agreement is?

MR. SULMAN: Well, if I might rely on my advisers for a moment.

The status of the agreement is that the landowners are being paid under the agreement.

MS. SPOEL: Thank you.

Mr. Vogel.

MR. VOGEL: Thank you, Madam Chair.

500 Madam Chair, Mr. Sulman refers to this agreement as being a little unique. The fact of the matter is that with respect to what is almost 200 landowners and agreements relevant to those landowners before the Board on this application, the interesting thing about this agreement is it's the only one that purports to expressly exclude the right of arbitration before the Board and substitutes this private right of arbitration. You'll find that in paragraph 10.

501 You'll see in paragraph 10 that what the agreement is purporting to do is to exclude a right of arbitration under the *OEB Act*, and substitute for that right of arbitration this private right of arbitration in appendix 1. It's the only one of the agreements affecting some 200 landowners.

502 And I submit to you that what's interesting about that is if that's what the parties intended and that's what Union attended to accomplish, it could, as evidenced by this agreement, have negotiated that clause with landowners and inserted it specifically. Therefore, I again submit to you that you should not imply into agreements that don't contain this provision some agreement as submitted by Mr. Sulman, that absent an express right of arbitration, that the landowner does not have a right to arbitrate. If they wanted to exclude that right, or at least purport to exclude that right, they could have done it in the form that they have here. And they haven't done that in any other agreement that's before you.

503 The second thing I want to submit about the position of Daniel and Brenda McLachlin is, as you've noted it, and Mr. McCann has drawn to your attention, paragraph 6 clearly does evidence some intention that there be a renegotiation of rates which will apply for some period of time. What you have at best here, in my submission, is an agreement of uncertain term. It was intended to have some termination; it doesn't have a termination date and therefore you've got an agreement which purports to extend indefinitely.

504 So with respect to the principles that I had enunciated this morning, this is not an agreement, again, that provides for just and equitable compensation; doesn't provide for periodic review by negotiation or the Board; doesn't provide for equivalence to other landowners. These landowners have received equivalent compensation, were part of the joint bargaining unit, and they have a substantial interest in the outcome.

505 In my submission, although they have a private right of arbitration, they shouldn't be -- certainly the result of this proceeding would be, if not determinative, of considerable persuasive value in a private arbitration. And these people should not be forced to undertake a private arbitration in order to have exactly the same claim determined as it is being advanced by other landowners in this proceeding.

506 Mr. Sulman has suggested to you that I have somehow or another attacked the sacrosanctity of private contracts. I'm not doing that. I'm simply submitting to you that there's a minimum threshold that has to be met for a contract to preclude the Board's jurisdiction under section 38, and that minimum threshold is that it has to provide for -- that a contract that does not provide for reviewability, does not provide for equivalence with other landowners, doesn't meet what the Board has stipulated and therefore doesn't preclude you exercising your jurisdiction.

507 And on that basis, these people should have standing as well.

508 MS. SPOEL: Thank you.

509 Mr. Sulman.

510 MR. SULMAN: The next Booth Creek landowner is the estate of Arthur Sanderson. I don't need to go through it, but it can be found at tab Q of my friend's reply evidence. This is a gas storage lease which does not allow for any renegotiation of rights.

511 Booth Creek, of course, is a developed pool. There has been an offer of compensation from Union to the landowner and there has been acceptance of the offer and payments received at current rates. So having had an acceptance of an offer under -- of compensation under section 38(2)(b), then we are in a situation where these -- this party should not have standing at this hearing. That's it.

512 MS. SPOEL: Mr. Vogel.

513 MR. VOGEL: With respect to the estate of Arthur Anderson -- Sanderson, there is no gas storage lease agreement. There's this gas storage agreement that's contained at tab Q that Mr. Sulman has referred you to.

514 If you turn to paragraph 7 in that agreement, it appears to contemplate additional compensation being able on designation. It says that:

515 "...the clear annual rental...shall be paid and accepted on account of any compensation due by the Lessee...as a result of the making of such Order."

516 It's not fixed by the agreement. I suppose it leaves the landowner in a position where he's limited to his $5 an acre under clause 1 before and after designation, or the purpose of paragraph 7 is to provide for some sort of increase in the compensation on designation. But if that's the intention of paragraph 7, it doesn't do that, at least it doesn't affix that compensation.

517 In my submission, if compensation is to be payable -- if the compensation payable under this agreement is to meet those minimum requirements of reviewability and equivalence that I've submitted to you, it doesn't do that.

518 And similarly for these landowners, they have been compensated equivalently to other landowners. They were part of the joint bargaining unit and they should be entitled to participate on the arbitration which results from the failure of those negotiations.

519 And if this proceeding is to determine the compensation they are to receive in the future, then again they have a substantial interest in the outcome and they should be permitted to participate.

520 Those are my submissions with respect to the estate of Arthur Sanderson.

521 MS. SPOEL: Mr. Sulman, I think we're back to you.

522 MR. SULMAN: Sorry, Madam Chair, I was just flipping into Arthur Sanderson. And I think we're -- I thought maybe we were in agreement, and I was going to tell you that. But perhaps we're not. I was going to read the same paragraph my friend has highlighted that says there's a clear annual rental payment. Just so that you're not confused, that's what we're relying on also. We just said that offer was made and was accepted in accordance with that same paragraph.

523 The next Sanderson in Booth Creek is Frank Nelson Jr. and Anne Marie Sanderson. They have one of these 1969 agreements, the same form of agreement that Mrs. Lang has. It's found at tab 4. And then subsequent to that you'll recall Mrs. Lang telling you that people signed unit operation agreements. I haven't provided that to you, but they also signed a unit operation agreement. The reason we haven't provided it is it's not particularly relevant to the issue of storage -- storage compensation. When it then went to storage, the same thing happened as happened with the estate of Arthur Sanderson. The order is made under section 38, and Union then, in the procedure that's long established by the Board, makes an offer to the landowners prior to first injection, and that offer was accepted and they were then paid in accordance with that offer.

524 So they are receiving compensation pursuant to section 38 of the *Act* and hence there is no standing for them in this hearing. They have already accepted an offer of fair -- of just and equitable compensation and are receiving it, and that complies with the *Act*. There is already an agreement lease in place, already a unit operating agreement where now they are receiving payment under the *Act* in accordance with the offer made to them by an offer on designation, which we're obligated to do prior to first injection, make that offer.

525 MS. SPOEL: Mr. Vogel.

526 MR. VOGEL: Madam chair, just to shorten things here. If you refer to tab N, you'll see that there's a grouping for all of these Booth Creek landowners; you'll see Arthur Sanderson, Frank and Anne Marie Sanderson, and Wayne Robinson. My submissions with respect to those landowners are the same as I've already given you with respect to the estate of Arthur Sanderson.

527 The only additional thing I would add with respect to Frank and Anne Marie Sanderson is if you look at the 1969 -- March 1969 agreement of lease that Mr. Sulman took you to, I do draw to your attention, and this is at tab 4 in Union's volume of materials. If you look at the second last paragraph in that lease, you'll see that it says:

528 "This Lease shall be subject to the provisions of any statute, Dominion or Provincial, and any Regulation or Order pursuant to such statute or Regulation thereunder, now or hereafter in effect and applicable to the same."

529 I submit that express in this form of lease is what is implicit in all others, which is that Union's rights under this lease and its right to rely on these leases is subject to the provisions of federal and provincial statutes, including section 38 of the *Ontario Energy Board Act*.

530 In the submissions that I made this morning, it's subject, then, to your determination of whether or not an agreement does, in fact, provide just and equitable compensation so as to preclude the Board's jurisdiction under section 38.

531 MR. McCANN: Can I just ask one question of clarification here, I guess, of Mr. Sulman.

532 So with regard to Frank Sanderson and Miriam Sanderson, there's the agreement of lease which is at tab 4, there's a unit operation agreement which is not included because it's not relevant, but then is there something else, that is, a document that carries out the offer of compensation and indicates that it's been accepted? I'm just trying to get the...

533 MR. SULMAN: Yes, of course there is, and that happens -- we haven't filed all of those because that happens pursuant to statute.

534 But just let me correct that. Frank Sanderson and Miriam Sanderson, although the names seem familiar, they are the predecessors of title to Frank Nelson Jr. and Anne Marie who seek to be applicants here.

535 MR. McCANN: Sorry.

536 MR. SULMAN: But I need to do that because the offer letter that goes out then to Frank Nelson Jr. and Mrs. Anne Marie Sanderson in August 1999, which is what I was referring to, then pursuant to -- it reads:

537 "An order of the Ontario Energy Board EBO-207 authorised Union Gas Limited to inject, store, and remove gas from the Booth Creek Storage Pool," which complies with the statute.

538 And then it sets out the terms of the offer after that. We haven't filed all these because, frankly, some people are sensitive to it becoming -- and I'm not saying these people, but we have been told by some that they don't want everybody to know what their exact compensation is. I mean it's arithmetic. It's set it out. We try to honour people's wishes.

539 That's what the letter is. We can file it, but it's...

540 MR. McCANN: I guess I'm just trying to make clear in my own mind what constitutes the agreement, from Union's point of view, that would, in this instance, preclude access to section 38(2) and (3)? What's the totality of --

541 MR. SULMAN: You have the section 38 order; you then have to make an offer of compensation, fair -- just and equitable compensation, prior to first injection. That offer is done through a letter in which the offer is contained, and the parties then accept the offer by accepting the cheques. If they reject the offer, they'll send -- they won't take the cheques or they'll send a letter saying, I reject your offer. And they have continued to be paid since 1999.

542 MS. SPOEL: So in this case your position is that they -- that offer you've been referring to is the reason why they're precluded from having applicant status in this case, not the 1969 agreement.

543 MR. SULMAN: No. The 1969 agreement is the base agreement, the original -- it is the agreement of lease that gives Union the right to -- by contract, I've got to make that clear, by contract, enter on the lands and store. They don't need these contracts, by the way. They could do it by Board order.

544 MS. SPOEL: I understand that.

545 MR. SULMAN: But in '69 it was different, so that's the base. Then there's the unit operating agreement, and then, because there is no amending agreement in place that sets out an amount, they make the offer letter under section 38.

546 As I said earlier, there's two, and I think in our evidence it's said that there's two approaches to this: There's contractual -- everything comes under section 38. You have an agreement, and that's the contractual portion, and we still have contracts here. But you also have to fall under section 38; that's the offer under section 38. That in itself, on acceptance, is also an agreement.

547 And that's our position on this one, and I speak at it a bit lengthy because Robinson, which follows, will be the same.

548 MS. SPOEL: And is it your position -- if you have this contract, the 1969 contract which has no amending -- I think I just heard you say that there's no amendment possible to that agreement, why would you send out that offer that you've just referred to? Presumably you're not required to do so under section 38, if they've already got an agreement. Or is it something new?

549 MR. SULMAN: No. It's a little more complicated, but I will explain my understanding of it.

550 At the Booth Creek hearing, under oath, witnesses gave the Board their assurance and undertaking that they would make an offer to the Booth Creek landowners, pursuant to section 38 of the *Act*.

551 MS. SPOEL: But that -- am I correct in saying -- your position this morning was that if they had an agreement there was no jurisdiction of the Board to order that kind of compensation -- a change in the compensation, that it was out -- in effect, it was outside our jurisdiction. So would that -- and I haven't read the Booth Creek decision and I don't want to get into what the Board did or didn't do. But strictly speaking, from a legal point of view, would you then say that this was not something

that the Board could order you to do in the case of the Sandersons because they already had an agreement that didn't allow for -- to be reviewed under section 38?

552 I mean, just looking at the way you argued it this morning, this is why I'm confused, you're referring to this offer as being the section 38 offer, but I think your argument was this morning that in fact there was no place for a section 38 offer in a case like this where there was an existing agreement.

553 I'm sorry, I shouldn't have said a section 38 offer, I should have said a section 38 order relating to compensation. Obviously you can voluntarily offer any time you want.

554 MR. SULMAN: That's what this was. There's not an order in the Booth Creek Pool hearing that we make this offer, I don't believe. This was an offer that we made under section 38 to reach agreement, as it's defined under section 38. If you don't accept the offer, then you don't have agreement.

555 MS. SPOEL: Then in this case your position, I think, is that there is still an agreement; it's the 1969 agreement.

556 MR. SULMAN: The right to store -- enter on, store and inject, subject to designation, is in the 1969 agreement, that's correct. And what we have done -- drill wells, storage, all those items are in that agreement. What we have done, then, is try to reach agreement, as defined in section 38, and that's what's been done by the offer of first compensation.

557 MS. SPOEL: And was that offer accepted?

558 MR. SULMAN: Yes. That's our position, that designation occurs -- well, 1969 is the date of the lease. Designation occurs 30 years later. And as we said, the gas storage business evolved somewhat from then.

559 The offer is then made after designation, before first injection. And you'll find that that's the -- the procedure that's been followed in several of these matters. They aren't all before you because they're accepted, they aren't seeking standing.

560 But these -- in this particular case, there's an offer letter, which I'd be glad to provide, but that's the procedure, the time-honoured procedure. And there's been acceptance and the payments have continued -- have started that way and continued. That's the same situation in Robinson.

561 MS. SPOEL: Thank you.

562 MR. SULMAN: Had they not accepted, it might be a different situation. But I don't want to speculate on that. They did accept and there is agreement under the *Act*.

563 MS. SPOEL: Thank you.

Mr. Vogel.

MR. VOGEL: I'm not sure what I'm responding to at the moment.

MR. McCANN: I think it's back to Mr. Sulman for the next person in this pool.

MR. SULMAN: Right. That was just my response to a question that was asked.

Well, the next one is Robinson and I won't do all that again. It's the similar situation. An offer letter was made on June 7th, 1999, after designation. It is the same 1969 vintage agreement. This one, in fact, is 1968, the year before. It's found at tab 5 of our document brief.

Wayne Gordon Russell Robinson accepted that offer of first compensation; there is therefore agreement under section 38(2) of the *Act*. He did this in June of 1999 and he's been paid from that date forward. And so our position is that, having accepted and having had agreement under section 38, Mr. Robinson should have no standing at this hearing.

MS. SPOEL: Thank you.

Mr. Vogel.

MR. VOGEL: I think I have already referred you to tab N with respect to Mr. Robinson. There is no agreement that Union relies on that provides reviewability, equivalence. Mr. Robinson was treated as a member of the joint bargaining unit, participated in the negotiations, and should be entitled to participate here. He has a substantial interest in the outcome, if that's going to determine what he's paid. And on all of those bases he should be granted standing.

MR. SULMAN: Okay. Now we go to the Knox Dawn Knox Dawn Presbyterian Church. It's in Dawn Pool 156, Dawn 156.

I'm going to --

MR. SULMAN: The Clubbs? Sorry.

MS. SPOEL: No. Under Dawn 47-49, did I forget to delete Pete and Wilf Allaer, where it says "challenged"?

MR. SULMAN: The Allaers? I addressed those in the preliminary matters.

MS. SPOEL: Sorry.

MR. SULMAN: They were the --

MS. SPOEL: My mistake. I didn't cross it off on this chart.

MR. SULMAN: Okay. The Dawn 156 Pool. We have objected to Peter Club et al, but that's only a road-way agreement and we'll get back to those later.

In the Dawn 156 Pool, the next one I'm going to address, I think the only other one is Knox Dawn Presbyterian Church. Now, again, maybe the best way for me to do this, this is a little unique, maybe if I can walk you through -- I will point you to where the documents are, but I will try, without necessarily referring to them, to walk you through what the situation is here.

They are found at tab 6 of our materials, and you'll find, and I don't want to go into this in great detail, but these are not previously filed because -- I'll explain why in a moment, but they are not previously filed, the documents I'm going to refer to. There's an abstract of title, which wouldn't be much necessity to file it except to explain what's gone on, and some other microfiched documents. But maybe the easy way is for me to do this:

I gave a little history of Lambton County at the beginning, and it was in fact the Canada Land Company, and I can't remember whether it was Tiger Dunlop or who it was, got the Canada Land Company grant from the Crown to come over here and develop land and place immigrants from the United Kingdom on these lands. But that's how far back this goes; it goes back prior to Canada, prior to Confederation.

So the Crown, in 1846, granted the lands, in fact a large tract of land but the Knox Presbyterian Church, where it's located, is now part of that land. In 1846, I don't know whether it was Her Majesty or His Majesty at that time granted the Canada Land Company --

MS. SPOEL: Her, I think.

MR. SULMAN: Her. Was that Queen Victoria at that time?

MS. SPOEL: Yes.

MR. SULMAN: Okay. Very good.

So the Canada Land Company then granted --

MR. VOGEL: She would not take well to "His Majesty".

MR. SULMAN: She would not be amused.

The Canada Land Company then granted the land to the first purchaser named -- I don't know whether this is a Mr. or Mrs., but Ledgan, or maybe back in those times it was probably Mr. But the mineral rights were reserved to Canada lands -- the Canada Land Company. So the Canada Land Company granted the estate to Ledgan in 1846 but reserved unto itself the mineral rights. 593

Then there are several transactions that occur, and that is shown on the abstract of title that I've left you. In fact, it is Thomas Ledgan. So he acquired the land for it looks like 2,000 -- $200 or 200 pounds. And numerous owners conveyed the land and finally it ends up with Mr. Wilson in 1903. 594

Mr. Wilson acquires the lands in 1903 and the mineral rights at that point are still with the Canada Lands Company, of course, because they reserved the mineral rights. 595

Wilson then sells a corner of the lot to the Knox Presbyterian Church in 1915. In doing so, the mineral rights are still with the Canada Land Company. You can only sell what you possess, and Wilson doesn't possess the mineral rights. In 1919, the Canada Lands Company releases the mineral rights back to the Crown, by then the King. But in any event, in 1928, the Crown sells the mineral rights to Wilson. So now Wilson does have the mineral rights but the church, who had acquired the lands 13 years earlier, doesn't have the mineral rights. 596

So then Wilson -- by 1928 Wilson conveys to Winder, and I believe the storage rights that we now face -- and the lands surrounding the church are still held by Winder, but the church doesn't have any mineral rights. 597

Now, the issue, then, really is between Winder and the church, not the church and Union Gas, because the church simply doesn't have the mineral rights, if we follow the title. It is not the largest transaction that will ever be before you; I think the annual payments are $17, because it's a very, very small portion of land. But it's here. Everybody -- everybody has a fair opportunity at this point to come forward. And we have to address the abstract of title in the way it flows through. 598

So that's where we are, and that's why we say, Nothing personal, Knox Presbyterian Church, but since you don't have -- in that bundle of rights I spoke about at the beginning, you just didn't get the mineral rights, and that's how it goes. 599

I hope you don't want me to walk you through the microfiche and the -- I think the abstract title, although it's so ancient that it's -- it's very well handwritten, but it is handwritten, with a whole series of cross-outs. It eventually gets you to the point that I've tried to lead you through. 600

MS. SPOEL: Thank you. 601

Mr. Vogel, is the Knox Presbyterian Church one of your clients? 602

MR. VOGEL: Yes, it is. And the compensation today may be $17 a year, but they, with other LCSA landowners, are looking for just and equitable compensation. 603

604 And if I -- I'm not going to take you through all these documents, but I think you do have to look at them. You'll find a better copy, actually, of the deed to the church at tab W in the reply evidence.

605 Tab W is where Wilson conveys a portion of his property to the church. If you look at page 2 of that document, it's clear that what he is conveying there is a fee simple interest, and you'll see that it's free from all encumbrances. That's what he purports to convey - a full fee simple interest in that portion of his property, "free from all encumbrances," it says. And that's what the church acquires in 1915.

606 If you then turn back to Union's documents and take a look at what was quit-claimed to Wilson later. This is -- these pages aren't numbered so you'll have to bear with me here.

607 After the abstract of title, you'll find a copy of that conveyance we were just looking at. Then what you'll find, the next document there is the Canada Company's quit-claim of its interest in the mineral rights to the Crown. And then the next document is a document I'm taking you to which is the quit-claim from the Crown to Wilson.

608 If you have that, at the top it says "(Signed) W.D. Ross, Province of Ontario, George the Fifth," et cetera, and it refers, "WHEREAS by Indenture dated the 1st day of October 1919, the Canada Company did release and quit-claim..." Have you got that?

609 MS. SPOEL: Yes.

610 MR. VOGEL: Okay. If you look, then, in the second paragraph, it says, "AND WHEREAS Frank Wilson has proven his ownership of" the aforementioned lands, blah, blah, blah, we grant and release and quit-claim in those lands the mineral rights.

611 Okay. Well, what's quite clear is that by the time of this quit-claim from the Crown to Wilson, which is 1928, Wilson did not own the property of the Knox Church, because that property had been acquired in 1915. So Wilson can't purport to -- and the Crown couldn't have conveyed to him, and didn't purport to convey to him any more than the mineral rights in the property in which he was capable of proving his ownership, which could not have included the Knox property, the Knox Church property.

612 So what you have, then, is you've got a situation where either the mineral rights remained in the Crown; or if they were, as Union asserts, effectively conveyed to Wilson, he would have received them, subject to the beneficial interest of the church which they obtained as a result of their fee simple acquisition of lands, free from all encumbrances, in 1915.

613 So my submission is that for the purposes of standing on this application, that the church at least has a sufficient interest -- a beneficial interest, if not a legal interest - and may well be a legal interest as well - in the mineral rights. And regardless of who Union has been paying $17 a year to, they should have status on this application.

614 Those are my submissions.

615 MS. SPOEL: Thank you, Mr. Vogel.

616 Mr. Sulman, can we --

617 MR. SULMAN: Move on from that one?

618 MS. SPOEL: -- move on from that one?

619 MR. SULMAN: I was hoping to find the 1866 document for you that shows the reservation. But I --

620 MS. SPOEL: I don't think there's any -- I don't think there's any issue that the minerals were reserved and were later quit-claimed, and so on. We'll deal with how to deal with the church.

621 MR. SULMAN: There's a disagreement that there may be a trust imposed on Mr. Wilson, but that's as between he and the church, not us.

622 The next one, we'll leave Dawn 156. There is another Dawn 1 -- alphabetically, 167, but that is a roadway agreement and we'll come back to that later.

623 Alphabetically, the next pool is Edy's Mills, and that would be William E. and Laura E. McGuire.

624 The documents that we have provided are under tab 7. The McGuires and other Edy's Mills land-owners were parties to gas storage lease agreements with a company known as Ram Petroleums at the time. And they had a gas storage lease with Ram Petroleums. Ram Petroleums sold their interest in the Edy's Mills Pool to Union Gas, I should say assigned the leases -- sold their interest and assigned the leases to Union Gas. And subsequent to that the pool was designated and went into storage operation.

625 There are a couple of issues arising out of this matter. There is a gas storage lease in place, a lease agreement, dated 11th October 1989, between Laura and Bill McGuire and Ram Petroleums. And there is no amending agreement in place. The contractual right to payment that the McGuires have are under this agreement.

626 There is an issue, I believe, raised by my friend with regard to certain matters on the McGuires, and I'll have to -- I should address that right up front.

627 I believe it's page 9 -- page 10. It says that -- page 10, paragraph C, there's a couple issues.

"Edy's Mills landowners do not now receive and have never received storage operation royalties under the provisions in their leases." 628

I believe that is directed with regard to Union, they haven't received any storage operation royalties from Union. And there is an interesting -- because, as I said, these documents come from different companies, they have different provisions in them. Ram Petroleums -- because people can contract, have freedom to contract, and can make what deals they want. 629

On page -- this one is a little different, quite a bit different. I've got you to tab 7. You see the document general is the first page in, and then you go to the gas storage lease. If you turn into seven pages at the top, it has 7 marked on it, that's seven pages under this tab, at the bottom of it in the original document is page 6. 630

This is the provision in the gas storage lease that the McGuires have in the Edy's Mills Pool that provides for payment of storage operation royalties, which is something unique to the Ram document. And it reads, and that would be at 19(c): 631

"In the event that Ram delegates, assigns or conveys to any of the powers, privileges, rights or interests conveyed by this agreement, Ram shall pay to the Lessors, within thirty (30) days of receipt by Ram, their proportionate share, as set out in schedule 'B'" - which is somewhere attached, I hope; perhaps not because it's maybe private - "of 10% of the consideration received or receivable by Ram," which -- my understanding from the hearing, and having been counsel at the hearing, that was done by Ram. They paid out to -- out to the landowners on the delegation, sale, assignment to Union. 632

Then it goes on to say: 633

"Subclauses 19(A) and 19(B)," which are the provisions for a royalty, are no longer applicable, "will not be binding on the aforesaid third party while the delegation, assignment or conveyance remains in effect." 634

So the question my friend raises on the -- in his evidence, prefiled, on McGuires, saying that royalty has not been paid, that's true; it has not been paid in accordance with the contract. Ram contracted to do -- to make a payment. They made a lump sum payment on the conveyance. But royalty, under 19(A), which reads: 635

"In addition --" before we go on and find out what the payments are on a rental basis, having walked through all that, but that's what proceeds in the gas storage lease. Then 19(a) is an additional payment to these landowners in Edy's Mills Pool, 19(A), at the top of page 7. 636

"In addition, the Lessee agrees to pay the Lessor the Lessor's share, as set out in Schedule 'B' of 10% of the Earnings from storage operations under said lands. Earnings are to be calculated on a yearly basis and payment to the Lessor is to be made no later than 90 days after the end of the year. The 637

date of this Agreement is the first day of the year for the purpose of this subclause. Earnings are defined in subclause 19(B). This subclause does not apply to gas purchased under Clause 16."

638 Well, that's clear. And then it defines what earnings are, the gross proceeds from the sale of gas less the amount paid.

639 But that is the royalty clause that my friend says Union didn't pay, and we agree with that, it hasn't been paid. But it hasn't been paid because the contract provides that when Ram conveys it, that clause is not binding on a third party. And Ram paid a lump sum out to the landowners on conveyance. So he's quite right, that has not been paid.

640 MS. SPOEL: So has there been some other -- now, since that's not binding, as the contract says, it's not binding on a third party. Has Union, being the third party, made some other arrangement with these applicants?

641 MR. SULMAN: Oh, yes, they've paid annual rentals. That's what I -- at the outset I said there's a lease agreement. They are paid annual rental in accordance with the lease agreement. There's no other amending agreement. I'm just saying, to bring you up to date, other -- some other agreements have amending. This one doesn't. This one has that unique clause that is a royalty payment unique to Ram.

642 But when there's a complaint that Union hasn't paid it, that's quite true. But there's a reason; it's contractual and doesn't apply to Union.

643 The other issue that my friend raises on page 10, at (d) that:

644 "Prior to the designation and injection of the Edy's Mills Pool, landowners received significant oil production royalties pursuant to the provisions of their P&NG leases."

645 And after designation they haven't received it. I think he's referring to Union evidence, and the implication I get is that they should be receiving it and somehow because of Union they haven't. I'll let him explain that himself, but I will give you the answer because I don't have reply on this, is that that's correct. But Union doesn't hold the oil leases. They're still entitled to oil production; Union isn't preventing it. The oil leases are held by -- I'll explain it a little.

646 There is a sublease from Union -- because Union wasn't in the oil business by 1989, and they -- when they purchased the Edy's Mills Pools from Ram Petroleums, Ram still continued in the oil business, petroleums. And Union then sublet back to Ram all the rights to extract oil, crude oil, so that remained with Ram. And when my friend says that these people have not got revenues from oil, that may be true. But, once again, it's not a Union Gas issue, it's a Ram Petroleums issue.

647 And I have, for purposes of understanding that, and I don't want to do it twice, but under tab 8 -- I did attach it both times. But under tab 8, and it's found further at 8.3 - it's rather a thick document,

from 8.3 to 9 - that is a sublease agreement and it applies both to the McGuire property and to the Snopko property that we'll get to in a minute.

648 And what it provides for is that Ram Petroleums can produce oil on that site. And when they do, or if they do, then the McGuires and Snopkos anybody who's subject to -- has an agreement with them, and anyone who is named in schedule A, may have an opportunity to get oil revenues. But it doesn't come from Union Gas and we haven't cut them off.

649 And to be accurate, Ram Petroleums either doesn't exist any longer or doesn't hold this property. They have conveyed it to a company called Torque, T-o-r-q-u-e, and I don't know whether it's Inc., Limited, Development, I don't know what it is. But anyway, that is to address the question that my friend asks or raises on oil. We just don't have anything to do with it. It's not the proper subject matter of this proceeding. Certainly not for standing and not for -- ultimately I'll leave that in your capable hands.

650 MS. SPOEL: Thank you, Mr. Sulman, I appreciate that history there.

651 Is there anything else on this particular applicant, McGuires, or can I turn it over to Mr. Vogel?

652 MR. SULMAN: Only that the payments that are to be received are based on the Ram -- the formula -- based on the Ram lease.

653 MS. SPOEL: Thank you. So the successors in title, I guess, on this --

654 MR. SULMAN: The successors in title on this one.

655 MS. SPOEL: Thank you.

656 Mr. Vogel.

657 MR. VOGEL: Again to save time, Madam Chair, if I can refer you to tab N. And this is now on the second page of tab N. You'll see again a group there, William and Laura McGuire, Colin McMurphy, and Marie Snopko. I'll make my submissions with respect to those three because they're all identical, with an additional consideration with respect to Marie Snopko. So I think perhaps, in the interests of time, the best way of dealing with them is as a group.

658 In the agreements, what you'll see in the Edy's Mills Pools, in the agreements that Mr. Sulman has referred you to with respect to these landowners, again you have no express provision which would preclude an application to the Board. There's no such provision in those lease documents or amending agreements.

What is interesting about the Edy's Mills Pools, as Mr. Sulman has pointed out to you, is that these leases -- sorry, these gas storage agreements in -- gas storage lease agreements in Edy's Mills do expressly provide for both a fixed storage payment and for the royalty participation in storage operations that Mr. Sulman has pointed out to you in paragraph 19(A) of the McGuire agreement, at a rate of 10 percent. 659

Mr. Sulman's correct that the -- those royalty payments were suspended during the period of this assignment pursuant to the provisions in the lease. But what's interesting about this is that this is precisely the structure of compensation that is the subject of this application that has been brought to you by the LCSA applicants. 660

The LCSA applicants are applying for just and equitable compensation, which would include a fixed payment and a royalty payment. And my submission to you is that for the Edy's Mills landowners to ever obtain just and equitable compensation on that structure that their lease permits, the only way that that's ever going to happen is upon a review by the Board and a determination of just and equitable compensation for those landowners. 661

With respect to the position of the Edy's Mills landowners, it's dealt with in the reply at paragraph 10. And I'm not going to go through all of this in detail with you. But if you turn, in the reply evidence, to tab A, again which was Union's invitation to its landowners to negotiate as a joint bargaining unit, you'll see specifically included in the schedule which is attached to that letter, that that invitation included the Edy's Mills landowners. That's at the third page of that document, under tab A. 662

It specifically includes the Edy's Mills landowners. They were invited to negotiate as part of this joint bargaining unit. And, again -- which took place under the provisions of that 1990 amending agreement which provided for the arbitration before the Board. 663

So my submission to you is that upon the failure of the negotiations, they, as the other landowners who participated in those negotiations, should have the right to come before this Board. 664

What's -- I don't think I have to -- with respect to the situation concerning Snopko, you'll find excerpted under paragraph 10(b) in the reply evidence the paragraph that comes out of the Snopko lease that provides specifically for renegotiation of well payments. 665

"Pending agreement or determination by the Ontario Energy Board, payments shall continue at the then current rate." 666

So it specifically provides for arbitration by the Board in that lease of the well compensation payment. Again, that excerpt is contained at paragraph 10(b). 667

The relevance with respect to what's dealt with in 10(d) that Mr. Sulman referred to, the cessation of well production royalties, if it comes down a question of equities here in interpreting what the 668

statutory rights are of these landowners, these landowners in the Edy's Mills Pool have a lease which provides for royalty participation in storage operations that they never received. They're assured, and the excerpt from the evidence on the designation hearing is contained at tab D, they're assured during the course of that hearing that the dual use, that is, production and storage of the pool, will continue to produce both gas and oil.

669 The evidence of Union led at that hearing was that delta pressured in the pool would, in fact, enhance oil production; and that if there were going to be damage issues arising from that after designation, that those would be capable of being dealt with under the former section 22, now section 38 of the *Act*.

670 Three weeks after designation, oil production ceases, and the related royalties. So those landowners, not only don't they get their storage royalties, they also are done out of their production royalties. And whether that's Union's responsibility or not, in terms of equities and the right of these landowners to come before this Board to have just and equitable compensation determined, in my submission, they not being party to an agreement which expressly excludes that right, they should have that right.

671 And those are my submissions with respect to Edy's Mills.

672 MS. SPOEL: Thank you, Mr. Vogel.

673 Mr. Sulman, what I'd like -- I thought we'd take a break shortly. But I'd like, if I could, to get through the storage -- there's only a few left, I think, of the storage issues. Or are they lengthy?

674 MR. SULMAN: I think we're halfway through. But if you'd like, we could stop after -- I haven't spoken at all to Edy's Mills yet, I have only spoken to McGuire.

675 MS. SPOEL: I understand that.

676 MR. SULMAN: We could finish Edy's Mills if that would be --

677 MS. SPOEL: That would be helpful.

678 MR. SULMAN: I will be brief on one of them, McMurphy, which is Edy's Mills, Colin McMurphy. His situation is the same as McGuire, so I need make no further submissions on that. I've explained that one.

679 But Snopko is a little more complicated. And where shall I start? Snopko is the same as McGuire and McMurphy with regard to storage compensation, but there are other issues. Snopko has that same agreement with regard to oil production, and I want to agree with my friend on the question of what was said at the Edy's Mills Pool -- he's extracted it for you.

680 And I believe it was -- it was probably -- I'm not sure who it was that was counsel at the time. But someone asking the witnesses, the Union Gas witnesses -- in fact, we're probably in the same -- we were in the Sarnia Holiday Inn at the time, and I know I was counsel to Union Gas. And they asked:

681 "Q. Well, perhaps then from your perspective as a geologist," they were asking Mr. Egden, who was the geologist on the panel, "are you comfortable that the dual use of this pool is safe and efficient? Can it be done that it continues to produce both gas and oil?"

682 And Mr. Egden's answer is:

683 "A. I think that I have no reservations at all about gas and oil production or storage operations in the same pool."

684 And Mr. Faye has said:

685 "Q. No, when the pool is pressured and delta pressured, will the increased pressure assist, enhance the rate of oil production?"

686 And we still say the same thing today. There's no argument on that issue. My friend has put it in there, but every once in awhile I'll confirm we agree on something.

687 But that's not the issue. We don't have -- equities or no equities, we don't have any control over that. That oil production may have ceased, but it was not Union's oil production. And we had no play in it at all and, as you can see, we still take the same position. It can continue today, could have continued then. But that's totally within the control of Ram Petroleums. And it's not that it wasn't an awareness of the Ram Petroleums involvement. In fact, Mrs. Snopko's agreement was with the former predecessor -- title to grants was in fact with Ram Petroleums. So that's not something that's within our control.

688 Roadways are an issue with Mrs. Snopko, and I'll deal with those when we get to that.

689 Wells. I think we're in agreement on that. I think we've got a couple of agreements. The well -- the way the well agreements work, and that is found in our tab 9, there are several documents in tab 9 but it's the last document just before document -- before tab 10. It's an amendment -- it's an amending agreement.

690 This is one of the more modern amending agreements with regard to certain issues. And this deals with roadways and pipelines, damages for the 1993 operations. And then you get to -- we're on page -- the second page of the amendment of gas storage lease agreement.

691 At the bottom it deals with future surface occupation compensation, which is another way of saying wells. You turn the page and you'll find that there's a payment, and then under (b) it says, "for each well on the Lessor's land, the sum of $400.00 per annum."

692 And that was negotiated, new well payments were negotiated in '94. But it says:

693 "If no agreement is reached, either party may make application under Section 21 of the *Ontario Energy Board Act* for determination of the amount of compensation for the well heads. Pending agreement or determination by the Ontario Energy Board payments shall continue at the current rate."

694 And that's what's happened from that date forward. There is no agreement on the new well payment subsequent. So we agree that because it's contractual, because there is a provision in the contract to come to the Ontario Energy Board, we agree that in fact with regard to the issue of well payments, Mrs. Snopko has a right to be -- Mr. and Mrs. Snopko, Marie Katherine and John Snopko, have a right to come before this Board on the -- and have standing on the issue of well payments and, our position is, well payments only.

695 MS. SPOEL: Thank you.

696 MR. SULMAN: I note that I signed this agreement, so it must be okay. In a much former life, it appears.

697 That, I believe, is all we have on Snopko until we get to the roadways. But with regard to storage payments, our argument is identical to that of McMurphy and McGuire in Edy's Mills.

698 MS. SPOEL: Thank you, Mr. Sulman.

699 Do you have anything more to add on these particular applicants, Mr. Vogel?

700 MR. VOGEL: No, I don't. I think I made my submissions. I will be making submissions with respect to Marie Snopko in the roadway agreement in response to submissions we have still to hear from Mr. Sulman.

701 MS. SPOEL: I think, in going through my copy of the chart, Mr. Sulman, that you've provided, table 1, it appears that the remaining issues all deal with Bluewater, Oil City, and Mandaumin Pools, the Century Pools; is that correct?

702 MR. SULMAN: That's correct.

703 MS. SPOEL: And the issues with respect to the storage lease agreements.

MR. SULMAN: That's correct, other than roadway agreements, yes. 704

MS. SPOEL: Yes. I understand that's a separate issue. 705

Perhaps this would be a good time to take a short break. I wonder if during the break counsel could discuss perhaps with Mr. McCann how we might get through the rest of this this afternoon. The Board is prepared to sit a little late; however, I don't know if the court reporter is available. My understanding, Mr. Sulman, is that you're not available tomorrow; is that correct? 706

MR. SULMAN: I apologise for that, but unfortunately -- 707

MS. SPOEL: That's fine. We've made arrangements not to be available tomorrow. In reliance on that, we've made those arrangements. So perhaps you could discuss how we might finish this up, and whether facilities are available and so on. 708

MR. SULMAN: Might we have just a little longer on the break in order to have that discussion? 709

MS. SPOEL: Well, a couple extra minutes, perhaps. 710

MR. SULMAN: That's all I'm saying. Five minutes. 711

MS. SPOEL: Perhaps the rest of the break could be shortened. We'll resume in slightly over 15 minutes. 712

--- Recess taken at 3:20 a.m. 713

--- On resuming at 4:00 p.m. 714

PROCEDURAL MATTERS: 715

MS. SPOEL: Thank you. Please be seated. 716

Mr. McCann, I understand that the parties have discussed a way to proceed with the rest of this. 717

MR. McCANN: Yes, thank you, Madam Chair. We've had some discussions during the break, and I hope we can present this clearly and it will help us streamline proceedings and get us through this. 718

First of all, with regard to the rest of today, I think there's an agreement that Mr. Sulman will address the Century Pools II issues, all of those issues first; then Mr. Vogel will reply to all of them. Then we will move on to the roadways issues and Mr. Sulman will present all of the issues, and Mr. Vogel will respond to all of them. That's perhaps a little bit different from what we had contemplated in 719

the schedule. But I think it may be a little bit faster. We're all starting, I think, to be familiar with the overall context of this.

720 We've also discussed the remainder of the proceedings which would involve argument in summary. Now, I think it's -- we do need to be clear that this whole proceeding today really has been, in effect, argument. We haven't heard evidence today. So we're not quite talking about the usual situation of argument as a means of linking legal considerations to facts that have been proved in evidence.

721 So I think the expectation of the Board, and of everyone here, is that the arguments will be relatively brief and they will only -- they will be summary in nature. They will not deal extensively with matters that have already either been argued today, which will appear in the transcript that will be available shortly, or matters that appear in the evidence that has been filed.

722 So the expectation under which we're all trying to work is that the argument will be brief and therefore hopefully not too time-consuming for counsel, although the comment has been made that sometimes it takes longer to produce shorter argument. But we will try to do shorter argument in a short time.

723 And the schedule that we've agreed to is that Union Gas would file its summary argument, argument in chief I'll call it, by Wednesday, June the 18th, at noon. That's next Wednesday. The reply to that argument by the applicants would be by Friday, the 20th of June, at 5 p.m.

724 Now, I should say that I discussed a schedule and timing with Mrs. Lang which was a little bit different from this. This is a little bit shorter. So I apologise that I wasn't able to discuss the revised schedule, but I'm certainly happy to discuss it with you.

725 So Mrs. Lang, therefore, would also have until Friday, at 5 p.m. to provide -- that is, Friday, June the 20th, at 5 p.m. to provide any further reply that she should like to to Union's argument. And then if there is any reply to the reply, that would be provided by Union by noon on Thursday, the 26th of June.

726 And we didn't discuss this, but I guess if it should prove, after an examination of it, there's no need to -- you can determine that there's no need to reply earlier than that, you might let the Board and the parties know as a courtesy so that we could press on.

727 But that would then complete the argument on this standing phase of the matter and, I think, put the Board in a position, put the panel in a position where it could begin deliberation.

728 So I think that's agreeable to everybody, but I'll give Mr. Sulman and Mr. Vogel an opportunity to comment, if they care to. Thank you.

729 MR. SULMAN: I'm in agreement with the schedule. There's one thing we didn't discuss, and maybe -- that may or may not be helpful. The form of the filing. I was going to say it would be quite easy to

do electronic filing with the Board. Because we have a compressed schedule, we can't very well courier or we will never hit the time lines.

730 MS. SPOEL: I think, from our point of view, if you send it to us by e-mail or fax or whatever, that's just fine.

731 MR. SULMAN: That's what I thought with the Board and with Mr. Vogel. But I wasn't in discussions with Mrs. Lang. Now, I do have a suggestion there also. If we could electronically file or fax, as you say, to her son's law office, that might be easier. I don't know how else we're going to get it there.

732 MS. SPOEL: Perhaps you can discuss this with Mrs. Lang after. I'm sure there's some arrangement that can be made to get the documents to her in a timely fashion.

733 MR. McCANN: I see Mrs. Lang nodding assent, so I'm sure we can work something else.

734 Mr. Vogel, is that okay by your...

735 Now, can I just clarify one thing, Mr. Sulman. When you say "electronic filing", the Board has been working for some time, you know all about that, on electronic regulatory filing. What you mean here is e-mail or -- yes, okay.

736 MR. SULMAN: Not that. I meant e-mail.

737 MR. McCANN: That's fine. That's fine. I've been too immersed in that and I think in a funny way.

738 Mr. Vogel, is that...

739 MR. VOGEL: The schedule is satisfactory, Madam Chair.

740 I would just say that the landowners whom I represent are quite anxious to see this proceeding get on with the substantive issues, and so the more we can expedite our efforts and put you in a position where you can get on with your deliberations, the sooner the better, I would say.

741 MS. SPOEL: Thank you. We appreciate that.

742 MR. McCANN: Could I just have one second, Madam Chair.

743 MR. VOGEL: Madam Chair, while I have the opportunity, I might just ask, as a point of clarification, I assume from the description of the argument that you're anticipating that you're not requiring from us detailed transcript references.

744 MS. SPOEL: No, I actually had that discussion with Mr. McCann. As far as we're concerned, this whole day is argument, and we would not expect -- in fact, if it's in the transcript, you've already said it and you don't really need to say it again. Similarly, if it's in your written argument that you prefiled, you don't need to say it again. If there are specific issues you want to highlight, as you might as sort of a summary at the end, we'd be happy to have that. But we do not see this as being some kind of particularly formal thing.

745 We would like to see the sort of argument that you would make orally if you had, you know, an hour over lunch or something to prepare, because we assume you came here today prepared to make all the arguments you were going to make. So we don't want to put you to any additional work, or your clients to any additional expense, in regard to doing written arguments, because I know it's time-consuming and can become a burden. And that's not our intention at all.

746 So if you've said it, you can assume that we heard it, and we'll read it again when we get the transcripts.

747 MR. VOGEL: Thank you, Madam Chair.

748 MR. McCANN: If I can just raise one more matter briefly.

749 It would be helpful, from the Board's point of view, if, when you're filing -- if you could also, in addition to the filing by e-mail, file nine copies with us in paper. Not necessarily, obviously, by the times we discussed today, but at some point thereafter.

750 Mrs. Lang, we can work out something with you.

751 But that would be very helpful, if you could do that. But not necessarily by the times we have set out. As soon as you can conveniently do it after that. Thanks very much.

752 MS. SPOEL: Okay.

753 Mr. Sulman, I think we're back to you to deal with the storage lease compensation issues with respect to the Bluewater, Oil City, and Mandaumin Pools.

754 **ARGUMENT BY MR. SULMAN AND RESPONSE BY MR. VOGEL ON INDIVIDUAL APPLICANTS BY POOL, STORAGE RIGHTS, AND RESIDUAL GAS STANDING; Continued:**

755 MR. SULMAN: Thank you, Madam Chair.

756 There are three pools and I'll start with Bluewater. The first landowner -- there are only two landowners.

757 The first landowners are David and Nancy Hicks. They have sought standing for storage lease agreement and for residual gas. Our position is that there is a storage -- let me get the -- gas storage lease agreement in place. It's found at tab 10 of our documents. And this one is -- in the continuing effort to have different forms, it appears. This one is between David W. Hicks, Nancy Hicks, and CanEnerco Limited, which is no longer in business, as I understand it. And Union is the successor in title to CanEnerco.

758 So the pool went to -- was designated and Union, as is its obligation under the *Act*, sent an offer letter. I'm talking about the offer letter before you. We actually filed the offer letter so you could see what goes on, and that is at tab 10, 10.2, directly behind the affidavit of land transfer tax.

759 But once again we've blocked out the -- blacked out the amounts for -- unfortunately, I think we blacked it out and one of the lines indicates that a certain portion of money was received prior to this date. But I don't know that much turns on that at this point. The letter is dated August 15th, 2000, but prior to that, the Hicks had already received a lump sum amount, and that's in the -- unfortunately in that blacked out line below.

760 I do have the other letter. You don't have to trust me on that. I have the other letter -- another letter that sets that out. But once again it blacks out the amounts. I'm not sure that's real helpful to you.

761 But in understanding what's gone on here, our position is that there's an existing gas storage lease with CanEnerco, now Union. The pool goes to storage. Author letter comes out. Landowners accept the offer of compensation in 2000. Payments are received and continue on that basis for a period of -- well, until now, and continue on a monthly basis.

762 With regard to residual gas, there, in fact, is a provision in the agreement for the purchase of -- once again, we're not going to find the words "residual gas". The residual gas payment is the part that's blocked out on the lower line. That's the lump sum. But it's found in the agreement itself at paragraph 17. Once again it doesn't call it residual gas, but it calls it the "purchase of any petroleums substances to be purchased." And the first petroleums substance is oil and the second is gas. But you know it's residual gas because it's the same theory I talked about before, about it being a proxy for the gas that could be produced. It's paragraph 17.

763 The residual gas is computed as follows: "12.5% of the current market value at the wellhead or pithead of all other petroleum substances commercially recoverable from the demised lands down to a reservoir pressure of 50 pounds p.s.i." and that is the -- once again, we don't see the words "residual gas"; you never well. But that is the amount -- that's what residual gas is.

764 And what has occurred, then, is the offer is then made under clause 18 which follows. I hope our copy -- the 18 doesn't come through real clearly. But the offer is made and the lessor, within 30 days of receipt of the offer, either disputes the amount or they are deemed to have accepted it. And if they dispute the amount, they give notice of dispute and come to the Board under the *Ontario Energy Board Act.*

765

MS. SPOEL: And so your position, Mr. Sulman, on this one is that there's a valid agreement in place that has not expired; is that --

766

MR. SULMAN: A valid agreement in place that's not expired; an offer made and received and accepted. And I will now lump the two together, the Hicks and Shand, both in Bluewater Pool, these are the -- there is found at tab L of the applicants' material, the proposed applicants' material, a notice. It's produced, I believe, by Mr. Vogel's office and it is a -- it's a notice that's one of rejection, just as I spoke about in clause 18. If they don't accept, they send a notice of rejection. There's no particular form. This has been prepared by the landowner's counsel to reject, so you've got some formal notice.

767

These are the only two landowners in the Bluewater Pool who did not sign such a rejection letter, okay? They are the only two we're objecting to because they accepted, they did not reject.

768

MS. SPOEL: So your position is that their agreement is valid because they -- I just want to make sure I have it completely clear -- because you made an offer of compensation to them and they chose not to reject the offer, a negative option kind of thing.

769

MR. SULMAN: Well, they followed the terms of the agreement which says if you don't send a rejection notice, then you're deemed to have accepted.

770

MS. SPOEL: Right. So your view is -- I'm sorry, I'm not trying to make this -- put any qualification on this. I just want to make sure I have it clear. Everybody else specifically rejected the offer and they did not and therefore they have a binding agreement. Is that --

771

MR. SULMAN: That's right. If everybody else rejects the offer --

772

MS. SPOEL: I just want to make sure I understand it.

773

MR. SULMAN: In addition to that, they have received payments under the offer letter --

774

MS. SPOEL: Okay.

775

MR. SULMAN: -- which ties back into the agreement.

776

MS. SPOEL: Yes, thank you.

777

MR. SULMAN: And I realise it's -- as I said at the beginning, there are a lot of different documents and every one of them has something a little different in the wording. But that's the way this one works under the CanEnerco form.

778

MS. SPOEL: Right. Thank you.

779 MR. SULMAN: That's it for both of the two Bluewater Pool landowners. That's -- just so it's clear, that is Hicks and the party here is Shand, Laura Shand. I think originally on title it would be Nagle, but it's subsequently Shand, and that's who the applicant is here.

780 Okay. That's those two. Now we move to Oil City. And once again, alphabetically, the first one I'll address is the estate of Ada Broadbent.

781 Mrs. Broadbent, and this is, once again, a little different again, Mrs. Broadbent has a gas storage lease agreement, and this one is between Mrs. Broadbent and McClure Oil Company. Union has subsequently acquired the interests of McClure Oil. This one is a little different here also.

782 Our position is that they have a storage lease agreement, so an agreement is in place, the contract is there. This agreement has a provision that --

783 MR. McCANN: Where do we find the agreement?

784 MR. SULMAN: I'm sorry, it's tab 12, if I didn't say it earlier. It's document brief tab 12.

785 So it has payments. On page 2 you'll see an addendum. It appears that they have a -- they've negotiated, and that's what it's about, negotiated an additional acreage rental clause that doesn't appear in other agreements, to be paid by now Union, formerly McClure, at a rate of no less than 5 and no more than $13 for each acre of land which, from time to time, may lay in a designated storage area. So they have that other provision they entered into with McClure in 1973.

786 This agreement is -- this actually has a -- because it's 1973, it has a clause that's very specific as to the steps you are to take when the gas goes -- when the gas production area becomes gas storage. And that's found at clause 16. So this one is a little different again.

787 Again, the printing is so small that even with these magnifiers, I'm having trouble reading it. But it says:

788 "Subject to its rights, if any, under the oil and gas lease, the Lessee shall not inject gas into the demised lands under the provisions hereof until it has offered to the Lessor the additional acreage rental to be paid to the Lessor in respect of its storage operations to be conducted hereunder in the manner hereinafter provided and until it has offered to purchase from the Lessor, as hereinafter provided, the Lessor's interest in such of the gas and oil and related hydrocarbons...contained in the demised lands as are liable on the withdrawal of the gas so injected to be co-mingled indistinguishably therewith as to their respective volumes, or as are liable to be rendered commercially unrecoverable by reason of such injection or the storage operations to be conducted by the Lessor hereunder."

789 That is another phrase that deals with residual gas, how you determine residual gas.

790 So our position is that there is, in fact, a valid lease, not providing for Board-ordered compensation for storage lease agreement. But there is a provision on page 2 that I told you about. Union has met that obligation of paying the amount that's on page 2, which is the not less than 5 and not more than $13.

791 And if you just give me a moment on this one. I'm advised that we're not objecting to this applicant's request for residual gas payment because it hasn't been paid, I guess, is the reason, the very practical reason. And that's on the estate of Ada Broadbent.

792 Oil City. Once again, it's the same situation again with Sterling, who is the next landowner. There is a gas -- and that is found at tab 13, right behind this one. It is the very similar gas storage agreement, but it's with Union Gas, not with McClure. And it doesn't have that $13 provision in it, it just has a $5 provision.

793 This is, once again, a situation where a gas storage lease is in place, an offer letter has been presented, and there's a notice of rejection from the Sterlings. So we take the position that this agreement doesn't provide for any Board-ordered compensation. They are tied to the offer -- we've made an offer and we take the position that they -- since there is a valid agreement, this gas storage agreement is not available for the Sterlings to be seeking additional storage compensation under this storage lease agreement.

794 I don't think there's any other issues on this -- well, once again, this is a residual gas request also. They haven't been paid for residual gas, apparently. And we agree with the standing for payment for residual gas and that will be a determination, as to the amount.

795 Hoffmuellers, also in Oil City. Once again, we agree that they have not been paid residual gas, and again their gas storage agreement does not provide for Board-ordered compensation. And they have been paid. So our position, again, is that they are not -- this is the same as Sterling. I'll address the roadways on each one of those as we come back.

796 Now, Mandaumin, this is where we get into something a little different throughout. The way to do Mandaumin -- in Mandaumin, I think the place to look is under my friend's tab M for Mandaumin, because you'll see there, the agreement that's at tab M for Mandaumin, in effect, is the same form that affects all of Mandaumin, so we can do that one fairly generically, I think. I don't think there's anything much different.

797 So this will affect the Elliots, the Feenstras, Halls, Lambton Wildlife, McCrie, William and Donald Moore, Noorloos, Vokes, and I believe there's a numbered company but I know it's Harris.

798 Now, you'll turn to tab M again and you'll see a document general between -- in this case it's Elliot, but my comments will apply to all those parties.

799 There's an amending agreement and it's a document general, and attached to that you'll see a schedule and then it leads over to a table of contents. And what this is about, you'll see fairly -- as time goes on and evolution occurs, that this is 1998 and this is a very -- one of the more very modern amending agreements. This is a comprehensive amending agreement that deals with many issues.

800 So as you turn through, you're at -- you see the topics in the table of contents. And I won't walk you through all of it, but this deals with all of those issues of residual gas, roadways, storage and payments.

801 So perhaps the best way to really get to the heart of it is to turn to the page numbered at the top 6. And at the top you'll see "New Production Royalties". And what this agreement has is a couple things that are unique.

802 To understand this, though, Madam Chair and Mr. Smith, this is a -- this was arrived at as part of a negotiated agreement between Union Gas and the landowners committee, with the advice of their counsel, Cohen Highley. So as we look through it, you can see that the future payments after designation are set out under clause 7(a) through (d). Residual gas, under clause 10, is set out. You'll see that it is consistent with what I described, I guess several hours ago, as the abandonment pressure of 50 p.s.i.a. as measured downhole. This is a -- being very modern, we've now got the term "residual gas", but that's the same -- if you look back, that's the same concept, same pressure, same payment, same based on mcf, the rate per mcf.

803 It's a little complicated in that it's got an inflationary component found at the top of the next page in terms of bank rate interest and how it's to be dealt with. But our position, therefore, is that this agreement covers all terms. It's an amending agreement. It's -- it complies with section 38. All the Mandaumin Pool landowners who seek to be -- seek standing here should be denied standing on the basis that they have an agreement in place. There's little point in negotiating agreements if they don't -- if they can simply come back after you have a comprehensive agreement, or any agreement.

804 Now, what you have interesting here is clause 20, which is found at page 9. And this one has another favoured-nations clause, as I would define it. It provides for periodic adjustment all right, but it provides:

805 "After designation, the minimum annual compensation rates specified in Clause 7 of this Agreement," and that's the one we looked at earlier, "shall be adjusted for the annual C.P.I. or by the methodology applied by the Lessee in the majority of the other Gas Storage Pools in Lambton County."

806 So these people have a -- that is, with regard to the compensation rates, not for residual gas but for storage compensation rates, so they have a favoured-nations clause; they have an existing gas agreement. They don't have any, in our respectful submission, right to standing here.

807 Now, this is, again, one of these issues where the question is, do they have substantive interest -- although they've got an agreement in place, our position is they have no right to be here as an applicant. Do they have a substantive interest because they have a favoured-nations clause? Our submis-

sion would be that they could be an observer, a different status than applicant. Or in the alternative, if observer doesn't give them the right -- sufficient rights to comment, then at best they could be an intervenor. But certainly not an applicant, because that would then require that the Board, at the end of the day, make an order for compensation for them directly when in fact they have a contractual right for that. And our position is that the Board ought not to interfere with that, going back into Bentpath. In any event, it should not interfere with a valid contract. And this valid contract provides for a favoured-nations clause.

808 So they may have an interest, they may have a substantive interest; all those Mandaumin owners may have that. But not -- they are covered by the favoured-nations clause, and their role ought not to be no more than, in our submission, observer. But should you see fit to give them greater rights, then intervenor would be the right title, not applicant.

809 So that is the Mandaumin Pool owners who -- with regard to storage rights. And the residual gas, I believe I've spoken to that in sufficient detail, and our position is that's dealt with and dealt with by contract.

810 If I can just have a moment before we leave the Mandaumin Pool landowners.

811 My friend may raise this, I don't know, but I guess I'll take that risk right now. The only issue that there may be with regard to residual gas is the issue is dealt with here in contract, it says how to obtain it. The only question that can arise out of residual gas is sometimes -- you've got agreement that the pressure is 50 p.s.i., you've got the rate at 2 cents mcf. Sometimes there's an argument as to, okay, that's fine, but what volume is there?

812 And we have evidence prefiled from Mr. Hessell -- Dr. Hessell, who, in my reading of the evidence, at page 1823, accepts the numbers that Union has presented for the remaining volumes.

813 So to put it all together in a ball, there shouldn't be any issues with residual gas, and there should be no standing for residual gas. So, in our submission, just no outstanding issues.

814 Maybe just if I can for the transcript, my note is that volume 1, tab 2(a)(ii) of the amended application is where you'll find the Hessell evidence. I know it's a bit overkill maybe to do that, but it's helpful on the transcript if we ever get beyond on this.

815 So that really, I think, covers off all the Mandaumin Pool owners, Bluewater and the Oil City. So with that, my friend. And then I'll turn to roadways after that.

816 MS. SPOEL: Thank you.

817 Mrs. Lang, did you --

818

MS. LANG: Excuse me. Mr. Vogel -- I mean Mr. Sulman, could you please confirm for me Union's standing regarding residual gas for Mrs. Lang at the Waubuno Pool. Remember we talked about this briefly. Just one word, do you challenge it or not?

819

MR. SULMAN: Yes, we do. That was the argument earlier. There isn't a column that -- you'll remember I said there wasn't a column that said that. But I said at the outset, yes, we challenge the residual gas.

820

MS. SPOEL: It was our understanding that Union Gas is challenging it. Thank you, Mrs. Lang.

821

MS. LANG: Thank you.

822

MS. SPOEL: Mr. Vogel.

823

MR. VOGEL: Thank you, Madam Chair. In the interests of time, Madam Chair, if I could refer you to tab N of the reply evidence and the chart.

824

Page 2 of the chart, you'll find two groupings of landowners for the Bluewater -- it's on page 2 of the chart at tab N, you'll find a grouping of landowners for the Bluewater Pool, which is David and Nancy Hicks and Laura Shand; and a grouping of landowners for the Oil City Pool, which is the estate of Ada Broadbent, Frederick and Patricia Sterling, and Heinz and Helga Hoffmueller. And in the interests of brevity, I will provide responding submissions with respect to these landowners as follows:

825

My submission to you is that the -- none of the agreements that Union relies on with respect to these landowners contain an express provision which would preclude those landowners from coming to this Board to have a determination of just and equitable compensation.

826

None of those agreements provide for the periodic review and the equivalence with other landowners that are the minimum threshold requirements for just and equitable compensation.

827

So for all of these landowners in the Bluewater and Oil City Pools, my submission to you is, there is not an agreement, for the purposes of section 38, which would preclude this Board from addressing the issue of just and equitable compensation for those landowners.

828

Secondly, with respect to the second principle I outlined this morning, given that this proceeding will determine the compensation these landowners receive in the future, my submission to you is they do have a substantial interest in the outcome of this proceeding and they are proper parties to this proceeding.

829

The third principle that I outlined this morning is also applicable to these landowners because they are Century Pools Phase II landowners, and that is that the Board, in any event, has already directed

that all of the compensation issues with respect to the Century Pools Phase II landowners be heard in the context of this application, and that's our request to you.

830 A couple of other things I'd like to add with respect to these landowners, however, is if you turn to the reply evidence in paragraph 11(h) -- sorry, this will be 11 -- yes, 11(h).

831 There's reference there to an affidavit earlier filed by Union in connection with this application, which was in respect of a motion that was heard by the Board in September of 2000. And there's a quotation from that affidavit contained in paragraph (h) in which Union acknowledges that:

832 "...this is a new designation and an 'agreement' as set out in (section 38) has not been reached."

833 This is an acknowledgement by Union, on an earlier motion in this application, in which they had acknowledged that there was no section 38 agreement with respect to the Century Pools Phase II landowners, Bluewater, Mandaumin, and Oil City Pools.

834 My submission to you is that any agreements that may have been made by Union, or payments that have been made by Union while this application has been pending have all been expressly on a without-prejudice basis; that is, without prejudice to the position that the landowners are asserting on this application.

835 There are two bases for that. One is the form of notice that Mr. Sulman referred you to, which is at tab L, which was delivered by most of the Century Pools Phase II landowners. And you'll see that in that form of notice which was delivered, in addition to the notification of dispute, you'll see in the last part of the notice that the landowners "accepts such payment and provides any documents as may be required by Union Gas in relation thereto without prejudice to the participation of the undersigned upon this application..."

836 So my submission to you is that certainly for the landowners who delivered this notice, any form of agreement or payment that was made from the time this application was pending, which was January 2000, was clearly on a without-prejudice basis. And in addition to that, in any event, there was an agreement with Union that all such payments would be on a without-prejudice basis.

837 There's an exchange of correspondence you'll find at tab S in the reply evidence, and you'll find an exchange of three letters between our office and Union in connection with payments being made by Union while this application has been pending.

838 The first one is dated October the 13th of 2000, in which I confirmed -- if you have that, I confirmed LCSA's position that:

839 "...all such payments and any future payments by Union to LCSA landowners are received by them without prejudice to their rights in the pending s.38 application."

840 And secondly, then, you'll see Union's response there, and basically Union agreed with that position, except that it wanted to ensure that any payments that it did make would be credited against any obligation it might eventually have as a result of this application. And that's set out in their letter there of November the 8th.

841 And concluding, then, with my letter of November the 17th, 2000, in which we confirmed LCSA's agreement on behalf of its members that storage compensation would be set off from amounts that Union may eventually be liable for as a result of this application.

842 So what you have there is an agreement by Union with LCSA and its members that any agreements that are entered into and the payments that are being made by Union pending the result of this application, going back to -- well, any payments that they've made while this application has been pending, are all on a without-prejudice basis.

843 So any agreements that Union may assert now as precluding Century Pools Phase II landowners from participating in this, those are without-prejudice agreements which couldn't affect their entitlement to participate here, and certainly can't affect their standing to participate on this application.

844 The only thing -- I might just mention, while I'm dealing with these landowners, and I assume that there's no dispute about this, the landowner Sterling, in Union's chart in their evidence, in Union's chart in their evidence with respect to -- Sterling is an Oil City landowner. You'll see that under compensation for roadway agreements, Union has indicated in the chart that it's not applicable to the landowner. I'm advised that, in fact, the Sterlings do receive roadway compensation, they're not being challenged, and I assume therefore that that's an error; that, in fact, Union is agreeable to them having status on that issue. But perhaps Union can respond to that in connection with roadways.

845 Those are my submissions with respect to the Bluewater and the Oil City situation.

846 With respect to the Mandaumin landowners, exactly the same arguments that I've just made, I submit, apply to the Mandaumin landowners.

847 Now, Mr. Sulman has referred you to the amending agreement at tab M in the reply evidence, and he pointed out some provision in that agreement for periodic adjustment of rates which is limited to inflation. In my submission to you, an agreement that provides for the periodic adjustment of rates limited to inflation is not the periodic review to determine just and equitable compensation which is being advanced here. These landowners aren't interested in continuing inflation adjustments only. They want just and equitable compensation. As I said before, that would include participation in the profit pools.

848 The position of the Mandaumin landowners is set out in paragraph 12 of the reply evidence. Perhaps the quickest way to do this is, if we just stay at tab M for a moment and you look at paragraphs 6, 7, 8 and 20, you'll see that all of those paragraphs deal with various aspects of compensation, and all of them provide for this annual C.P.I. adjustment, or by methodology applied by the lessee and the majority of other gas storage pools in Lambton County.

849 So my submission is that, again, these landowners do have a substantial interest in the outcome of this proceeding. Their compensation is being determined expressly in accordance with the other methodology applied to other landowners in Lambton County and therefore they should have status.

850 I wanted to address the residual gas compensation issue because there is an additional consideration with respect to these landowners.

851 The situation with respect to residual gas is this: If you turn to paragraph 23 in the amending agreement, which again is at tab M, paragraph 23(a) deals with the effect of this agreement. It says:

852 "The specific terms of this Agreement will serve to alter, adapt or amend the corresponding terms of the" other agreements.

853 So what was specifically addressed and included in the amending agreement is that its effect is to amend only the corresponding terms of the other agreements.

854 And you'll see, referring to paragraph 10, that to the extent this amending agreement deals with residual gas, it is only with respect to amendment of the formula. That's the extent to which there's -- there's an amendment of the formula which is contained in the original lease.

855 And if you -- the original leases in Mandaumin are all similar in form to the lease which was considered by this Board in the Sombra decision, which is included in the reference materials here.

856 If you look at tab 7 in the reference materials, you'll find the decision of the Board from 1995 in Sombra. And so considering an identical lease provision in the Sombra case, I refer you to page 9, paragraph 1.2.4. The Board there is considering an identical clause. So what you have is you've got a paragraph 17(a) which contains the formula, and then paragraph 17 -- maybe I can just find this for you. That clause is reproduced at page 4 of this decision, and it's identical to the ones that we find in the Mandaumin agreement.

857 So if you look at page 4 of this decision, you'll see that paragraphs 17 and 18 are set out. Those paragraphs are the same -- that's the same paragraphs , same numbers as you'll find in the Mandaumin leases.

858 What you can see in paragraph 17 is there's a subparagraph (a) which says that the purchase price shall be calculated on the basis of this formula, and then there's sub (i) and sub (ii), and then it says, "or (b) in the manner hereinafter provided," and then it goes on in paragraph 18 to say that if the landowner doesn't accept the formula valuation of residual gas, then they have the entitlement under paragraph 18 to apply to the Board.

859 So that's -- and dealing with that clause, which, as I say, is identical to the Mandaumin clause, paragraph 1.2.4, on page 9 of the decision:

"The Board concludes that the word 'or' in the context of Clause 17 of the Gas Storage Lease Agreements should be given its ordinary meaning and interpreted disjunctively." 860

And so over the page: 861

"...the purchase price can either be computed pursuant to the provisions of sub-Clause 17(a) or Clause 18." 862

"Clause 18 then provides that the Lessor may dispute 'the purchase price or the additional acreage rental or both," et cetera. 863

So you've got exactly the same clauses as the Mandaumin agreement. In my submission, the end result of all this is you've got an amending agreement which, by its express terms, only amends the corresponding term of the lease, which is 17(a), the formula calculation. So you've got an amending agreement that amends only the formula, it doesn't amend or otherwise affect or prejudice the right of the landowners, under 17(b) and 18, to apply to this Board for a determination of their residual gas compensation rates. 864

So my submission with respect to the entitlement of Mandaumin landowners to bring that issue to this Board is on the basis of the interpretation of exactly that clause in the Sombra decision, where the Board held it was disjunctive; and if they don't accept the compensation formula as it was amended under the amending agreement, those Mandaumin landowners are entitled to come here under the disjunctive provision of 17(b) and 18. 865

Finally, the only other submission I make with respect to the Mandaumin landowners is specifically with respect to the position of the landowner Feenstra. And in the reply evidence at paragraph 16, again, the right of the landowner to participate in this application which is before you today was addressed by the Board in the context of the Century Pools Phase II hearing. And there's an excerpt at -- in the reply evidence at page 19, paragraph 16, starting at the bottom of the page there: 866

"The Board agrees with Union and Board staff that the portion of the lands owned by Mr. Feenstra that have not been included in the proposed DSA are not required..." 867

But the Board went on to say: 868

"The Board notes the comments made by Board staff at the hearing that these lands may qualify as 'outside acreage' and that Mr. Feenstra may be entitled to additional compensation depending on the result of the LCSA Section 38 Application." 869

Well, if Mr. Feenstra isn't before the Board and participating, how can he possibly get the benefit of the additional compensation that the Board contemplated at the time that it made that ruling in Century Pools Phase II? 870

871 Those are my submissions with respect to Mandaumin.

872 MS. SPOEL: Thank you, Mr. Vogel.

873 Mr. Sulman, I think we're at the stage to talk about roadways.

874 **ARGUMENT BY MR. SULMAN AND RESPONSE BY MR. VOGEL ON ROADWAY COMPENSATION STANDING:**

875 MR. SULMAN: Thank you, Madam Chair.

876 MS. SPOEL: And to the extent, obviously, that you can group them by issue, and keep it as simple for us as possible, it would be most appreciated.

877 MR. SULMAN: Well, I think these are fairly -- some of these are fairly straightforward, so I will go through. I think we start back at Dawn 156.

878 It's as simple as this: If you look at tab R of the applicants' materials, and you see a form of roadway agreement. And I believe, I'm going to make sure I've got all of these in order here, but -- I guess I could go back as far as Booth Creek. The one that's before you here is Sanderson, Booth Creek. And they're all the same -- and these are Sanderson, Clubb; Hardy in Bluewater; Kabbes in Waubuno; and Hoffmueller in Oil City, I believe, are all the same form of lease.

879 And in our view this is relatively straightforward. The roadway agreement is made, in this particular case, effective -- I can't find the exact date, but the date of the signature. And unfortunately the way it's -- you'll soon see what I'm struggling with in a minute. I can see the date of registration. What I can't say is the date of --

880 MS. SPOEL: It appears to be sometime in April 2000, and for our purposes today that's probably close enough.

881 MR. SULMAN: It would be, except for we have to turn to page 2, paragraph 2, where the agreement is entered into in April sometime. But it stays at paragraph 2, page 2, partway down, after you get through the annual rental being fixed at $650, it then says, "and it shall be payable in advance on January 1st of each year, commencing on January 1st, 2000."

882 So my assumption is that this goes back to January 1st, 2000, retroactively, despite the fact it's signed in April.

883 But the key point is:

884 "The amount of the annual rental shall be adjusted prior to the sixth payment, to the then rent per acre being paid for roadway rights in the Booth Creek Pool, and prior to every sixth payment thereafter, the rate per acre under this Agreement, shall be identical to the rate per acre being paid in the Booth Creek Pool."

885 So what's happened is, this is an agreement that goes for a period of 6 years; we're only in year 3 of a 6-year agreement.

886 So with regard to the roadway itself, it is a 6-year agreement and we're only in year 3, so it hasn't expired. There's an agreement in place, is our position. I know there might be some suggestion that, yes, you've got a grant of easement here. But nothing in this grant of easement affects any other rights that you may have under any other agreements that you may have entered into. But as I understand it, the agreement that's entered into by Frank Sanderson is the one I went through with you earlier, hours ago, which was simply a gas -- I'll get the right term because they're all different -- this is an agreement of lease.

887 MS. SPOEL: Well, Mr. Sulman, I'm just trying to keep it as simple as possible because it's easier for us that way.

888 On these -- if Mr. Vogel should happen to make an argument that there's some other basis for it, you will have an opportunity, at least in your written argument, to respond to that. For our purposes right now, can I take it your position with respect to this roadway agreement, and any others that are identical, is that it's the simple case you put forward this morning; that where there is an agreement that has not expired, whether there's a term upon which it can be renegotiated, that if we haven't got to that point in time yet, there is no status for the applicants to reopen it before this Board, or in any other way. Is that --

889 MR. SULMAN: That's exactly right.

890 MS. SPOEL: Thank you.

891 MR. SULMAN: But I'm anticipating that other argument, because I'm going to try to keep my concise when we get to it. But you can see since I don't have reply, it may be a little longer.

892 That is exactly our argument, and that paragraph is exactly what we're relying on. This is an unexpired agreement, as are all the ones I listed for you, Sanderson, Kabbes, et cetera.

893 MS. SPOEL: Right.

894 MR. SULMAN: That's the first category of roadway agreements, but not all the roadway agreements.

895 Then we turn to a couple of other roadway agreements which are -- let me -- Snopko and Donorma Farms. If you give me a moment I'll find those.

896 Donorma Farms is found at tab T of my friend's reply evidence. Again, our position on this is quite straightforward also. This is a full and final release. It is between two willing parties, a farm corporation, Donorma Farms, and Union Gas. The amounts are negotiated, but they're blacked out. And in free negotiations they got whatever they got for the full and final release, and that's fair, that's what negotiation is about.

897 But there is -- if you will read the wordings of it, it is a full and final release, and I won't repeat the whole matter, but it's -- of all claims against -- "including land damages, we may have against Union Gas Limited, its successors, assigns, agents," et cetera, which may be "sustained by us for inconvenience, disturbance and disruption to the overall present and future crops, excluding present crop damage from, stockpiling of soil..." And this is all "in consequence of the location, access, drilling and construction of existing and future, (a) wells; (b) permanent roadways..." And it goes on to deal with pipes and pipeline.

898 It says:

899 "Notwithstanding the foregoing, Donorma Farms reserves its rights to compensation for gas storage rights, petroleum and natural gas rights and annual wellhead payments for the lands..." But that's separate and apart from the roadway damages that have been discussed before.

900 So it's a full and final release. The only things that are excluded are the compensation for gas, storage rights, petroleum and natural gas rights and wellhead payments. Everything else was covered off by the full and final release.

901 Now, in keeping with our theme of documents not all being the same because people have negotiated, this one found at U, tab U, is Mrs. Snopko's. It's very similar but not identical to the Donorma Farms. Let me just pause for a moment to find the exact line that is different.

902 This one is a little different and I will point you to the first paragraph starting with "I, Marie Katherine Snopko..." To that point is certainly is all identical to Mr. -- not Mr., but Donorma Farms Limited. But it reads:

903 "I, Marie Katherine Snopko," and she sets out what she owns, the property that she's referring to, "do myself, my heirs, executors, administrators, agents, assigns and tenants and for anyone claiming by, through, or under me, hereby release forever discharge and waive any and all claims, costs, damages, and compensation of any nature including land damages, excluding tile damage and surface restoration, I may have against Union Gas Limited, its successors, assigns, agents, contractors and employees for any reason which heretofore may have been sustained which occurred to the end of the 1993 calendar year...in consequence of the...permanent roadways," I guess, the topic here. I won't repeat the others.

904 The key here, what she said is, I release you to any damages that may have occurred by the end of calendar 1993 for permanent roadways. Our position is that the roadway was in, completed, and finished by the end of 1993, so this releases for all damages caused by the roadway, but it was already in place.

905 MS. SPOEL: Isn't that a matter of evidence as to whether or not there have been any damages since -- I mean if, and I have no idea what Mrs. Snopko's claim is, but if she were to come to claim that in fact there were damages subsequent to 1993, would she not have the right -- I mean this release would not preclude her from coming to us to say she has not been compensated for those damages should she allege and should we find as a matter of fact that there were -- I'm sorry, I forgot to put my microphone on.

906 If she alleged damages post 1993, I take it, Mr. Sulman, this wouldn't preclude her from having the status to bring that application.

907 MR. SULMAN: That is true insofar as crop damages, for instance, that are not excluded and they have been paid. And these people can come forward on an ongoing basis. They are not foreclosed from coming forward with actual damages that occur. But I think I understand your question. If she were to come forward and say, I have sustained greater damages to the roadway after '93, should she be precluded at this early stage.

908 MS. SPOEL: Correct. We don't have -- you know, you're not in a position to actually give evidence.

909 MR. SULMAN: I'm not.

910 MS. SPOEL: And she may or may not be here, but she's not giving evidence today either. So I'm just wondering, as a matter of status, whether she could be excluded at this stage, given the time-limited nature of her release.

911 MR. SULMAN: Well, I think I've made my comment. I can't go any further than that on it at this point.

912 MS. SPOEL: Thank you.

913 MR. SULMAN: Okay. Those are all the roadway agreements that are entered into.

914 MS. SPOEL: Okay, Mr. Vogel, roadways.

915 MR. VOGEL: Yes, Madam Chair.

916 Again, I refer you to tab N, which sets out the position of the LCSA applicants with respect to the two different types of roadway agreements.

917 Let me try and deal with this fairly summarily. The first group, or the first type of roadway agreements that Mr. Sulman has referred you to and on which Union relies to deny these landowners the opportunity to come before the Board to have their compensation reviewed is at tab R in the reply evidence.

918 And my submission to you is brief. It is that there is nothing in this agreement which would preclude -- which expressly precludes the landowner from coming to the Board, and from the Board considering the issue, of just and equitable compensation for roadways.

919 The form of agreement Union relies on does not provide for periodic review, either by negotiation or by the Board, it does not provide for equivalent compensation to these landowners through the term of the agreement and therefore, in my submission, it doesn't meet the minimum threshold requirements for section 38 agreement and therefore does not constitute the section 38 agreement. And the Board would not be precluded, on the basis of this agreement, from considering the issue of just and equitable compensation for roadways for these landowners.

920 Secondly, these landowners have a -- since, as Mr. Sulman pointed out to you in paragraph 2, it does provide for compensation adjustment at 6-year intervals identical to the rate then being paid in the Booth Creek Pool, so it does provide for these landowners to eventually have their compensation be determined by what's paid to other landowners, that gives them a substantial interest in this proceeding; therefore, in my submission, they are properly party to it and they should be permitted to participate.

921 More than that, however, I would like to submit to you that all of the agreements with all of these landowners, this first form of agreement with all of these landowners was entered into in the period between 2000 and 2002. And my submission is that's covered by the without-prejudice agreement with Union, which I've already reviewed with you under tab S, and that accordingly any payments made or agreements entered into with these landowners were on a without-prejudice basis and cannot affect their standing to participate in this hearing.

922 Further, with respect to this form of agreement, if you look at tab 9 -- sorry, section 9 in the agreement, what it says is:

923 "Nothing in this grant of easement or anything herein contained or anything done hereunder shall affect or prejudice either the Transferor's or the Transferee's rights and privileges which may exist as a result of any other agreements, contracts or arrangements between them or their predecessors in title."

924 That would obviously cover the without-prejudice agreement that I've submitted to you. But it is also with respect to Clubb and Kabbes, K-a-b-b-e-s. Both of those landowners were parties to the 1990 amending agreement that Union acknowledges contains a provision entitling the landowners to come to this Board.

925 So in my submission, it is not available to Union to rely on this agreement as precluding their right to apply to the Board because this agreement is expressly, in paragraph 9, without prejudice to the 1990 amending agreement that both those landowners had with Union.

926 With respect to the second form of agreement Union relies on in its challenge of landowner status on roadway payments, as you've noted, Madam Chair, this is in the form of a full and final release. And if we read what it says, this release -- and I'm referring now to this form of release at tab T in the reply evidence. It releases compensation for inconvenience, disturbance and disruption to the overall present and future crops, excluding present crop damage, et cetera, okay, so it's a limited form of release, okay? It's limited to compensation for inconvenience, disturbance and disruption to crops in consequence of the roadway construction. It does not address, for example, the land value component of roadway compensation.

927 And the claim which is being advanced in the amended application here is that it's for roadway compensation which consists of land rights, disturbance and crop loss. And the land rights component claimed in the amended is $15,000 per facility, so $15,000 for a roadway. That is not addressed in this form of release, okay? This release is expressly, by its terms, limited to the inconvenience, disturbance and disruption to crops.

928 I'd just very briefly refer you to the authorities again in respect of the proposition which I think is probably trite, that releases have to be construed strictly in accordance with their terms.

929 And if you look in the book of authorities at tab 8, there's a case there, a Supreme Court of Ontario case called Cloutier Brothers and Kenogami Lake Lumber Limited. And the proposition that I submit to you is a trite principle of law and it appears at paragraph 27, which the court in that case says:

930 "I am cognizant of those authorities in support of a proposition that a release or a hold-harmless agreement or indemnity agreement will be interpreted strictly and adversely to the beneficiary thereof."

931 So my submission here is, again, that that release must be interpreted strictly, according to its terms. It doesn't apply to, certainly, a significant portion of the claim with respect to roadway compensation which is being advanced on behalf of these landowners; and that that form of roadway agreement should not preclude those landowners coming before the Board. There's no express provision in it which would prevent them from doing so. And it doesn't, again, meet the minimum requirements for just and equitable compensation; no reviewability, no equivalence.

932 You've already addressed the issue with respect to the Snopko release at tab U, which only goes to 1993. And, Madam Chair, in addition to the fact that whether there have been damages beyond that being a matter of evidence, I do submit to you this: That the damages which are caused by roadways and for which landowners should be entitled to just and equitable compensation isn't limited to the crop loss. And as I've just submitted to you, the claim being advanced here is that there's a land rights component, an increasingly valuable land rights component, and various aspects of disturbance which are not included in the present compensation payment and not addressed in this release.

933 Accordingly, Snopko and the others who have signed these releases and are being challenged by Union should be entitled to participate as applicants in this proceeding.

934 Those are my submissions with respect to roadway agreements.

935 MR. SULMAN: Before we leave roadway agreements, I did not address Sterling. And my friend, you'll recall, before we started that, my friend raised the issue whether we might be in agreement on Sterling.

936 MS. SPOEL: Right.

937 MR. SULMAN: I have not been able to find out from my advisers whether there is, in fact, any roadway at Sterling. That's why we didn't address it. I will address that, I think it's more appropriate in argument, because then I will have the facts. The brief information that I have is that there is no roadway --

938 MS. SPOEL: I assume, Mr. Vogel, in fact, there is no roadway. Perhaps you two can sort it --

939 MR. SULMAN: I didn't finish. No roadway agreement. You started talking before I got any further. There's no roadway agreement with Sterling.

940 MR. VOGEL: My submission is that the evidence before you which the parties have filed, and my understanding is that in fact roadway compensation is being paid with respect to Sterling. And on the evidence which is before us, which is in the record, in my submission, the Sterlings have every right to participate. And they haven't been challenged on that issue by Union.

941 MS. SPOEL: Well, Mr. Sulman, if indeed you intend to challenge it, you perhaps can include it in your written -- your further submissions, and Mr. Vogel can respond appropriately.

942 MR. SULMAN: That's exactly my suggestion.

943 MS. SPOEL: Thank you.

944 Mr. McCann, is there anything further?

945 MR. McCANN: No, I don't think so. Except to thank all the people who have come out here today for their patient attention through a relatively long day. And of course we always thank our diligent and hard-working court reporters for their hard work in these matters.

946

MS. SPOEL: The Board would like to thank counsel and Mrs. Lang for your presentations today. It's been very helpful. We will look forward to receiving your further short submissions, and we'll get our decision out as soon thereafter as we can. Thank you.

947

MR. VOGEL: Thank you, Madam Chair.

948

MS. SPOEL: We're adjourned.

949

--- Whereupon the hearing adjourned at 5:15 p.m.

2009 CarswellOnt 9447,

2009 CarswellOnt 9447

Snopko v. Union Gas Ltd.

Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight, Plaintiffs and Union Gas Ltd. and Ram Petroleums Ltd., Defendants

Ontario Superior Court of Justice

John A. Desotti J.

Heard: December 17, 2008
Judgment: January 6, 2009
Docket: 5021/08

Counsel: Donald R. Good, for Plaintiffs

Crawford Smith, for Defendant, Union Gas Ltd.

Richard Opekar, for Defendant, Ram Petroleums Ltd.

Subject: Natural Resources; Civil Practice and Procedure

Natural resources --- Oil and gas — Statutory regulation — Provincial boards

Plaintiffs brought action against defendant gas corporations — Defendants brought motion for summary judgment to dismiss claim — Defendants contended that there was no jurisdiction in court to bear case governed by Ontario Energy Board Act, 1998, as board had exclusive jurisdiction — Motion granted; claim dismissed — There was disagreement with plaintiffs' interpretation of s. 38(3) of Act — Section speaks of "no action" lying with respect of compensation — Failure to come to agreement without compensation allows board to make that determination — Nowhere does that exclude board in assessing evidence before it and from making ultimate determination.

Civil practice and procedure --- Summary judgment — Miscellaneous.

Cases considered by *John A. Desotti J.*:

Wellington v. Imperial Oil Ltd. (1969), [1970] 1 O.R. 177, 8 D.L.R. (3d) 29, 1969 CarswellOnt 247 (Ont. H.C.) — followed

Statutes considered:

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

Generally — referred to

Ontario Energy Board Act, R.S.O. 1990, c. O.13

s. 21(3) — referred to

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

Generally — referred to

s. 38(3) — considered

MOTION by defendants for summary judgment to dismiss plaintiffs' claim.

***John A. Desotti J.*:**

Analysis

1 The defendants bring this motion for summary judgment to dismiss the plaintiffs' claim. There are two grounds that form the basis for this motion. One ground concerns whether these claims are statute barred by virtue of the Limitations Act. The second ground is that there is no jurisdiction in the court to bear a case governed by the Ontario Energy Board Act, 1998, as the Board has exclusive jurisdiction. I will only respond to this secondary position.

2 The argument advanced by the defendants is that since there is no dispute that the claims of the plaintiffs' arise from the defendants' operation of the Edys Mills Pool, then the Board has exclusive jurisdiction over such claims.

3 Section 38(3) of 'the Act' states as follows:

> No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board.

4 While I could spend some time in reviewing what I have described as an excellent compendium of cases, materials, and facts, I was arrested in my enthusiasm for the interpretations of this information as presented by counsel by the reality that one of my brother judges already has made a comprehensive determination of the issue of jurisdiction.

5 Justice Pennell, in a 1969 decision of *Wellington v. Imperial Oil Ltd.* [1969 CarswellOnt 247 (Ont. H.C.)], at page 183, stated as follows:

> It seems to me it is in substance a claim for compensation in respect of a gas right and damages necessarily resulting from the exercise of the authority given by virtue of the order of the Ontario Energy Board.
>
> But it seems to me that in many cases where a dispute arises as to the amount of compensation, the first

> thing the board of arbitration has to do is to inquire what were the subsisting rights at the time the right of compensation arose; and that in some cases such inquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied.

6 Further on in his judgment and after concluding that the wording of then section 21 (3) now section 38 (3) precludes an alternative remedy as might be found before a Superior Court, he stated at page 184:

> It is with reluctance that I conclude that the Legislature has taken away the prima facie right of a party to have dispute determined by declaration of the Court.

7 I inquired of both parties whether this case had been appealed or whether it has been cited in other decisions. Neither counsel has found any such appeal or further commentary in other decisions.

8 In reviewing the plaintiffs' factum, I disagreed with the manner in which he interprets subsection 3 of section 38 in paragraph 28 of his factum. Frankly, I indicated that although I lack expertise as a constructionist, that I could not agree with his suggested interpretation of that subsection. The section speaks of "no action" lying with respect of compensation. The failure to come to an agreement about compensation allows the Board to make that determination. No where does that exclude the Board in assessing the evidence before it and from making an ultimate determination.

9 Justice Pennell came to that conclusion as do I. In the result, the Plaintiffs' claim against the defendants is dismissed. My trial coordinator can be approached with respect to the timing of any submissions with respect to costs and whether counsel would like to proceed by way of conference call.

Motion granted; claim dismissed.

END OF DOCUMENT

Date: August 13, 1998
Docket:**C22661, C23102**
C22849

COURT OF APPEAL FOR ONTARIO

CHARRON, ROSENBERG and BORINS JJ.A.

Action C22661, C23102	)	
	)	
PHILIP DAWSON, SIVAKUMAR RASIAH, GÉRARD CLAUDE SÉGUIN, PAUL LALONDE, STEVEN I. SZABO, STEPHEN PYE, KRISHAN KUMAR SACHDAVA, DOUGLAS E. WOODARD, DEBORAH L. SIMON, WILFRED GEORGE SIMON, ANTHONY GOVEAS, LUCY GOVEAS, RAY W. BURZYNSKI, ERNEST R. MATTHEWS, HUGH MOORE, JAMES TULLY MEEK, ABDUL KARIM GHAFOOR, CHRISTOPHER HOARE, HENRY YAN, URSULA SYAL, TEJINDER SINGH DHILLON, PHILLIP PARIAG, ALFRED AMOS, DANIEL PAUL MAW, EDMUND SAMUEL, JOSEPH ZISIS, ANDY AMBROZIC, HAROLD CHUNG, DANIEL ANTHONY TRATCH, PETER AMBROZIC, GURDEEP SINGH JASSAL, DOUGLAS OBERMEYER, CAUSLEY DEHANEY, SURJA SINGH REEHAL, PHILLIP CHARLES DESOUZA and PATRICIA KINSEY	)	**Peter C.P. Thompson, Q.C. for the appellants** **K. Scott McLean for the respondent, The Bank of Nova Scotia** **Paull N. Leamen for the respondent, Shivkumar**
	)	
Plaintiffs/Appellants	)	
	)	
- and -	)	
	)	
REXCRAFT STORAGE AND WAREHOUSE INC., REXCRAFT MANAGEMENT LTD., REXCRAFT CAPITAL INC., CENTURY PEDA DEVELOPMENT LTD., EDWARD W. REID, BARRY D. THOMPSON, JASBIR MANN, PIGEON-ROY APPRAISAL LTD., GINSBERG GLUZMAN, FAGE & LEVITZ, SECURITY HOME MORTGAGE INVESTMENT	)	

CORPORATION, REICOR CAPITAL CORPORATION ABDUL FATTAH ODEH, MAURICE YELLE EXCAVATION LTD., RICHARD PARKER, GARY GORDON HOLDINGS LIMITED, LES MAISONS DE PIÈCES BONDU INC., ROZENA LOW-BEER IN TRUST, CHARLES CONNOLLY, INDERJEET SINGH BHOI, STEPHEN BERRY STREET DEVELOPMENTS LTD., THAKOORDIAL SHIVKUMAR, CANADIAN IMPERIAL BANK OF COMMERCE and THE BANK OF NOVA SCOTIA

Defendants/Bank of Nova Scotia Respondent

Action No. C22849

B E T W E E N :

PACIFIC & WESTERN TRUST COMPANY

Plaintiff (Respondent)

- and -

PATRICK CARROLL

Defendant (Appellant)

A N D B E T W E E N :

HOUSEHOLD REALTY CORPORATION LIMITED

Plaintiff

- and -

PATRICK CARROLL

Defendant

Peter C.P. Thomson, Q.C. for the appellant

Sean E. Cumming for the respondent

AND BETWEEN:	)	
PATRICK CARROLL	)	
Plaintiff by Counterclaim	)	
- and -	)	
HOUSEHOLD REALTY CORPORATION LIMITED, STANDARD TRUST COMPANY, LISE JEANNINE REID, HOUSEHOLD REALTY CORPORATION LIMITED, Assignee of LISE JEANNINE REID, EDWARD REID and THE CANADIAN IMPERIAL BANK OF COMMERCE	)	
Defendants by Counterclaim	)	
-and-	)	
NELLIGAN/POWER and	)	**Heard: February 9, 10**
	)	**11, 1998**
Third Party	)	

BORINS J.A.:

[1] These are three appeals in two actions. In *Dawson et al. v. Rexcraft Storage and Warehouse Inc. et al.* (the "*Rexcraft* action"), the plaintiffs, except Matthews, Moore and Meek, appeal a summary judgment obtained by The Bank of Nova Scotia (the "B.N.S.") dismissing the plaintiffs' claims against it. In addition, all of the plaintiffs appeal a summary judgment awarding the defendant, Shivkumar, summary judgment on his counterclaim against the plaintiff, Wilfred George Simon, dismissing the plaintiffs' claims for declaratory relief against Shivkumar, and awarding costs against all plaintiffs, jointly and severally, in the amount of $36,524.48. These motions were argued before Chilcott J.

[2] Patrick Carroll has appealed from a summary judgment against him in the amount of $38,955.69 obtained by the plaintiff in the action *Pacific & Western Trust Company v. Carroll* on September 5, 1995. He has also appealed from a summary judgment dismissing his counterclaim against Pacific & Western Trust Company ("Pacific & Western") in a different action entitled *Household Realty Corporation Limited v. Carroll*, in which Carroll has counterclaimed against Pacific & Western and several other parties, which was granted on September 9, 1996. I will refer to these actions collectively as "the *Carroll* actions." Both motions were argued together before Chadwick J.

[3] Although each of the three appeals was argued separately, it is appropriate that the appeals be considered together. The appeals in the *Rexcraft* action arise from the same set of circumstances and arise from summary judgments granted by the same motions judge, Chilcott J. Although the appeal in the *Carroll* actions arises from a different set of circumstances and from the decision of a different motions judge, the action raises legal issues similar to those raised in the *Rexcraft* action. Further, the same legal issues become central to the resolution of each appeal. The issues relate to the proper role of a motions judge hearing a motion for summary judgment under Rule 20 of the Rules of Civil Procedure.

RULE 20

[4] Before I consider the merits of each appeal, it will be helpful to discuss the purpose of Rule 20 and the approach required of a motions judge hearing a motion under this rule. This court has done so on previous occasions, most recently in *Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222. However, these principles still appear to give rise to difficulties in their application.

[5] In each of the appeals before this court, two issues predominate. The first issue centers on the analytical approach taken by motions judges in determining whether the moving party has satisfied its burden of demonstrating that there is no genuine issue of material fact. The second issue centers on the proper role of the motions judge when undertaking this task.

[6] In my view, a helpful way to discuss these issues is to compare the principal devices provided by the Rules of Civil Procedure for the pre-trial resolution of a claim or a defence. The first is a motion under rule 21.01(1)(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence. The second is a motion for summary judgment under rule 20.01(1) or (3) on the ground,

provided by rule 20.04(2), that there is no genuine issue for trial with respect to a claim or defence. Generically, each may be characterized as a device to challenge the merits of the plaintiff's claim, or the defendant's defence, before trial, with the goal of foreclosing the need for a trial to resolve all, or part, of the lawsuit. As background to this discussion, it is necessary to recognize the paramountcy of the due process requirements which apply to the resolution of disputes which have been incorporated in the Rules of Civil Procedure, notably pre-trial discovery and a plenary trial on the merits before a trial judge presiding alone, or with a jury.

[7] I begin by reproducing the relevant rules:

> **20.04** (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
>
> (2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.
>
> (3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.
>
> (4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.
>
> (5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1)(a), except with leave of a judge or on consent of the parties;

(b) under clause (1)(b).

[8] Under rule 21.01(1)(b), a defendant may move to strike out a plaintiff's statement of claim on the ground that it does not disclose a reasonable cause of action. The essence of the defendant's motion is that the "wrong," described in the statement of claim, is not recognized as a violation of the plaintiff's legal rights, with the result that the court would be unable to grant a remedy, even if the plaintiff proved all the facts alleged. Thus, to permit the plaintiff to litigate the claim through discovery and trial would be a waste of both the parties' and the court's time.

[9] Because the purpose of a rule 21.01(1)(b) motion is to test whether the plaintiff's allegations (assuming they can be proved) state a claim for which a court may grant relief, the only question posed by the motion is whether the statement of claim states a legally sufficient claim, i.e., whether it is substantively adequate. Consequently, the motions judge, as mandated by rule 21.01(2)(b), does not consider any evidence in deciding the motion. The motions judge addresses a purely legal question: whether, assuming the plaintiff can prove the allegations pleaded in the statement of claim, he or she will have established a cause of action entitling him or her to some form of relief from the defendant. Because dismissal of an action for failure to state a reasonable cause of action is a drastic measure, the court is required to give a generous reading to the statement of claim, construe it in the light most favourable to the plaintiff, and be satisfied that it is plain and obvious that the plaintiff cannot succeed. See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[10] In some cases, a statement of claim will be vulnerable to dismissal under rule 21.01(1)(b) because the plaintiff has sought relief for acts that are not proscribed under the law. The typical textbook example is a statement of claim that alleges that the defendant made a face at the plaintiff, or that the defendant drove a car of an offensive colour. In other cases, however, the statement of claim may be defective because it has failed to allege the necessary elements of a claim that, if properly pleaded, would constitute a reasonable cause of action.

[11] To illustrate the second situation, suppose, for example, that P sues D for damages for malicious prosecution. To recover for malicious prosecution, a plaintiff must establish these elements: institution of criminal proceedings by the defendant without reasonable and probable cause; an improper purpose in instituting the proceedings such as malice, or a primary purpose other than that of carrying the law into effect; termination of the criminal proceedings in favour of the plaintiff; and damages: J. Fleming, *The Law of Torts* (8th ed., 1992, The Law Book Co. Ltd.) at 610. If P fails to plead favourable termination of the criminal proceedings, D may move to strike out the statement of claim on the ground that P failed to allege a necessary element of the tort. P's failure to plead favourable termination may simply be an oversight. If so, the court should allow P to amend the statement of claim to add this allegation, and the lawsuit will proceed. See *AGF Canadian Equity Fund v. Transamerica Commercial Finance Corp. Canada* (1993), 14 O.R. (3d) 161 at 172-74 (Gen. Div.).

[12] Although I have analyzed rule 21.01(1)(b) from the perspective of a defendant's motion to strike out a statement of claim on the ground that it is substantively inadequate, a similar analysis applies to a plaintiff's motion to strike out a statement of defence on the ground that it does not state a reasonable defence.

[13] In contrast, a motion for summary judgment under Rule 20 permits the motions judge to consult not only the pleadings, but affidavits, cross-examination of the deponents, examinations for discovery, admissions and other evidence to determine whether there is a genuine factual dispute between the parties. No witnesses testify (unless, in exceptional circumstances, leave is granted under rule 39.03(4)). The essential purpose of summary judgment is to isolate, and then terminate, claims and defences that are factually unsupported. Because a motion for summary judgment is decided on the basis of documentary evidence, American commentators have described summary judgment as "a form of quick 'paper trial'." See S.C. Yeazell, J.M. Landers and J.A. Martin, *Civil Procedure*, (3rd ed., 1992,

Little, Brown & Co.) at 653. Rule 24.04(2), which is mandatory, provides that a motion for summary judgment is to be granted where the record shows "[t]here is no genuine issue for trial with respect to a claim or a defence," and the moving party is entitled to judgment as a matter of law. See *T1T2 Ltd. Partnership v. Canada* (1995), 23 O.R. (3d) 81 (Gen. Div.), aff'd (1995), 24 O.R. (3d) 546 (C.A.) The second part of this requirement is essentially a replay of a rule 21.01(1)(b) motion. However, as most motions for summary judgment focus on the factual foundation of the claim, or defence, their legal sufficiency does not arise frequently on a motion for summary judgment. Even though there is no genuine issue for trial with respect to the facts, a plaintiff is not entitled to summary judgment if the facts do not establish a cause of action which entitles the plaintiff to some remedy from the defendant. However, as I will discuss, where the court determines that the material facts are not in dispute, and the only genuine issue is a question of law, the motions judge has the discretion under rule 24.04(4) to either determine the question and grant judgment accordingly, or to send the action on to trial.

[14] Thus, while a rule 21.01(1)(b) motion focuses on the substantive adequacy of a claim, or a defence, it offers no assistance in weeding out cases where a substantively adequate claim, or defence, has been pleaded, but cannot be proved. This is the function of a motion for summary judgment. This can be illustrated by reference to the hypothetical action for malicious prosecution. Suppose that P has pleaded the essential elements of the tort, and D knows that the case was stayed by the court, rather than dismissed. If this disposition does not constitute "favourable termination," P cannot win his malicious prosecution action. Under Rule 20, D may challenge P's ability to prove favourable termination by moving for summary judgment, supported by evidence that provides proof that the case was stayed without a finding, and legal argument that a stay is insufficient to meet the "favourable termination" element of a malicious prosecution action.

[15] To avoid summary judgment dismissing his claim, P must produce evidence to demonstrate that his claim is adequately supported by evidence. For example, he might produce evidence that, although a stay was entered, it was later lifted and the case was tried and dismissed. This would create a genuine issue of material fact as to whether the criminal proceeding was terminated in P's favour. Consequently, summary judgment must be denied, as it is not meant to try the facts, but only to determine whether there are genuinely contested issues of material fact. On the other hand, P might produce evidence that the charge was stayed, but argue that the stay constitutes a favourable determination. In this situation, because there is no dispute about any material fact, the only genuine issue is a question of law — whether a stay

of a criminal charge constitutes a favourable determination of the charge. It would then be permissible for the motions judge to decide this question of law under rule 20.04(4). However, because this subrule is discretionry, the motions judge may not consider that it is appropriate to do so, and send the case on to trial. If the motions judge were to send the case to trial, it would be appropriate for the judge to make an order specifying what material facts are not in dispute and defining the issue to be tried: rule 20.05(1). An appropriate situation in which to send such a case to trial to determine the question of law would be where P and D have introduced affidavits of expert witnesses who differ as to whether the stay constituted a favourable termination of the criminal proceeding.

[16] To complete the comparison of rule 21.01(1)(b) and Rule 20 motions, even if D knows that P cannot prove his claim for malicious prosecution, D will be unable to obtain a dismissal of the action under rule 21.01(1)(b) if P has pleaded the necessary elements of the tort because the court cannot look beyond the plaintiff's allegations. D must "pierce the pleadings," that is, go beyond the allegations in the statement of claim, in order to convince the court that although P has alleged a proper claim for malicious prosecution, he cannot prove the favourable termination element of his claim. Thus, to avoid the expense and delay of a trial to establish that P cannot prove this element of his claim, D must move for summary judgment and establish, through evidence, that in respect to this element there is no genuine issue of fact which requires resolution by a trial judge. If D is successful, summary judgment will be granted dismissing P's claim. D will have succeeded in demonstrating the fatal weakness in P's case.

[17] At the summary judgment stage, the court wants to see what evidence the parties have to put before the trial judge, or jury, if a trial is held. Although the onus is on the moving party to establish the absence of a genuine issue for trial, as rule 20.04(1) requires, there is an evidentiary burden on the responding party who may not rest on the allegations or denials in the party's pleadings, but must present by way of affidavit, or other evidence, specific facts showing that there is a genuine issue for trial. The motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial. See *Rogers Cable T.V. Ltd. v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25 (Gen. Div.), and the cases cited therein. Thus, in the malicious prosecution case, if D's evidence is that P was convicted and P cannot provide evidence to dispute this fact, the motions judge would conclude that D has established there is no genuine issue for trial, and dismiss the claim. This example represents the easy case. However, not every motion for summary judgment is that easy.

[18] The caselaw and the experience of this court suggest that motions judges frequently encounter difficulty in the analytical exercise of determining whether the record demonstrates that there is no genuine issue in respect to a material fact which requires resolution by a trial judge or jury. In this regard, it is helpful to emphasize that the dispute must center on a material fact, and that it must be genuine: *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.); *Rogers Cable T.V. Ltd.., supra*; *Royal Bank of Canada v. Feldman* (1995), 23 O.R (3d) 798 (Gen. Div.), appeal quashed (1995), 27 O.R. (3d) 322 (C.A.); *Blackburn v. Lapkin* (1996), 28 O.R. (3d) 292 (Gen. Div.). In my view, the difficulty encountered by motions judges arises not so much because of any real problem in appreciating that the inquiry must focus on a genuine issue of material fact, but because of uncertainty concerning the role of a motions judge and that of a trial judge. Not infrequently, it is apparent from their reasons for judgment that some motions judges have come to regard a motion for summary judgment as an adequate substitute for a trial. In my view, this is incorrect and does not reflect the true purpose of Rule 20. This confusion of roles usually arises in the more difficult cases in which the parties have presented conflicting evidence relevant to a material fact. Each of the four cases cited above illustrates the more difficult type of motion, in which it is tempting for a motions judge to exceed his or her proper role.

[19] In *Aguonie*, this court discussed the role of a motions judge in determining whether a genuine issue exists with respect to a material fact. It is helpful to repeat what the court said at pp. 235-36:

> In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.
>
> ....
>
> In reviewing the evolution of Rule 20, Doherty J. [in *Masciangelo v. Spensieri* (1990), 1 C.P.C. (3d) 124 (Ont. H.C.J.)] made this significant observation at p.129: "The case law which has developed under Rule 20

> promotes an expansive use of the rule as a means of avoiding expensive litigation where it is possible to safely predict the result without a trial." Morden A.C.J.O. made a similar observation in the passage which I have quoted from his reasons in *Ungerman*, *supra*: "It must be clear that a trial is unnecessary." As I read these observations, it must be clear to the motions judge, where the motion is brought by the defendant, as in this appeal, that it is proper to deprive the plaintiffs of their right to a trial. Summary judgment, valuable as it is for striking through sham claims and defences which stand in the way to a direct approach to the truth of a case, was not intended to, nor can it, deprive a litigant of his or her right to a trial unless there is a clear demonstration that no genuine issue exists, material to the claim or defence, which is within the traditional province of a trial judge to resolve.

[20] To what the court said in *Aguonie*, I would add this. Underlying Rule 20 is the premise that little purpose is achieved by having an unnecessary trial. Rule 20 is the mechanism adopted by the Rules of Civil Procedure for deciding cases where it has been demonstrated clearly that a trial is unnecessary and would serve no purpose. I recognize, however, that deciding when a trial is unnecessary and would serve no purpose is no mean task. However, in my respectful view, in determining this issue it is necessary that motions judges not lose sight of their narrow role, not assume the role of a trial judge, and, before granting summary judgment, be satisfied that it is clear that a trial is unnecessary. This is not to say that the court is not to consider the evidence which constitutes the record. Indeed, to do so is central to determining the existence of a genuine issue in respect to material facts.

[21] *Jones v. Clinton and Ferguson*, 990 F. Supp. 657 (1998), (U.S. Dist. Ct., E. Dist. Ar.) provides a paradigm of the distinction between a motion to strike out a claim for want of substantive adequacy and the dismissal of a claim for want of proof in the American context. Although decided on the defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("F.R.C.P."), I find the case helpful, as well, in illustrating the analytical approach which a motions judge should take in determining the existence of a genuine issue of material fact. As

Morden A.C.J.O. pointed out in *Ungerman, supra*, at p. 549, Ontario Rule 20 is derived from Rule 56 of the F.R.C.P. The relevant language of rule 56(c) reads:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[22] The principal defendant, President Clinton, had been successful on an earlier motion for judgment on the pleadings pursuant to Rule 12(c) of the F.R.C.P., which is the American equivalent of Ontario rule 21.01(1)(b), in obtaining the dismissal of some of the plaintiff's claims. The court, on the earlier motion, found that the remaining three claims in the plaintiff's complaint stated viable causes of action. These were claims alleging that Governor Clinton deprived the plaintiff of her constitutional right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution by sexually harassing her and that Governor Clinton and Ferguson conspired to deprive her of her rights to equal protection of the laws and of equal privileges and immunities under the laws. There was also a state law claim in which the plaintiff asserted a claim of intentional infliction of emotional distress or outrage against Governor Clinton. President Clinton then moved under Rule 56 of the F.R.C.P. for summary judgment dismissing each of those claims. His position was that there was no genuine issue of material fact in respect to each claim because, on the basis of the evidence which he presented and the plaintiff's evidence, the plaintiff lacked the evidence to establish an essential element of each of the claims.

[23] Wright J. articulated the following analysis of the approach which the American courts take to a motion for summary judgment under Rule 56 of the F.R.C.P. at p. 667:

> Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

> and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). As a prerequisite to summary judgment, a moving party must demonstrate "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the nonmoving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The nonmoving party may not rest on mere allegations or denials of his pleading, but must "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Id.* at 587 (quoting Fed.R.Civ.P. 56(e) and adding emphasis). See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (citations omitted). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* (citation omitted).

[24] Although this passage is from an American case, the similarities between Ontario Rule 20 and Rule 56 of the F.R.C.P. are such that, in my view, it is of assistance in formulating the proper analytical and jurisprudential approach for the court to take in deciding a Rule 20 motion. The manner in which Wright J. applied this approach in the *Jones* case provides a helpful model.

[25] The position taken by President Clinton in respect to each of the plaintiff's three claims was identical. He sought to demonstrate the absence of evidence to support at least one element of each of the claims. The plaintiff, in an attempt to survive the motion for summary judgment, adduced evidence to support each element of her claims.

[26] The starting point for Justice Wright in her approach to the motion was to examine each of the plaintiff's claims individually and state the elements of the claim. Then she reviewed the caselaw with respect to each claim for the purpose of determining the range of facts which courts have accepted as establishing the claim. The next step which she took was to examine the entire evidentiary record with a view to determining whether it disclosed a genuine issue for trial with respect to a fact material to the proof of the claim. In the context of the motion before her, President Clinton, as the moving party, had established that there was no genuine issue for trial by demonstrating an absence of evidence to support the responding party's claims against him. Therefore, to survive the motion for summary judgment, the burden fell on Ms. Jones to adduce evidence which demonstrated that there was evidence which, if accepted by the trier of fact, supported her claims. Wright J. examined this evidence, in the context of the evidentiary record and the elements of the plaintiff's claims as defined by the caselaw, to determine whether the evidence, if accepted by the trier of fact, was capable of proving any, or all, of the claims, and concluded that it was not. President Clinton had succeeded in demonstrating that the plaintiff's claims were undeserving of trial. He had established the absence of a genuine issue for trial in respect to a material fact. In my view, the manner in which Wright J. analyzed the President's motion for summary judgment applies equally to a motion under Ontario Rule 20. It also applies, with suitable modification, to a plaintiff's motion for summary judgment.

[27] Justice Wright concluded her opinion with this finding at p. 679:

> Reduced to its essence, the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party and the court therefore finds that there are no genuine issues for trial in this case.

In coming to this finding, she applied the test enunciated by Justice Powell on behalf of a majority of the Supreme Court of the United States in *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 at 586-7 (1986). In Justice Powell's discussion of the test, as I understand it, he underscored the importance of the court not considering a particular fact in isolation, but the need for evaluating it in the factual context of the entire record in deciding whether there is a genuine issue for trial.

[28] As I read the trilogy of United States Supreme Court decisions referred to in the passage from Justice Wright's opinion quoted in paragraph 23, I am impressed by

the functional approach which American courts take in adjudicating motions for summary judgment. In applying a test which focuses on whether the entire record could lead a rational trier of fact to find for the nonmoving party, what the court is saying is that there is no evidence on which the plaintiff's claim, or the defendant's defence, can succeed. In a sense, the courts have come to equate "genuine issue for trial" with "genuine need for trial." However, at the end of the day, it is clear that the courts accord significant deference to the trial process as the final arbiter of the dispute which has brought the parties to litigation. If there is a genuine issue with respect to material facts then, no matter how weak, or how strong, may appear the claim, or the defence, which has been attacked by the moving party, the case must be sent to trial. It is not for the motions judge to resolve the issue.

[29] As I have stated, the purpose of Rule 20 is not to deny the parties due process. It is not intended to deprive plaintiffs and defendants of their day in court absent demonstrated compliance with its requirements. Under the Rules of Civil Procedure, the plenary trial remains the mode for the resolution of disputes. Rule 20 does not represent court reform, or the reform of the adversary system, in disguise. Together with rule 21.01(1)(b), its purpose is to weed out cases at the pre-trial stage when it can be demonstrated clearly that a trial is unnecessary.

[30] In the context of this discussion of Rule 20, and the role of a motions judge hearing a motion for summary judgment, I will consider the merits of each appeal.

THE *REXCRAFT* ACTION

[31] This is a complex lawsuit. The 36 plaintiffs purchased investments in a tax shelter syndicated warehouse project (the "project") between May 1988 and December 31, 1989. The defendant, Edward W. Reid, conceived and developed the project. Barry D. Thompson, Jasbir Mann and Mr. Reid were the owners, officers, servants or agents of various companies involved in the development and promotion of the project, which consisted of warehouse storage condominium units. Collectively, they were the promoters of the project. Ultimately, the project failed and the investors commenced this action on July 29, 1991.

[32] The plaintiffs obtained default judgment against Rexcraft Storage & Warehouse Inc., Rexcraft Management Ltd., Rexcraft Capital Inc., Reicor Capital Corporation, Reid, Thompson & Mann, each of which, we were told, is insolvent. Consent orders were granted dismissing the plaintiffs' claims against Security Home

Mortgage Investment Corp., Ginsberg, Gluzman, Fage & Levitz and Pigeon-Roy Appraisal Ltd. The claim of the plaintiff Dawson was discontinued.

[33] Stating the facts of this case is a daunting task. The appellants have filed a 17-volume record containing over 4,300 pages that is said to contain most of the evidence on which the motions judge based his reasons for judgment. The transcripts of the examinations for discovery of the plaintiffs, containing about 3,000 pages, were also part of the motion record. The motions judge indicated that he read the examinations for discovery of eleven plaintiffs.

[34] I will not attempt to state all the underlying facts of this action, or summarize all the documents that comprise the record on appeal. Since this court reviews only the standard applied by the motions judge in deciding the motions for summary judgments, I find it unnecessary to state the facts in great detail. I will do so only to the extent that it is necessary to provide the background of the plaintiffs' claims sufficient to review the reasons of the motions judge.

[35] In general, the advertising and promotional material distributed by the promoters represented the market value of each unit to be the equivalent of its purchase price — $28,000 in 1988 and $31,000 in 1989 — a value which would support the financing to be made available to purchasers by the promoters. It is not in dispute that the market values of the units were significantly less than represented by the promoters. The units in the project were marketed on the promoters' representations that they had arranged for mortgage and equity financing for the investors which would enable them to purchase a unit for a downpayment of $300. In addition, the promoters stated they would provide for the investors revenue guarantees, and manage the project to assure that there was adequate revenue to support the financing which each investor was to incur. As a further inducement to investors, the promotional materials stated that, in conjunction with income tax savings, the net revenues to be generated by the project would provide positive cash flows which would be sufficient to support the financing to be incurred by each investor.

[36] The promoters used investment summaries and an "independent appraisal report" to support the representations which they made to induce prospective investors to purchase a unit. The investment summaries prepared by the defendant Ginsberg, Gluzman, Fage & Levitz, from information provided by the promoters were inaccurate. The "independent appraisal report" prepared by the defendant,

Pigeon-Roy Appraisal Ltd., was neither independent, nor correct. Although the promoters knew it was incorrect, they continued to use it.

[37] The project was developed in two phases. Some of the plaintiffs invested in Phase I of the project between May 1988 and December 31, 1989. The other plaintiffs invested in Phase II from the summer of 1989 to December 31, 1989. The vehicle which the promoters used to structure the investments was Rexcraft Storage & Warehouse Inc. ("Rexcraft"). In August 1989, it became the registered owner of the lands and premises which constituted both phases of the project, consequent to a declaration of trust in its favour, executed by Century Peda Developments Ltd. ("Century") which had been the vehicle used earlier by the promoters to market Phase I of the project. Century made an assignment in bankruptcy in May 1991. Rexcraft was to hold title to the units in trust for each investor until the investor had fulfilled all of his or her payment obligations. Under this structure, first mortgages on each unit were to be provided by their registered owner, Rexcraft, to Security Home Mortgage Investment Corporation ("Security Home").

[38] Reicor Capital Corporation ("Reicor") was a company owned by Reid. Acting as trustee for the plaintiffs, Rexcraft mortgaged the units to Reicor, which became the second mortgagee of the units. Subsequently, Reicor assigned its mortgages to a number of the defendants, including Shivkumar. Thus, Security Home & Reicor were the mortgage lenders, being first and second mortgagees, respectively.

[39] As I have indicated, the project was marketed on the basis of the promoters' representations that they had arranged for mortgage and equity financing which would be provided to enable investors to purchase an interest in the project for a downpayment of $300 per unit. Specifically, the promoters represented that "a facility has been arranged with a Canadian financial institution to lend qualified investors the equity portion of the purchase price of each equity unit." The promoters made arrangements with the B.N.S. to provide equity financing to support the sale of the units. In the summer of 1988, Reid approached the University Avenue and Elm Street branch of the B.N.S. in Toronto to determine whether it would agree to provide a lending facility to support the promoters' sales of interests in the project to investors. Ron Turk, a lending officer at the branch, and his superior, Eoghan McDonagh, agreed that the B.N.S. would provide the financing support which the promoters requested.

[40] It is Turk's alleged complicity with the promoters, and his knowledge of the alleged fraudulent nature of the promotion, or his failure to investigate thoroughly the

referral source before agreeing to provide a lending facility to support the activities of the referral source, which are central to the plaintiffs' claim against his employer, the B.N.S. This claim is based on the bank's failure to exercise a duty of care to borrower customers to investigate the referral source before it agreed to provide a lending facility to support its activities. It is further alleged that the B.N.S., through Turk, as well as Mann, promoted the investments by orally representing that the investments were sound in that the units were worth their appraised value, that the financial forecasts and projections with respect to the project were accurate and reliable, and that the promoters were financially sound and able to support the rent guarantees and cashflow guarantees that were fundamental to the investment transactions. It is said that Turk worked very closely with Mann, transacting some of the loans in Mann's Toronto office and travelling with him to arrange loans with some of the plaintiffs.

[41] All but three of the plaintiffs obtained equity financing from the B.N.S. to finance the purchase of investments in the project. The remaining plaintiffs obtained financing from the Canadian Imperial Bank of Commerce. The B.N.S. approved equity loans in favour of these plaintiffs, secured by promissory notes which they signed, on an immediate basis, with little or no assessment of the ability of each plaintiff to support the equity financing in the event the rental and cashflow guarantees of the promoters failed to materialize, which was what occurred. In many cases, the B.N.S. forwarded loan advances directly to the promoters without written directions from the borrower, and, in some cases, in contravention of the borrower's directions.

[42] Another significant feature of the plaintiffs' claim is that none of the promoters, including Rexcraft, was authorized to sell investments pursuant to the *Securities Act*, R.S.O. 1980, c. 466, s. 24. The Act requires sellers of investments to be registered with the Ontario Securities Commission ("O.S.C."), and prohibits the sale of investments unless the sellers have been registered. It also requires that sellers make full, accurate and timely disclosure of all facts material to an investment transaction. For example, the Act is contravened where financial forecasts used to induce an investment have not been verified by a public accountant. Of particular importance to this case, was the failure of Rexcraft to prepare a prospectus, which is the disclosure document required by the Act where an investment has a value of under $150,000, as did all of the investments.

[43] It is the position of the plaintiffs that a breach of the Act's registration and prospectus requirements results in the investment contract becoming void, or voidable, at the instance of an investor. They submit the Act has always applied to

sales to the public of investments in commercial real estate, as confirmed by a Notice of News Release issued by the O.S.C. on October 11, 1988, and that this was known by the B.N.S. The Notice and News Release was published prior to any loans made by the B.N.S. to the plaintiffs.

[44] It is an essential feature of both the plaintiffs' claims against the B.N.S. and the assignees of the Reicor second mortgages that a lending contract collateral to an underlying void, or voidable, transaction will also be void, or voidable, at the instance of the borrower if it is established that the lender had knowledge of the illegality. In this regard, the plaintiffs submit knowledge of the facts constituting the illegality will suffice. Their position is that specific knowledge of Rexcraft's non-compliance with the Act is not required.

[45] The plaintiffs' claim against the B.N.S. is based on evidence on which it could be found the B.N.S. had knowledge that Rexcraft was in breach of the *Securities Act*. For example, the O.S.C. Notice and News Release made it clear that the investment transactions were subject to the Act, and Turk had a close relationship with the promoters, which included his support for their activities. As well, he failed to conduct a proper investigation of the promoters as a referral source.

[46] As further support for their claim against the B.N.S., the plaintiffs relied on an internal audit report dated March 20, 1991, and related memoranda prepared by the B.N.S. in respect to Turk's involvement with the promoters. These documents were not listed by the B.N.S. in its affidavit of documents. As a preliminary to the hearing of the B.N.S.'s motion for summary judgment, the plaintiffs sought an order, *inter alia*, requiring the B.N.S. to produce these documents The motions judge, Chilcott J., declined to hear the motion and adjourned it to permit the B.N.S. to file responding materials. In the meantime, he heard the motion for summary judgment on December 5, 6 and 7, 1994, and January 19 and 20, 1995. On March 7, 1995, Chilcott J. ordered the B.N.S. to produce documents pertaining to its internal investigations of Turk and McDonagh, and allowed the plaintiffs to cross-examine Turk on the further productions. Further argument of the summary judgment motion based on the additional material was heard on June 30, 1995. Chilcott J. released his reasons for judgment on August 10, 1995, granting summary judgment dismissing the plaintiffs' claims against the B.N.S..

[47] It is the plaintiffs' position that evidence pertaining to Turk's overt support for the activities of the promoters, including his inadequate investigation of the promoters as a referral source, his approval of loans to unqualified borrowers and his

payment of funds directly to the promoters without directions from the borrowers, was corroborated by the B.N.S.'s internal investigation of Turk's activities.

[48] In addition, the plaintiffs rely on the adverse inference which the court may draw from the failure of the B.N.S. to produce the dealer file which Turk and McDonagh had created pertaining to their investigation of the promoters as a referral source, referred to in most of the loan applications made by the plaintiffs as the "Rexcraft investment file."

[49] In respect to the Reicor second mortgages, the plaintiffs affected by them received notices from Reicor advising them that mortgages from Rexcraft to Reicor had been assigned to various assignees, including the defendant Shivkumar, who was the assignee of three mortgages, totalling $30,600, in respect to three units beneficially owned by the plaintiff, Wilfred George Simon. The plaintiffs did not make mortgage payments to the assignees; they were made by Rexcraft. Earlier, the promoters had each plaintiff sign a document entitled "Direction, Agreement and Charge of Beneficial Interest" in favour of Security Home and Reicor, which Rexcraft used to obtain enforceable charges against the plaintiffs. Throughout the document, Rexcraft was described as the "Trustee" for the beneficial owner — who was one of the plaintiffs. It is the plaintiffs' position that the existence and provisions of the Direction, Agreement and Charge of Beneficial Interest constituted persuasive evidence that the relationship between Rexcraft and the beneficial owners was that of trustee and beneficiary, and not that of agent and principal.

[50] The plaintiffs' claim that the mortgages were not enforceable against them by assignees such as Shivkumar is based on the following submission. The Rexcraft to Reicor mortgages, and the Directions, Agreements and Charges of Beneficial Interest between Reicor and the plaintiffs, were collateral to the investment transactions. Since Reicor was a member of the promoter group, it was aware that the investment transactions were in contravention of the *Securities Act*. As a result, the mortgages to Reicor were unenforceable. The assignment of unenforceable mortgages by Reicor did not operate to make them enforceable by the assignees.

[51] It is in the context of this complex background that the plaintiffs claimed the following remedies in respect to the B.N.S. and the assignees. Paragraph 1 of the statement of claim reads, in part, as follows:

> 1. The Plaintiffs claim the following relief:

(a) a declaration that the sale to them of investments in Rexcraft Space Condominium Syndicates Nos. 1 and 2, and all financing transactions related thereto are null and void and unenforceable;

(b) in the alternative, an Order rescinding the investment transactions aforesaid and all financing transactions relating thereto;

(c) an Order requiring the Defendants, Rexcraft Storage and Warehouse Inc., Rexcraft Management Ltd., Rexcraft Capital Inc., Century Peda Developments Ltd., Edward W. Reid, Barry D. Thompson, and Jasbir Mann (hereinafter described as the "Promoters"), to repay to the Plaintiffs, to the "Mortgage Lenders" as hereinafter described and to the "Banks" as hereinafter described all funds paid to the Promoters by the Plaintiffs and/or the Mortgage Lenders and/or the Banks on the Plaintiffs' behalf with respect to the purchase
by the Plaintiffs of the investments in the illegal, null and void, and unenforceable investment transactions aforesaid;

(d) an Order requiring the Mortgage Lenders and the Banks to repay to the Plaintiffs the amounts paid to them by the Plaintiffs for principal and interest, in excess of funds received by the Plaintiffs from the Promoters as net income with respect to the investments by the Plaintiffs in the Syndicates aforesaid;

(e) damages for negligent and/or fraudulent misrepresentations, and for breach of fiduciary duties and obligations and inducing breach of fiduciary duties and obligations in the amount of up to $31,000.00 per unit, and interest thereon

> from the date of payment by or on behalf of the Plaintiffs to the Promoters;

[52] Thus, the principal relief which the plaintiffs are seeking is a declaration that they be relieved from their obligations to repay their loans from the B.N.S. and the second mortgage loans which Reicor assigned.

[53] Shivkumar, and the other Reicor second mortgage assignees who joined with him in their statement of defence, counterclaimed as follows:

> 11. By way of Counterclaim, the Defendants pleading claim against the Plaintiffs for the monies due to each of them by their respective Plaintiffs in accordance with Schedule "A" hereto, together with interest and Solicitor-Client costs.

As I have noted, Shivkumar counterclaimed against the plaintiff, Wilfred George Simon, for $30,600.

THE REASONS FOR JUDGMENT

The motion of the B.N.S.

[54] Although the motions judge, Chilcott J., had not been appointed pursuant to rule 37.15(1) to hear all motions in the *Rexcraft* action, it is apparent from the record that he was a *de facto* rule 37.15(1) judge. He has been involved in this action since its commencement on July 29, 1991, and it appears that he has heard all of the motions brought by the various parties, which approximate 15 motions. It also appears that he was responsible for the trial management of the action.

[55] The bank moved for summary judgment dismissing the plaintiffs' claim against it, "without prejudice to [its] right ... to pursue legal action against the plaintiffs for any amounts owing to [it] which are not paid within thirty days of any order granting summary judgment." In this regard, one is left to speculate why the bank did not assert counterclaims for these amounts as, in my view, it should have done as it is now vulnerable to a *res judicata* defence should it subsequently bring

proceedings against the plaintiffs. The grounds for the motion were "the fact that there are no issues raised by the plaintiffs which could reasonably be sustained at trial and therefore there are no triable issues." Thus, the bank's position was that the plaintiffs' claims should be dismissed because they would be unable to prove them at trial.

[56] The record before the motions judge was voluminous. In addition to several affidavits, it included summaries of the examinations for discovery of 34 plaintiffs. As I have indicated, the 17-volume record before this court contains most of the evidence considered by the motions judge. In addition, he read the transcripts of the examinations for discovery of eleven plaintiffs. The argument of the motion required six days to complete.

[57] It would appear from the following observations and concerns of Chilcott J. that he appreciated that the resolution of the issues presented by this complex case through the vehicle of a motion for summary judgment could engage him in performing the role of a trial judge. I say, with great respect to an experienced trial judge, that in light of the view which I hold of this appeal, it would have been best had he heeded his own concerns. This is what he said:

> Let me say at the outset that because of the sheer size of the records and the complexity of the legal and factual issues described in the records, I have considered at length whether the interests of justice would be better served, and a more efficient use of the Court's time achieved, by managing this case so that it would proceed to trial expeditiously.
>
> It has been pointed out to the Court that the purpose of the Summary Judgment rule is to reject promptly and inexpensively claims and defences that are bound to fail at trial. Further that complicated issues of fact and\or law should be resolved at trial and not on motion for Summary Judgment and lastly, that Summary Judgment ought not to issue where claims for equitable relief are asserted.
>
> I think for the Court not to attempt to resolve this matter under the Summary Judgment rules, would be an

> abdication of the obligation imposed on the Court and would be taking the easy way out in a complicated matter.

[58] It is helpful to examine the analytical approach taken by the motions judge in determining whether the B.N.S. had satisfied its burden of demonstrating that there were no genuine issues of material fact for trial in respect to the plaintiffs' claims.

[59] At the outset, Chilcott J. divided the plaintiffs into two groups, from which he extracted five sub-groups. It is not clear why he did so. In any event, he made the following findings respecting each of the sub-groups:

> (1) It was composed of the plaintiffs Séguin and Obermeyer in respect to whom he found "no bases for any liability by the bank."
> (2) It was composed of the plaintiffs to whom Turk said about the investment, "something to the effect, 'it was a good investment, it's okay,' or 'if not good the Bank of Nova Scotia would not be backing it.'"
> (3) It was composed of the plaintiffs who purchased the investment because the B.N.S. was involved, sought no independent legal advice, or did no investigation of their own.
> (4) It was composed of the plaintiffs, Woodard, Pariag, Amos, Hoare, DeSouza, Dhillon, Wilfred Simon, Deborah Simon, Anthony Goveas and Lucy Goveas, who were "wilfully lazy, did not attempt to make any inquiry, read the material — or try to understand."
> (5) It was composed of the plaintiffs Syal, Yan and Chung, who were "looking for someone to blame other than themselves for getting involved in this investment" and who directed "that effort toward the Bank of Nova Scotia." In addition, he found the positions of Chung and Yan to be "just not credible in all of the circumstances."

[60] Ultimately, the motions judge made adverse findings of credibility in respect to all of the plaintiffs, except Kinsey. I will review these findings later in my reasons. However, before he made the findings of credibility, he discussed each of the five claims advanced by the plaintiffs against the B.N.S.

[61] The first claim was the unenforceability of the bank's lending transactions. Although the motions judge accepted that the investment and lending transactions were interdependent and related, and that the investment transactions took place in

contravention of the *Securities Act*, he concluded that the plaintiffs would be unable to succeed on this ground because there was no evidence that the bank had actual knowledge of the contraventions of the Act or that it intended to finance an illegal transaction. He stated his reasons as follows:

> In my view although the lending transaction and investment contracts were interdependent and related contracts, I am unable to find anything in the material before me that indicates the Bank was aware that the offering of Rexcraft to the investors was illegal.
>
> ....
>
> In my view the breaches of the *Securities Act* cannot affect the validity and enforceability of the Bank's loans, unless the loan was made to finance an illegal transaction and the lender had actual knowledge of the illegality and intended to finance an illegal transaction. There is no such evidence before this Court.

Accordingly, the motions judge concluded "the claim under the *Securities Act* raises no genuine issue of fact and/or law for trial."

[62] Implicit in the motions judge's consideration of this issue is his acceptance of these propositions: a breach of the Act's registration and prospectus requirements results in the investment contract being void, or voidable, at the instance of the investors, and a lending contract collateral to an underlying void, or voidable, transaction will also be void, or voidable, at the instance of the borrower if it is established that the lender had knowledge of the illegality: *Mastercraft Group Inc. Investment Collection Actions (Re)* (1995), 123 D.L.R. (4th) 161 at 173-74 (Ont. C.A.).

[63] The second claim was in tort and was based on the bank's support of the promoters' misrepresentations. Although Chilcott J. accepted that the promoters misrepresented the market value of the units and that this misrepresentation operated to induce the plaintiffs to invest in the project, he concluded there was no evidence that the bank had actual or constructive knowledge of the misrepresentations. Although he referred to authorities relied on by the plaintiffs in support of their tort claim, he either distinguished them on their facts, or concluded there was no evidence to warrant the application of the authorities. He disagreed with the plaintiffs'

contention that a trial judge could reasonably find on the evidence that the bank was required to disclose to its borrower customers all the information of which it was aware that was material to the investment. He went on to find that the evidence disclosed nothing other than "a normal, standard relationship between a lender and a borrower."

[64] The third claim was also in tort and was based on an alleged duty of care owed by the B.N.S. to the borrowers to investigate the referral source carefully and to take care not to favour the promoters at the expense of its borrower customers. The motions judge noted that the plaintiffs relied on a bulletin of the Canadian Imperial Bank of Commerce and the B.N.S.'s "Guidelines for Business Conduct" as evidence supporting the existence of the duty of care. He dealt with this claim as follows:

> Even if Mr. Turk made loans in contravention of the Bank's policy or guidelines, I cannot see how that can create any duty of care by the Bank to the investor.
>
> In my opinion, the feature of dependency and vulnerability in the relationship between Bank and investor did not exist as it relates to the investors in category one and two. The transactions were arm's length transactions. It follows that the Bank owed no duty of care to protect the investors' interest during the application, processing and administration of the investors' loans.
>
> In my view there are no genuine issues of law and\or fact for trial pertaining to the allegations that the lender Bank of Nova Scotia breached a duty of care owed to the plaintiff investors in categories one and two.

[65] The fourth issue considered by the motions judge was the plaintiffs' reliance on the defence of equitable set-off in respect to the bank's enforcement of the promissory notes signed by them, on the basis of *Holt v. Telford*, [1987] 2 S.C.R. 193. The motions judge reviewed the principles applicable to equitable set-off stated by the British Columbia Court of Appeal in *Coba Industries Ltd. v. Millies Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689, but failed to consider the *Holt* case.

However, he found that the transactional proximity between the investment and lending transactions was insufficient to engage the doctrine of equitable set-off and, in any event, that there were no equities in favour of the plaintiffs. This, in my view, represented a significant finding of fact.

[66] He gave the following reasons for this conclusion:

> In the present case the promoters indicated to the investors that the project had a value equivalent to the purchase price of $28,900.00 in 1988 and $31,000.00 in 1989, a financing package would be available from reputable mortgage and equity lenders to enable investors to purchase interests in the project for a down payment of only $300.00 per unit. Mr. Turk, an employee of the Bank of Nova Scotia, provided the plaintiffs with equity financing which he paid to the promoters.
>
> I am unable to find an equitable ground upon which to protect the investors from the Bank. Many of the investors did not bother to read the documentation or try and understand the overall transaction.
>
> Moreover, I cannot determine that the cross-claim is as clearly connected to the demand of the Bank that it would be manifestly unfair to allow the Bank to enforce payment against the investors without allowing the investors' claim to be taken into consideration.
>
> ....
>
> In my opinion there are no genuine issues of fact and\or law, pertaining to the defence of equitable set-off, to go to trial.

[67] Finally, the motions judge addressed the credibility of each plaintiff based on his reading of the plaintiff's examination for discovery, or a summary thereof. Without hearing *viva voce* testimony, he rejected the credibility of every plaintiff,

except Patricia Kinsey. Although Chilcott J. did not articulate why it was necessary to consider the credibility of the plaintiffs, in my view, the reason can only be because it was necessary that their evidence be considered together with Turk's evidence in respect to the many material facts relevant to the previous four issues which he had considered, which are the foundation of the plaintiffs' claim against the bank. As he concluded that there were no genuine issues for trial in respect to the *Securities Act* violations, the two tort claims and the defence of equitable set-off, he must, necessarily, have accepted as credible Turk's evidence when it was in conflict with the evidence of any plaintiff in respect to Turk's knowledge of the facts which the plaintiffs would be required to prove at trial — particularly, in a broad sense, what Turk knew about the questionable conduct of the promoters and that the promotion was tainted. In simple language, central to the plaintiffs' claims was the submission that Turk was a "rogue employee," and that there was evidence contained in the affidavits and examinations of various plaintiffs, and the bank's internal audit report of Turk's activities capable of proving this fact. In assessing and weighing all of this evidence, the plaintiffs contend that Chilcott J. exceeded his proper role as a motions judge hearing a Rule 20 motion.

[68] What follows are the motions judge's reasons with respect to credibility:

> However an evidentiary burden is placed on the respondent on a motion of this nature. The burden is to go beyond mere allegations or denials, and set out in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
>
> ....
>
> In reviewing the voluminous material on this motion, it is clear that the parties have "put their best foot forward".
>
> In my opinion there was no genuine issue for trial in respect of the plaintiffs in group two after reading the summaries of the examinations for discovery and considering any other evidence.
>
> In respect of the plaintiffs in group one, after reading the summary of the examinations for discovery

> and other material, the issue of credibility arose in my mind and as such I felt that the examinations for discovery should be read in order to get the full flavour of that evidence. After reading the examinations for discovery of Anthony and Lucy Goveas, Ursula Syal, Henry Yan, Wilfred and Deborah Simon, Harold Chung, Daniel Maw, Andy Ambrozic and Peter Ambrozic, in my opinion there was no genuine issue of credibility, but rather these plaintiffs were putting forward a story that was not believable in the circumstances. Alternatively they were attempting to try to find someone that they could blame for their poor judgment, lack of scrutiny and attention, or lack of investigative diligence of a poor investment, and thus hope to recover their losses.
>
> In my opinion the only plaintiff who raises a genuine issue of credibility is Patricia Kinsey and her claim should go to trial.

Chilcott J. did not specify in what respect there was a genuine issue for trial in respect to Kinsey's claim.

[69] The motions judge concluded:

> For the reasons set out above the moving party has satisfied the burden on it in establishing that there is no genuine issue for trial on the various issues raised by the plaintiffs.
>
> I would allow the motion by the Bank of Nova Scotia for Summary Judgment dismissing the plaintiffs' claims, with the exception of Kinsey, against the Bank of Nova Scotia without prejudice to the right of the Bank to pursue legal action against the plaintiffs above set out for any amount owing to the Bank.

Shivkumar's motion

[70] On October 5, 1995, which was about a month after he had granted the bank's motion for summary judgment, Chilcott J. granted summary judgment for $30,600 on Shivkumar's counterclaim against the plaintiff, Wilfred George Simon, on three second mortgages assigned to him by Reicor, as well as a summary judgment dismissing Simon's claim against Shivkumar. On April 30, 1996, he awarded Shivkumar party-and-party costs which he fixed at $31,162.25, and disbursements of $5,362.23, and ordered that all the plaintiffs were jointly and severally liable to pay the costs. It should be noted that there is a discrepancy between the formal judgment of the court and Chilcott J.'s reasons for judgment. Paragraph 1 of the formal judgment provides for the dismissal of the action of all the plaintiffs against Shivkumar, whereas in his reasons Chilcott J. dismissed only Simon's action against Shivkumar — which conforms with the relief Shivkumar requested in his notice of motion. This discrepancy was not noticed by the court during the argument of the appeal. I believe that paragraph 1 of the formal judgment is erroneous and that it should conform with the reasons of the motions judge. Simon has appealed the two summary judgments, and all of the plaintiffs have appealed the costs award.

[71] The motions judge's review of the facts indicated that Simon, as purchaser of three of the units, accepted the obligation to repay three second mortgages from Rexcraft to Reicor, which Reicor assigned to Shivkumar. Shivkumar received from Reicor an assignment, the Direction, Agreement and Charge of Beneficial Interest and an appraisal. Simon and Shivkumar neither spoke to, nor had any dealings with, one another.

[72] It is difficult to understand the analytical approach which the motions judge took in deciding this motion, keeping in mind that it was a motion by Shivkumar for summary judgment on his counterclaim and to dismiss Simon's claim. As I understand his approach, he reviewed the opposing legal arguments of the parties, made a number of findings of fact, concluded that there was "not a genuine issue of either fact or law raised by the plaintiff's claim against this defendant" and granted summary judgment dismissing Simon's claim against Shivkumar. He then "awarded the amount due and owing to [Shivkumar] on the three mortgages." As I will explain subsequently, it is my view that the approach taken by the motions judge was similar to that of a trial judge, and, in doing so, exceeded the role of a motions judge hearing a motion for summary judgment. In doing so, he made numerous findings of fact, some of which were clearly incorrect.

[73] It would appear that the motions judge focused on the motion to dismiss Simon's claim as he reviewed, and rejected, each of the three principal arguments which had been advanced in opposition to the motion. Having decided that Shivkumar had established there was no "genuine issue of either fact or law" raised by Simon's claim, he awarded Shivkumar summary judgment dismissing it, and, without further analysis, awarded Shivkumar summary judgment on his counterclaim.

[74] The first argument was similar to the one relied on by the plaintiffs in opposing the B.N.S.'s motion for summary judgment — the unenforceability of the financing transactions because Rexcraft had failed to comply with the provisions of the *Securities Act*. It was Simon's position that this illegality tainted the assignment of the mortgage from Reicor to Shivkumar and rendered it unenforceable against him. Succinctly stated, Simon's position was, regardless of what Shivkumar or his solicitors knew or did not know about the contraventions of the Act, the assignment of an unenforceable mortgage could not operate to render enforceable what was unenforceable. Although Chilcott J. acknowledged that "the whole promotion by Rexcraft was not done in accordance with the provisions" of the Act, he found that the Rexcraft to Reicor mortgages were not invalid because of violations of the Act. It would appear that his reasons for this finding were that Simon had not read "the prospectus" pertaining to the investment transaction and that "there [was] no indication that Shivkumar or his solicitor had any knowledge "of the *Securities Act* violations.

[75] The second argument was that Shivkumar could not enforce the mortgage against Simon because there was no privity of contract between them. This argument was based on the fact that Rexcraft was the registered owner of the three units which it had mortgaged to Reicor, Simon being the beneficial owner of them, and that Rexcraft held the units in trust for Simon, and not his agent. Although he recognized that Rexcraft was the registered owner and mortgagor to Reicor of the legal interests in the units, and that it was the Direction, Agreement and Charge of Interest signed by Simon that created his obligation to pay Reicor, Chilcott J. decided that Simon had direct, personal liability to Reicor pursuant to the Rexcraft\Reicor mortgages which had been assigned to Shivkumar. He held that Simon had personal liability, and was required to pay Shivkumar, because he was the "undisclosed principal" of Rexcraft. Thus, central to this holding was whether the relationship between Rexcraft and Simon was trustee and beneficiary, or agent and principal. This is because, if Rexcraft was the trustee of Simon, the assignee of rights from a trustee cannot maintain an action against the beneficiary of a trust because of the absence of privity of contract.

[76] Chilcott J. rejected this position. After reviewing *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. (2d) 65 (C.A.) and *Tri-S Investments Ltd. v. Vong*, [1991] O.J. No. 2292 (Gen. Div.), he concluded:

> At first glance it appears as if Rexcraft is the mortgagor and the owner of the property, but that is not the case. Simply because title to the condominium units is registered in the name of Rexcraft does not mean that Simon is not the owner. Rexcraft is the registered owner and Simon is the beneficial owner. The fact that Rexcraft is not described as a trustee on title is irrelevant, since pursuant to section 62 of the Land Titles Act, R.S.O. 1990, c.L.5, this would not even be permitted. Simon is the owner of the condominium units, and it would be absurd to suggest otherwise.
>
> The mortgages were obtained in order to assist in the financing of the transaction. Rexcraft had authority from Simon to essentially do whatever was necessary to secure the mortgage financing and then to assign it. It was the "Direction, Agreement and Charge of Beneficial Interest" that created the obligation by Simon to pay Reicor.
>
> I think it is clear from paragraphs 3, 9, 13, 22 and particularly 22 (m) of the schedule attached to the charge and in reviewing the "Direction, Agreement and Charge of Beneficial Interest", that Rexcraft was both a trustee and agent for Simon. In my view Simon is responsible as an undisclosed principal.

[77] The third argument, which was similar to the one advanced by the plaintiffs on the B.N.S.'s motion, was that Simon was entitled to rely on the defence of equitable set-off. The motions judge did not deal with this argument in any detail. He appears to have deprived Simon of this defence in part because of the clause in Simon's

agreement with Reicor to which he referred in the following passage from his reasons, although it was not assigned to Shivkumar:

> In my opinion on reading Section 53(1) and (2) of the Conveyancing and Law of Property Act an assignment of the second mortgage includes all remedies. Also in the "Direction, Agreement and Charge of Beneficial Interest" that was signed by Simon he acknowledges his beneficial interest in each mortgage and;
>
> > Waives any and all defences that may constitute a legal or equitable defence or discharge by Simon and agrees that the enforcement of the charge of beneficial interest hereby constituted shall not be affected, reduced, modified or impaired by any circumstances other than payment and performance in full.

[78] The only specific reference to the defence of equitable set-off is contained in the following concluding passages from Chilcott J.'s reasons:

> In my view the defendant exercised due diligence by retaining a lawyer to protect his interest in the assignment of the mortgages. That certainly discharged any duty of diligence he had in respect of the transaction.
>
> There is nothing before me to indicate that Shivkumar had any knowledge of the non-compliance of Rexcraft with the Securities Act or that he was in any way involved with the promoters in misleading the investors. In my view there are no equities between Simon and Reicor that would entitle Simon to priority over the claims of Shivkumar or to set-off against Simon's debt Shivkumar [*sic*].

> Aside from the reasons I have set out above which answer the arguments put forward, in my opinion it is clear that Simon got the benefit of the funds advanced by Shivkumar and it allowed Simon to complete the transaction. It was Simon's investment and he was to get the benefits. Simon expected to pay Shivkumar and Shivkumar expected to be paid.

ANALYSIS AND CONCLUSION

[79] I have reviewed in considerable detail the general background of this litigation, the positions of the parties advanced before Chilcott J., together with the conclusions which he reached, to underscore the complexities of this case, and to illustrate that the conclusions reached by the motions judge were not as plain and obvious as appeared to him. I say this with respect, as undoubtedly the motions judge, who has been involved with this action since its inception, devoted considerable time and effort to the motions, motivated, it would appear, by a desire to see an end to the litigation without the need for a lengthy and costly trial. However, it is my view that in deciding each motion he exceeded the role of a motions judge hearing a motion for summary judgment which this court described in the *Aguonie* case, at p. 235, as "narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial." On the record before this court, I am unable to reach the confident conclusion, in either motion, that a trial is unnecessary.

[80] In *Mastercraft*, which involved several appeals from the orders of a number of motions judges allowing motions for summary judgment dismissing the plaintiffs' claims, this court stated the standard of review to be applied when an appeal has been taken to it. After reference to a submission by the appellant that the motions judge appeared to have made certain findings of fact, the court stated at p. 168:

> ... The judge is not to find facts but, rather, to examine the evidence to see if it is reasonably capable of raising a genuine issue for trial. The reasons, however, should be examined in their context. In these circumstances, we think the proper course is to examine the evidence relied upon by the appellants to see if it is capable of giving rise

to a genuine issue respecting the conclusions of the motion judge.

THE *REXCRAFT* ACTION

The motion of the B.N.S.

[81] I will discuss first the conclusion of the motions judge that there is no genuine issue for trial with respect to the plaintiffs' claim for a declaration that the loans made by the B.N.S. to the plaintiff were unenforceable because the investment transactions contravened the *Securities Act*. It will be recalled that although the motions judge accepted that the investment and lending transactions were interdependent and the investment transactions contravened the Act, he concluded there was no genuine issue for trial as there was no evidence that the bank had actual knowledge of the contraventions of the Act or that it intended to finance an illegal transaction. In this regard, it is important to observe that in *Mastercraft*, at pp. 173-74, this court was satisfied that the security interests acquired by the financial institutions collateral to the investment contracts could be found void as against the borrowers if the financial institutions had knowledge that the investment transactions contravened the Act. However, unlike this case, in *Mastercraft* there was no evidence that the investment transactions contravened the Act, and even if there had been, there was no evidence that the financial institutions had actual knowledge of the contraventions.

[82] In this appeal, there is evidence capable of giving rise to a genuine issue for trial respecting the bank's knowledge of the contraventions of the Act. Central to this claim, as well as the two tort claims and the defence of equitable set-off, is the role played by the bank's employee, Turk, who facilitated the bank loans to the plaintiffs. There was evidence, as I outlined earlier, of his close relationship with the promoters, his support of their activities, his failure to conduct a proper investigation of the promoters as a referral source and his failure to make inquiries with respect to the promoters' compliance with the Act when, as he acknowledged in cross-examination, an inquiry with the O.S.C. would have revealed non-compliance. The motions judge said there was no evidence the bank had the requisite knowledge. It may be true that there was no direct evidence. However, no reference to the above evidence was made by the motions judge. Knowledge, at times, may be a difficult fact to be proved and, of course, need not be proved by direct evidence. The proof of a person's knowledge may involve a very subtle exercise and, in the circumstances of this appeal, would be

much better canvassed by a trial judge who will have the benefit of *viva voce* evidence.

[83] There is a further aspect of this issue which requires comment. Any denial of knowledge by the bank appears to lack credibility in light of its failure to produce its "Rexcraft investment file" and its initial refusal to produce its internal audit report which is critical of Turk's conduct in respect to the bank loans. Indeed, the bank did not produce the audit report until ordered to do so by Chilcott J. several months after the five-day hearing of the summary judgment motion. Although it is true that the hearing was re-opened to permit counsel to make further submissions relative to the internal audit report, it was not considered by Chilcott J. in his reasons.

[84] Therefore, with due respect to the motions judge, he was incorrect in concluding that there was no evidence capable of supporting a finding that the bank, through Turk, had knowledge that the investment transactions contravened the Act and that it intended to finance an illegal transaction. Clearly, this represented a genuine issue for trial.

[85] Where facts are in dispute, we should not decide the underlying legal issue. Indeed, as I have pointed out, rule 20.04(4) precludes the court from deciding a question of law unless the only genuine issue is a question of law. We need only be satisfied that the record contains evidence, if accepted by the trial judge, that is capable of establishing the legal remedy sought by the plaintiff. As I have indicated, the record contains evidence capable of supporting the plaintiffs' claim that the bank, as a collateral party, was affected by the promoters' failure to comply with the *Securities Act*. It is within the traditional province of a trial judge to adjudicate this issue. It was not for the motions judge to do so. In this regard, I am not to be taken as agreeing with the test applied by Chilcott J. which is quoted in paragraph 61.

[86] Although my conclusion on the *Securities Act* issue completely disposes of the appeal in favour of the appellants, rendering it unnecessary to deal with the other issues raised by the appellants, in deference to the extensive submissions made by counsel for the parties I feel I should deal with them.

[87] It is convenient to deal with the two tort issues together. Central to the tort claims was the acceptance by the motions judge that the promoters misrepresented the market values of the units and that this operated to induce the plaintiffs to invest in the project. The first tort issue is based on the submission that Turk supported, and concurred in, the promoters' misrepresentation and that a party in a position to benefit

from another's misrepresentations, who overtly or tacitly supports such misrepresentations, can be found liable for the damage caused thereby. See, e.g., *R. v. Cognos Inc.* (1993), 99 D.L.R. (4th) 626 (S.C.C.) *per* Iacobucci J. at 641-42, 647-49, 653, 659; *Bradford Third Equitable Benefit Building Society v. Borders*, [1941] 2 All E.R. 205 (H.L.) *per* Lord Wright at 220.

[88] In my view, there is ample evidence concerning this issue which deserves the scrutiny of a trial judge. As the promoters, the appraisers and the first mortgagee, Security Home, knew that the units were overpriced in relation to their value, it could be inferred that, as an experienced lender engaged in financing real estate investments, the B.N.S. knew, or ought to have known, what the other participants knew. In addition, there is the evidence to which I have referred in respect to the *Securities Act* issue — Turk's involvement with, and support of the promoters, as corroborated by the bank's internal audit of Turk's conduct, and the bank's failure to produce its Rexcraft investment file.

[89] With respect to the second tort issue, the plaintiffs' position is that the bank owed a duty to take reasonable care in circumstances where it was foreseeable that a failure to take care could cause harm: *R. v. Cognos*, at pp. 648-49; *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (C.A.) at 494-504. It is a well-accepted principle that the categories of relationships giving rise to a duty of care are never closed. The motions judge held that, because the transactions were at arm's length, there were no genuine issues of fact or law arising from this issue.

[90] In my view, the motions judge erred in reaching this conclusion. There was, in support of the factual foundation for this issue, the evidence to which I have referred bearing on the *Securities Act* issue and the first tort issue. On a motion for summary judgment, a motions judge is not permitted to determine a question of law unless it is the only genuine issue: Rule 20.04(4); *Aguonie*, at p. 235. Consequently, as there was a genuine issue of fact, the motions judge was not entitled to determine that, as a matter of law, the plaintiff could not succeed on the duty of care issue.

[91] The plaintiffs' next claim in respect to which Chilcott J. found there to be "no genuine issues of fact and/or law" was the defence of equitable set-off. His reasons for this finding have been reproduced in paragraph 66 and represent a clear example of a motions judge becoming a trial judge. He made findings of fact and applied them to the law as he found it in *Coba Industries*, and reached the conclusion that there was no "equitable ground on which to protect the investors from the bank."

Even though he found that there was transactional proximity between the investment and lending transactions, he appears to have concluded it would be unfair to the bank to allow the defence of equitable set-off.

[92] The equitable set-off issue is a subtle one that should be determined by a trial judge. At the heart of it is the acknowledged failure of the promoters to comply with the *Securities Act* and the knowledge of this, and other irregularities, which the bank may have acquired through Turk's involvement with the promoters, as well as the acknowledged transactional proximity between the transactions. As the case must go to trial to determine the degree of Turk's knowledge, because this knowledge is a necessary element of the defence of equitable set-off, it follows that there is a genuine issue for trial concerning the defence of equitable set-off raised by the plaintiffs respecting the bank's enforcement of the promissory notes signed by them.

[93] Finally, it is necessary to address the motions judge's rejection of the credibility of each of the plaintiffs, except Kinsey. In doing so, he exceeded the role of a motions judge. Evaluating credibility and weighing evidence, as this court pointed out in *Aguonie*, at p. 235, are functions reserved for the trier of fact. As I pointed out earlier, his purpose in reviewing the extensive evidence of the plaintiffs was to assess it in relation to the evidence of Turk, which it is implicit he preferred. It follows that I cannot agree with the submission of counsel for the respondent that Chilcott J., having reviewed the transcripts and summaries of the evidence of the plaintiffs, "was in as a good a position as a trial judge would have been to make finding of fact." Rule 20, and the authorities which have interpreted it, precluded him from doing so.

[94] Applying my earlier discussion of the analytical approach which is required of a motions judge hearing a motion for summary judgment, the B.N.S. has failed to demonstrate a fatal absence of evidence to support the plaintiffs' claims. Simply stated, fact issues as to Turk's knowledge of a fraudulent scheme on the part of the promoters to market the project and their failure to comply with the *Securities Act*, precluded summary judgment dismissing the plaintiffs' claims against the B.N.S. Unfortunately, what has occurred is that the plaintiffs were subjected to a trial by transcript. They are entitled to a trial before a trial judge who will have the advantage of deciding their claim on *viva voce* evidence.

[95] Accordingly, I would allow the plaintiffs' appeal and set aside the summary judgment dismissing their claim and order that the action proceed to trial. The plaintiffs are entitled to their costs of the motion and the appeal.

Shivkumar's motion

[96] In my view, there is a genuine issue for trial with respect to material facts relative to each issue. As in the B.N.S. motion, Chilcott J. accepted that the investment transactions contravened the *Securities Act*. Because Reicor was a part of the promoter group, there was evidence capable of supporting the inference that Reicor had knowledge of the contravention of the Act when it entered into the mortgages with Rexcraft rendering them void, or voidable. Yet Chilcott J. found these mortgages were not invalid for reasons I have difficulty appreciating, assuming, as a motions judge, he was entitled to make this finding of fact. With respect to his first reason, I do not understand how Simon's failure to read "the prospectus" (there was no prospectus) pertaining to the investment transaction rendered the mortgages valid. The second reason was that "there [was] no indication that Shivkumar or his solicitor had any knowledge" of the violations of the Act. However, Shivkumar produced no evidence that neither he nor his lawyer did not have knowledge of the violations. Indeed, an examination of his affidavit, and his cross-examination, indicates that neither he, nor his lawyer, contemplated the application of the Act to the underlying mortgage transactions. It appears that the inquiries directed by Shivkumar's lawyer to Nelligan/ Power, who were apparently acting for the assignor of the mortgages, were quite cursory.

[97] It is Simon's position that regardless of what Shivkumar knew or did not know about the contraventions of the Act, the assignment of the unenforceable Rexcraft\Reicor mortgages to Shivkumar could not operate to render enforceable what was unenforceable. There is support for that position in *Canadian Bank of Commerce v. Yorkshire & Canadian Trust*, [1939] S.C.R. 85 at 100-101 and *Jacobson v. Williams* (1919), 48 D.L.R. 51 (Alta. S.C.). In any event, the evidence suggests that Shivkumar and his solicitor failed to conduct an independent inquiry as to the value of the units before purchasing the three mortgages from Reicor, and relied on fraudulent appraisals provided by Reid. Whether an assignee has taken all reasonable steps to satisfy himself that all proper legal requirements have been met with respect to the mortgage being assigned must, necessarily, depend on the circumstances surrounding the assignment. So, too, does the question whether his solicitors exercised proper due diligence in making the appropriate inquiries. This, in itself, raises a genuine issue for trial and precludes Shivkumar from obtaining summary judgment on his counterclaim.

[98] This, of course, is sufficient for Simon to succeed in his appeal from the judgment on the counterclaim. He is entitled to succeed, as well, in respect to the privity of contract issue. The reason is that it is for the trial judge to determine whether Rexcraft was a trustee for Simon, or his agent, or both. On the evidence before the motions judge he ought not to have decided this question on a Rule 20 motion.

[99] As well, whether Simon was entitled to the defence of equitable set-off was for a trial judge to decide. If Rexcraft was in breach of the *Securities Act*, any rights which Simon would have against Rexcraft and Reicor, would constitute equities to which Shivkumar would be subject as assignee of Reicor. In my view, the motions judge was incorrect in finding that Shivkumar could claim the benefit of Simon's waiver of any equitable defences against Reicor contained in the Direction, Agreement and Charge of Beneficial Interest he entered into with Reicor, as this agreement was not assigned to Shivkumar. A party who is not a party to a contract cannot claim the benefit of a waiver contained in the contract: *Edgeworth Construction Ltd. v. N.D. Lea & Associates*, [1993] 3 S.C.R. 206 *per* McLachlin J. at 219-221.

[100] As well, to the extent that Chilcott J.'s reasons can be interpreted as holding that s. 53(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, C. 34, deprives Simon of the right to assert the defence of equitable set-off, this holding is problematic. Section 53(1) is procedural, and does not affect any substantive rights, such as the right of Simon, in a suit brought by the assignee, to rely on any defence available against the assignor. Section 53(1) is designed to simplify and make easier the process for enforcing an assignment. See G.H.L. Fridman, *The Law of Contract in Canada* (3rd ed., 1994, Carswell) at pp. 682-83; *Slattery v. Slattery*, [1945] O.R. 811 at 822-23 (C.A.). For a thorough dicussion of s. 53, see *DiGuilo v. Boland*, [1958] O.R. 384 (C.A.), aff'd. [1961] S.C.R. vii; *Canning v. Avigdor*, [1961] O.W.N. 59 (C.A.).

[101] Accordingly, I would allow Simon's appeal and set aside the summary judgment dismissing his claim and allowing Shivkumar's counterclaim, including the order in respect to costs, and order that the claim and the counterclaim proceed to trial. I have had the opportunity to read the reasons of Rosenberg J.A. and agree with him that the question of the costs of the motion and the appeal should be reserved to the trial judge.

THE *CARROLL* ACTIONS

[102] As indicated in paragraph 2, Carroll has appealed from a summary judgment obtained against him in one action by Pacific & Western, and from a summary judgment dismissing his counterclaim against Pacific & Western in a different action. The first order was granted pursuant to the reasons of Chadwick J., released September 5, 1995, and the second order was granted by him more than a year later, on September 9, 1996.

[103] The first action was brought by Pacific & Western on a covenant in a mortgage made between Standard Trust Company ("Standard Trust") and Carroll, which Standard Trust sold to Pacific & Western before the mortgage fell into default. Carroll defended this action on the ground that the mortgage was void and unenforceable because it was a financing transaction collateral to the sale of an investment to him by promoters who had failed to comply with the *Securities Act* — a position similar to the one taken by the plaintiffs in the *Rexcraft* action and has raised the defence of equitable set-off. Chadwick J.'s reasons granting summary judgment against Carroll are now reported: (1995), 48 R.P.R. (2d) 92.

[104] The second action, entitled *Household Realty Corporation Ltd. v. Carroll*, was also an action on a covenant in another mortgage of the same property that fell into default. In his statement of defence, Carroll relied on the same defence as in the *Pacific & Western* case. In his counterclaim he sought a declaration that the mortgage, and the investment transaction to which it was collateral, were null and void and unenforceable, and, *inter alia*, claimed damages against the mortgagee and the promoters on the grounds of fraudulent misrepresentation, negligent misrepresentation and breach of fiduciary duties. On September 9, 1996, Carroll obtained an order from Chadwick J. permitting him to amend his counterclaim to add Pacific & Western and the law firm, Nelligan/Power, as defendants, and to deliver an amended counterclaim. Nelligan/Power were the solicitors for the promoters, the mortgage lenders and Carroll.

[105] As I understand it, it was also on September 9, 1996, that Chadwick J. granted a separate order dismissing Carroll's counterclaim against Pacific & Western. The formal order of the court is dated September 5, 1995, and September 9, 1996, and is in respect to both the *Pacific & Western* action and the *Household Realty* action. In addition to the dismissal of the counterclaim, it also awards Pacific & Western summary judgment against Carroll. It is from this order that Carroll has appealed. Although Chadwick J. provided reasons on September 9, 1996, for permitting Carroll

to amend his counterclaim in the *Household Realty* action, we have not been provided with any reasons for the dismissal of the counterclaim. In the circumstances, we are left with no alternative other than to presume that the motions judge gave no reasons for dismissing the counterclaim.

[106] Similar to the *Rexcraft* action, this litigation arises out of Carroll's purchase of a condominium in Winnipeg from a company promoted by Edward Reid, who was the principal promoter of the Rexcraft project. As in the *Rexcraft* action, the condominium was marketed as an investment in a tax shelter which ultimately failed. In regard to its structure, this project exhibited complexities similar to those in the Rexcraft project. Carroll purchased the condominium for $84,900 on or about December 16, 1987. Acting pursuant to a power of attorney given to it by Carroll on the same day, the vendor mortgaged the condominium on his behalf to Standard Trust, Household Realty and Lise Jeannine Reid for a total of $69,900. Nelligan/Power, to whom he had been referred by the promoters, acted as Carroll's solicitors in respect to the purchase and the mortgages, while at the same time acting for the vendor, the mortgagees and the promoters.

[107] Carroll's mortgage with Standard Trust was one of a large number of mortgages that it sold to Pacific & Western on December 30, 1988. After Standard Trust was liquidated, and pursuant to the order of Houlden J.A., its provisional liquidator transferred the Carroll mortgage to Pacific & Western on March 6, 1992, which commenced its action against Carroll on the mortgage on February 15, 1993.

REASONS OF THE MOTIONS JUDGE

[108] In his reasons for judgment, Chadwick J. provided the following background information at pp. 93-94:

> The defendant Patrick Carroll is one of a number of investors in the Winnipeg projects. The projects were advertised in the Ottawa papers by Imperial Anaheim, which described themselves as "Canada's most innovative real estate income producing and property management organization." Mr. Carroll attended a seminar at one of the Ottawa hotels, and received a brochure outlining the nature of the investment, and the tax advantages which would flow to each of the investors. Projections as to

positive cash flows were provided, and it was also confirmed that all of the financing had been pre-approved. In an affidavit dated July 19th, 1993, in defence to the plaintiff's summary judgment application, the defendant Patrick Carroll makes the following statement:

> When I purchased the Condominium property from Imperial Anaheim I did so on the basis of the cash flow, rental and buy-back guarantees contained in the schedules to the agreement as well as the revenue in capital projection I was provided by Mr. Reid. The project was, in the essence, to carry itself. However, the project was not in fact self-supporting and the various mortgages fell into arrears.

Mr. Carroll made the payments under the various mortgages. The first default payment to Pacific & Western Trust Company was on January 1st, 1991. Each year, Mr. Carroll also took advantage of the tax benefits derived from the investment.

Household Realty Corporation's mortgage also went in default, and they commenced action on their mortgage against Mr. Carroll in July 1991.

I would note that default of the Pacific & Western mortgage occurred before the formal transfer of the mortgage to it on March 6, 1992, by the liquidator.

[109] Before Chadwick J., counsel for Carroll contended that Pacific & Western had failed to demonstrate that there were no genuine issues for trial in respect to the unenforceability of the mortgage because of non-compliance with the *Securities Act*, that Pacific & Western acquired the mortgage from Standard Trust with knowledge of misrepresentations made by the promoters which induced him to make the investment, and the defence of equitable set-off.

[110] In considering the position of Carroll, Chadwick J. stated at p. 95:

> The issues raised by the defendant in defence to the plaintiff's summary judgment motion are derived primarily from the documentation of the various lenders, and a suggested inference to be drawn from these documents.
>
> The defendant Patrick Carroll has no direct evidence of the relationship between the promoters and the various lenders. As indicated in his affidavit, financing had been pre-arranged by the promoter, so there was very little direct contact between Mr. Carroll and the various lenders. In addition, he consulted the law firm of Nelligan/Power, who were referred by the promoters as a member of Imperial Anaheim's "panel of experts".

He noted that Carrol also relied on Nelligan/Power, the accountants Peat Marwick, and a mortgage broker.

[111] After reference to the reasons of Ground J. in *Avco Financial Services Realty Ltd v. Bhabha* (1994), 3 C.C.L.S. 264 (Ont. Ct. (Gen. Div.)), and his own reasons in *Armstrong v. R.J. Nicol Homes Ltd.* (1995), 7 C.C.L.S. 282 (Ont. Ct. (Gen. Div.)), aff'd. [1997] O.J. No. 1545 (C.A.), in which, in the circumstances of those cases, it was found that the *Securities Act* did not apply to certain lenders, the motions judge concluded at p. 96:

> Without revisiting the reasons in both of these cases, I find that there is no evidence the *Securities Act* would apply in this particular case; as such, I find that there is no genuine issue for trial as it relates to the *Securities Act*.

[112] Chadwick J., because of this finding, did not have to consider whether Standard Trust had knowledge of alleged noncompliance with the Act when it entered into the mortgage with Carroll.

[113] The motions judge reached the following conclusion with respect to the misrepresentation defence at p. 96:

> The defences raised by the defendant Carroll to the application for summary judgment depend entirely upon there being some evidence of a relationship between the plaintiff lender and the promoter. The arguments, as put forth by Mr. Thompson, are framed on the basis that there was a relationship between the lender Pacific & Western Trust Company and the promoters. This would put the lenders in a position where they knew or should have known what the promoters were doing and saying relating to this project. If that is the case, they are tainted or caught by any misrepresentations which may have been made by the promoter.
>
> In reviewing the affidavits and materials put forward by Mr. Carroll, I have been careful to attempt to determine whether there is a genuine issue for trial in this regard.
>
> The only conclusion I can reach is there is no evidence, either direct or indirect, which would establish a relationship between this lender and the promoters which would allow any alleged misrepresentation of the promoters to be used as a defence to the lender's actions. As such, there is no genuine issue for trial.

[114] With respect to the defence of equitable set-off, the motions judge stated his conclusions at pp. 96-97:

> Mr. Thompson argues very strenuously there is such a transactional proximity between the lending institutions and the investment transaction; this would allow Mr. Carroll to raise equitable set-off to the lender's actions.

> Mr. Cumming, counsel for the plaintiff, does not take issue with the statements of law relating to the equitable set-off as contained in Mr. Thompson's factum, but argues that it has no application against the lender, as there is no evidence of the inter-relationship as argued by Mr. Thompson.
>
> I must agree with counsel for the plaintiff there are no genuine issues of fact which would establish this transactional proximity, and bring into play equitable defences as argued by counsel for the defendant.

ANALYSIS AND CONCLUSION

[115] I agree with the position of counsel for Carroll that there were genuine issues for trial with respect to the *Securities Act* defence and the defence of equitable set-off which precluded the granting of summary judgment on the plaintiff's claim.

[116] It was not the role of the motions judge to determine whether or not failure by the promoters to comply with the *Securities Act* rendered the investment contract with Carroll, and financing contracts collateral to it, void at the instance of Carroll, and he did not see that it was his role to do so. He limited his role to finding that there was "no evidence the *Securities Act* would apply in this particular case." In my view, there was evidence in the record before him that was capable of establishing noncompliance with the Act, and the knowledge of Standard Trust that there had been noncompliance when it entered into the mortgage with Carroll. This evidence derives from the central role played by the firm of Nelligan/Power, which acted for the promoters, the lenders and the investors, and in this capacity would, or ought to, have known of the failure of the promoters to comply with the requirements of the Act, which knowledge could be imputed to Standard Trust. Carroll was referred to Nelligan/Power by the promoters. The law firm failed to disclose to him that they had acted for the promoters in the acquisition of a unit for $55,950 which they sold to Carroll on the same day for $84,900. Prior to the transfer of Standard Trust's interest in the Carroll mortgage to Pacific & Western, Carroll had provided notice to Pacific & Western of his claims against Standard Trust, the promoters, and others, including the illegality of the mortgage as a result of the failure of the promoters to comply with the Act. As well, there is the evidence of the opinion which Carroll obtained from an

expert in security law concerning the contravention of the Act. In summary, there is evidence which supports the view that the circumstances ought to have prompted an inquiry by Standard Trust, or its solicitors, and by Pacific Western as to whether the marketing of the units by the promoters was in contravention of the Act.

[117] The plaintiff provided no evidence from Standard Trust, or from Nelligan/Power, who represented all the parties, in respect to their knowledge of whether the promoters were not in compliance with the Act. The onus is on Pacific & Western to demonstrate that Standard Trust had no knowledge of the alleged violation of the Act by the promoters. In this regard, rule 20.02 provides that on the hearing of a Rule 20 motion "an adverse inference may be drawn, if appropriate, from the failure of a party to provide evidence of persons having personal knowledge of contested facts." Therefore, the application of the Act to the investment transaction and its financing is an issue which must be tried.

[118] I have discussed the legal implications of the promoters' failure to comply with the Act in respect to the motions of the B.N.S. and Shivkumar in the *Rexcraft* action. Pacific & Western was in a similar position to the Standard Trust mortgage as Shivkumar was in respect to the Reicor mortgage. If Standard Trust had the requisite knowledge of the failure of the promoters to comply with the Act, with the result that its mortgage to Carroll was unenforceable, and voidable at the instance of the mortgagor, then Pacific & Western would have to convince the court that it was entitled to enforce a mortgage that was unenforceable between the mortgagor and the mortgagee. Just as Turk's role is central to the issue of the knowledge of the B.N.S. in the *Rexcraft* action, the role of Nelligan/Power is central to this issue in this case as it was the law firm for all parties involved in this project and its financing. These are all issues which must be tried.

[119] The motions judge correctly observed that the issues raised by Carroll "are derived primarily from the documentation of the various lenders, and a suggested inference to be drawn from these documents." He may also have been correct in observing that Carrol has "no direct evidence of the relationship between the promoters and the various lenders." In making these observations, it is clear that the motions judge appreciated that there was some evidence capable of supporting Carroll's defence. However, he appeared to feel that direct evidence was required to raise a genuine issue of fact. In this respect, he was incorrect. It is trite law that a fact can be proved by direct evidence, circumstantial evidence, or a combination of both, and inferences that can be drawn from the evidence. As I stated earlier, the proof of knowledge is often difficult. Indeed, the proof of any fact may require the

court to draw inferences from the testimony of several witnesses and the interpretation of many documents. However, if there is evidence before the motions judge that raises a *genuine* issue of fact, then he or she must defer to the trial judge whose traditional role it is to decide the factual issue.

[120] In my view, there is also a genuine issue for trial with respect to the defence of equitable set-off. The record contains evidence which is capable of showing that when the Standard Trust mortgage was transferred by its liquidator to Pacific & Western on March 6, 1992, it accepted the mortgage with actual notice of Carroll's claims against the promoters and Standard Trust contained in Carroll's counterclaim in the *Household Realty* action. In this regard, there is also an issue whether the date for assessing the equities is March 6, 1992, when the mortgage was actually transferred to Pacific & Western, or, December 30, 1988, when Pacific & Western signed an agreement to purchase this, and other mortgages, from Standard Trust.

[121] I appreciate that the defence of equitable set-off raised by Carroll is subtle and is dependent upon the trial judge making critical findings of fact. However, if the record contains evidence capable of supporting the relevant findings, the case is to be allowed to proceed to trial. The equities to which Pacific & Western is subject flow from claims which Carroll could assert against Standard Trust, and those in transactional proximity with Standard Trust. The transactional proximity which Chadwick J. was required to examine was that between the investment transaction between Carroll and the promoters, and the lending transaction involving Standard Trust, the promoters and Carroll. There is evidence that the investment transaction and the lending transaction were interrelated and interdependent. In my view, the evidence pertaining to transactional proximity between Carroll's investment transaction with the promoters and his lending transaction with the Standard Trust is sufficient to raise a genuine issue concerning his entitlement to raise the defence of equitable set-off in answer to the claim of Pacific & Western.

[122] I agree with the conclusion of Chadwick J. that there is no evidence that could establish a relationship between Pacific & Western and the promoters which would allow Carroll to raise as a defence to Pacific & Western's action on the covenant in the mortgage any alleged misrepresentations by the promoters which caused him to invest in the project.

[123] This leaves for consideration Carroll's appeal from the summary judgment dismissing his counterclaim against Pacific & Western in the *Household Realty*

action. As I stated earlier, we do not have the benefit of Chadwick J.'s reasons for making this order.

[124] In view of the absence of reasons, it is necessary to approach this issue by considering the relief sought in the amended counterclaim in respect to Pacific & Western. The counterclaim is lengthy. However, as I understand it, only paras. 5(a) and (f) could apply to Pacific & Western, and they read:

> 5. The plaintiff by counterclaim claims the following relief:
>
> (a) A declaration that the sale to him of the investment in the condominium unit described in paragraph 14 of the counterclaim and all financing transactions relating thereto are null and void;
>
> ....
>
> (f) Damages, against all defendants by counterclaim for negligent misrepresentations and/or breach of fidiciary duties.

[125] The claim in para. 5(a) is based on the alleged noncompliance with the *Securities Act*, in respect to which I have found there to be a genuine issue for trial. The claim in para. 5(f) is similar to the misrepresentation defence in the *Pacific & Western* action, in respect to which the motions judge concluded correctly that there is no genuine issue for trial. Accordingly, the appeal from the dismissal of the counterclaim in the *Household Realty* action is allowed and the counterclaim can proceed to trial in respect to the claim in para. 5(a).

[126] I conclude with this observation. Although it may be tempting to do so, it is not for a motions judge hearing a Rule 20 motion to assess the strengths and weaknesses of a claim or defence. Where a plaintiff has moved for summary judgment on its claim, if there is evidence capable of supporting a defence, summary judgment cannot be granted as the motions judge must defer to a plenary trial as the accepted forum for the resolution of disputed facts. There must, of course, be legal validity to the defence. Similarly, where a defendant has moved for summary judgment dismissing a plaintiff's claim, if there is evidence capable of supporting the

claim, summary judgment is precluded. There must, of course, be legal validity to the claim. However, it must be remembered that any evidentiary dispute arising from the record must be in respect to material facts and must be genuine: *Rogers Cable T.V. Ltd.*; *Royal Bank of Canada v. Feldman*; *Blackburn v. Lapkin*. If the moving party can demonstrate that the dispute is not genuine, as defined by the caselaw, it has satisfied its onus and is entitled to obtain summary judgment.

RESULT

[127] In the *Rexcraft* action, the appeal from the motion brought by the Bank of Nova Scotia is allowed with costs of the motion and the appeal. The appeal from the motion brought by Shivkumar is allowed with costs of the motion and the appeal reserved to the trial judge.

[128] With respect to the *Carroll* actions, in the *Pacific & Western* action the appeal is allowed with costs of the motion and the appeal. In the *Household Realty* action the appeal is allowed with costs of the appeal, and the counterclaim can proceed to trial in respect to the claim stated in para. 5(a) of the counterclaim.

[129] In considering the costs of each appeal, I was mindful of rule 20.06(1) which requires the court to fix the opposite party's costs of the motion on a solicitor-and-client basis where the moving party has obtained no relief, unless the court is satisfied "that the making of the motion, although unsuccessful, was nevertheless reasonable." The effect of this provision was not the subject of submissions by counsel. Nevertheless, in the circumstances of this appeal, particularly in view of the *Mastercraft* case, I am satisfied that the bringing of each motion was reasonable.

ROSENBERG J.A. (concurring):

[130] Borins J.A. has set out in detail the nature of these proceedings and I agree that the appeals must be allowed. I write these reasons because I would make a different order for costs with respect to the respondent Shivkumar from the other respondents and to state my views concerning the effect of the alleged breach of the *Securities Act*, R.S.O. 1980, c. 466.

[131] The history of these proceedings is a lengthy, and in some respects, a tortured one. A not inconsiderable portion of the argument before us concerned the reasons for

the delays in the litigation and attempts by the various parties to lay blame on each other. I attach no blame to anyone. However, I am concerned that in the process the respondent Shivkumar has been forced to incur costs that he should not have had to bear.

[132] As indicated by Borins J.A., the claim involving Shivkumar arises out of investments made by Mr. Simon in 1989. For a down payment of $300 per unit, Mr. Simon acquired a beneficial interest in three condominium units. These units, which were nothing but storage compartments in a warehouse, were sold to Mr. Simon for $31,000 per unit. Mr. Simon financed these acquisitions through mortgages and so-called equity financing arranged by the promoters. First mortgage financing was arranged with Security Home Mortgage Investment Corporation in the amount of $13,500 per unit. Second mortgage financing in the amount of $10,200 per unit was, in effect, a vendor take back mortgage provided by Reicor Capital Corporation, a company related to the promoters. The balance of the purchase price was financed through an unsecured loan from the Bank of Nova Scotia (the equity financing).

[133] These acquisitions were represented to the investors as tax shelters and the transactions were entirely tax-driven. Now that the investments have turned bad, Mr. Simon and the other Rexcraft investors are being asked to meet the obligations that they agreed to assume. So far as can be ascertained from the evidence, Mr. Simon took few steps to protect his interests. He made no independent investigation of the investment and now complains that he was induced to enter into the transactions by misrepresentations by Reid and others to which the Bank and others are said to be party. Simon complains that the Reid group did not comply with the *Securities Act*. While Simon and the other plaintiffs allege that they were induced to invest because of inaccurate investment summaries provided by an accounting firm and incorrect appraisals provided by an appraisal firm, they have discontinued their actions against these defendants. Those steps in the litigation remain unexplained. The plaintiffs have also discontinued the action against the first mortgagee, Security Home.

[134] Shivkumar became involved in this litigation because in August 1990 he took assignments of the second mortgages on the three units beneficially owned by Simon. Legal title to these units remained in the name of Rexcraft. Rexcraft gave second mortgages to Reicor and it is these second mortgages that were assigned to Shivkumar. There is no covenant from Simon in the Rexcraft to Reicor mortgages. To obtain enforceable charges from Simon, as the beneficial owner of the units, the Rexcraft promoters used a "Direction, Agreement and Charge of Beneficial Interest" signed by Simon in which he acknowledged that Rexcraft was a bare trustee. In this document, Simon agreed to charge his beneficial interest in the units and to pay the indebtedness. This document was not assigned to Shivkumar and Simon did not execute a power of

attorney or mortgage assumption agreement that might have clearly imposed an obligation upon him to repay the second mortgage to the assignee, Shivkumar.

[135] In the circumstances, it is unclear whether Rexcraft was a bare trustee or agent for Simon so as to trigger the doctrine set out by this court in *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. (2d) 65. Accordingly, I agree with Borins J.A. that what he refers to as the privity of contract issue is a triable one and that Chilcott J. erred in granting summary judgment. The appeal must therefore be allowed in the Shivkumar action, even though there is no evidence that he was party to or was aware of any of the alleged misrepresentations by the Reid group or that he had or his counsel had any knowledge of an alleged violation of the *Securities Act*.

[136] Since there must be a trial in any event, I would not attempt to limit the issues that may be raised by the parties and I do not understand that Borins J.A. has done so. I add these comments concerning the *Securities Act* issues only to clarify what I understand to be the effect of this court's decision in *Mastercraft*.

The *Securities Act*

[137] As Borins J.A. points out, the motion before Chilcott J. proceeded on the assumption that the failure by the promoters to comply with the provisions of s. 24 of the *Securities Act* could render the equity loans from the Bank unenforceable. Chilcott J. does not seem to have directly dealt with this issue as it might affect the validity of the second mortgages, except in the following portion of his reasons:

> There is nothing before me to indicate that Shivkumar had any knowledge of the non-compliance of Rexcraft with the Securities Act or that he was in any way involved with the promoters in misleading the investors. In my view there are no equities between Simon and Reicor that would entitle Simon to priority over the claims of Shivkumar or to set-off against Simon's debt to Shivkumar.

[138] The theory that illegality in the primary transaction can render other related transactions unenforceable is based on the decision of this court in *Mastercraft Group Inc. Investment Collection Actions (Re)* (1995), 123 D.L.R. (4th) 161. In *Mastercraft*, it was alleged that the promoters had violated s. 53 of the *Securities Act*, R.S.O. 1990, c. S.5, which prohibits trading in a security unless a preliminary prospectus and a prospectus have been filed. The violations alleged in this case are similar although it is also alleged that the promoters were trading in a security without being registered.

[139] In *Mastercraft* as in this case, there were different classes of lenders. This court held that assuming the *Act* was breached by the sales transactions, that primary contract was itself merely voidable, not void. Accordingly, the security interests acquired by the financial institutions, in positions comparable to that of the Bank of Nova Scotia in this case, by way of "collateral" contracts, without knowledge of any illegality, were enforceable. This court did not elaborate on what kind of knowledge would suffice to render the collateral contracts unenforceable because it found that there was no evidence of any knowledge on the part of the financial institutions of breaches of the *Securities Act*. The motions judge in *Mastercraft* appears to have held that the investors would not only have to establish that the financial institutions were aware of the illegality but "intended to finance an 'illegal' transaction" (at p. 171). I do not read this court's reasons for judgment in *Mastercraft* as either approving or disapproving of this statement of the law.[1]

[140] In *Mastercraft*, the court, at p. 175, also considered lenders in positions similar to that of Mr. Shivkumar in this case, namely institutions that were assignees of mortgages from a corporation associated with the promoters. In *Mastercraft*, the purchasers argued that if Mastercraft were in breach of the *Act*, any rights, which the purchasers had against Mastercraft, constituted equities to which the assignees would be subject. The Court of Appeal did not have to deal with that issue since it found that there was no proof of any violation of the *Act* in those transactions. I do not read the reasons of the court as necessarily accepting the purchasers' initial premise. In my view, there are at least two issues that will have to be dealt with at the trial, even if the plaintiffs are able to establish that the primary transactions violated the *Securities Act*.

[141] First, in my view, it is very much an open question whether the security interest obtained by Shivkumar from the second mortgagee (Reicor) should be held invalid, even if the primary transaction, to the knowledge of the second mortgagee, is tainted with illegality. The cases relied upon by the appellant, namely *Canadian Bank of Commerce v. Yorkshire & Canadian Trust*, [1939] S.C.R. 85 and *Jacobson v. Williams* (1919), 48 D.L.R. 51 (Alta. S.C.) do not, in my view, conclusively determine that issue against Shivkumar. Those cases appear to turn on their particular facts. It will be for the trial judge to determine that issue in this case against a complete factual background.

[142] The second issue concerns the effect of the alleged illegality on the validity of the second mortgage itself. The court in *Mastercraft* did not have to consider whether there were circumstances in which the contract would be held enforceable even if the lending institutions were aware of the illegality. The critical portion of the reasons for judgment in *Mastercraft* with respect to this issue is the following, found at p. 173:

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[1] This slightly different formulation of the rule may have its origin in comments by Megarry J. in *Spector v. Ageda*, [1971] 3 All E.R. 417 at 426-27 (Ch. Div.).

> Further, we do not think it is correct to say that the original transactions between the investors and Mastercraft were void as opposed to voidable, in so far as the positions of the investors and the financial institutions are concerned. Accordingly, the security interests acquired by the financial institutions, without knowledge of any illegality, are valid.
>
> We shall state our reasons for this conclusion briefly. Not all contracts prohibited by statute are void ... More specifically, the relevant part of the definition of "trade" in s. 1(1) of the *Securities Act,* which appears in the opening of s. 53(1) of the *Securities Act*—"No person or company shall *trade* in a security ..." (emphasis added [in *Mastercraft*]), provides that "trade" or "trading" "does not include a purchase of a security". This indicates, we think, that as far as the purchaser is concerned, the transaction is voidable only.

[143] As I understand this passage, the court held that if there was a breach of the *Securities Act*, even the primary transaction was not void but merely voidable. Therefore the security interest acquired by a third party who played a part in financing the transaction without knowledge of the illegality, was valid. I do not read this passage as holding that in all circumstances a violation of the *Securities Act* renders the contract unenforceable.

[144] I reach this conclusion because the law appears to have developed to the point that not all transactions that violate a statute are necessarily unenforceable. In *Royal Bank of Canada v. Grobman et al.* (1977), 18 O.R. (2d) 636 (H.C.J.), Krever J. considered the modern authorities including the decision of the Supreme Court of Canada in *Sidmay Ltd et al. v. Wehttam Investments Ltd.,* [1968] S.C.R. 828 affirming, [1967] 1 O.R. 508 (Ont. C.A.), and held that not every breach of statute will render the transaction invalid. Krever J. summarized the test as follows, at p. 653:

> The serious consequences of invalidating the contract, the social utility of those consequences and a determination of the class of persons for whom the prohibition was enacted, are all factors which the Court will weigh.

[145] Grobman was referred to with approval by Blair J.A. in *William E. Thomson Associates Inc. v. Carpenter* (1989), 61 D.L.R. (4th) 1. In my view, the factors referred to by Krever J. in *Grobman* and Blair J.A. in *Carpenter* will have to be considered at the trial in this case to determine whether the second mortgage is invalid even if the plaintiffs are able to establish that the transactions breached the *Securities Act*. See also *Beer v. Townsgate I Ltd.* (1997), 36 O.R. (3d) 136 (C.A.). If the second mortgage would have been enforceable even in the hands of Reicor, notwithstanding a violation of the *Securities Act,* an assignee of Reicor would be in no worse position.

Costs

[146] With respect to costs, there are a number of circumstances that lead me to make a different order for costs in the *Shivkumar* appeal. The statement of claim in this matter is dated July 29, 1991. It names some 22 persons as defendants including large institutions, such as the Bank of Nova Scotia, Reid and his various companies, the first mortgagees and the assignees of the second mortgages including Shivkumar. The statement of claim seeks various forms of relief, most of which have nothing to do with Shivkumar. However, the plaintiffs, including Simon, also sought a declaration that the sale of the investments and all of the financing transactions are null and void and unenforceable. The appellant explained in his factum why Shivkumar was included in the litigation:

> The assignees of Reicor were named as Defendants in these proceedings because, as holder of Reicor mortgages, they were necessary parties to the "in rem" declaratory relief being sought by the Plaintiffs which, if granted, would have led to a declaration that the Rexcraft to Reicor mortages were unenforceable.

[147] Only some of the assignees chose to defend. Shivkumar is one of them. In addition, he brought a counterclaim against Simon for the monies owing on the second mortgages that were assigned to him by Reicor. At a very early stage in the litigation, April 1992, Shivkumar brought a motion for summary judgment. That motion was adjourned to await the outcome of various other proceedings in which Shivkumar was not directly involved. His motion for summary judgment was not argued until September 8, 1995, after Chilcott J. had disposed of the motion by the Bank of Nova Scotia. Reasons for judgment were released on October 5, 1995. In April 30, 1996, Chilcott J. assessed Shivkumar's costs on a party and party basis at $31,162.25 and disbursements at $5,362.23. He was satisfied that those costs had been properly incurred to defend the plaintiff's claim and press the counterclaim. In 1992, Shivkumar claimed that Simon was indebted to him in the sum of $30,600.00 plus interest of 13.5% from May 1, 1991. Shivkumar is thus now in the unique

situation that the cost of being dragged into this complex litigation, in which he plays only a very small part, has now exceeded the value of the debt.

[148] In these unusual circumstances, I consider that it is preferable not to give Simon his costs of these proceedings against Shivkumar at this stage. There remains a realistic possibility that Simon will ultimately fail to prove his claim and will be found to be indebted as he agreed in the documents signed by him. I also think that a trial judge will be in a much better position than is this court to exercise the discretion respecting costs and I would not want a trial judge to be precluded from taking into account the costs incurred by these motions and this appeal.

[149] Accordingly, while I would allow the appeals, I would reserve the question of costs of the motion and the appeal with respect to Shivkumar to the trial judge.

CHARRON J.A. (concurring):

[150] I agree with Borins J.A. that the appeals must be allowed for the reasons set out in his judgment. I also agree with the additional reasons given by Rosenberg J.A. in his concurring reasons.

DATE: 19971027
DOCKET: C26300

COURT OF APPEAL FOR ONTARIO

OSBORNE, DOHERTY and ROSENBERG JJ.A.

B E T W E E N :	)	
	)	
FORD MOTOR COMPANY OF CANADA, LIMITED	)	**James A. Hodson and Hugh M. DesBrisay for the appellants**
	)	
Plaintiff/Appellant	)	
	)	
and	)	
	)	**Dennis O'Connor and**
ONTARIO MUNICIPAL EMPLOYEES RETIREMENT BOARD AND THE PERSONS SET OUT IN SCHEDULES "A" and "B"	)	**Christopher Bredt for the respondents**
	)	
Defendants/Respondents	)	
	)	**Heard: June 3, 1997**

OSBORNE J.A.:

[1] This appeal requires the court to examine and interpret the partial summary judgment provisions of Rule 20 of the Rules of Civil Procedure which permit a motions judge to grant summary judgment for "part of" a claim. More particularly, the issue to be determined on this appeal is whether the dissenting shareholders on a "going private" transaction can secure summary judgment for part of their claim based on the fair value offer made by the company under the provisions of the *Canada Business Corporation Act* (CBCA) and the *Ontario Business Corporation Act* (OBCA).

OVERVIEW

[2] In this case, Ford Motor Company of Canada, Limited ("Ford Canada"), by the provisions of both the CBCA and the OBCA, was required to make an offer to dissenting shareholders in an amount considered by its board of directors to be fair value for the dissenting shareholders' shares. Ford Canada's offer was $185 per share. It was rejected

by the dissenting shareholders, who sought more. 93.8% of the shareholders who accepted Ford Canada's offer were paid $185 per share. The dissenting shareholders, having rejected Ford Canada's fair value offer, promptly moved for summary judgment for "part of" their fair value claim on the basis that there was no genuine issue for trial that the fair value of their shares was less than $185.00 per share.

[3] The motions judge, Farley J., held that the dissenting shareholders were entitled to partial summary judgment for $185 for each share that they owned because he concluced that Ford Canada's fair value offer to them in that amount constituted a form of admission of minimum fair value. Ford Canada appeals from that decision.

[4] The dissenting shareholders cross-appeal from the motions judge's finding that reserved the issue of pre-judgment interest to the trial judge. They also seek to appeal the motion judge's order that each side bear its own costs.

THE FACTS

The Going-Private Transaction and Ford Canada's Fair Value Offer

[5] In September 1995 Ford Canada passed shareholder resolutions which set in motion a going private transaction through which the Ford Motor Company ("Ford U.S."), the U.S. parent of Ford Canada, eventually became Ford Canada's sole shareholder.

[6] Ford Canada was a incoporated under the CBCA and was thus governed by CBCA provisions. The going private transaction contemplated that at the end of the process Ford Canada would be governed, as a private company, by the OBCA. To achieve that goal Ford Canada asked its shareholders to pass, and the shareholders did pass, a Continuance Resolution authorizing the continuance of Ford Canada as an OBCA company. The going private transaction also contemplated the subsequent amalgamation of the company with other OBCA companies controlled by Ford U.S. Under the amalgamation the common shares of Ford Canada (apart from those held by the American parent company) were to be converted into preference shares redeemable at $185 per share.

[7] I do not think any further reference to the continuance and amalgamation is

required. Suffice it to say, all require corporate steps in furtherance of the continuance and amalgamation were taken and the respondents dissented, as they were entitled to do.

[8] Once Ford Canada set the "going private" transaction in motion and the dissenting shareholders gave notice of their dissent, the transaction followed a path dictated by the OBCA and the CBCA. The relevant provisions of the two acts are substantively identical. For the sake of brevity, I will for the most part confine my references to the relevant sections of the OBCA.

[9] In connection with the going private transaction, Ford distributed an information circular to its shareholders entitled to vote on the continuance and amalgamation resolutions. The circular included share valuation reports prepared by Wood Gundy Inc. and Salomon Bros. Inc. which set out their opinions on the range of value of Ford Canada's shares as at July 25, 1995. It is agreed that the valuation date for purposes of fixing fair value is September 11, 1995. Wood Gundy valued the shares at $170 to $200 per share. Salomon Bros.' valuation was $110 to $150 per share.

[10] Wood Gundy was retained by a special independent committee established by Ford Canada's board of directors. Its mandate was to recommend what Ford Canada should offer to its shareholders as fair value for their common shares. Salomon Bros. was retained by Ford Canada's board of directors, not the special committee, to provide an opinion on the fair value of the shares.

[11] In its management circular, Ford Canada advised its shareholders that:

> Under the proposed amalgamation, each common share of Ford Motor Company of Canada Limited, other than those now held by Ford Motor Company, will be converted into a redeemable preference share of one of two classes of the amalgamated corporation, which will be redeemed, as soon as practicable following the amalgamation, for $185.
>
> ...On July 5, 1995, Ford submitted a revised proposal to the Board of Directors of Ford of Canada in which the common shares held by Public Shareholders would be exchanged for preference shares to be redeemed for $185 per share.

[12] Under s. 185(1), both the continuance and amalgamation resolutions triggered Ford Canada's shareholders right to dissent. Section 185(10) required dissenting shareholders who intended to dissent to submit a demand for payment of the fair value of their shares. Once the dissenting shareholders submitted the demand notice required by s. 185(10), s. 185(14), provided that each dissenting shareholder "...ceases to have any rights as a shareholder other than the right to be paid the fair value of the shares as determined under this section ...."

[13] Ford Canada was required by s. 185(15) to send a fair value offer to each dissenting shareholder who complied with the relevant OBCA and CBCA provisions. Section 185(15)(a) sets out Ford Canada's obligation, as follows:

> (15) **Offer to pay.**– A corporation shall, not later than seven days after the later of the day on which the action approved by the resolution is effective or the day the corporation received the notice referred to in subsection (10), send to each dissenting shareholder who has sent such notice,
>
> (a) a written offer to pay for the dissenter shareholder's shares in an amount considered by the directors of the corporation to be fair value thereof, accompanied by a statement showing how the fair value was determined;

[14] The offer required by s. 185(15) is part of the process to give effect to the dissenting shareholders' entitlement to be paid fair value for their shares. This entitlement is set out in s. 185(4) which states:

> 185(4) In addition to any other right the shareholder may have, but subject to subsection (30), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents becomes effective, to be paid the fair value of the shares held by the shareholder in respect of which the shareholder dissents, determined as of the close of business on the day before the resolution was adopted.

[15] On October 12, 1995 Ford Canada, as required by s. 185(15)(a), submitted an offer to pay fair value to each dissenting shareholder. The offer was for $185 per share, payable in cash. In its written offer Ford Canada told the dissenting shareholders:

> The Directors of Ford Canada consider $185.00 a share to be the fair value of one common share as of the close of business on September 11, 1995 ...

[16] The offer lapsed, according to the provisions of both the CBCA and OBCA, when it was not accepted within 30 days after the date on which it was made. Like the motions judge, I do not think anything turns on this.

[17] Ford Canada's offer was based, in part, upon the advice of Wood Gundy and not on the lower valuation of Salomon Bros.. As I noted earlier, Salomon Bros. was retained

by Ford Canada, not the Special Committee established by Ford Canada's board of directors. As a result the Salomon Bros. valuation was not considered to be independent. Both OBCA and CBCA required Ford Canada's fair value offer to be based on an independent valuation.

THE FAIR VALUE ACTION

[18] Section 185(18) provides that if the dissenting shareholders do not accept the company's fair value offer the company may apply to the court "...to fix a fair value for the shares of any dissenting shareholder." Section 185(19) completes the circle. It provides that if the company fails to apply under subsection (18), a dissenting shareholder may apply to the court to fix fair value.

[19] Although either the company or the dissenting shareholders may be the applicant in the statutory application to fix fair value, neither bears the burden of proof. In particular, the dissenting shareholders do not have to establish that the corporation's offer is too low. See *Ultramar Canada Inc. v. Montreal Pipe Line Ltd.* (1990), 70 O.R. (2d) 136, additional reasons at (1990), 75 O.R. (2d) 498; *Smeek v. Dexleigh Corp.* (1990), 72 D.L.R. (4th) 609 (Ont. H.C.). Similarly, there is no onus on the corporation to establish that its offer represents fair value. In the end, the court must determine fair value on the evidence, the pleadings and in the exercise of its judgment. Section 185(25) permits the court to appoint one or more appraisers to assist in that determination.

[20] It was against that general statutory background that Ford Canada commenced an action in which it sought a declaration of the court fixing the fair value of its common shares pursuant to s. 190(15) of the CBCA and s. 185(18) of the OBCA. Ford Canada's statement of claim referred to its $185 per share offer but did not contain an admission of fair value or minimum fair value, unless one construes its offer made under s. 185(15) as some sort of minimum fair value admission.

[21] In paragraph 6 of their statement of defence the dissenting shareholders pleaded that the fair value of Ford Canada's common shares was greater than Ford Canada's $185 per share offer. They further contended that the valuations relied upon by Ford Canada understated the value of the shares and were thus deficient.

THE MOTION FOR SUMMARY JUDGMENT

[22] Shortly after they delivered their statement of defence, the dissenting shareholders moved for summary judgment. As I have said, on December 2, 1996, Farley J. granted

summary judgment for part of their claim based on Ford Canada's $185 per share fair value offer.

[23] Two affidavits were filed on the motion for summary judgment. The dissenting shareholders relied upon the affidavit evidence of Benjamin T. Glustein, an associate in the office of their counsel in the fair value action. Ford Canada relied upon the affidavit evidence of Norman Stewart, its Vice-President Government Relations, and General Counsel.

[24] In his affidavit, Mr. Glustein referred to the various transactions and events leading to Ford Canada's fair value offer and its rejection by the dissenting shareholders. He set out the dissenting shareholders' position that there was no genuine issue for trial "...that the fair value of the common shares is less than $185 per share, given the representations of Ford of Canada, the Special Committee and Wood Gundy, as well as the statutory obligations of Ford of Canada under the CBCA and OBCA to offer to pay the fair value of the common shares."

[25] In his affidavit filed in opposition to the respondents' summary judgment motion, Norman Stewart referred to both the Wood Gundy and Salomon Bros.' share valuation reports. He stated that neither of these reports was prepared for the purpose of litigation and that both Wood Gundy and Salomon Bros. had been retained by Ford Canada to give expert evidence at trial on the issue of fair value. He explained that Ford Canada's offer to pay fair value was based upon:

(a) the Wood Gundy report;

(b) then current financial advice received by the directors from Wood Gundy;

(c) those matters previously considered by the Special Committee and by the Board of Directors as set out in the proxy resolution materials;
(d) legal advice on the issue of fair value;
(e) discussions with senior management of Ford Canada as to Ford Canada's present and proposed business and operations.

[26] He further deposed to the fact that the preparation of valuation evidence was ongoing:

> There is a significant amount of evidence that will be before this court on the trial of the actions [to determine the fair value of the Ford Canada

> shares] including the evidence of expert witnesses retained to assist the court in establishing fair value, which is not before the court on this motion because the work of experts has yet to be completed.

[27] He noted in his affidavit that Ford Canada had given the valuator retained by the dissenting shareholders substantial material to assist the valuator in the preparation of a share valuation report for the dissenting shareholders. He added that Ford Canada had not been told what the dissenting shareholders' valuator had concluded the fair value of the shares was.

[28] Mr. Stewart stated that in making Ford Canada's fair value offer Ford Canada's directors did not consider or rely upon the Salomon Bros.' valuation opinion, only because the Special Committee of the Board had retained Wood Gundy, whereas Ford Canada's board of directors had retained Salomon Bros. However, he made it clear that Ford Canada intended that representatives of Salomon Bros. would give valuation evidence at trial.

THE MOTIONS JUDGE'S REASONS

[29] The motions judge, "reluctantly" granted the respondents partial summary judgment requiring Ford Canada to pay its dissenting shareholders $185 for each of their shares. He left the issue of pre-judgment interest to be determined by the trial judge and he concluded that each party should bear its own costs. His no costs order was based on his finding that there were conflicting judgments of this court on the issue before him. I will refer to these judgments shortly.

[30] In granting partial summary judgment to the dissenting shareholders, the motions judge concluded that this case was "on all fours" with *Roytor and Co. v. Skye Resources Ltd.*, [1986] O.J. No. 25 (H.C.J.), aff'd., in part, [1986] O.J. No. 1342 (C.A.). He said:

> The ratio of *Roytor* would appear to be that partial summary judgment in a dissent rights fair value case is appropriate where there has been some form of admission of (minimum) fair value by the corporation." [Emphasis added.]

[31] The motions judge concluded that Ford Canada's statutorily required fair value offer to pay $185 per share constituted, "some form of admission of (minimum) fair value" that in light of the authority of *Roytor* required him to grant partial summary judgment consistent with the admission. He appreciated that the summary judgment

would give the dissenting shareholders a payment in advance on account of fair value, a payment that he noted was not explicitly provided for in either the OBCA or CBCA.

[32] After reviewing the motions judge's reasons, I think it is fair to say that he would not have granted summary judgment had he not found that Ford Canada's offer to pay $185 per share constituted a form of admission which compelled him to grant summary judgment under the authority of *Roytor*.

[33] The motions judge granted partial summary judgment, "reluctantly", because he recognized that the summary judgment would not eliminate the need for a trial, or shorten the trial. He accepted that this result was at odds with the purpose of rule 20 as set out in *Irving Ungerman Ltd. v. Galinas* (1991), 4 O.R. (3d) 545 (C.A.) and *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (Ont. C.A.).

THE FACTS AND ISSUES IN *ROYTOR*

[34] Since this court's judgment in *Roytor* was central to the motions judge's decision to grant the dissenting shareholders summary judgment based on Ford Canada's fair value offer, I think that it is necessary to examine the evidence and what was in issue in that case.

[35] In *Roytor*, the right of shareholders to dissent was triggered by the proposed amalgamation of two mining companies. In due course, the dissenting shareholders chose not to accept the company's offer. In accordance with an order directing the trial of the issue of fair value, the dissenting shareholders were the plaintiffs and the corporation was the defendant in the statutory action to fix the fair value of the dissenting shareholders' shares.

[36] In their statement of claim the dissenting shareholders alleged that their shares had a fair value of no less than $22.64 per share. In its statement of defence the corporation asked the court to declare that the fair value of the shares was $7.875 per share on the basis that fair value could not be greater than the shares' market value, which was $7.875 per share on the valuation day.

[37] Having received what they considered to be an admission of minimum fair value in the corporation's statement of defence, the dissenting shareholders moved before the Master for summary judgment. It is clear from the Master's reasons that the dissenting shareholders' motion was based on their contention, as the Master put it, that "...the defendant's statement of defence at paragraphs 3 and 4 contains an admission as to the value of the shares being $7.875 per share."

[38] The Master did not think what was pleaded in the corporation's statement of defence, as referred to above, constituted an admission and he therefore dismissed the motion for a partial summary judgment.

[39] The dissenting shareholders appealed to a High Court Judge. On the appeal Saunders J. noted that the corporation had filed no evidence. He then turned to the corporation's pleading, which the Master had held did not constitute an admission of fair value, and observed:

> By its pleading, the respondent [the corporation] is clearly saying that it is prepared for the court to make a finding in that amount. It is possible that a trier of the issue may find the shares had a lower value. If that

> should occur after summary judgment has been granted and the result is that the appellants have been overpaid, then the court can make an appropriate order. In view of the pleadings and the absence of any genuine issue, I think it is fair to say that such a result is highly unlikely. [Emphasis added.]

[40] It seems to me to be clear from Saunders J.'s reasons that he granted summary judgment because the corporation's statement of defence permitted him to conclude that the corporation "is prepared for the court to make a finding in that amount [$7.875 per share]." He also concluded that the "part of the claim" reference in Rule 20 should not be confined to circumstances, "where there is more than one separate and distinct claim." By that I take it he meant that distinct claims in an action could be subdivided for partial summary judgment purposes.

[41] The corporation appealed Saunders J.'s judgment to this court. In a brief endorsement, this court dismissed the appeal and accepted Saunders J.'s interpretation of Rule 20.01, subject to the caveat that he should not have expressed an opinion on the issue whether the trial judge might find that the fair value of the shares was lower than the amount asserted by the corporation in its statement of defence. It follows that, notwithstanding the summary judgment for "part of" the dissenting shareholders' claim, it would be open to the trial judge to fix fair value in an amount greater or less than the corporation's fair value offer.

ANALYSIS

[42] The core issue on this appeal is the ambit of the provisions of Rule 20 which permit the court to grant a partial summary judgment to a plaintiff (R. 20.01(1)), or a defendant (R. 20.01(3)). I proceed on the basis that both sides were seeking a determination of fair value and that it was open to the motions judge to grant a partial summary judgment to the defendants, the dissenting shareholders. The question that was to be answered is whether the provisions of Rule 20, on the authority of *Roytor*, or otherwise, permit the court to grant summary judgment for part of the dissenting shareholders' claim, the "part" being what Ford Canada had offered to pay for the dissenting shareholders' shares ($185 per share).

[43] The relevant parts of Rule 20 are:

> 20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with support affidavit

material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

20.04 (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

[44] The purpose of the summary judgment provisions of Rule 20 was described in this way by Morden A.C.J.O. in *Ungerman Ltd. v. Galinas, supra,* at p. 550:

> A litigant's 'day in court', in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party is being both unnecessarily delayed in the obtaining of substantive justice and is being obliged to incur added expense. Rule 20 exists as a mechanism or avoiding these failures of procedural justice.

[45] In *Ontario Jockey Club*, the purpose of Rule 20 was described in this way:

> The purpose of Rule 20 is clear. The rule is intended to remove from the trial system, through the vehicle of summary judgment proceedings, those matters in which there is no genuine issue for trial...

[46] The cases in which summary judgment has been granted for "part of" a claim seem to me to fall into three groups:

(a) actions where the evidence establishes that there is no genuine issue for trial in respect of a discrete claim. These partial summary judgment cases

require no further comment except to say the result of summary judgment for "part of" a claim is consistent with the purpose of Rule 20; the partial summary judgment removes a discrete issue from the issues to be tried and thus shortens the trial. This is consistent with "procedural justice" concerns referred to by Morden A.C.J.O. in *Ungerman* and with the purpose of Rule 20 as referred to in *Jockey Club*;

(b) actions in which there is an admission that may properly engage both Rule 20 and Rule 51.06. I will refer to some "admission" cases where a partial summary judgment has been granted (or not granted) under the authority of Rules 20 and 51.06 shortly. In those cases, the evidentiary basis for the partial summary judgment order is an admission;

(c) actions in which there is no admission but the plaintiff seeks a partial summary judgment in some amount equal to or less than his/her inevitable recovery at trial.

[47] Rule 20 contains no explicit reference to a party's admissions. Nonetheless, the combined effect of Rules 20 and 51.06, which I think overlap to some extent, may provide access to summary judgment for part of a claim where there has been a relevant admission. Rule 51.06 provides:

> 51.06 (1) Where an admission of the truth of a fact or the authenticity of a document is made,
>
> (a) in an affidavit filed by a party;
>
> (b) in the examination for discovery of a party or a person examined for discovery on behalf of a party; or
>
> (c) by a party on any other examination under oath or affirmation in or out of court,
>
> any party may make a motion to a judge in the same or another proceeding for such order as the party may be entitled to on the admission without waiting for the determination of any other question between the parties, and the judge may make such order as is just.
>
> (2) Where an admission of the truth of a fact or the authenticity of a document is made by a party in a pleading or is made or deemed to be made by a party in response to a request to admit, any party may make a motion in the same proceeding to a judge for such order as he or she may be entitled to on the admission without waiting for the

> determination of any question between the parties, and the judge may make such order as is just.
>
> (3) If Rule 30.1 applies to the admission, its use in another proceeding is subject to Rule 30.1. (deemed undertaking).

[48] The purpose of Rule 51.06 somewhat parallels Rule 20's purpose. If a party makes an admission (as occurred in the defendant's statement of defence in *Roytor*), Rule 51.06 gives the beneficiary of the admission access to an order based on the admission. For example, if a defendant admits to liability, or a particular part of a loss claimed by the plaintiff, Rule 51.06 would permit a motions judge to grant an order based on the admission. Such an order will typically take the form of a summary judgment for part of the plaintiff's claim.

[49] *Dzamba v. Hurst*, [1989] O.J. No. 1261 provides an example of the combined effect of Rules 20 and 51.06. In that case Master Clark held that Rule 51.06 provided a source of relief of the same nature as that available under Rule 20. He did not think Rule 51.06 limited Rule 20. However, in *Mason's Masonry Supply Ltd. v. 690884 Ontario Limited* (1993), O.J. 10, Ground J. concluded that the two rules served a different purpose. He refused summary judgment for "part of" the plaintiff's claim. He held that the motion should have been brought under Rule 51.06, since the basis of the plaintiff's claim for payment of $5,000 before trial was an admission made by the defendant.

[50] The relationship between Rules 20 and 51.06 remains somewhat unclear and does not have to be resolved here. All that I need say is that I think the two rules serve a similar, but not identical purpose. Rule 20's purpose is to remove actions, or distinct issues with respect to which there is no genuine issue for trial from the trial system. This advances procedural justice. Rule 51.06's purpose is to permit an appropriate order to be made as a result of a party's admission. An order made under Rule 51.06 in response to an admission may or may not shorten the trial. I see no reason why a summary judgment may not be granted for part of a claim through the combined effect of Rules 20 and 51.06 if there is an admission that satisfies the no genuine issue for trial test and, in the language of Rule 51.06, the order sought (a partial summary judgment consistent with the admission) is an order to which "the party may be entitled without waiting for the determination of any question between the parties." (Rule 51.06(2))

[51] This brings me to those cases where there is no admission, but summary judgment is sought for part of a claim on other grounds, sometimes as basic as the plaintiff's contention that he or she needs the money. This is what happened in *Johnson v. Bates*

(1994), 20 O.R. (3d) 751 (Ont. Gen. Div.). See also *Moore v. Vanderbosh* summarized (1989), 18 A.C.W.S. (3d) 418 (L.J.S.C.).

[52] In *Johnson, supra,* the plaintiff moved for summary judgment for part of her claim in an action based on her former solicitor's negligence. The motions judge observed in his reasons that the evidence showed that the plaintiff was "impecunious plight", that is, she needed some money. He granted summary judgment for $5,000 and said at p. 754:

> It is clear on the facts before me that the injured plaintiff in this case will enjoy a substantial monetary recovery following trial. The figure of $5,000 requested at this time by her counsel seems to be a small request. It is a certainty that the plaintiff will recover net sums in excess of that figure. [Emphasis added.]

[53] Cases like *Johnson v. Bates* and *Moore v. Vanderbosh, supra,* use Rule 20 to provide a plaintiff with what seems to me to be an advance payment to be credited to the eventual judgment, in the same way as a payment in advance made under s. 256 of the *Insurance Act*, R.S.O. 1990, c. I.8 is credited to the judgment. It appears to me in those partial summary judgment – payment in advance – cases the common denominator, apart from the plaintiff's need for some financial assistance, is the established fact that the plaintiff will secure a monetary judgment at trial for more than the amount of the partial summary judgment.

[54] Other authorities have not accepted the minimum claim value – payment in advance approach to Rule 20. In *St. Pierre et al. v. Bernardo* (1988), 26 C.P.C. (2d) 97 (Ont. H.C.J.) the plaintiff sought partial summary judgment in the form of an advance payment to be credited to damages assessed at trial. The motions judge, Wright J., looked at the issue from the defendant's perspective and dismissed the motion. He said at p. 100:

> In the first place I am of the opinion that on a motion for summary judgment the defendant cannot be expected to produce evidence with respect to damages and certainly not at this stage where discoveries have not been conducted nor productions made. There is no way that the defendant can realistically assure himself that damages as postulated will be the damages as proven before the trial court ...

[55] The plaintiff's claim for a partial summary judgment was also refused in *Maxwell v. G.E.C. Canada Ltd.* (1991), 6 O.R. (3d) 253 (Ont. Gen. Div.). In *Maxwell*, the plaintiff sued his former employer for wrongful dismissal. He moved for summary judgment for part of his claim on the basis of the defendant's offer, which the plaintiff had rejected, to

pay the plaintiff 26 weeks' salary in lieu of notice. The plaintiff did not use the defendant's offer as an admission but as evidence that established the probable minimum value of his claim. Borins J. refused to grant partial summary judgment consistent with this offer. In dealing with the import of the offer and the contention that it could be taken to represent the plaintiff's minimum recovery, he rejected the submission that the defendant's offer could establish the minimum value of the plaintiff's claim. He also held that what notice is reasonable notice should not be determined on a piecemeal basis. He put it in this way at p. 254:

> Counsel has provided a number of cases which illustrate, on their facts, that where an employer has made an offer to an employee based on a particular period of notice, the court has not found that a shorter period was appropriate. In my view, these cases may be very helpful to the plaintiff at trial. However, on this motion, they do no more than underscore the value of the defendant's offer as an important piece of evidence which the trial judge will no doubt consider in determining the issue of proper notice....All of this leads me to the conclusion that there is a genuine issue of both law in fact in regard to the proper period of notice which should be considered by the trial judge. [Emphasis added.]
>
> ...
>
> Rather, this case relates to the determination of the proper notice to be given to an employee which I believe should not be determined on a piecemeal basis, but by the trial judge who will have the benefit of all of the evidence on the issue. [Emphasis added.]

[56] In his reasons for refusing to grant summary judgment for part of the plaintiff's claim, Borins J. distinguished the case before him from Saunders J.'s judgment in *Roytor*, without elaboration. I assume that he was mindful of the fact that in *Roytor* the claimed entitlement to the partial summary judgment for the minimum fair share value was based on an admission in the corporation's statement of defence.

[57] I pause here to note that the dissenting shareholders in this case and the plaintiffs in *Maxwell* were in a somewhat similar position. Both had rejected an offer, in this case Ford Canada's fair value offer, and in *Maxwell* the employer's salary in lieu of notice offer, and both sought partial summary judgment based upon the rejected offer.

[58] In *Szabo v. Walton* (1987), O.J. 1000 (Ont. C.A.), the plaintiff sought partial summary judgment on the issue of liability for his lost income to the date of the motion. Liability was a discrete issue. Loss of income to the date of the motion was a subdivision

of a discrete issue (special damages). The motions judge granted partial summary judgment for both parts of the plaintiff's claim and the defendant appealed.

[59] On the appeal to this court, the defendants accepted that summary judgment could be granted on the issue of liability, but they took issue with the motions judge's decision to grant summary judgment for part of the plaintiff's special damages (his lost earnings to the date of the motion). There is nothing to suggest that the plaintiff did not lead evidence establishing what his lost income to the date of the motion was. Brooke J.A. did not accept that the plaintiff could recover that part of his special damages by a partial summary judgment. He held that there were issues, including the plaintiff's entitlement to loss of income, that "...could not properly be decided in a summary way as envisaged by Rule 20." He reached this conclusion even though the defendant's liability to the plaintiff was established. He was clearly mindful of the fact that the plaintiff's special damages, including his loss of income from the date of the accident to the date of trial would have to be determined at trial. This interpretation of Rule 20's partial summary judgment provision is consistent with what this court has held the purpose of Rule 20 is.

[60] Cases like *St. Pierre v. Bernardo*, *Maxwell v. G.E.C.* and this court's judgment in *Szabo v. Walton, supra*, seem to me to illustrate the court's reluctance to further expand Rule 20 into a payment in advance of trial rule, based on need or minimum claim value, at least where there is no admission in the pleadings, or elsewhere, that would provide a basis for summary judgment for part of the plaintiff's claim, as occurred in *Roytor*.

[61] I acknowledge that there is not a exact parallel among minimum fair value in a dissent rights case (this case), minimum salary in lieu of notice in a wrongful dismissal case (*Maxwell v. G.E.C.*) and loss of earnings to the date of the summary judgment motion in a negligence case (*Szabo v. Walton*). These cases are, however, analogous in that they all involve circumstances where partial summary judgment, if granted, would be based on the probable minimum value of the plaintiff's claim, or part of the plaintiff's claim. In all such cases granting summary judge will not eliminate or shorten the trial in any meaningful way. Thus, the purpose of Rule 20 is not advanced by granting partial summary judgment on this basis, if one looks to *Ungerman* and *Jockey Club* to define the purpose of the rule.

[62] In addition, I note that Rule 20.04(3) directly addresses claims for summary judgment where quantum is the genuine issue for trial. In such circumstances the rule provides two options on a motion for summary judgment, – a trial or a judgment with a reference. There is no language in Rule 20.04(3) that suggests that partial judgment may be granted in "quantum" cases, based upon evidence of minimum claim value. In my

view, had the Legislature intended to open this door to a partial summary judgment, it would have done so explicitly, likely in Rule 20.04(3). Relief under Rule 51.06 may be available in true hardship cases like *Johnson v. Bates*, since in those cases there will frequently be an admission that would engage the provisions of that rule.

CONCLUSION

[63] In my opinion, the scope of the partial summary judgment provisions of Rule 20.01(1) and (3) should be defined and limited by the purpose of the rule as set out in *Ungerman* and *Jockey Club*. What is, and is not, a genuine issue for trial is central to the operation of Rule 20. Apart from cases where there is an admission, access to a partial summary judgment was intended to remove from the trial process issues that would otherwise have to be resolved at trial. Here, the minimum amount at which fair value could be fixed is not a trial issue at all. The trial issue is fair value, not minimum fair value. In my view, determining minimum fair value for partial summary judgment purposes causes delay and adds to the cost of litigation (the summary judgment motion). There is no offsetting benefit such as shortening the trial, except in providing the dissenting shareholders with an advance payment that may be higher or lower than fair value determined by the court.

[64] It seems to me that had the Legislature intended that Rule 20 be used to grant partial summary judgment based on the probable minimum value of a plaintiff's claim, or plain need, it would have said so. I do not think Rule 20 was intended to serve that purpose. If the Legislature wants to establish a general payment in advance scheme it can easily do so. I note, however, that to date legislative action in this area has been modest. Section 256 of the *Insurance Act* (which applies only to automobile claims) does provide for advance payments in automobile accident cases. It does not, however, give the injured plaintiff the right to demand a payment in advance. It simply gives the automobile insurer the right to make and receive the appropriate credit for (a release) a voluntary payment made before judgment.

[65] This brings me back to *Roytor*. The motions judge concluded that this court's *Roytor* judgment stands for the proposition "...that partial summary judgment in a dissent rights fair value case is appropriate where there has been some form of admission of (minimum) fair value by the corporation." He also held that Ford Canada's offer made under s. 185(15) was a form of admission.

[66] I think the motions judge stated the ratio of *Roytor* too broadly. The admission in *Roytor* was in the corporation's statement of defence. The admission committed the

corporation to its pleaded minimum fair value ($7.875 per share). In my opinion, *Roytor* is a case where the basis for partial summary judgment was the admission of minimum fair value. It was the admission, not the evidence of the corporation's offer that triggered partial summary judgment in *Roytor*. Here, Ford Canada made the statutorily required fair value offer to the dissenting shareholders. As the motions judge correctly noted, it made no admission of minimum fair value in its pleadings. I do not think that standing alone, evidence of Ford Canada's offer is a form of admission that brings this case within the authority of *Roytor*.

[67] I do not think that the fair value offer that Ford Canada was required to make is anything other than what it purports to be, that is a statutorily required offer to pay a particular amount for the dissenting shareholders' shares. In my opinion, it would defeat the balance established in the OBCA and CBCA if that offer could, on its own, be the basis upon which the dissenting shareholders receive summary judgment based on the quantum of the offer.

[68] A partial summary judgment based on Ford Canada's fair value offer effects an intermediate result not contemplated by either the OBCA or the CBCA. It gives the dissenting shareholders a judgment for part of their claim based upon an offer that they have rejected, and permits them to proceed with the statutory fair value application to secure more. As the motions judge rhetorically, but aptly, observed, "[T]his puts the dissenting shareholders in a 'heads I win, tails you lose', position." It also raises important policy considerations. The rules shsould be interpreted so that corporations are encouraged to make a true fair value offer, not an offer premised on the corporation's view as to the minimum value that might be set after the prolonged and complex litigation that s. 185 applications appear to engender. An interpretation of Rule 20 that would encourage a corporation to "low-ball" the offer to avoid the consequences of a dissenting shareholder's summary judgment motion would be unfair to the majority of shareholders and encourage litigation. Thus, the primary purposes of Rule 20 and s. 185 would be undermined.

[69] A corporation's fair value offer, unlike an admission in a pleading, does not establish the minimum fair value of the shares. In fact, in cases such as *Re Smeenk v. Dexleigh Corp.* (1990), 72 D.L.R. (4th) 609 (Ont. H.C.J.), appeal dismissed (1993), 105 D.L.R. (4th) 193 (Ont. C.A.) and *New Quebec Raglin Mines Ltd. v. Blok-Andersen* (1993), 9 B.L.R. (2d) 93 (Ont.Gen. Div.), the court set a fair value which was below the fair value offer made by the corporation.

[70] It seems to me to be clear that had the motions judge not viewed Ford Canada's fair value offer to be a form of admission he would not have granted summary judgment. As I have said above, I do not think the fair value offer should be taken to be an admission and, in my opinion, there was no other basis upon which to grant partial summary judgment in this case.

[71] Accordingly, I would allow the appeal and set aside the order below and in its place dismiss the motion for summary judgment. The appellant is entitled to its costs of the appeal. In the circumstances, I would dimiss the summary judgment motion without costs.

[72] The cross-appeal concerns pre-judgment interest and costs. In light of my proposed disposition of the appeal there will be a trial to determine fair value and the trial judge will deal with those issues. Accordingly, I would dismiss the cross-appeal, in the circumstances, without costs.

Released: October 27, 1997

CITATION: Cuthbert v. TD Canada Trust, 2010 ONSC 830
COURT FILE NO.: CV-09-7981-0000
DATE: 20100204

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Frank Cuthbert, Plaintiff

AND:

TD Canada Trust and the Toronto-Dominion Bank, Defendants

AND:

Royal Bank of Canada, Third Party

BEFORE: Karakatsanis J.

COUNSEL: *Aliamisse Mundulai*, Counsel for the Plaintiff

Martin Greenglass, Counsel, for the Defendants and Third Party

HEARD: January 25, 2010

ENDORSEMENT

[1] Both the plaintiff and the defendants and third party have each brought a motion for summary judgement. These motions rest primarily upon an assessment of the evidence under the new Rule governing motions for summary judgement.

[2] This action pertains to monies obtained from the Royal Bank by fraud, and deposited to Cuthbert's account with the defendants (the TD Bank). The funds were subsequently debited from that account by the TD Bank and returned to the Royal Bank. While Cuthbert concedes that the monies were obtained from the Royal Bank by fraud, he deposes that he is an innocent third party who received the funds in repayment of loans made by him. Cuthbert seeks return of those funds. The Banks seek dismissal of the action.

[3] Many of the facts are not disputed. In early 2003, Cuthbert received five payments totalling $454,115.64 that were paid by the Royal Bank pursuant to directions from the solicitor for the mortgagees in fraudulent mortgages on four different properties. The final payment was a Royal Bank draft dated May 8, 2003 for $112,327.33 deposited in Cuthbert's TD Bank account on May 12, 2003. These funds were paid from the proceeds of the fraudulent mortgage on 22 Louis Street, Port Colborne. Only this last payment remained intact in Cuthbert's account when the Royal Bank traced the funds. In July 14

2003, the TD Bank debited Cuthbert's account and returned the $112,327.33 to the Royal Bank (subject to an indemnification agreement).

[4] The Royal Bank subsequently commenced a mortgage fraud action against various parties, including Cuthbert as recipient of the funds and obtained a Mareva injunction in December 2003. Cuthbert only became aware that the funds had been debited in April 2004. The Royal Bank ultimately obtained judgment in the mortgage fraud action (including the mortgage placed on 22 Louis Street Port Colborne) but the action against Cuthbert was dismissed, on consent, without costs, in August 2008. The Royal Bank evidence is that it did not expect any further recovery because Cuthbert was elderly and had no exigible assets. After the dismissal of the action, Cuthbert asked for return of the monies debited from his account and commenced this action. He states in his affidavit that the branch Manager had assured him that his account was frozen and that he would have his money back once everything was resolved.

[5] Cuthbert seeks summary judgment in this action for the return of those funds. The plaintiff submits that the Royal Bank can point to no judgment or court order identifying the funds as belonging to it and that the bank was not entitled to trace the funds. Further the plaintiff submits that the evidence is uncontroverted that the money was in Cuthbert's account and belonged to him as repayment for loans made by him.

[6] The TD Bank and Royal Bank seek summary judgment dismissing this action on the basis that the funds belong to the Royal Bank and Cuthbert has no claim to the funds. The Banks also submitted that the action was commenced outside the limitation period; and that Cuthbert is estopped from seeking the funds based upon the settlement of the action.

[7] I have before me documents and affidavits from the mortgage fraud action, cross-examinations on those affidavits, as well as affidavits and a cross examination in this motion. While the plaintiff did not have an opportunity to cross examine the Banks' affiant, Moran, due to the tight schedule and the intervening holidays, I do not strike that affidavit or draw an adverse inference. The Banks rely only upon the exhibits to that affidavit; those exhibits are excerpts of the exhibits already before the court on a previous motion in the fraud action.

[8] For the reasons that follow, summary judgment shall issue dismissing the action. I am satisfied that the Royal Bank paid the funds pursuant to a fraudulent mortgage and is *prima facie* entitled to them. I am satisfied that Cuthbert has no claim to the funds that can defeat the claim of the Royal Bank. I am satisfied that there is no genuine issue requiring a trial and that the interests of justice do not require that the evidence be presented and assessed at trial. As a result, I need not deal with the other issues raised by the Banks.

The New Rule for Summary Judgment Motions

[9] Rule 20.04 provides:

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence;...

(2.1) In determining under clause 2 (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interests of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule 2.1 order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[10] The change in the Rules from "no genuine issue for trial" to "no genuine issue requiring a trial," together with the explicit powers of the motions judge to make evidentiary determinations permits a more meaningful review of the paper record and expressly overrules jurisprudence that prevented motions judge from making evidentiary determinations. As a result, consistent as well with the new principle of proportionality in Rule 1.04 (1.1), cases or issues need not proceed to trial unless it is genuinely required.

[11] The decision itself or the test for summary judgment –whether there is a genuine issue of material fact that requires a trial for its resolution as first articulated in *Irving Ungerman Ltd. v Galanis* 1991, 4 O.R. (3d) 545 (C.A.)– has not changed. However, the cases that have since restricted a motions judge in assessing credibility, weighing evidence or drawing factual inferences have been superseded by the powers set out in the new Rule. Both the analytical review and the availability of oral evidence have considerably broadened the motions judge's tools in a summary judgment motion. Nonetheless, although a motions judge may weigh the evidence, evaluate the credibility and draw reasonable inferences from the evidence, it is not the role of the motions judge to make findings of fact for the purpose of deciding the action on the basis of the evidence presented on a motion for summary judgment. This change in the Rule does substitute a summary trial for a summary judgment motion. Although a summary judgment motion may, if the motions judge so directs, resemble a summary trial, the test and the decision are different (See *Dawson v Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.)) The motions judge must take "a hard look" at the evidence to determine whether it raises a genuine issue requiring a trial. (See *Rozin v Ilitchev* (2003), 66 O. R. (3d) 410 at para 8 (C.A.)) New Rule 20.04 provides the judge with more tools to do so.

[12] The new Rule does not change the burden of a party in a summary judgment motion. Rule 20.01 provides that a party who seeks summary judgment must move with supporting affidavit material or other evidence to support its motion. Pursuant to Rule

20.02(2), a responding party "may not rest solely on the allegations or denial in the party's pleadings but must set out in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial." In other words, consistent with existing jurisprudence, each side must "put its best foot forward." The court is entitled to assume that the record contains all the evidence which the parties will present if there is a trial, although in some circumstances the interests of justice may require that a material issue should be determined at trial, upon a full evidentiary record.

[13] In this case there are two summary judgment motions. It is only after the moving party has discharged its evidentiary burden of proving that there is no genuine issue which requires a trial for its resolution, that the burden shifts to the responding party to prove that its claim or defence has a real chance of success. *Augonie v Galion Solid Waste Material Inc.*, 39 O.R. (3rd) 161 (C.A.).

[14] The parties have met their initial evidentiary burden in both motions. With respect to the plaintiff's motion, the plaintiff has led evidence that the funds had been taken from its account and the plaintiff had received the money as repayment of a loan. With respect to the Banks' motion, the Banks have led evidence that the Royal Bank had traced the funds that it paid as a result of fraud to the plaintiff's account and that it was entitled to restitution of those same funds. The Banks' evidence regarding the Royal Bank's right to retain those funds and challenging the plaintiff's evidence that he had received consideration for the funds, was relevant both in response to the plaintiff's motion and on its own motion summary judgment. Similarly, the plaintiff's evidence that it had received the funds as repayment of loans was relevant both to prove his claim and to provide a defence to the Royal Bank's claim. In effect, each asserted competing claims to the funds. In the circumstances of this case, the same analysis is relevant to both motions.

[15] For the reasons that follow, I have taken a good hard look at the evidence, evaluated it, drawn inferences and made a finding of credibility in order to determine whether there was a genuine issue of a material fact for trial. I have concluded that the evidence of the Royal Bank's claim for restitution is compelling; I have concluded, on the other hand, the evidence of the plaintiff's claim that it received the funds in repayment of the loan is not credible and that it is not in the interests of justice that credibility be determined at trial. To this extent I have weighed and evaluated the evidence and determined that there is no genuine issue of a material fact requiring a trial.

The Royal Bank's Claim

Tracing

[16] I am satisfied that the Royal Bank properly traced the funds it paid out pursuant to a fraudulent mortgage. The Royal Bank draft deposited in Cuthbert's account was made in response to a direction to pay to Cuthbert $112,327.33 of the mortgage proceeds on 22 Louis Street; the bank draft itself references the name of the mortgagee; and the direction was signed by the solicitor who was ultimately convicted of fraud in relation to this mortgage. This payment was part of a total of $454,115.64 traced to Cuthbert's account

from the proceeds of fraudulent mortgages placed on four properties. The other payments were no longer in the account at the time of the tracing. However, the $112,327.33 remained whole and was traced by the Royal Bank as the very monies that had been stolen from it by way of a mortgage advance in a fraudulent mortgage transaction.

[17] As the Supreme Court of Canada held in *B.M.P. Global Distribution. Inc. v Bank of Nova Scotia*, 2009 SCC 15 at paras. 75, 79, and 85, tracing is an identification process. The common law rule is that the claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them. It is possible at common law to trace funds into bank accounts if it is possible to identify the funds and mixing by the recipient is not a bar to recovery. Tracing at law is permitted where a person has received money rightfully claimed by the claimant and liability is based on mere receipt (subject to any defences).

[18] Although there is no Court order directing the return of these specific funds to the Royal Bank, the mortgage fraud action specifically references the mortgage frauds on all these properties, including 22 St Louis St. Similarly, the criminal judgment made specific findings of the mortgage funds obtained by fraud in relation to 22 St Louis St. In addition to the Court findings, there is clear evidence establishing the Royal Bank's claim to the funds. Cuthbert does not dispute that the funds were obtained from the Royal Bank as a result of fraud.

[19] As a result, the Bank was entitled to trace the funds. I am satisfied that the funds debited from Cuthbert's account at the TD Bank were traced and identified as the funds paid by the Royal Bank pursuant to the fraudulent mortgage. There is no issue that the funds came from the Royal Bank and there is no issue of the identification of the funds in Cuthbert's account; they had not lost their identity.

Mistake of Fact

[20] Where monies are paid to another under a mistake of fact which causes the payer to make the payment, the payer is *prima facie* entitled to recover the monies. The claim may fail, however, if (1) the payer intends that the payee shall have the money at all events or is deemed in law so to intend; (2) the payment was made for good consideration, in particular if the money is paid to discharge a debt owed to the payee by the payer or by a third party who has authorized the payer to discharge the debt; or (3) the payee has changed his position in good faith or is deemed in law to have done so. *B.M.P. Global Distribution. Inc. v Bank of Nova Scotia*, 2009 SCC 15 at para. 22.

[21] In *B.M.P.*, BMP deposited a cheque drawn on the Royal Bank into its account with the Bank of Nova Scotia. The Royal Bank subsequently discovered that the signature on the cheque was forged. The Bank of Nova Scotia returned the funds in BMP's account and in related company accounts. BMP sued the Bank of Nova Scotia for the return of the monies. The Supreme Court of Canada held that the Royal Bank had a right to recover the money paid to BMP on the basis of a forged cheque and the defences were not available to BMP in the circumstances of that case.

[22] The Court noted that the Royal Bank, as drawee, provided the funds under the mistaken assumption that the drawer's signature was genuine. The Royal Bank had no right to pay the funds, would have to reimburse its customer and therefore would incur the loss; in such a situation the payer cannot be said to have intended the payee to keep the money in any event. The rightful owner had a legitimate claim against the recipient and the Bank of Nova Scotia had no duty to give preference to BMP who had given no consideration and did not lose anything because the funds had to be returned to the Royal Bank. The Bank of Nova Scotia had the right to claim the amount in BMP's account and to trace funds in the related accounts. There was no issue of identification of the money in BMP's account.

[23] The plaintiff's position is that in this case the Royal Bank did not pay the funds under a mistake of fact. It seeks to distinguish this case from BMP on the basis that the mistake of fact in that case was based upon a fraudulent cheque, while in this case the plaintiff received the funds that had already been negotiated by the solicitor acting in the real estate transaction.

[24] However, mistake of fact is not restricted to fraudulent cheques. In this case, the Royal Bank provided the funds by way of bank draft pursuant to the direction of the solicitor for the mortgagee under the mistaken belief it was pursuant to a valid mortgage. This is clear not only from the evidence but also from the findings and judgments in both the mortgage fraud action and the criminal trial. Unjust enrichment does not arise. This issue does not require a trial.

The Plaintiff's Claim - Consideration

[25] The success of the Royal Bank's entitlement to the funds does not depend upon a finding that the plaintiff was involved in the fraud. However the common law affords defences to a party who receives the funds paid under mistake of fact. Two of the defences do not arise on the evidence before me. Given that the Royal Bank intended to provide the funds based upon valid security, it cannot be said in such circumstances that it intended that the recipients of the mortgage proceeds would keep the money in any event. Furthermore, there is no evidence that Cuthbert changed his position as a result of the receipt of the funds; there is no suggestion, for example, that he gave any releases with respect to any loans.

[26] The key disputed factual issue is Cuthbert's claim that he received the funds in repayment of loans and whether it raises an issue requiring a trial. The plaintiff's position is that he received the funds for valuable consideration for lending services rendered. Counsel for the plaintiff submits that whether Cuthbert failed to keep records or engaged in questionable business practices is irrelevant given his uncontraverted evidence that the monies were paid to him in repayment of a loan. As the money was in his account and he deposed that the money belonged to him as repayment of a loan, counsel submits the plaintiff is entitled to summary judgement for the return of the monies. The banks submit

that the evidence does not support a claim that Cuthbert received the funds for consideration and does not raise an issue requiring a trial.

[27] In his various affidavits and examinations, Frank Cuthbert has sworn he was not involved in the mortgage fraud. He has set out the nature of his interest in the funds in two different affidavits in the 2003 mortgage fraud action and two affidavits in this action, as well as in his examinations.

[28] In his affidavit sworn November 26, 2003, Frank Cuthbert swore that Terry Walker provided the cheques, identified by the Royal Bank as proceeds from the fraudulent mortgages, as repayment for loans which Cuthbert had advanced to Walker. In his examination, he confirmed that the $112,327.33 was part of that repayment by Walker. Cuthbert said that after the sale of his business in the late 1980s, he had available cash so he started advancing small short-term loans to individuals whom he knew who would repay the loans with interest. Cuthbert stated that his friend Ken Shah had introduced him to Terry Walker, who was in the brokerage business and put deals together; he would advance funds to Mr. Walker making the cheques payable to individuals as he directed. Mr. Walker would repay the loans advanced to these individual with interest.

[29] In his affidavits sworn November 24, 2009 and January 19, 2010, Frank Cuthbert again repeated that he was not involved with mortgage fraud and that: "I[n] 2003 I was involved in the supply of small loans, bridge financing and small mortgage financing to individuals for a short or medium term period."

[30] Cuthbert was cross-examined on the 2003 affidavits and on his 2009 affidavit. He was required to produce all relevant documentation. He produced 12 bank drafts payable to various individuals between December 13, 2002 and May 6, 2003 that he swore represented loans to Walker, payable to the various payees at Walker's direction. He testified that the funds he received (from the fraudulent mortgages) were funds that Walker directed others to pay him in repayment of those loans.

[31] Cuthbert testified that he had no receipts whatsoever from Mr. Walker. He was unable to provide any other details of the loans including dates or interest earned; and he was unable to produce any documentation for the loans; and he was unable to provide any covering letters or receipts or contact information for Walker at the time.

[32] In response to an undertaking Cuthbert also provided a hand-written sheet of paper explaining the loans. It indicated that Walker owed him a total of $452,289, and Walker paid $455,626.63 in repayment of loans. The indebtedness was made up of the loan payments made at Terry Walker's direction of $177,289.49 (matching the 12 bank drafts disclosed); cash loans to Walker of $80,000 and the assumption of loans to Ken Shah in the amount of $195,000. Cuthbert testified that he made the loans to Ken Shah ($195,000) mainly from the cash from his business before 1995 and the loans to Mr Walker ($257,289.49) were made after 1995.

[33] When pressed in cross examination where he obtained the capital to make those loans, Cuthbert deposed that it came from cash sums from his business and the sale of his business in the late 1980s, although he had not deposited the cash or invested it in any financial institution. In his affidavit he indicated his main source of income was from the business and that since selling the business he had available cash to pursue his small business. Cuthbert's evidence is that he was a real estate agent and mortgage agent in the years following his business closing in the late 1980s. He testified that since the closing of the club he did a little bit of lending to people he knew. His income tax returns did not disclose any appreciable income.

[34] During the course of this proceeding, counsel for the banks discovered that Cuthbert filed for bankruptcy in 1993 and was discharged in 1994. He declared assets of $1050 and liabilities of $125,000, although he admitted in cross examination that Ken Shah still owed him the money ($195,000) and he had not advised the Trustee in bankruptcy of the receivable. When confronted with the bankruptcy information for the first time during his cross examination for this motion, Cuthbert testified that he was able to build his business between his bankruptcy and the time he loaned the $257,000 to Walker by starting small, for example with $5000 loans. When pressed he said he borrowed the sums from friends. He had no records. This is not consistent with his earlier evidence in the affidavits and previous examination that he used the cash from his business and the sale of his business in the late 1980s as capital for the loans in his loan business.

[35] Finally, in this proceeding, Cuthbert filed two documents that he had not produced in the 2003 mortgage fraud action. He did not recall when he received them. In his affidavit dated November 24, 2009, he states at para 6: "Part of the money in the account I had received as repayment of personal loans I had provided to Mr Terry Walker. Attached ...is a copy of a letter and a promissory note provided by Mr. Walker to confirm the personal loans." In the undated letter, Terry Walker expresses his regret that they can no longer work together on projects, indicates he is moving away and acknowledges "indebtedness to ...[Cuthbert] the sum of $37,852.60 plus interest which was made payable to TD Canada Trust on my behalf, on April 25, 2003."

[36] The undated promissory note reflects the payees and amounts of the 12 bank drafts and the amount shown in the written explanation of loans to Walker produced in the mortgage fraud action. It lists funds advanced to others on Walker's behalf which he agrees to repay, totalling $177,289.49 plus 12% interest of $21,274.74. (During his examination Mr Cuthbert testified that the interest rate was not per annum but per loan.) On the face of the promissory note, interest of $21,274.74 was payable on these loans even though, according to the date of the bank drafts, only $54,214 had been loaned between December 13, 2002 and March 2003, and even though all loan advances were repaid within two days, the last advance of $85,195.89 on May 6, 2003.

[37] Furthermore, the promissory note is inconsistent with the dates of the loan payments and the loan repayments as established in the 2003 documentation provided by Cuthbert. Given the dates of the various bank drafts referenced in the note, it is clear that the promissory note was written after the final advances dated May 6, 2003. However as of

May 6, 2003 all the repayments except the final repayment had been made. Thus the principal amount noted as outstanding was obviously inaccurate as of that date. Indeed, the final payment of $112,327.33 was made 2 days after the last advances of $85,000 were made on May 6, 2003. Mr Cuthbert testified however that loans were never repaid within 2 days. When this was put to him in cross-examination, Cuthbert testified that the payment of $112,327.33 could have been for some of the earlier loans. This, however, is not consistent with his written loan description produced in 2004. It is clear from all his evidence that this was the final repayment of all the loans to Walker.

[38] (In addition, of the 12 loan advances identified in the promissory note, the corresponding bank drafts show that 4 of the loan advances totalling $123,048.49 were made after April 25, 2003. By April 23, 2003 however, Cuthbert had received all the repayments except for the $112,327.33 bank draft dated May 8, 2003. In other words, as of April 23, 2003 repayments exceeded the amounts loaned.)

[39] Therefore, although the note purports to set out existing liabilities, it does not accurately reflect the liabilities as they would have existed at the time of its preparation. It is inconsistent with the documentary evidence provided by Cuthbert in 2004. The only explanation is that this promissory note was produced after the events. Cuthbert could not recall when he received the documents (although he thought it must have been after the earlier lawsuit since he had not disclosed it); whether he had the originals; and when he last saw Mr. Walker (he thought 4 or 5 years ago although he said it was before his cross examination in 2004). In his 2004 examination Cuthbert testified that Walker did not sign a promissory note or an IOU or any receipts.

Findings

[40] The Royal Banks was clearly defrauded of these funds and is entitled to them subject to any valid claim of the plaintiff as a third party recipient that he provided consideration for the funds.

[41] Counsel for the plaintiff argued that Cuthbert's statements that the funds were repayment of loans made as part of his small business were uncontroverted and established his entitlement to return of the money. He submitted that the activity in his bank account was consistent with a small business. (Cuthbert however states in his affidavits that the money that was seized was from a personal bank account and was money that he was using for current expenses for himself and for his family.) Finally, he points to the criminal judgment convicting the solicitor who directed that the Royal Bank send mortgage funds to Cuthbert, which sets out his evidence that his dealings included legitimate transactions. However, it is clear from the judgment that the proceeds from the mortgage on 22 Louis St, including the funds in issue, were proceeds of a fraudulent transaction.

[42] I am satisfied that Cuthbert's evidence is not credible and does not raise an issue requiring a trial. Although I have not had the benefit of observing his demeanour during

his testimony, courts have long recognized that demeanour can be misleading and is but one factor in assessing credibility. Credibility is best tested against common sense, inherent consistency and consistency with contemporaneous and undisputed documents. I have numerous sworn statements – three affidavits and two cross-examinations – relating to this issue and numerous undisputed documents with which to test his evidence.

[43] Cuthbert's testimony about the loans lacks internal consistency and credibility. He has no records to support his testimony, except bank drafts that bear no relationship to the amounts of the repayment. The loan advances were not made to the person he says borrowed the money; nor were the repayments made by the person he says borrowed the money. He was unable to provide any contact information for the borrower. He has no records and no receipts. He could not provide a credible or consistent account of where he obtained the money to make the loans. His explanation was either misleading or he misled the Trustee in Bankruptcy. He told the Trustee in Bankruptcy that he had no assets and testified he did not tell him about prior receivables of $195,000 he claims were ultimately repaid by the funds obtained through the mortgage fraud. The undisputed documentary evidence regarding the payments to Cuthbert's account is compelling and is inconsistent with Cuthbert's evidence. Finally, the undated letter and promissory note produced in this litigation for the first time, despite his obligation to produce all relevant documents in the mortgage fraud action, are self-serving and inconsistent with his evidence about the loans, his 2003 documentation and the undisputed bank drafts. The documents were obviously created after the fact.

[44] In these circumstances, I am satisfied there is a strong evidentiary basis upon which to make findings of credibility, to draw inferences and to weigh the evidence. I am satisfied that the interests of justice do not require that this issue should be resolved at trial. The Royal Bank's claim to the money is undisputed based upon undisputed documentary evidence. Cuthbert has had a number of opportunities to provide evidence by way of affidavit and in cross-examination. I have no hesitation in finding Cuthbert's evidence lacks any credibility based upon the evidence before me. As a result, I am satisfied there is no genuine issue requiring a trial.

[45] The plaintiff's motion for summary judgment is dismissed. I grant summary judgment to the defendants and third party and dismiss this action.

[46] The Banks have filed a costs outline in the amount of $14,693.14 all inclusive. Given the plaintiff's request for costs of $44,880 all inclusive, the amount claimed by the Banks is within the reasonable expectation of the plaintiff (even if previous cost awards and disbursements are deducted, the amount claimed still exceeds $30,000). The amount claimed is reasonable and proportionate to the nature and complexity of the issues raised in accordance with Rule 57.01 of the Rules.

Karakatsanis J.

Date:

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

Consolidation Period: From January 1, 2011 to the e-Laws currency date.

Last amendment: O. Reg. 436/10.

This is the English version of a bilingual regulation.

EVIDENCE ON MOTION

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. O. Reg. 438/08, s. 12.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. O. Reg. 438/08, s. 12.

THE LAW OF LIMITATIONS

SECOND EDITION

Graeme Mew
B.A. (Hons.) Law, LL.B., F.C.I. Arb.
of the Middle Temple and the Ontario Bar

LexisNexis™ Butterworths

3. PURPOSE OF LIMITATION PERIODS

Four broad categories of reasons for a limitations system can be identified.[44]

3.1 "Peace and Repose"

It is said that statutes of limitation are acts of "peace" or "repose".[45] The theory is that, at some point after the occurrence of conduct that might be actionable, a defendant is entitled to peace of mind.

> When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken; discharge his solicitor if he has been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.[46]

3.2 Evidentiary Concerns

With the passage of time between the occurrence of events giving rise to a claim and the adjudication of the claim, the quality and availability of the evidence will diminish. Memories will fade, witnesses will die or move away, and documents and other records will be destroyed. If a point in time is reached when evidence becomes too unreliable to form a sound basis for adjudication, a limitation period should prevent the claim from being adjudicated at all. Courts should not be called upon to adjudicate stale disputes: "Every trial judge is aware that stale claims with stale testimony produce bad trials and poor decisions."[47]

3.3 Economic and Public Interest Considerations

People who provide goods and services may be adversely affected by the uncertainty of potential litigation. Economic consequences will directly flow. A potential defendant faced with possible liability of a magnitude unknown may be unable or unwilling to enter into other business transactions. Others may be unaware of a specific claim until many years after an event upon which the

[44] See generally, Institute of Law Research and Reform, *Limitations, Report for Discussion No. 4* (Edmonton: September, 1986), at 2; Ontario Law Reform Commission, *Report Limitation of Actions* (Toronto: Department of the Attorney General, 1969), at 9-10; Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8*, Report No. 112 (Victoria: March, 1990); The Law Commission, *Making the Law on Civil Limitation Periods Simpler and Fairer*, Law Commission Consultation Paper 151 (London: H.M.S.O. 1998) at 11-16.

[45] *Doe d. Duroure v. Jones* (1791), 4 Term Rep. 300, 100 E.R. 1031 *per* Lord Kenyon C.J.; *A'Court v. Cross* (1825), 3 Bing. 329 *per* Best C.J. at 332-33.

[46] *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553 (P.C.), *per* Lord Brightman at 563.

[47] *Per* Laycraft J.A. in *Costigan v Ruzicka*, [1984] 6 W.W.R. 1 at 11, 13 D.L.R. (4th) 368 at 377 (Alta. C.A.).

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[48] Institute of Law Reform and Rese
September, 1986), at 4.

[49] England and Wales, Law Commiss
151, 1998) at paras. 1.31-1.33.

claim is based. The cost of maintaining records for many years and obtaining adequate liability insurance is ultimately passed on to the consumer. The Alberta Report concluded:

> . . . the result of peace denied can become excessive cost incurred, for the cost burden on the entire society is too high relative to any benefits which might be conferred on a tiny group of claimants by keeping defendants exposed to claims.[18]

Society has an interest in maximizing the chances of doing justice with due regard to the resources required to do so. The English Law Commission put forward the following views in a 1998 consultation paper:

> It is desirable that claims which are brought should be brought at a time when documentary evidence is still available and the recollections of witnesses are still reasonably fresh. This is the best way to ensure a fair trial and thus to maximise the chance of doing justice. It also ensures that public money is not wasted in the hearing of claims that cannot be dealt with properly. Apart from this, the state has an interest in promoting legal certainty. Not only potential defendants, but third parties need to have confidence that rights are not going to disturbed by a long-forgotten claim. Financial institutions giving credit to businesses, for example, have an interest in knowing that a borrower's affairs will not be damaged by the revival of years old litigation. Buyers who want to purchase land or goods held by a potential seller want to know that their title cannot be disturbed by a third party to the deal.
>
> On the other hand, the interests of society will not be served if plaintiffs are obliged to bring proceedings before they have had an opportunity to explore the possibility of settlement, which could equally waste judicial resources . . .
>
> The possible consequences of setting a limitation period which is too short should also be considered. At least in the short term, this will increase the number of plaintiffs whose claims are time-barred. In a number of cases, the plaintiff may in consequence have a claim for negligence against his or her solicitor. The trial of that negligence action will require the court to examine, at second hand, the plaintiff's chance of success in the original action. A significant increase in the number of such actions would strain judicial resources.[19]

3.4 Judgmental Reasons

If a claim is not adjudicated until many years after the events that give rise to it, different values and standards from those prevailing at the time the events occurred may be used in determining fault. Because of changes in cultural values, scientific knowledge and societal interests, injustice may result. Can it be said that the conduct of the "reasonable person" as perceived by a court today would accord with the view taken by a judge of an earlier generation?

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[18] Institute of Law Reform and Research, *Limitations, Report for Discussion No. 4* (Edmonton: September, 1986), at 4.

[19] England and Wales, Law Commission, *Consultation Paper on Limitation of Actions* (Law Com 151, 1998) at paras. 1.31-1.33.

In order to consolidate the various limitation periods, several provinces have amended their limitation period legislation, reducing the general limitation period for breach of contract or tort actions to two years.[19] In many cases, these revised acts also repeal limitation periods found in other provincial legislation so that more consistency is obtained throughout the province.[20]

It thus becomes imperative to identify those cases in which there exist concurrent causes of action, to ascertain both when time starts to run and the applicable period of time. Can a plaintiff simply rely on the limitation period that is most advantageous to it? This is yet another area that has been the subject of much judicial debate.[21]

2. DISCOVERABILITY

Under the discoverability principle, "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence".[22] The discoverability rule is not one of universal application. Although it has its genesis in tort claims, its tentacles have nevertheless spread much further. In some provinces the discoverability rule has been codified by statute, or has been deemed redundant because of other remedial provisions in the limitations statute. Throughout this book, cases involving discoverability crop up. In this chapter the history, main principles and principal statutory exceptions are reviewed.

2.1 History: Accrual v. Discoverability

As will be seen, the discoverability principle has not enjoyed the general acceptance in England that it has enjoyed in Canada. The English cases nevertheless provide the source for the development of the Canadian rule.

In *Cartledge v. E. Jopling & Sons Ltd.*[23] the House of Lords held, in a personal injury action, that time started to run from the earliest date at which the plaintiff had suffered more than minimal damage as a result of the defendant's breach of duty. In so deciding, the court acknowledged that due to the inability of medical science to detect the plaintiff's pneumoconiosis, a progressive disease with a period of latency, the plaintiff was barred from asserting a claim before he even knew he had a claim.[24] The court regarded as significant the fact that the prevailing English statute provided that in certain cases of fraud and mistake "the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered

[19] For example, B.C., Alta., Nfld., Ont.-2002.

[20] For example, Ont.-2002.

[21] See Chapters 7 and 8.

[22] *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 224, 37 C.C.L.T. 117 at 180, *per* Le Dain J.

[23] [1963] A.C. 758, [1963] 2 W.L.R. 210; [1963] 1 All E.R. 341 (H.L.).

[24] The effect *of Cartledge* was reversed, for personal injury cases only, by the *Limitation Act* (U.K.), 1963, c. 47.

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[25] *Limitation Act, 1939* (U.K.), 2 & 3 G

[26] [1976] Q.B. 858, [1976] 2 All E.R. 6

[27] *Ibid.*, at 868 (Q.B.).

[28] (1982), 36 O.R. (2d) 97, 134 D.L.R.

[29] (1981), 124 D.L.R. (3d) 350 (Nfld. C

[30] *Ibid.*, at 355-56.

[31] [1983] 2 A.C. 1, [1983] 1 All E.R. 6

[32] (1982), 263 E.G. 879 (C.A.).

Cited as:
Chrysler Canada Ltd.

William Gordon Switzer, Applicant v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 1459, Responding Parties v. Chrysler Canada Limited, Intervenor

[1997] O.L.R.D. No. 2605

File No. 0221-97-U

Ontario Labour Relations Board

BEFORE: G.T. Surdykowski, Vice-Chair

August 7, 1997

DECISION OF THE BOARD

I - INTRODUCTION

1 In accordance with the interventions filed by them, the title of proceedings is hereby amended to describe the responding parties as: "National Automobile, Transportation and General Workers Union of Canada (CAW-Canada) and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 1459."

2 This is a complaint under section 96 of the LABOUR RELATIONS ACT, 1995 (the "Act") which the applicant has filed with the assistance of counsel. The applicant alleges that the responding trade unions have breached section 74 of the Act, and requests orders requiring the trade unions to file two grievances: (i) regarding his discharge from employment and seeking reinstatement to "August 1992", and (ii) regarding a claim to sickness, accident and extended disability benefits.

3 Both responding trade unions had filed responses in which they submit that this complaint is untimely and discloses no PRIMA FACIE case, and that in either event the Board should dismiss it without a hearing. In the alternative, the trade unions deny any breach of the Act.

4 The employer involved ("Chrysler") has filed an intervention in which it also pleads that the complaint is untimely and discloses no PRIMA FACIE case and should therefore be dismissed.

5 Together with and following the filing of the intervention, the applicant and Chrysler made

extensive written submissions primarily concerning the issue of delay. In that respect, counsel for Chrysler and counsel for the applicant each wrote three letters containing their written representations. Because it appeared that each counsel was determined to have a last word without really having anything further to say which was new, I directed the Registrar to advise them that the merry-go-round had stopped.

6 I note that although they have been named as the responding parties (properly so), the trade unions seemed content to let Chrysler "carry the ball" in this respect, since neither of them filed any representations in addition to their responses.

II

CHRYSLER'S STANDING TO SEEK DISMISSAL ON THE BASIS OF DELAY OR NO PRIMA FACIE CASE

7 The applicant's representations suggest that there may be some uncertainty regarding Chrysler's standing or role in these proceedings. There should not be.

8 Section 74 of the Act does not create obligations or prohibitions for employers. Accordingly, employers cannot breach section 74. Complaints that section 74 has been breached concern a trade union's representation conduct. However, employers are commonly named as interested parties or intervene in complaints that section 74 has been breached because applicants have an interest in having them there at least for remedial purposes. On the other hand, an employer often has an indirect interest in the liability stage (insofar as the dealings between it and its collective bargaining partner and therefore the collective bargaining relationship may be in issue), and the employer will often have a very direct interest at the remedial state if the complaint succeeds. The Board recently reviewed how this has come to be in WILLIAM HILL JR., [1995] OLRB rep. Oct. 1249, at paragraphs 5 to 8, as follows:

> 5. There has been a "duty of fair representation in the LABOUR RELATIONS ACT since 1971. Initially, the Board took a rather traditional litigation approach in such cases. That is, the Board treated them as disputes between the employee and trade union involved which did not concern the employer. First the Board assessed the trade union's conduct. Then, if the Board determined that the trade union had breached what is now section 69 of the Act, the Board awarded damages, based on the Board's own assessment of the employee's grievance (RUTHERFORD'S DAIRY LIMITED, [1972] OLRB Rep. Mar. 240, ALFRED COMPTON. [1972] OLRB Rep. Oct. 916).
> 6. Until 1973, an employer was not considered to be a proper party to a duty of fair representation case. But with its decision in FORD MOTOR CO. OF CANADA LTD., [1973] OLRB Rep. Oct. 519 (sometimes referred to as the GEBBIE AND LONGMOORE case) the Board began to take a more labour relations oriented approach to fair representation cases, and determined that an employer could be made a party, primarily for remedial purposes (see also, IMPERIAL TOBACCO PRODUCTS, [1974] OLRB Rep. July 418). As the Board continued to develop its labour relations approach to fair representation cases, it began to consider whether one appropriate remedy might be to send the grievance at the center of such a case to arbitration, and thereby put the parties in the position they would often have been in but for the trade union's breach of the Act.
> 7. It appears that the Board first directed that a grievance be referred to arbitration as a primary remedy in a duty of fair representation proceeding in LEONARD MURPHY,

[1977] OLRB Rep. Mar. 146. Then, beginning with MASSEY-FERGUSON INDUSTRIES LIMITED, [1977] OLRB Rep. Apr. 216, the Board departed from the approach which required it to assess grievances in fair representation cases in the same way that a board of arbitration might, and suggested that the appropriate remedy in fair representation cases is generally to send the matter to arbitration:

20. Not only did the BACHIU dictum result in protracted section [69] proceedings, it was also regarded in some quarters, and we think with some justification, as unfair to the employer who is, after all, only a party to a section [69] complaint because its rights might be affected thereby. Lest there be any misunderstanding on this point, we want to make it clear that the Board holds to the position that an employer should not be permitted to shelter behind a trade union's breach of its duty of fair representation, and thereby escape from its contractual obligation made mandatory by section 37 of THE LABOUR RELATIONS ACT to answer in arbitration for "its alleged violations of the collective agreement". Accordingly, the Board will continue to use its powers under section 79 of the Act, which include the power to override the specific provisions of a collective agreement, to ensure that an aggrieved complainant is not in that way deprived of the opportunity to obtain full and effective redress for a trade union's wrongful failure to carry his grievance to arbitration (for the Board's initial exercise of this remedial authority, see LEONARD MURPHY AND INTERNATIONAL PRINTING AND GRAPHIC COMMUNICATIONS UNION, LOCAL 482, Board File No. 1687-76-U discussed infra). But that notwithstanding, we do not think it entirely fair to require an employer to defend itself against an alleged contract violation before a contravention of section [69] has been established.

21. With this analysis of the problems inherent in the procedural format suggested in BACHIU, we can now outline the procedure which the Board intends to adopt when dealing with section [69] complaints.

22. Where the Board determines that a trade union has violated its statutory duty of fair representation by failing to take an employee's grievance to arbitration, and where it further determines that arbitration is the appropriate remedy in the circumstances, (which it will not always be, see paragraph 28), the Board will exercise its remedial authority under section 79 of the Act to make an order directing the union to arbitrate the grievance with whatever modifications of the collective agreement appear necessary to ensure that a fair and expeditious arbitration on the merits of the grievance takes place. If the union's denial of fair representation has aggravated the complainant's financial loss, the Board will also, at that time, make an order for damages, apportioning liability as between the trade union and the employer in the event that the grievance succeeds at arbitration, together with whatever further orders that contingent order for damages may necessitate.

23. This procedure has already been used in another recent section [69] case. In LEONARD MURPHY (supra), the Board found that the arbitrary and bad faith conduct of the union had denied the complainants a chance to have their discharge grievances arbitrated. To rectify the loss occasioned by the union's breach of its duty of fair representation, the Board directed the union to arbitrate the grievances forthwith, notwithstanding certain potential collective agreement obstacles. Further, the union was required to compensate the complainants for their damages directly attributable to the union's unfair representation. Because of the inherent conflict of interest resulting from the Board's contingent order for damages, the union was also ordered to engage counsel, jointly chosen by the complainants and the union, to present the complainants' grievances at arbitration.

24. The implication of the procedure which the Board utilized in MURPHY, and which the Board is now adopting, is that a party to an unfair representation proceeding (be in

complainant, trade union or employer), need no longer feel compelled to present to the Board all its evidence on the merits of the complainant's grievance against the employer. The reason is that it will have a full opportunity to introduce that evidence before an arbitration board if the union is found to have committed a breach of its statutory duty and arbitration is indicated. We realize, of course, that many section [69] complainants appear before the Board without benefit of legal representation and that they will be no more familiar with this new procedural format than they were with the old. So as not to deny a complainant a full and fair opportunity to make its case, the Board has not been in the past, and will not be in the future, unduly restrictive with respect to the evidence which it allows to be introduced in a section [69] proceeding. The adoption of the new procedure, however, will mean that neither the union nor the employer will be required to respond to evidence which is of no relevance to the issue of whether the union is in breach of its duty of fair representation.

25. To summarize, the procedure which we have adopted for the adjudication of section [69] complaints is designed to avoid the twin pitfalls inherent in the procedure suggested in BACHIU - unduly protracted hearings and need for the employer to come forward with evidence to defend its actions in respect of the alleged contract violation before a violation of section [69] has been made out.

26. It should be emphasized that the procedure outlined in this decision does not mean that the parties to an unfair representation proceeding will now have no need of adducing evidence of the merits of the grievance underlying the complaint. The parties (particularly the complainant and the union) will still have an interest in conveying to the Board, through their evidence, a sense of how the complainant's grievance against the employer was likely to have been perceived by the trade union. There is in many section [69] cases, however, a great deal of evidence which, while very pertinent to the question of whether the complainant's grievance would be successful at arbitration, is not relevant to the issue of whether the union has dealt with that grievance in a proper manner.

27. Before concluding, we would add these further comments about the significance of the procedure which we have adopted within the framework of the Board's developing section [69] jurisprudence. Before GEBBIE, the remedy of referring the grievance of a successful complainant to arbitration was not regarded as available, the Board taking the view that an employer was not a proper party to a fair representation complaint, since section [69] imposed no duty upon it. In order to assess the complainant's damages, the Board, therefore, was required to make a judgment about whether the complainant would have secured a favourable arbitration award. IMPERIAL TOBACCO then held that an employer, although under no statutory duty to the complainant, could be joined as a party for remedial purposes; and, from that point on, it was no longer necessary for the Board to speculate on the outcome of arbitration. Nevertheless, the option of final adjudication by the Board was preserved: first, because there was a concern that a trade union which had violated its duty of fair representation by failing to take an employee's grievance to arbitration might not do a sincere job of presenting that employee's case at an arbitration hearing; second, because the Board was concerned about referring unmeritorious grievances to arbitration with the expense, delay and duplication of evidence which that would entail; and, finally, because the remedy of the Board finally disposing of an established section [69] violation had always existed in theory, if not in practice, and the Board saw no immediate need to abandon that remedy simply because it was no longer restricted to an award of damages against the offending trade union.

28. With hindsight, the Board can now see that the uncertainty which was created by the

preservation of that remedial option, with its unforeseen procedural ramifications, was neither necessary nor desirable. Should there be a concern now that a successful complainant will not be represented fairly by his union at arbitration, that concern can be met by the Board making an order directing the union to retain counsel acceptable to the complainant, as was done in MURPHY.

29. It is true that the abandonment of the remedy of final adjudication by the Board of the grievances which come before it under section [69] may service to delay and increase the costs to the parties in cases where a section [69] complaint succeeds. But that sacrifice is something which we believe, on balance, to be unavoidable. It should be emphasized, though, that not every successful section [69] complaint requires the remedy of arbitration. As we stated in MURPHY, the whole point of a remedy for a violation of section [69] is to, as nearly as possible, put the parties into the position they would have been in had the unfair representation not occurred. Stated another way, the Board does not view section [69] as conferring upon a successful complainant an automatic right to have his grievance arbitrated. If the grievance is not one which his union would have been required to carry further had it not breached its duty of fair representation, the union should not be required to proceed to arbitration if it decides, after proper consideration, that it still does not wish to do so. This last conclusion suggests that the Board need not be concerned about abandoning the type of remedy which was ordered in PAP . It will be remembered that the Board there decided against referring the grievance of a successful complainant to arbitration, assuming it had authority to do so, not only because of the cost and time involved, but also because of the lack of merit in the grievance itself. That exercise of the Board's remedial authority, while perhaps supportable within its historical context - at a time when the Board was still uncertain as to its authority to require a union to arbitrate a grievance - would not, in our view, be an appropriate one today, regardless of its procedural implications. Not only would an a-type remedy be of small consolation to a "successful complainant", it would also be inconsistent with the Board's concept of the purpose of a section [69] remedial order - that of restoring the STATUS QUO ANTE. The more appropriate response in a case where a union fails to take a grievance to arbitration, and it is not obvious that arbitration is necessary, is for the Board to direct the union to re-process the grievance from the point at which fair representation was denied. That is the kind of remedial response which the Board would have ordered in PEDALINO (supra) had the views of the Vice-Chairman in that case been in the majority. It is, moreover, a remedial response which affords the parties an opportunity to voluntarily settle the grievance on terms which are not unfair to the complainant.

8. As things have developed since MASSEY-FERGUSON INDUSTRIES LIMITED SUPRA, referral of the applicant's grievance to arbitration has become a conventional remedy in duty of fair representation cases. However, although this is now the primary remedy, it is not the only one. The Board will fashion a different remedy in circumstances in which it considers that sending the matter to arbitration is either unnecessary or otherwise inappropriate. For example, the Board has directed consideration of the grievance at an earlier stage in the overall process (SUSAN FORBES, [1993] OLRB Rep. Dec. 1283, PETER GALIATSOS, [1992] OLRB Rep. June 714), has ordered the employee to be reinstated to his employment (TIM TURNER, [1993] OLRB Rep. Aug. 811), and has awarded damages (GERALD LECUVER, [1985] OLRB Rep. July 1099 and [1987] OLRB Rep. Jan. 72). In one case, the Board declined to award any remedy which might effect the employer because that employer had not been named as a party and had had no notice of the proceeding (DAVID A. SNACKMAN, [1991] OLRB Rep. Aug. 1006). However, the

common thread which runs through all of the Board's jurisprudence, including the Board's decisions in what it is considered to be exceptional circumstances, is that referral to arbitration is the primary remedy in duty of fair representation cases.

9 For the vast majority of employees who allege a breach of section 74, successfully prosecuting a complaint against their trade union is only half the battle. Their ultimate objective is to obtain a remedy from the employer (or former employer), under the collective agreement between the union and that employer. Indeed, that ifs precisely what the applicant wants in this case. He wants the Board to require the responding trade unions to file or "reinstate" a grievance contesting the termination of his employment, and to file a grievance objecting to the denial of the various health, welfare and disability benefits he claims he is entitled to; and, presumably to take them to arbitration if necessary. The only way to get to arbitration, even if the Board orders it, is under the grievance arbitration provisions of the collective agreement between Chrysler and the responding trade unions (or either of them). As the Board went on to observe in WILLIAM HILL JR., SUPRA, the conventional wisdom is that because the employer is a necessary party to the grievance and arbitration proceedings, it is therefore directly affected, particularly if the Board makes direction regarding the conflict of the grievance and arbitration proceedings (for example, by ordering the employer to waive any applicable time limits).

10 It is apparent that the employer concerned can play a useful role in even the liability stage of a section 74 proceeding. There can be no question that it is entitled to participate in the remedial phase, and to call evidence or make representations with respect to what the Board can or should do in that respect. It is therefore well accepted that an employer is entitled to participate in a section 74 proceeding if it chooses to do so. Further, an employer is not there as some sort of window dressing or only so that it will be bound by the Board's decision. It is entitled to full party participation in every part of the proceeding. As such, it is entitled to make objections to the Board's jurisdiction, or to seek to have the complaint dismissed on the basis of delay or because it discloses no PRIMA FACIE case, whether or not the trade union which is the responding party does so, or the extent to which it does so. There is certainly nothing improper in Chrysler's motion in that respect in this case.

11 No one has the absolute right to have a complaint under section 96 of the Act, whether it alleges a breach of section 74 or some other unfair labour practice provision, adjudicated on its merits. The Act clearly gives the Board a broad discretion with respect to whether or not to inquire into the complaint, like this one, which alleges a violation of the Act. Of course, it is appropriate for the Board to exercise this discretion with caution and only in clear cases. Further, this discretion must be exercised judicially, with due regard to the circumstances and labour relations considerations in a particular case.

12 Excessive unexplained delay in filing or proceeding with an application is one basis upon which the Board may decline to inquire into an application in the exercise of its discretion under section 96 (the Ontario Divisional Court has confirmed the Board's jurisdiction in that respect in RE DHANOTA AND UAW LOCAL 1285, (1983) 42 OR (2d) 72, an application for judicial review of the Board's decision in SHELLER-GLOBE OF CANADA LIMITED, [1992] OLRB Rep. Jan. 113). It has long been accepted that delay is inimical to labour relations. To put it in another way, labour relations delayed are labour relations defeated and denied (JOURNAL PUBLISHING CO. OF OTTAWA LTD., [1977] 1 ACWS 817 (Ont. Court of Appeal)), and delay in labour relations matters often works unfairness and hardship (RE UNITED HEADWEAR AND BILTMORE - STETSON (CANADA) INC., (1983) 41 OR (2d) 287; and see also DAYCO (CANADA) LTD. v. NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNIONS OF CANADA (CAW-CANADA) ET AL., [1993] 2 SCR 230 (Supreme Court of Canada)). Whenever the resolution of a labour relations dispute is delayed, some prejudice is likely to exist. The Board and the courts have long recognized that the speedy resolution of a labour relations dispute is both in the public interest and of importance to those directly involved. Consequently, there is an expectation that allegations that the LABOUR RELATIONS ACT

or related legislation has been contravened will be made and pursued within a reasonable time, which time is generally measured in months rather in years, so that the allegations can be dealt with in a timely manner which is fair to all concerned.

13 However, the fact that delays in resolving labour relations disputes can create tension and interfere in the proper functioning of a collective bargaining relationship, and that delay is presumptively prejudicial, is not necessary determinative of a motion for dismissal because of delay. The rights of affected individuals, such as section 74 applicants, must also be considered. Accordingly, the Board's response to motions seeking dismissal of applications under section 96 of the Act on the basis of delay is not a mechanical one. It is neither possible nor appropriate to draw up an exhaustive list of factors which the Board will consider when dealing with the motion to dismiss on the basis of delay. Each situation must be examined and determined according to the merits of a particular case, although the onus is on an applicant to explain what appears to be ,inordinate delay in making or pursuing a particular complaint (see THE CORPORATION OF THE CITY OF MISSISSAUGA, [1982] OLRB Rep. March 420; SHELLER-GLOBE OF CANADA LIMITED, SUPRA, CENTRAL STAMPINGS LIMITED, [1984] OLRB Rep. Feb. 215; GEORGE HINKSON, [1987] OLRB Rep. Oct. 1246; JOHN KOHUT, [1991] OLRB. Dec. 1367)

14 But speed is not the only objective, and justice and fairness require that someone who may be aggrieved have a reasonable opportunity to recognize this, to formulate a position and plan of action, seek legal advice or representation, and to actually plead and file a complaint. While there is no fixed rule, in cases which involve a loss of employment (particularly in an economy in which jobs are hard to come by), the rule of thumb developed by the Board is that it will generally not dismiss a complaint which makes out a PRIMA FACIE case on the basis of delay which is less than one year long, except where a responding party demonstrates actual prejudice and there is no satisfactory explanation for the delay. As a general matter, where the delay asserted is less than one year, the onus is on the responding party to demonstrate actual prejudice (or perhaps some other good reason) sufficient to justify dismissing a complaint without a hearing on its merits. But where the delay is more than one year, the onus is on the applicant to provide a satisfactory explanation for it. At that point it becomes incumbent upon an applicant to provide a good reason for the Board to exercise its discretion in favour of entertaining the application or complaint.

15 In approaching issues of delay in this manner, the Board attempts to balance the need to have labour relations dispute resolved in an expeditious manner against the rights of parties who may be inexperienced or unsophisticated in legal matters or unaware of their rights, to seek advice and to formulate and file a complaint, and also to give parties who appear to have delayed unduly an opportunity to explain the delay.

16 In dealing with this motion, which is made by the responding trade unions and Chrysler notwithstanding that only the latter has made written representations in addition to those contained in the original pleadings, I must assume that the applicant's assertions are true and provable. However, I need not accept the applicant's conclusions or assertions of law.

III - DELAY

17 Turning first to the issue of delay, it is important to remember that the delay in issue is the delay in filing this complaint against the responding trade unions, and not whether the time for filing a claim for sickness and disability benefits has expired or any delay in that respect, although it may be appropriate to consider these as factors in determining whether the applicant's delay in filing this complaint was excessive, unreasonable and without satisfactory explanation.

18 The following are the facts which are pertinent to the delay issue:

(a) The applicant became an employee of Chrysler in May 1974.
(b) By letter dated August 10, 1992, the applicant's employment was terminated effective August 5, 1992.
(c) On or about August 20, 1992, CAW Local 1459 filed a grievance alleging that the termination was unjust, and seeking "full redress and immediate reinstatement".
(d) Chrysler denied the grievance which then proceeded to the grievance procedure to the fourth step where, on May 12, 1993, the grievance was "withdrawn by Union without prejudice".
(e) At all material times, the responding trade unions or either of them held bargaining rights for a bargaining unit of Chrysler employees as described in the collective agreement between them, and the applicant was an employee in the bargaining unit at the time of his discharge.
(f) This complaint was filed with the Board on April 18, 1997.

None of these facts are in dispute. In addition, I accept the following facts as true and provable for the purposes of this decision;

(g) For some time prior to and at the time of this termination, the applicant was suffering from mental and physical illnesses. By mid 1995, he had become, and is expected to remain, legally blind.
(h) The applicant discussed his claim for disability benefits with counsel in late November 1993.
(i) On or about December 8, 1993, Chrysler was notified by the applicant of his sickness and disability claim.
(j) In August 1994, the applicant advised AETNA Benefits Management Inc. (which issued Group Policy No. 3817 under which the applicant claims benefits) of his claim and of his December 8, 1993 letter to Chrysler in that respect.
(k) The applicant commenced a civil action claiming sickness and disability benefits against Chrysler

and the various insurer entities on May 31, 1995.

(l) On November 24, 1995, Chrysler advised the applicant of the Supreme Court of Canada decision in WEBER v. ONTARIO HYDRO, [1995] 2 SCR 929 (which decision had been released on June 29, 1995) and took the position that the applicant was required to seek his remedy, if any, under the grievance procedure in the collective agreement. On November 28, 1995, Chrysler further advised that it was deciding whether to seek a stay of the applicant's civil action or to defend it.

(m) On December 5, 1995, the applicant advised Chrysler and CAW Local 1459 that he wished to grieve his entitlement for sickness and disability benefits. He did this by way of a two-page "Notice of Grievance" in which he reviewed what he considered to be the points and facts in which he concluded by saying that:

I make this grievance for the purpose of preserving my claim and my right, if applicable, to grieve and without prejudice to my position that I have properly commenced and I am entitled to proceed with an action issued in the Ontario Court (General Division) at Brampton, Ontario as No. C32784/95.

The union did not respond to this or to the subsequent written inquiries on March 6, and April 11, 1996.

(n) In the meantime, on December 15, 1995, the applicant was injured in a motor vehicle accident. As a result of his injuries, he was hospitalized until May 8, 1996.

(o) On April 30, 1996, Chrysler wrote to the applicant that it intended to oppose his entitlement to proceed with his civil action, but the applicant was unaware of this until June 5, 1996 and he, through counsel, did not actually receive a copy of this letter until July 3, 1996. The applicant has included a copy of this letter in the materials filed with his application. In addition to taking the position as aforesaid, Chrysler also specifically addressed and denied the applicant's December 5, 1995 "Notice of Grievance".

(p) Counsel for the applicant had difficulty contacting him until August 26, 1996, and was unable to obtain a copy of the collective agreement from him until November 15, 1996. (I note that the materials filed by the applicant with his application include a letter dated March 29, 1995 from CAW Local 1459 to counsel for the applicant which bears a "received" stamp of March 31, 1995, in response to a March 2, 1995 letter from counsel indicating that the following documents were included:

(i) a copy of the discharge letter dated August 50, 1992;

(ii) the discharge grievance filed by the trade union;

(iii) documents relating to the grievance

proceedings;

(iv) the grievance disposition document indicating that the grievance had been withdrawn without

prejudice; and

(v) a copy of the collective agreement in effect at that time.)

(q) After counsel obtained and reviewed a copy of the collective agreement, a request to grieve dated February 3, 1997 was filed by the applicant, through counsel, with CAW Local 1459.

(r) By letter dated March 13, 1997, the responding trade unions refused the applicant's request.

19 Normally, the time for calculating the period of delay begins when the matter complained of arose. In this case, the matter complained of is the responding trade union's decision not to pursue the applicant's discharge grievance past the fourth stage of the grievance procedure to arbitration, and the fact it did not file, or assist the applicant in filing, a claim for sickness and disability benefits, or a grievance in that respect. Accordingly, for purposes of this complaint to the Board, the time does not run from the state of discharge or when a sickness or disability claim could first have been made (which was at about the same time). The time begins to run from the point at which the applicant was aware, or

reasonably to have been aware that the responding trade unions were not proceeding with the grievances which he now seeks to have the Board require them to do.

20 Whatever the applicant's knowledge or state of mind was before that time, it is readily apparent that he was aware of the situation; namely, that he had been discharged, that his discharge grievance was not proceeding and that he might have a claim for disability benefits under the collective agreement, when he sought and apparently retained counsel in November 1993.

21 Although the applicant pleads that the withdrawal of the grievance and the circumstances of the withdrawal were not communicated to him until March 31, 1995, it is inconceivable that he did not know that the grievance had been withdrawn, or at least that it was not going anywhere, by November 1993. Even if he did not know, he ought to have known. In his December 8, 1993 letter to Chrysler, counsel referred to the applicant as a "former employee" and "specifically raised the disability benefits issue. Further, the applicant's real objective is, and always has been, to obtain disability benefits. On his own pleadings, the applicant knew of the basis for a disability benefits grievance when he met with counsel in late November 1993. He should have realized then, or shortly thereafter, as he does now, that the theory which he has been pursuing requires that he be successful on his discharge grievance first. And yet it appears that neither the applicant nor counsel make any inquiries, as they reasonably ought to have done, regarding the discharge grievance or the possibility of the disability benefits grievance at that time, or at all, until March 1995, some 15 months later. No reason for this failure to make inquiries in this respect has been suggested. It is quite appropriate for a person to show some patience and to wait for things to develop or to be advised by his trade union with respect to his status of a grievance. However, it is quite inappropriate for a person to demonstrate no interest and make no inquiries for an extended period, particularly where the person has counsel and the issues are reasonably clear and obviously serious.

22 I am satisfied that it is appropriate to calculate the delay in this case as beginning in late November 1993 when the applicant knew, or reasonably ought to have known that his discharge grievance have been withdrawn, which is more than three years before this complaint was filed. In the alternative, even on his own pleadings taken at the very highest, the latest that the applicant knew that the discharge grievance had been withdrawn was in late March 1995. That is the delay of over two years. In either case; that is, whether it is three years or two years, the delay is undue and requires explanation.

23 I am not satisfied that the applicant has provided an acceptable explanation for this delay. In essence, there are four inter-related parts to the applicant's explanation. I find it unnecessary to describe these in detail. In summary these are:

1. The applicant was pursuing a civil remedy.
2. The applicant or counsel had difficulty in obtaining certain relevant documents.
3. Under the disability benefits plan the applicant has four years to begin legal proceedings to recover benefits.
4. The applicant did not become aware of the Supreme Court of Canada's decision in WEBER, SUPRA, until counsel for Chrysler brought this to his lawyer's attention in November 1995.

24 The fact that the applicant was pursuing a remedy in another forum is no excuse for not bringing this complaint earlier. There was nothing to prevent the applicant from pursuing a complaint before the Board concurrently. Indeed, insofar as the defendants in the civil action are Chrysler and the insurer entities, while this complaint is against the responding trade unions, and the remedies which he requests and which he can obtain are quite different; it would probably have been advisable to do so - if the applicant really believes he has a complaint against the trade unions.

25 Nor do any difficulties in obtaining documents provide any excuse in the circumstances. On the face of this application, when the applicant asked for documents, either of the trade unions, Chrysler or the insurer, he got them within a reasonable period of time. Any difficulties between the applicant and his own lawyer in that respect do not mitigate the delay. It appears that those difficulties were not such that counsel had any concern for the applicant's ability to instruct him or to take advice, and they should have dealt with that problem as between themselves. Further, diligent pursuit of the civil action, or a timely filing of this complaint would have quickly resolved any real production problems.

26 It is not at all clear that the applicant does (or did) have four years to institute legal proceedings to recover the benefits he seeks. But this Board is neither the Court where the civil action appears to still be pending, nor a tribunal which might have jurisdiction to determine that point. Not only is that question not the focus of this complaint, the Board would not answer it, or decide the merits of the discharge or disability grievances in this complaint. The focus of this complaint is on the manner in which the responding trade unions or either of them represented the applicant with respect to the termination of his employment and his claim for disability benefits. Further, to the extent that this complaint can be said to constitute a legal proceeding for the recovery of the benefits, the applicant is out of time even if he is correct in his interpretation of the provisions of the insurance plan. On his own pleadings, the applicant's disability commenced at or before the date his employment was terminated by Chrysler in August 1992, which he knew as early as November 1993, and which is more than four years before this complaint was filed.

27 Nor does the time when the WEBER, SUPRA, decision was brought to counsel's attention excuse the delay. In that decision, the Supreme Court of Canada held that to the extent of the benefits of a sickly plan are part of a collective agreement, and the conduct complained of essentially concerns a dispute arising out of the content of the agreement or an allegation of unfair treatment under the agreement, grievance arbitrators have the exclusive jurisdiction to deal with the subject matter of the dispute, which jurisdiction includes dealing with the Canadian Charter of Rights and Freedoms and granting Charter remedies if appropriate.

28 Although recent, this decision is hardly a startling revelation. The Courts have long held that grievance arbitrators have exclusive jurisdiction when the issues raised and remedies sought are essentially matters of collective agreement application or interpretation: see, for example, GENERAL MOTORS OF CANADA LTD. v. BRUNET, [1977] 2 SCR 537; Shell Canada Ltd. v. United Oil Workers of Canada, [1980] 2 SCR 181; ST. ANNE NACKAWIC PULL & PAGER CO. v. CANADIAN PAGER WORKERS UNION, LOCAL 219, [1986] 1 SCR 704; and GENDRON v. SUPPLY AND SERVICES UNION OF PUBLIC SERVICE ALLIANCE OF CANADA, LOCAL 50057, [1990] 1 SCR 1298. In any event, on the applicant's pleadings, WEBER, SUPRA, was brought to his attention in late November 1995, and this complaint was not filed until more than 16 months later.

29 Finally, the applicant has made much of the fact that his discharge grievance was withdrawn "without prejudice". I find it difficult to accept the applicant's assertion that this meant that the grievance could be reinstated at any time. In labour relations, when a grievance is withdrawn, whether without prejudice or not, it is spent. Even if there are not time limits in the collective agreement which would preclude bringing it again, it cannot be refiled or "reinstated". It may be withdrawn without prejudice to other timely grievances, or without prejudice to the ability to seek relief elsewhere or to raise issues which could have been raised in the withdrawn grievance, but the particular grievance is dead. Nor do I understand what difference it makes that the withdrawal is without prejudice to the applicant as well as to Chrysler and the trade unions. In any case, and more to the point, the "without prejudice" can only apply to the grievance and not to the filing of a complaint against the trade union. And even if it could, it would not lase for ever.

30 In the result, I am satisfied that it is not appropriate for the Board to inquire further into this complaint because of the undue delay in filing it.

IV - PRIMA FACIE CASE

31 In the alternative, I am not satisfied that the applicant has even now made out a PRIMA FACIE case for this complaint.

32 The LABOUR RELATIONS ACT, 1995 provides that once the trade union has obtained bargaining rights, it has the exclusive right to speak for the employees it represents in dealing with the employer with respect to matters relating to their employment. With this right comes the obligation, imposed by section 74 of the Act, to represent all of the employees of whom it is the exclusive bargaining agent in a manner which is not arbitrary, discriminatory or in bad faith. In essence, section 74 establishes what is commonly known as "a duty of fair representation".

33 Complaints that a trade union has failed to represent an employee in a manner consistent with its obligations under the Act, and specifically section 74, usually involve a refusal by the union either to file a grievance which the employee wishes to pursue, or if a grievance was filed, a refusal to pursue it to arbitration. However, the duty of fair representation established by section 74 does not require a trade union to file a grievance or to take a grievance to arbitration merely because the employee concerned wishes it too. Unless the collective agreement specifically provides otherwise, it is the trade union which is the party to the collective agreement which has care and control of the grievance in arbitration process under it (on its side of the collective bargaining relationship). Accordingly, it is the trade union which has the exclusive authority, and the obligation, to decide, upon a fair consideration of the relevant factors and no irrelevant ones, whether a grievance will be filed or taken to arbitration.

34 The mere fact that a trade union has refused to file a grievance, or has failed to pursue a grievance to arbitration, does not by itself constitute even a PRIMA FACIE breach of section 74. As the Board pointed out in GEORGE LEE, [1994] OLRB Rep. August 1009, a union must give a grievance honest consideration, but having done so, the union is entitled to settle or withdraw the grievance as it considers appropriate. Because settlement is always preferable to litigation, particularly in labour relations matters where there is an ongoing collective bargaining relationship, most grievances can and should be settled. Whatever the wishes of an employee, it is generally inappropriate to "fight regardless of the odds", or to seek some sort of revenge, or to pursue a matter merely because an employee insists on his/her "day in Court".

35 In CANADIAN MERCHANTS SERVICE GUILD v. GUY GAGNON, [1984] 1 SCR 509, (at page 527), the Supreme Court of Canada had occasion to review the principles applicable to fair representation cases as follows:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly after a thorough study of the grievance and the case, taking into account the significance of the grievance and of the consequences for the employee under one hand and the legitimate interests of the union on the

other. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine, and not merely apparent, undertaken with integrity and competence without serious or major negligence and without hostility towards the employee.

This offers a useful set of general guidelines against which a trade union's conduct can be assessed, and also reflects "the Board's approach to fair representation cases (see, for example, WILLIAM HILL JR., [1995] OLRB Rep. Jan. 21; MARCIA ROBERTSON, [1990] OLRB Rep. 886; BALFORD LINDSAY, [1989] OLRB Rep. March 264; DON ROE et al., [1986] OLRB Rep. Oct. 1429; Jeanne St. Pierre, [1986] OLRB Rep. June 883; CATHERINE SYME, [1983] OLRB Rep. May 775).

36 Honest mistakes, errors in judgement, and innocent misunderstandings do not constitute conduct which is prohibited by section 74. Nor does the fact that the Board (or some other labour relations expert) might have arrived at a different conclusion necessarily suggest a breach of the duty of fair representation by a trade union. A trade union's approach or decision(s) with respect to a grievance or a proposed grievance must be more than merely "wrong": it must be arbitrary, discriminatory or in bad faith.

37 There is a great deal of Board jurisprudence which deals with the duty of fair representation, both generally and specifically with respect to the meaning of the words "arbitrary", "discriminatory" and "in bad faith". I find it unnecessary to engage in a lengthy analysis or review of that jurisprudence. Suffice to say that:

(a) "arbitrary" means conduct which is capricious, implausible or unreasonable, often demonstrated by a consideration of irrelevant factors or a failure to consider all relevant factors;
(b) "discriminatory" is broadly defined to include situations in which a trade union distinguishes between or treats employees differently without a cogent reason or labour relations basis for doing So;
(c) "bad faith" refers to conduct motivated by hostility, malice, ill-will, dishonesty, or improper motivation.

38 The manner in which the applicant alleges that the responding trade unions have breached section 74 in this case is pleaded in paragraphs 26 to 28 of Schedule "A" to the complaint. His allegations come down to this: the trade unions withdrew the grievance without notifying the applicant in writing and the decision to withdraw the discharge grievance was based on "error or misapprehension".

39 It is not a breach of section 74 to not communicate with a grievor in writing, or to make an error or otherwise be "wrong". The question is whether the trade unions have acted in a manner which can arguably characterized as arbitrary, discriminatory or in bad faith. What did the trade unions allegedly do or fail to do in that respect?

40 I am not satisfied that the applicant has pleaded anything which suggests that the trade unions or either of them has acted in a manner which is even arguably arbitrary, discriminatory or in bad faith. It is not enough to say that the applicant has suffered, as he undoubtedly has, or to baldly allege a breach of section 74. The onus is on the applicant to plead with particularity the manner in which section 74 has been breached, and I am not satisfied that he has done so.

V - CONCLUSION

41 In the result this complaint is dismissed both because of the undue delay in filing it, and because it discloses no PRIMA FACIE case.

cp/s/das

Case Name:
Mississauga (City)

Kostantinos Iaonnidis, Applicant v. Amalgamated Transit Union, Local 1572, Responding Party v. Corporation of the City of Mississauga, Transportation and Works Department, Transit Division, Intervenor

[2005] O.L.R.D. No. 152

File No. 2287-04-U

Ontario Labour Relations Board

BEFORE: Marilyn Silverman, Vice-Chair

January 18, 2005.

(10 paras.)

DECISION OF THE BOARD

1 This is an application filed under section 96 of the LABOUR RELATIONS ACT, 1995 (the "Act") claiming a breach of section 74 of the Act.

2 By decision dated November 4, 2004, the applicant was asked to provide an explanation for the delay in filing this application. Those submissions were received in accordance with the time limit set by the Board and are as follows.

3 The applicant says that he asked the union to grieve his termination. The applicant says that the termination arose as a result of a disability. He was then advised of an offer of settlement made by the intervenor, which he contends the responding union refused to obtain in writing for him.

4 The applicant filed a civil action against Maritime Life Insurance Company for long-term disability benefits, which action was settled in 2003. The separate issue of his extended health and medical benefits was unresolved. Those medical benefits are what the applicant seeks in this application.

5 In his submissions, the applicant provides yet additional details as to the nature of the settlement of his long-term disability claim and the activities he engaged in in pursuing his claims. Nowhere in the narrative has he responded to the reason for the delay other than through the inference that he has been actively dealing with a variety of issues and proceedings in furtherance of his claim for extended health benefits.

6 Specifically, there is nothing to explain or respond to the facts set out in paragraph 5 of the November 4, 2004 decision herein stated as follows:

> 5. There does appear to be a substantial period of delay inherent in this application. Even on the applicant's facts, he says that by the summer of 2003 he was advised he would not be reinstated. It should have been clear to the applicant by the summer of 2003 that any claim he had against the union had crystallized. His claim was not filed for at least a year after that time. The time line becomes greater than that if it runs from the date of termination or the date when the settlement offer was made and rejected, both of which occurred in December of 2002.

7 The applicant has provided a copy of an e-mail from December 2003 which the employer again reiterates that it will not reinstate the applicant nor his medical benefits. The applicant said he never knew where he stood in respect of his grievance and found out in 2004 that the grievance procedure had never been formally undertaken.

8 The only reason advanced for the delay from the additional material filed by the applicant is that he was involved in pursuing other avenues in dealing with his claim for extended benefits. The applicant says he asked his union to file a grievance on his behalf in December 2002 and only inquired into its status again in the summer of 2004. If in fact, under section 74, an applicant seeks to obtain a remedy against the union for acting in a manner that is arbitrary, discriminatory or in bad faith it must do so with reasonable diligence. It is inherently unfair to the union to have an applicant pursue and fail in obtaining relief in other forums and then decide to proceed with a section 74 complaint after a substantial period of time has elapsed. That unfairness is recognized in the Board's jurisprudence and in the CHRYSLER CANADA INC. [1997] O.L.R.D. No. 2605, August 7, 1997 decision described in paras. 22 and 24 as follows:

> ...
>
> 22. I am satisfied that it is appropriate to calculate the delay in this case as beginning in late November 1993 when the applicant knew, or reasonably ought to have known that his discharge grievance have been withdrawn, which is more than three years before this complaint was filed. In the alternative, even on his own pleadings taken at the very highest, the latest that the applicant knew that the discharge grievance had been withdrawn was in late March 1995. That is the delay of over two years. In either case; that is, whether it is three years or two years, the delay is undue and requires explanation.
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> ...
>
> 24. The fact that the applicant was pursuing a remedy in another forum is no excuse for not bringing this complaint earlier. There was nothing to prevent the applicant from pursuing a complaint before the Board concurrently. Indeed, insofar as the defendants in the civil action are Chrysler and the insurer entities, while this complaint is against the responding trade unions, and the remedies which he requests and which he can obtain are quite different; it would probably have been advisable to do so - if the applicant really believes he has a complaint against the trade unions.

9 Here, there is no explanation for the delay other than the pursuit of other remedies. That is not sufficient and I am satisfied that it is not appropriate for the Board to inquire into this complaint because

of the undue delay in filing it.

10 For the reasons expressed herein and in the earlier decision of the Board, this application is dismissed.

cp/e/qlesm

Limitations Act, 2002

S.O. 2002, CHAPTER 24
SCHEDULE B

Consolidation Period: From October 25, 2010 to the e-Laws currency date.

Last amendment: 2010, c. 16, Sched. 4, s. 27.

Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

Demand obligations

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made. 2008, c. 19, Sched. L, s. 1.

Same

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004. 2008, c. 19, Sched. L, s. 1.

William (Billy) Solosky (*Plaintiff*) *Appellant*;

and

Her Majesty The Queen (*Defendant*) *Respondent.*

1979: June 13; 1979: December 21.

Present: Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Prisons — Censorship of prisoners' mail — Right of prison inmates to communicate in confidence with their solicitors — Solicitor-client privilege — Inmate failing to establish entitlement to a declaration — Penitentiary Service Regulations, SOR/62-90 — Canadian Bill of Rights, 1960(Can.), c. 44, ss. 1(b), (d), 2(c)(ii).

The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court of Canada for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened". The action was dismissed and on appeal to the Federal Court of Appeal the pleadings were amended to request a declaration " . . . that henceforth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The appeal failed, and at the opening of the appeal in this Court counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the Director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor David Cole, and to mail written by the Plaintiff to his solicitor David Cole, is not authorized by law".

In accordance with the *Penitentiary Act*, R.S.C. 1970, c. P-6, and Regulations thereunder, an institutional head of a penitentiary may order censorship of inmate correspondence to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. The main ground upon which the appellant rested his case was solicitor-client privilege.

Held: The appeal should be dismissed.

William (Billy) Solosky (*Demandeur*) *Appelant*;

et

Sa Majesté La Reine (*Défenderesse*) *Intimée.*

1979: 13 juin; 1979: 21 décembre.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Pigeon, Dickson. Beetz, Estey, Pratte et McIntyre.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Prisons — Censure du courrier des prisonniers — Droit des détenus de communiquer en confidence avec leurs avocats — Privilège entre avocat et client — Détenu ne réussissant pas à établir son droit à un jugement déclaratoire — Règlement sur le service des pénitenciers, DORS/62-90 — Déclaration canadienne des droits, 1960 (Can.), chap. 44, art. 1b), d), 2c)(ii).

L'appelant, détenu à l'institution de Millhaven, a intenté une action en Cour fédérale du Canada afin d'obtenir un jugement déclaratoire portant que «la correspondance valablement identifiée comme adressée à son avocat et reçue de ce dernier soit désormais considérée comme communication privilégiée et soit remise aux destinataires concernés sans être ouverte». L'action a été rejetée et en appel à la Cour d'appel fédérale, les procédures écrites ont été modifiées afin d'obtenir un jugement déclaratoire portant « . . . que désormais, toute la correspondance valablement identifiée comme échangée entre l'avocat et son client soit remise aux destinataires concernés sans être ouverte». L'appel a échoué et au début de l'audition devant cette Cour, l'avocat de l'appelant a demandé que le redressement requis dans la déclaration soit remplacé par un jugement déclaratoire portant que l'ordre du directeur de l'institution de Millhaven d'ouvrir et de lire le courrier de l'appelant «quand il a été appliqué au courrier provenant de son avocat, Me David Cole, et à celui expédié par le demandeur à son avocat, Me David Cole, n'est pas légal».

Conformément à la *Loi sur les pénitenciers*, S.R.C. 1970, chap. P-6, et à son règlement d'application, le chef d'une institution pénitentiaire peut ordonner la censure de la correspondance des détenus selon les modalités tenues pour nécessaires ou utiles à la réadaptation du détenu ou à la sécurité de l'institution. Le moyen principal sur lequel l'appelant se fonde est le privilège entre avocat et client.

Arrêt: Le pourvoi est rejeté.

Contrary to the views expressed by the Court below, the important issues raised in this case should not be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

There could be no doubt that there was a real, and not a hypothetical, dispute between the parties. The declaration sought was a direct and present challenge to the censorship order of the Director of Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the Director's continuing order. Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case. The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any such determination relates to correspondence not yet written. However poorly framed the prayer for relief may be, even as twice amended, the present claim was clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege.

Recent case law has taken the traditional doctrine of solicitor-client privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. However, while there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, the concept has not been stretched far enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. The appellant's suggestion that privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property", was not accepted. Without the evidentiary connection, which the law now requires, the privilege cannot be invoked.

Contrairement à l'opinion exprimée par la cour d'instance inférieure, les questions importantes soulevées dans cette affaire ne doivent pas dépendre de l'énoncé particulier de la demande de redressement, ni de l'argument que la question est hypothétique.

Il ne fait aucun doute qu'il existe entre les parties un litige réel et non un litige hypothétique. Le jugement déclaratoire sollicité attaque directement et maintenant l'ordre de censure du directeur de l'institution de Millhaven. Cet ordre, tant qu'il reste en vigueur, du passé au présent et dans l'avenir, est contesté. Le fait qu'un jugement déclaratoire accordé aujourd'hui ne puisse réparer les maux passés ou puisse toucher aux droits futurs, ne prive pas le recours de son utilité potentielle dans la solution du litige découlant de l'ordre permanent du directeur. Une fois admis qu'il existe un litige réel et qu'accorder un jugement est discrétionnaire, alors la seule autre question à résoudre est de savoir si le jugement déclaratoire est à même de régler, de façon pratique, les questions en l'espèce. Déterminer le droit d'un détenu de correspondre librement et en confidence avec son avocat est d'une importance pratique considérable même si, de l'aveu général, pareille détermination se rapporte à de la correspondance non encore écrite. Aussi mal rédigée que puisse être la demande de redressement, même avec ses deux modifications, la présente réclamation vise clairement les procédures de traitement du courrier en prison et le recours à cet égard au privilège entre avocat et client.

Une jurisprudence récente a placé la doctrine traditionnelle du privilège entre avocat et client sur un plan nouveau. Le privilège n'est plus considéré seulement comme une règle de preuve qui fait fonction d'écran pour empêcher que des documents privilégiés ne soient produits en preuve dans une salle d'audience. Les tribunaux, peu disposés à restreindre ainsi la notion, ont élargi son application bien au-delà de ces limites. Cependant, même s'il ne fait aucun doute que les tribunaux canadiens s'orientent vers une notion plus large du privilège entre avocat et client, la notion n'a pas été suffisamment étendue pour donner gain de cause à l'appelant. Bien qu'il y ait eu un mouvement qui tende à éloigner le privilège entre avocat et client de la règle de preuve qui ne peut être invoquée qu'au moment où l'on tente de produire des documents privilégiés, cet éloignement des restrictions temporelles rigides ne va pas aussi loin que le prétend l'appelant. L'allégation de l'appelant que le privilège est maintenant reconnu comme un «principe fondamental» plus justement qualifié de «règle de propriété», n'est pas acceptée. A défaut du lien avec la preuve, actuellement exigé en droit, le privilège ne peut être invoqué.

The statutory disciplinary régime, described in this case, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant was seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

In aid of his main submission, appellant argued faintly that the *Penitentiary Service Regulations* and Commissioner's Directive should not be construed and applied so as to abrogate, abridge, or infringe any of the rights or freedom recognized in the *Canadian Bill of Rights* by s. 1(b) (the right of the individual to equality before the law and the protection of the law), 1(d) (freedom of speech) and 2(c)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). This argument also failed.

One could depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law. In that context, the Court was faced with the interpretation of the *Penitentiary Service Regulations* and Commissioner's Directive No. 219.

It was submitted there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution. The third such interpretation was as follows: "he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege". This alternative represents that interpretation of the scope of the Regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

The "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband;

Le régime disciplinaire établi par la législation, et décrit dans cette affaire, ne déroge pas à la doctrine de *common law* portant sur le privilège entre avocat et client, dans sa conception actuelle, mais l'appelant cherche en l'espèce quelque chose qui va bien au-delà des limites du privilège malgré l'élargissement que lui ont donné les décisions récentes.

A l'appui de son allégation principale, l'appelant a fait timidement valoir que le *Règlement sur le service des pénitenciers* et la directive du Commissaire ne doivent pas être interprétés et appliqués de manière à supprimer, restreindre ou enfreindre l'un quelconque des droits ou libertés reconnus dans la *Déclaration canadienne des droits* aux termes de l'al. 1b) (le droit de l'individu à l'égalité devant la loi et à la protection de la loi), de l'al. 1d) (la liberté de parole) et du sous-al. 2c)(ii) (le droit d'une personne arrêtée ou détenue de retenir et constituer un avocat sans délai). Cet argument échoue également.

On peut s'écarter de la notion actuelle du privilège et aborder l'affaire dans une optique plus large, savoir, (i) le droit de communiquer en confidence avec son conseiller juridique est un droit civil fondamental, fondé sur la relation exceptionnelle de l'avocat avec son client et (ii) une personne emprisonnée conserve tous ses droits civils autres que ceux dont elle a été expressément ou implicitement privée par la loi. Dans ce contexte, la Cour fait face à l'interprétation du *Règlement sur le service des pénitenciers* et de la directive du Commissaire nº 219.

On a fait valoir trois interprétations possibles de la portée des art. 2.17 et 2.18 du Règlement qui peuvent déterminer l'étendue du pouvoir du chef d'une institution face à une enveloppe qui paraît provenir d'un avocat ou lui être adressée, dans les cas où il a des motifs de croire que la transmission sans restriction et sans examen du courrier adressé à un détenu en particulier ou envoyé par ce dernier présente un risque pour la sécurité et la sûreté de l'institution. La troisième de ces interprétations est qu'«il peut ordonner que l'enveloppe soit ouverte et examinée dans la mesure minimale jugée nécessaire pour établir si son contenu relève effectivement du privilège entre avocat et client». C'est l'interprétation de la portée du Règlement qui donne à un détenu le maximum de possibilités de communiquer avec son avocat par courrier, tout en étant compatible avec le maintien de la sécurité de l'institution.

La «mesure minimale jugée nécessaire pour établir si son contenu relève effectivement du privilège entre avocat et client» doit être interprétée de manière que (i) le contenu d'une enveloppe puisse être inspecté pour

(ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the *bona fides* of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication.

Per Estey J.: As to the above item (iii) in the catalogue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege", any procedure adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law.

[*Mellstrom v. Garner*, [1970] 1 W.L.R. 603, distinguished; *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438; *Pyx Granite Co. v. Ministry of Housing and Local Government*, [1958] 1 Q.B. 554; *Pharmaceutical Society of Great Britain v. Dickson*, [1970] A.C. 403; *Re Director of Investigation and Research and Shell Canada Ltd.* (1975), 22 C.C.C. (2d) 70; *Greenough v. Gaskell* (1833), 39 E.R. 618; *Anderson v. Bank of British Columbia* (1876), 2 Ch. 644; *Re Director of Investigation and Research and Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745; *Re Presswood et al. and International Chemalloy Corp.* (1975), 65 D.L.R. (3d) 228; *Re Borden and Elliot and The Queen* (1975), 30 C.C.C. (2d) 337; *Re BX Development Inc. and The Queen* (1976), 31 C.C.C. (2d) 14; *Re B and The Queen* (1977), 36 C.C.C. (2d) 235, referred to.]

APPEAL from a judgment of the Federal Court of Appeal[1], dismissing an appeal from a judgment of Addy J. who dismissed the appellant's application for a declaration. Appeal dismissed.

Ronald Price, Q.C., and *David P. Cole*, for the appellant.

[1] [1978] 2 F.C. 632, 86 D.L.R. (3d) 316.

déceler la contrebande, (ii) dans des cas limités, la communication puisse être lue pour s'assurer qu'elle renferme effectivement une communication à caractère confidentiel entre l'avocat et son client aux fins de consultation ou d'avis juridiques; (iii) la lettre ne soit lue que s'il existe des motifs raisonnables et probables de croire le contraire et, dans ce cas, uniquement dans la mesure nécessaire pour déterminer la bonne foi de la communication; (iv) le fonctionnaire compétent du pénitencier qui examine l'enveloppe, après s'être assuré que cette dernière ne renferme rien qui enfreigne la sécurité, ait l'obligation légale de garder la communication confidentielle.

Le juge Estey: Quant au point (iii) susmentionné et figurant dans la liste des considérations afférentes à l'interprétation de la phrase «dans la mesure minimale jugée nécessaire pour établir si son contenu relève effectivement du privilège entre avocat et client», toute procédure visant l'examen de lettres échangées entre un avocat et son client devrait, lorsque c'est raisonnablement possible, reconnaître le privilège entre avocat et client depuis longtemps ancré dans nos principes de droit.

[Jurisprudence: distinction faite avec l'arrêt *Mellstrom v. Garner*, [1970] 1 W.L.R. 603; *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438; *Pyx Granite Co. v. Ministry of Housing and Local Government*, [1958] 1 Q.B. 554; *Pharmaceutical Society of Great Britain v. Dickson*, [1970] A.C. 403; *In re le Directeur des enquêtes et recherches et Shell Canada Ltd.* (1975), 22 C.C.C. (2d) 70; *Greenough v. Gaskell* (1833), 39 E.R. 618; *Anderson v. Bank of British Columbia* (1876), 2 Ch. 644; *Re Director of Investigation and Research and Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745; *Re Presswood et al. and International Chemalloy Corp.* (1975), 65 D.L.R. (3d) 228; *Re Borden and Elliot and The Queen* (1975), 30 C.C.C. (2d) 337; *Re BX Development Inc. and The Queen* (1976), 31 C.C.C. (2d) 14; *Re B and The Queen* (1977), 36 C.C.C. (2d) 235.]

POURVOI à l'encontre d'un arrêt de la Cour d'appel fédérale[1] qui a rejeté un appel interjeté du jugement du juge Addy, qui avait rejeté la demande de jugement déclaratoire de l'appelant. Pourvoi rejeté.

Ronald Price, c.r., et *David P. Cole*, pour l'appelant.

[1] [1978] 2 C.F. 632, 86 D.L.R. (3d) 316.

E. Bowie and *J.-Paul Malette*, for the respondent.

The judgment of Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Pratte and McIntyre JJ. was delivered by

DICKSON J.—This case concerns the censorship of prisoners' mail and the right of an inmate of a federal penitentiary to communicate in confidence with his solicitor. The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened".

I

Prison Disciplinary Regime

The penitentiary authorities rely upon the following statutes and Regulations as authorizing restrictions upon the personal correspondence of prison inmates. Section 660(1) of the *Criminal Code*, R.S.C. 1970, c. C-34, provides that a sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced. Section 29(1) of the *Penitentiary Act*, R.S.C. 1970, c. P-6, empowers the Governor in Council to make regulations for the custody, treatment, training, employment, and discipline of inmates, and, generally, for carrying into effect the purposes and provisions of the *Penitentiary Act*. Section 29(3) authorizes the Commissioner of Penitentiaries to make rules, known as Commissioner's directives, for the custody, treatment, training, employment, and discipline of inmates, and the good government of penitentiaries.

Pursuant to the foregoing, *Penitentiary Service Regulations* SOR/62-90, were passed, which provide in part, as follows:

E. Bowie et *J.-Paul Malette*, pour l'intimée.

Version française du jugement du juge en chef Laskin et des juges Martland, Ritchie, Pigeon, Dickson, Beetz, Pratte et McIntyre rendu par

LE JUGE DICKSON—Cette affaire porte sur la censure du courrier des prisonniers et sur le droit d'un détenu d'un pénitencier fédéral de communiquer en confidence avec son avocat. L'appelant, détenu à l'institution de Millhaven, a intenté une action en Cour fédérale afin d'obtenir un jugement déclaratoire portant que [TRADUCTION] «la correspondance valablement identifiée comme adressée à son avocat et reçue de ce dernier soit désormais considérée comme communication privilégiée et soit remise aux destinataires concernés sans être ouverte».

I

Le régime disciplinaire en milieu carcéral

Les autorités pénitentiaires tirent leur pouvoir d'imposer des restrictions à la correspondance personnelle des détenus des lois et du Règlement qui suivent. Le paragraphe 660(1) du *Code criminel*, S.R.C. 1970, chap. C-34, prévoit qu'une sentence d'emprisonnement doit être purgée conformément aux dispositions et règles qui régissent l'institution où le prisonnier est incarcéré. Le paragraphe 29(1) de la *Loi sur les pénitenciers*, S.R.C. 1970, chap. P-6, donne au gouverneur en conseil le pouvoir d'édicter des règlements relatifs à la garde, au traitement, à la formation, à l'emploi et à la discipline des détenus et, de façon générale, à la réalisation des objets de la *Loi sur les pénitenciers* et à l'application de ses dispositions. Le paragraphe 29(3) donne au Commissaire des pénitenciers le pouvoir d'établir des règles, connues sous le nom d'Instructions du commissaire, concernant la garde, le traitement, la formation, l'emploi et la discipline des détenus et la direction judicieuse des pénitenciers.

Le *Règlement sur le service des pénitenciers*, DORS/62-90, a été adopté en application des dispositions qui précèdent. Il prévoit notamment ce qui suit:

Institutional Heads

1.12(1) The institutional head is responsible for the direction of his staff, the organization, safety and security of his institution and the correctional training of all inmates confined therein.

Visiting and Correspondence

2.17 The visiting and correspondence privileges that may, in accordance with directives, be permitted to inmates shall be such as are, in all the circumstances, calculated to assist in the reformation and rehabilitation of the inmate.

Censorship

2.18 In so far as practicable the censorship of correspondence shall be avoided and the privacy of visits shall be maintained, but nothing herein shall be deemed to limit the authority of the Commissioner to direct or the institutional head to order censorship of correspondence or supervision of visiting to the extent considered necessary or desirable for the reformation and rehabilitation of inmates or the security of the institution.

It will be observed then that the Regulations, the validity of which are not challenged by the appellant, expressly recognize the authority of the institutional head of a penitentiary to order censorship of inmate correspondence to the extent considered necessary or desirable for the security of the institution. These Regulations are implemented by Commissioner's Directive No. 219 (as amended following the date of issuance of the statement of claim in these proceedings, but prior to the date of trial). The following paragraphs are pertinent to the present inquiry:

Directive

5. a. Penitentiary staff shall promote and facilitate correspondence between inmates and their families, friends, and other individuals and agencies who can be expected to make a contribution to the inmate's rehabilitation within the institution and to assist in his subsequent and eventual return to the community.

c. Subject to the provisions of paragraph 14 every inmate shall be permitted to correspond with any

Chefs d'institutions

1.12(1) Le chef d'institution est responsable de la direction de son personnel, de l'organisation, de la sûreté et de la sécurité de son institution, y compris la formation disciplinaire des détenus qui y sont incarcérés.

Visites et correspondance

2.17 Les privilèges concernant les visiteurs et la correspondance, qui peuvent conformément aux directives être accordés aux détenus, doivent être tels qu'en toutes circonstances ils contribuent à la rééducation et à la réadaptation du détenu.

Censure

2.18 Dans la mesure où cela est pratique, la censure de la correspondance doit être évitée et l'intimité des visites doit être respectée, mais rien aux présentes ne doit être considéré comme limitant l'autorité du Commissaire de réglementer, ou du chef d'une institution d'ordonner, la censure de la correspondance ou la surveillance des visites selon les modalités tenues pour nécessaires ou utiles à la rééducation et à la réadaptation des détenus ou à la sécurité de l'institution.

Il convient de noter que le Règlement, dont la validité n'est pas contestée par l'appelant, reconnaît expressément le pouvoir du chef d'une institution pénitentiaire d'ordonner la censure de la correspondance des détenus selon les modalités tenues pour nécessaires ou utiles à la sécurité de l'institution. La Directive du commissaire nº 219 (modifiée postérieurement à la date de la signification de la déclaration dans les présentes procédures mais antérieurement à la date de l'instruction) met en application ce règlement. Les alinéas suivants s'appliquent en l'espèce:

Directive

5. a. La correspondance entre les détenus et leurs parents, leurs amis et les autres personnes et organismes doit être encouragée par le personnel pénitentiaire lorsque la communication est nécessaire ou désirable, et spécialement lorsque l'on croit qu'elle peut contribuer à la réadaptation du détenu.

c. Sous réserve du paragraphe 14, chaque détenu sera autorisé à correspondre avec qui il voudra et

person, and shall be responsible for the contents of every article of correspondence of which he is the author. There shall be no restriction to the number of letters sent or received by inmates, unless it is evident that there is mass production.

Paragraph 5 d. makes provision for inspection for contraband, in these terms:

d. Subject to the provisions of paragraph 8, every item of correspondence to or from an inmate may be opened by institutional authorities for inspection for contraband.

Censorship, dealt with in para. 7, is defined as any examination (other than for the express purpose of searching for contraband) and includes the reading, reproducing, extracting, or withdrawing of inmate correspondence. Paragraph 7 b. makes the point that censorship in any form is to be avoided, but reserves to the Commissioner of Penitentiaries and to the Institutional Director the authority to censor for one of two purposes, the rehabilitation of the inmate, or the security of the institution. Paragraph 7 b. reads:

Censorship of correspondence in any form shall be avoided, but nothing herein shall be deemed to limit the authority of the Commissioner to direct, or the Institutional Director to order, censorship of correspondence in any form, to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. (PSR 2.18). Any form of censorship shall be undertaken only with the approval of the Institutional Director.

The Directive seeks to maintain the confidentiality of the contents of correspondence. Paragraph 7 c. states that only authorized staff shall be allowed to read inmate mail, when necessary, and further provides that no comments, other than those required for official duties, shall be made to other members of the staff on the contents of the correspondence.

Paragraph 8 of Directive 219 speaks of "privileged correspondence", defined as "properly identified and addressed items directed to and received from" any of a lengthy list of persons including, among others, members of the Senate, members of the House of Commons, members of provincial

sera responsable du contenu de chaque envoi qu'il expédiera. Aucune restriction ne sera imposée quant au nombre de lettres envoyées ou reçues par les détenus, à moins qu'il ne soit évident qu'il y ait production en masse.

L'alinéa 5 d. prévoit l'inspection de la correspondance pour prévenir la contrebande:

d. Sous réserve du paragraphe 8, chaque pièce de correspondance envoyée ou reçue par un détenu peut être ouverte par la direction de l'institution qui est chargée de prévenir l'introduction d'objets de contrebande.

La censure signifie, aux termes du par. 7, tout examen (autre que dans le but exprès de chercher des objets de contrebande) et comprend la lecture, la reproduction, l'extraction ou l'interception de la correspondance des détenus. L'alinéa 7 b. établit la règle que la censure, sous quelque forme qu'elle soit, doit être évitée, mais réserve au Commissaire des pénitenciers et au directeur de l'institution le pouvoir de censurer dans l'un des deux buts suivants, la réadaptation sociale du détenu ou la sécurité de l'institution. L'alinéa 7 b. se lit comme suit:

On évitera de censurer la correspondance sous quelque forme qu'elle soit, mais rien dans la présente ne sera considéré comme limitant l'autorité du Commissaire ou du directeur de l'institution d'ordonner la censure de la correspondance sous quelque forme qu'elle soit, lorsque cette mesure sera jugée nécessaire ou souhaitable pour la réadaptation sociale du détenu ou la sécurité de l'institution (art. 2.18 du RSP). Toute forme de censure ne sera entreprise que sur l'approbation du directeur de l'institution.

La directive cherche à maintenir le caractère confidentiel du contenu de la correspondance. L'alinéa 7 c. prévoit que seul le personnel autorisé pourra lire le courrier des détenus, si nécessaire, et prévoit en outre qu'aucune observation sur son contenu autre que celles que commande l'exercice de fonctions officielles ne sera faite à d'autres membres du personnel.

Le paragraphe 8 de la directive nº 219 définit la «correspondance privilégiée» comme celle «se rapportant à des pièces dont les identificateurs et adresses sont indiqués comme il se doit et dont la destination ou la provenance» se rattache à l'une des nombreuses catégories de personnes énumé-

legislatures, and provincial ombudsmen. Conspicuous is the absence of any reference to inmates' legal representatives. Privileged correspondence is forwarded to the addressee unopened with the proviso that in exceptional cases, where institutional staff suspect contraband in such privileged correspondence, the Commissioner's approval shall be obtained before it is opened. Paragraph 8 clearly countenances the maintenance of uncensored channels of mail for complaints and grievances. But the restricted listing of destinations assures that the channels through which grievances pass are limited to internal procedures (Solicitor General, Commissioner of Penitentiaries, Correctional Investigator) or political outlets (Members of Parliament and Senators). Lawyers are mentioned in paragraph 10 c. of Directive No. 219, "Use of Telephone and Telegraph", which reads:

> c. In urgent cases where lawyers call their inmate clients, and wish to communicate privately with them, the institutional authorities shall ask the lawyer to leave his name and telephone number and, following verification of the lawyer's identity, a call shall originate from the institution.

For the purposes of trial, an agreed statement of facts was filed. Paragraphs 4 and 5 of the statement are in the following terms:

> 4. Pursuant to section 6 paragraph (b) [s. 7(b), as amended,] of Directive No. 219, John Dowsett, Director of Millhaven Institution has ordered that William (Billy) Solosky's mail be opened and read. This order has been applied to mail originating from his solicitor David Cole.
>
> 5. William (Billy) Solosky's mail is being read because it is John Dowsett's opinion that William (Billy) Solosky's conduct, activities and attitude cause him to believe that attention should be paid to his incoming and outgoing correspondence. Those letters which are deemed to be significant with respect to the security of the institution are being brought to the attention of John Dowsett.

Paragraph 5 of the statement of defence clarifies any obscurity in para. 5 of the agreed statement of facts. The statement of defence reads "The security of the Millhaven Institution has required that the Plaintiff's mail be opened."

rées, notamment, les sénateurs, les députés fédéraux, les députés provinciaux et les ombudsmans provinciaux. L'absence de toute mention des conseillers juridiques des détenus est frappante. La correspondance privilégiée est envoyée au destinataire sans avoir été ouverte sous réserve qu'en des cas exceptionnels où le personnel de l'établissement soupçonne qu'un envoi privilégié contient des objets de contrebande, on obtienne l'approbation du Commissaire avant de l'ouvrir. Le paragraphe 8 consacre clairement le maintien de canaux non censurés pour la correspondance relative aux plaintes et aux griefs; mais l'énumération restreinte des destinataires assure que les canaux empruntés par les griefs débouchent seulement sur les procédures internes (Solliciteur général, Commissaire des pénitenciers, Enquêteur correctionnel) ou les politiciens (députés et sénateurs). L'alinéa 10 c. de la directive nº 219, intitulé «Usage du téléphone et du télégraphe», fait mention des avocats:

> c. Dans des cas urgents où des avocats appellent leurs clients détenus et désirent communiquer en privé avec eux, les autorités de l'institution demanderont à l'avocat de laisser son nom et son numéro de téléphone et, après une vérification de l'identité de l'avocat, un appel proviendra de l'institution.

Aux fins du procès, un exposé conjoint des faits a été déposé, dont les par. 4 et 5 se lisent comme suit:

> [TRADUCTION] 4. Conformément à l'al. 6b) [al. 7b), modifié] de la directive nº 219, John Dowsett, directeur de l'institution de Millhaven, a ordonné que le courrier de William (Billy) Solosky soit ouvert et lu. Cet ordre a été appliqué au courrier en provenance de son avocat, Mᵉ David Cole.
>
> 5. Le courrier de William (Billy) Solosky doit être lu parce que John Dowsett est d'avis que la conduite, les activités et l'attitude de Solosky justifient une surveillance de son courrier à l'envoi et à la réception. Les lettres qui sont réputées présenter un intérêt pour la sécurité de l'établissement sont portées à l'attention de John Dowsett.

Le paragraphe 5 de la défense dissipe toute ambiguïté du par. 5 de l'exposé conjoint des faits. La défense précise que [TRADUCTION] «La sécurité de l'institution de Millhaven exige que le courrier du demandeur soit ouvert».

II

Judicial History

Mr. Justice Addy, at trial, was of the view that solicitor and client privilege, upon which the appellant founds his case, can only be claimed document by document and that each document is privileged only to the extent it meets the criteria which would support the privilege. Whether a letter does, in fact, contain a privileged communication cannot be determined until it has been opened and read. There is no logical nor legal justification for permitting correspondence which appears to have emanated from, or to be addressed to, a solicitor to enjoy any special aura of protection. Mr. Justice Addy relied upon these propositions in dismissing the appellant's action, with costs. He buttressed his conclusion by the argument that in this situation it would be too easy for a person to obtain envelopes and letterheads bearing the name and title of a real or fictitious solicitor, and equally as easy for a prisoner to camouflage the true identity of an addressee.

The appellant appealed to the Federal Court of Appeal. In that Court, his counsel amended the pleadings to request a declaration " . . . that henceforth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The revised form of declaration differs little from that appearing in the amended statement of claim. Both are defective, at least to this extent—it is not every item of correspondence passing between solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity, or in which counsel gives advice, are protected. That a privilege may not encompass all solicitor and client communications is clearly illustrated by the correspondence exhibited in the present case. Some of the letters concerned the appellant's parole review. Others merely contained criticism of the administration, information about other inmates, and prison gossip. One letter enclosed a second letter with the request that the second letter be forwarded to a named magazine for publication.

II

L'historique judiciaire

En première instance, le juge Addy était d'avis que le privilège entre avocat et client, sur lequel l'appelant s'appuie en l'espèce, ne peut être invoqué que pour chaque document pris individuellement et qu'un document est privilégié uniquement quand il répond aux critères qui permettent d'appuyer le privilège. On ne peut pas déterminer si une lettre contient effectivement une communication privilégiée avant de l'avoir ouverte et lue. Il n'y a aucune justification logique ou juridique à ce que la correspondance, qui semble provenir d'un avocat ou lui être adressée, jouisse d'une aura protectrice particulière. Le juge Addy s'est fondé sur ces propositions pour rejeter l'action de l'appelant, avec dépens. Il fonde sa conclusion sur l'argument que dans ce cas, il serait trop facile à quiconque de se procurer des enveloppes et du papier à en-tête avec les nom et titre d'un avocat, réel ou imaginaire, et également aussi facile pour un détenu de camoufler l'identité véritable d'un destinataire.

L'appelant a interjeté appel devant la Cour d'appel fédérale. Son avocat a modifié les procédures écrites afin d'obtenir un jugement déclaratoire portant [TRADUCTION] « . . . que désormais, toute la correspondance valablement identifiée comme échangée entre l'avocat et son client soit remise aux destinataires concernés sans être ouverte». Cette nouvelle formulation diffère très peu de celle de la déclaration amendée. Les deux sont imparfaites, au moins dans la mesure où le privilège ne se rattache pas à toute la correspondance échangée entre un avocat et son client, car seules sont protégées les communications en vertu desquelles le client consulte son avocat à titre professionnel ou en vertu desquelles ce dernier lui donne un avis. La correspondance produite en l'espèce illustre clairement qu'un privilège ne peut pas englober toutes les communications entre un avocat et son client. Certaines lettres traitent de l'examen de la libération conditionnelle de l'appelant. D'autres contiennent simplement des critiques de l'administration, des renseignements sur d'autres détenus et des potins de la prison. L'une des lettres renferme une seconde lettre avec une note qui en demande la transmission à une revue désignée afin d'y être publiée.

The Federal Court of Appeal dismissed the appeal, holding that a declaration that *all correspondence* between the appellant and his solicitor be declared privileged would extend considerably the ambit of the solicitor-client privilege as it is generally known and understood. To grant the declaration sought would be to give to the appellant an extension of the privilege afforded to the ordinary citizen. As a second ground for rejecting the appeal, the Court held that by issuing an order relating to correspondence not yet written, the court would be granting relief on the basis of purely hypothetical issues, and *in futuro*. Assuming jurisdiction, the case was not one where jurisdiction should be asserted.

III

Declaratory Relief

At the opening of the appeal in this Court, counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the Director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor David Cole, and to mail written by the Plaintiff to his solicitor David Cole, is not authorized by law". The amended form of prayer seems to have been conceived with a view to meeting the point, taken by the Federal Court of Appeal, that the relief earlier sought would relate to letters not yet written.

With great respect for the views expressed in the Federal Court of Appeal, I do not think that the important issues raised in these proceedings should be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

The principles which guide the court in exercising jurisdiction to grant declarations have been

La Cour d'appel fédérale a rejeté l'appel au motif qu'un jugement qui déclarerait privilégiée *toute la correspondance* échangée entre l'appelant et son avocat élargirait de façon considérable la portée du privilège entre avocat et client tel qu'on le comprend généralement. Accorder la déclaration demandée équivaudrait à donner à l'appelant une extension du privilège dont bénéficie le citoyen ordinaire. Comme second motif de rejet de l'appel, la Cour a conclu qu'en délivrant un ordre relatif à de la correspondance non encore écrite, elle accorderait un redressement fondé sur des questions purement hypothétiques, et pour l'avenir. En supposant que la Cour ait compétence, il ne s'agit pas d'une affaire où elle devrait l'exercer.

III

Le jugement déclaratoire

Au début de l'audition devant cette Cour, l'avocat de l'appelant a demandé que le redressement requis dans la déclaration soit remplacé par un jugement déclaratoire portant que l'ordre du directeur de l'institution de Millhaven d'ouvrir et de lire le courrier de l'appelant [TRADUCTION] «quand il a été appliqué au courrier provenant de son avocat, M^e^ David Cole, et à celui expédié par le demandeur à son avocat, M^e^ David Cole, n'est pas légal». Cette modification semble vouloir répondre au point soulevé par la Cour d'appel fédérale que le redressement sollicité auparavant se rapporterait à des lettres non encore écrites.

Avec égards pour l'opinion exprimée en Cour d'appel fédérale, je n'estime pas que les questions importantes soulevées dans ces procédures doivent dépendre de l'énoncé particulier de la demande de redressement, ni de l'argument que la question est hypothétique.

Le jugement déclaratoire est un recours qui n'est pas restreint par la forme ni limité par le fond et qui appartient à des personnes ayant un lien juridique dont découle une «véritable question» à trancher concernant leurs intérêts respectifs.

Les principes qui guident le tribunal dans l'exercice de sa compétence en matière de jugement

stated time and again. In the early case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*[2], in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):

> The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

In *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government*[3], (rev'd [1960] A.C. 260, on other grounds), Lord Denning described the declaration in these general terms (p. 571):

> ... if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

The jurisdiction of the court to grant declaratory relief was again stated, in the broadest language, in *Pharmaceutical Society of Great Britain v. Dickson*[4], a case in which the applicant sought a declaration that a proposed motion of the pharmaceutical society, if passed, would be *ultra vires* its objects and in unreasonable restraint of trade. In the course of his judgment, Lord Upjohn stated, at p. 433:

> A person whose freedom of action is challenged can always come to the court to have his rights and position clarified, subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case.

In the instant case, *Mellstrom v. Garner*[5], was cited in the Federal Court of Appeal in support of

[2] [1921] 2 A.C. 438.
[3] [1958] 1 Q.B. 554.
[4] [1970] A.C. 403 (H.L.).
[5] (1970] 1 W.L.R. 603.

déclaratoire ont été maintes fois exposés. Dans une affaire ancienne *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*[2], où les parties à un contrat ont demandé une aide pour l'interpréter, la Cour a affirmé qu'un jugement déclaratoire peut être accordé lorsque des questions réelles, et non fictives ou théoriques, sont soulevées. Lord Dunedin a formulé le critère suivant (à la p. 448):

> [TRADUCTION] La question doit être réelle et non théorique, celui qui la soulève doit avoir un intérêt réel à le faire et il doit pouvoir présenter un adversaire valable, c'est-à-dire quelqu'un ayant un intérêt véritable à s'opposer à la déclaration sollicitée.

Dans *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government*[3], (inf. [1960] A.C. 260, pour d'autres motifs), lord Denning décrit la nature du jugement déclaratoire en ces termes (p. 571):

> [TRADUCTION] ... s'il existe une question de fond que quelqu'un a un intérêt réel à soulever, et quelqu'un d'autre à s'y opposer, alors le tribunal a le pouvoir discrétionnaire de la résoudre par voie de jugement déclaratoire, ce qu'il fera si c'est justifié.

La compétence du tribunal de rendre des jugements déclaratoires a encore été énoncée, en termes très généraux, dans l'arrêt *Pharmaceutical Society of Great Britain v. Dickson*[4]. Dans cette affaire, le requérant sollicitait un jugement portant qu'une proposition de la société pharmaceutique, advenant son adoption, outrepasserait les objets de la société et constituerait une limitation injustifiée du commerce. Lord Upjohn s'est exprimé en ces termes dans son jugement, à la p. 433:

> [TRADUCTION] Une personne dont la liberté d'action est contestée peut toujours s'adresser au tribunal afin de faire éclaircir ses droits et sa situation, toujours sous réserve, bien entendu, du droit du tribunal dans l'exercice de sa discrétion judiciaire, de refuser le redressement demandé dans les circonstances de l'affaire.

L'arrêt *Mellstrom v. Garner*[5], a été cité en Cour d'appel fédérale à l'appui de la proposition que les

[2] [1921] 2 A.C. 438.
[3] [1958] 1 Q.B. 554.
[4] [1970] A.C. 403 (Ch. L.).
[5] [1970] 1 W.L.R. 603.

the proposition that courts will not grant declarations regarding the future. There, a chartered accountant and former partner of the defendant sought a declaration as to the true construction of the agreement by which the partnership had been dissolved. The plaintiff asked whether, having regard to a clause in the agreement, he would be in breach were he to solicit clients or business of the 'continuing partners'. Karminski L.J. held that declarations concerning the future ought to be approached with considerable reserve. Since neither the plaintiff nor the defendants had broken the provisions of the clause in question, nor sought to do so, there was no useful purpose to be gained in granting the declaration. The application was dismissed. That is a very different case from the present one.

As Hudson suggests in his article, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal.L.J. 706:

> The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.

The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as future rights. (p. 710)

Here there can be no doubt that there is a real and not a hypothetical, dispute between the parties. The declaration sought is a direct and present challenge to the censorship order of the Director of

tribunaux n'accordent pas de jugements déclaratoires sur des questions concernant le futur. Un comptable agréé, ancien associé des défendeurs, y demandait un jugement déclaratoire sur la bonne interprétation de la convention de dissolution de la société. Le demandeur voulait savoir si, vu une clause de la convention, solliciter pour son compte des clients ou des affaires des «associés restant» constituait une violation de la convention. Le lord juge Karminski a conclu que les jugements déclaratoires sur des questions concernant le futur doivent être abordés avec beaucoup de réserve. Puisque ni le demandeur ni les défendeurs n'avaient violé les dipositions de la clause en question ni cherché à le faire, il ne servait à rien d'accorder le jugement déclaratoire. La requête a été rejetée. Cette affaire est très différente de la présente affaire.

Comme le laisse entendre Hudson dans son article intitulé «Declaratory Judgments in Theoretical Cases: The Reality of the Dispute» (1977), 3 Dal.L.J. 706:

> [TRADUCTION] Le jugement déclaratoire est de nature discrétionnaire et les deux facteurs qui vont influencer le tribunal dans l'exercice de son pouvoir discrétionnaire sont l'utilité du redressement, s'il est accordé, et la probabilité dans ce cas qu'il puisse régler les questions en litige entre les parties.

Le premier facteur vise la «réalité du litige». Il est clair qu'un jugement déclaratoire n'est normalement pas accordé lorsque le litige est passé et est devenu théorique ou lorsque le litige n'est pas encore né et ne naîtra probablement pas. Toutefois, comme Hudson le souligne, il faut faire la distinction entre d'une part un jugement déclaratoire qui vise des droits «futurs» et des droits «hypothétiques» et, d'autre part, un jugement déclaratoire qui peut être [TRADUCTION] «applicable sur-le-champ» lorsqu'il détermine les droits des parties au moment de la décision ainsi que les implications et conséquences indissociables de ces droits, ce qu'on appelle les «droits futurs». (p. 710)

En l'espèce, il ne fait aucun doute qu'il existe entre les parties un litige réel et non un litige hypothétique. Le jugement déclaratoire sollicité attaque directement et maintenant l'ordre de cen-

Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the Director's continuing order.

Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.

The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any such determination relates to correspondence not yet written.

However poorly framed the prayer for relief may be, even as twice amended, the present claim is clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege. It is not directed to the characterization of specific and individual items of correspondence. If the appellant is entitled to a declaration, it is within this Court's discretion to settle the wording of the declaration: see de Smith, *Judicial Review of Administrative Action* (3rd ed. 1973, p. 431). Further, s. 50 of the *Supreme Court Act* allows the Court to make amendments necessary to a determination of the "real issue", without application by the parties.

sure du directeur de l'institution de Millhaven. Cet ordre, tant qu'il reste en vigueur, du passé au présent et dans l'avenir, est contesté. Le fait qu'un jugement déclaratoire accordé aujourd'hui ne puisse réparer les maux passés ou puisse toucher aux droits futurs, ne prive pas le recours de son utilité potentielle dans la solution du litige découlant de l'ordre permanent du directeur.

Une fois admis qu'il existe un litige réel et qu'accorder un jugement est discrétionnaire, alors la seule autre question à résoudre est de savoir si le jugement déclaratoire est à même de régler, de façon pratique, les questions en l'espèce.

Déterminer le droit d'un détenu de correspondre librement et en confidence avec son avocat est d'une importance pratique considérable même si, de l'aveu général, pareille détermination se rapporte à de la correspondance non encore écrite.

Aussi mal rédigée que puisse être la demande de redressement, même avec ses deux modifications, la présente réclamation vise clairement les procédures de traitement du courrier en prison et le recours à cet égard au privilège entre avocat et client. Elle ne porte pas sur la caractérisation de pièces de correspondance précises et individuelles. Si l'appelant a droit à un jugement déclaratoire, il relève du pouvoir discrétionnaire de cette Cour d'en fixer l'énoncé. Voir de Smith, *Judicial Review of Administration Action* (3e ed. 1973, p. 431). De plus, l'art. 50 de la *Loi sur la Cour suprême* donne à la Cour le pouvoir de faire les amendements nécessaires pour statuer sur la «véritable question», sans que demande en ait été faite par les parties.

IV

Solicitor-Client Privilege

As I have indicated, the main ground upon which the appellant rests his case is solicitor-client privilege. The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice. As Jackett C.J. aptly

IV

Le privilège entre avocat et client

Comme je l'ai déjà indiqué, le moyen principal sur lequel l'appelant se fonde est le privilège entre avocat et client. La notion des communications privilégiées entre avocat et client est depuis longtemps reconnue comme essentielle à la bonne administration de la justice. Comme le juge en

stated in *Re Director of Investigation and Research and Shell Canada Ltd.*[6], at pp. 78-9:

... the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.

The history of the privilege can be traced to the reign of Elizabeth I (see *Berd v. Lovelace*[7] and *Dennis v. Codrington*[8]). It stemmed from respect for the 'oath and honour' of the lawyer, dutybound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether litigious or not. The classic statement of the policy grounding the privilege was given by Brougham L.C. in *Greenough v. Gaskell*[9], at p. 620:

The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers).

But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

[6] (1975), 22 C.C.C. (2d) 70, [1975] F.C. 184.
[7] (1577), 21 E.R. 33.
[8] (1580), 21 E.R. 53.
[9] (1833), 39 E.R. 618.

chef Jackett l'a dit avec justesse dans *In re le Directeur des enquêtes et recherches et Shell Canada Ltd.*[6], aux pp. 78 et 79:

... la protection civile et criminelle, que nos principes de droit accordent à l'individu est subordonnée à l'assistance et aux conseils que l'individu reçoit d'hommes de loi sans aucune crainte que la divulgation pleine et entière de tous ses actes et pensées à son conseiller juridique puisse de quelque façon être connue des tiers de manière à être utilisée contre lui.

L'histoire du privilège remonte au règne d'Élizabeth I (voir *Berd v. Lovelace*[7] et *Dennis v. Codrington*[8]). Il découle alors du respect [TRADUCTION] «du serment et de l'honneur» de l'avocat, tenu de garder étroitement les secrets de son client, et est limité, dans son application, à une exemption de l'obligation de témoigner. Par la suite et progressivement, le privilège est élargi afin d'inclure les communications échangées au cours d'autres litiges, celles faites en vue d'un litige et enfin toute consultation juridique sur une question litigieuse ou non. L'énoncé classique du principe sur lequel repose le privilège a été fait par le lord chancelier Brougham dans *Greenough v. Gaskell*[9], à la p. 620:

[TRADUCTION] Le fondement de cette règle n'est pas difficile à trouver. Ce n'est ni la conséquence (comme on l'a quelquefois dit) d'une importance particulière que le droit attribue aux affaires des juristes, ni le résultat de dispositions particulières leur accordant une protection (même s'il n'est certes pas tellement facile de voir pourquoi on a refusé le même privilège à d'autres personnes et, plus particulièrement, aux médecins).

Mais c'est en considération des intérêts de la justice, qui ne peuvent être respectés, et de l'administration de la justice, qui ne peut suivre son cours, sans l'aide d'hommes de loi versés dans la théorie générale du droit, les règles de procédure devant les tribunaux et les matières touchant les droits et les obligations, qui font l'objet de toutes les procédures judiciaires. Si le privilège n'existait pas du tout, chacun devrait s'en remettre à ses propres ressources en matière juridique. Privée de toute assistance professionnelle, une personne ne s'aventurerait pas à consulter un spécialiste ou oserait seulement divulguer partiellement l'affaire à son conseil.

[6] (1975), 22 C.C.C. (2d) 70, [1975] C.F. 184.
[7] (1577) 21 E.R. 33.
[8] (1580), 21 E.R. 53.
[9] (1833), 39 E.R. 618.

The rationale was put this way by Jessel M.R. in *Anderson v. Bank of British Columbia*[10], at p. 649:

> The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

Wigmore [8 Wigmore, *Evidence* (McNaughton rev. 1961) para. 2292] framed the modern principle of privilege for solicitor-client communications, as follows:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach, *O'Shea v. Woods*[11], at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton*[12], in which Stephen J. had this to say (p. 167): "A communi-

[10] (1876), 2 Ch. 644.
[11] [1891] P. 286.
[12] (1884), 14 Q.B.D. 153.

Le maître des rôles Jessel, dans *Anderson v. Bank of British Columbia*[10], à la p. 649, traite de ce principe en ces termes:

> [TRADUCTION] L'objet et le sens de la règle sont les suivants: puisqu'en raison de la complexité et de la difficulté de nos principes de droit, seuls des hommes de l'art sont qualifiés pour s'occuper d'un litige, il est absolument nécessaire qu'un homme, pour faire valoir ses droits ou pour se défendre contre une réclamation indue, ait recours à des avocats en titre. Ceci étant absolument nécessaire, il l'est autant, pour reprendre une expression familière, qu'il soit capable de dire ce qu'il a sur le cœur à celui qu'il consulte en vue d'intenter des procédures ou de prouver le bien-fondé de sa défense à l'encontre de la réclamation de tiers; qu'il ait une confiance illimitée dans son mandataire, homme de l'art, et que ses communications à ce dernier soient tenues secrètes, sauf s'il consent à renoncer à son privilège (car il s'agit du sien et non de celui du mandataire), qu'il puisse mener de façon appropriée son litige.

Wigmore [8 Wigmore, *Evidence* (McNaughton rev. 1961) par. 2292] formule comme suit le principe moderne du privilège des communications entre avocat et client:

> [TRADUCTION] Lorsque l'on consulte un conseiller juridique en titre, les communications qui se rapportent à la consultation et que le client a faites en confidence font l'objet à son instance d'une protection permanente contre toute divulgation par le client ou le conseiller juridique, sous réserve de la renonciation à cette protection.

Le privilège connaît des exceptions. Il ne s'applique pas aux communications qui n'ont trait ni à la consultation juridique ni à l'avis donné, c'est-à-dire, lorsque l'avocat n'est pas consulté en sa qualité professionnelle. De même, le privilège ne se rattache pas à une communication qui n'est pas censée être confidentielle, *O'Shea v. Woods*[11], à la p. 289. Plus significatif, si un client consulte un avocat pour pouvoir perpétrer plus facilement un crime ou une fraude, alors la communication n'est pas privilégiée et il importe peu que l'avocat soit une dupe ou un participant. L'arrêt classique est *R. v. Cox and Railton*[12], où le juge Stephen s'exprime en ces termes (p. 167): [TRADUCTION] «Une

[10] (1876), 2 Ch. 644.
[11] [1891] P. 286.
[12] (1884), 14 Q.B.D. 153.

cation in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. See *Re Director of Investigation and Research and Canada Safeway Ltd.*[13]; *Re Director of Investigation and Research and Shell Canada Ltd., supra; Re Presswood et al. and International Chemalloy Corp.*[14]; *Re Borden and Elliot and The Queen*[15], (affirmed on other grounds[16]; *Re BX Development Inc. and The Queen*[17]; *Re B and The Queen*[18].

While there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, I do not think the concept has been stretched far enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. In the factum of the appellant, it is suggested that the privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property". The cases cited in support of this proposition, however, all involved search warrants that caught documents to which the privilege unquestionably attached. In those cases, such as *Re Borden & Elliot and The Queen, supra*, the search warrant led to the seizure of documents believed "to afford evidence." If privilege were to attach to the documents, then such material could not afford evidence at trial and hence the evidentiary connection remained.

[13] (1972), 26 D.L.R. (3d) 745 (B.C.S.C.).
[14] (1975), 65 D.L.R. (3d) 228 (Ont. H.C.).
[15] (1975), 30 C.C.C. (2d) 337.
[16] (1975), 30 C.C.C. (2d) 345 (Ont. C.A.).
[17] (1976), 31 C.C.C. (2d) 14 (B.C.C.A.).
[18] (1977), 36 C.C.C. (2d) 235 (Ont. Prov. Ct.).

communication faite en vue de servir un dessein criminel ne «relève pas de la portée ordinaire des services professionnels.»

Une jurisprudence récente a placé la doctrine traditionnelle du privilège sur un plan nouveau. Le privilège n'est plus considéré seulement comme une règle de preuve qui fait fonction d'écran pour empêcher que des documents privilégiés ne soient produits en preuve dans une salle d'audience. Les tribunaux, peu disposés à restreindre ainsi la notion, ont élargi son application bien au-delà de ces limites. Voir *Re Director of Investigation and Research and Canada Safeway Ltd.*[13]; *In re le Directeur des enquêtes et recherches et Shell Canada Ltd.*, précité; *Re Presswood et al. and International Chemalloy Corp.*[14]; *Re Borden and Elliot and The Queen*[15], (*confirmé sur d'autres motifs*)[16]; *Re BX Development Inc. and The Queen*[17]; *Re B and The Queen*[18].

Même s'il ne fait aucun doute que les tribunaux canadiens s'orientent vers une notion plus large du privilège entre avocat et client, je n'estime pas que la notion ait été suffisamment étendue pour donner gain de cause à l'appelant. Bien qu'il y ait eu un mouvement qui tende à éloigner le privilège entre avocat et client de la règle de preuve qui ne peut être invoquée qu'au moment où l'on tente de produire des documents privilégiés, cet éloignement des restrictions temporelles rigides ne va pas aussi loin que le prétend l'appelant. Dans son factum, il allègue que le privilège est maintenant reconnu comme un «principe fondamental», plus justement qualifié de «règle de propriété». Toutefois, les décisions citées à l'appui de cette proposition mettent toutes en cause des mandats de perquisition qui avaient permis la saisie de documents auxquels s'appliquait indiscutablement le privilège. Dans ces affaires comme, par exemple, *Re Borden & Elliot and The Queen*, précitée, le mandat de perquisition a conduit à la saisie de documents susceptibles [TRADUCTION] «de fournir une preuve». Si le privilège devait s'appliquer aux documents, alors

[13] (1972), 26 D.L.R. (3d) 745 (C.S.C.-B.).
[14] (1975), 65 D.L.R. (3d) 228 (H.C. Ont.).
[15] (1975), 30 C.C.C. (2d) 337.
[16] (1975), 30 C.C.C. (2d) 345 (C.A. Ont.).
[17] (1976), 31 C.C.C. (2d) 14 (C.A.C.-B.).
[18] (1977), 36 C.C.C. (2d) 235 (C. prov. Ont.).

The judgments can be rationalized as merely shifting the time at which the privilege can be asserted. As the comment by Kasting in (1978), 24 McGill L.J. 115, "Recent Developments in the Law of Solicitor-Client Privilege" suggests, the shift away from the strict rule-of-evidence-at-trial approach has taken place by logical extensions. Chassé, in his annotation at (1977), 36 C.R.N.S. 349, The Solicitor-Client Privilege and Search Warrants, asserts that the privilege is being looked upon "as more akin to a rule of property rather than merely as a rule of evidence" (p. 350), but the privilege, in my view, is not yet near a rule of property. That is what the privilege must become if the appellant is to succeed.

There is no suggestion in the materials in the case at bar that the authorities intend to employ the letters or extracts obtained therefrom as evidence in any proceeding of any kind. Much as one might well wish to analogize from the search warrant cases to the censorship order here impugned, as a form of blanket search warrant upon appellant's mail, the order cannot be characterized as being directed to obtaining or affording evidence in any proceeding. Without the evidentiary connection, which the law now requires, the appellant cannot invoke the privilege.

As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

The complication in this case flows from the unique position of the inmate. His mail is opened

ceux-ci ne pourraient être produits au procès et le lien avec la preuve subsisterait donc. On peut expliquer ces décisions en disant qu'elles ne font que déplacer le moment où l'on peut faire valoir le privilège. Comme le souligne Kasting dans son article (1978), 24 R. de D. McGill 115, «Recent Developments in the Law of Solicitor-Client Privilege» l'éloignement de la conception stricte de règle-de-preuve-au-procès s'est effectué par développements logiques. Chassé, dans son article (1977), 36 C.R.N.S. 349, «The Solicitor-Client Privilege and Search Warrants» *affirme que le privilège est considéré* [TRADUCTION] «comme plus apparenté à une règle de propriété qu'à une simple règle de preuve» (p. 350), mais le privilège à mon avis est encore très loin de constituer une règle de propriété. C'est ce qu'il doit devenir pour que l'appelant ait gain de cause.

Rien ne permet de conclure des pièces déposées au dossier de la présente affaire que les autorités ont l'intention d'utiliser les lettres ou des extraits de ces lettres comme preuve au cours de procédures. Quand bien même l'on souhaiterait pouvoir faire une analogie entre les affaires de mandats de perquisition et l'ordre de censure attaqué en l'espèce, en tant que sorte de mandat de perquisition général relatif au courrier de l'appelant, il reste que l'on ne peut considérer que cet ordre a été rendu en vue d'obtenir ou de fournir une preuve au cours de procédures. A défaut du lien avec la preuve, actuellement exigé en droit, l'appelant ne peut invoquer le privilège.

Comme le souligne le juge Addy, le privilège ne peut être invoqué que pour chaque document pris individuellement, et chacun doit répondre aux critères du privilège: (i) une communication entre un avocat et son client; (ii) qui comporte une consultation ou un avis juridiques; et (iii) que les parties considèrent de nature confidentielle. Le juge doit lire les lettres afin de décider si le privilège s'y rattache, ce qui exige, à tout le moins, qu'elles relèvent de la juridiction d'un tribunal. Enfin, le privilège vise à empêcher leur utilisation ou divulgation injustifiée et non simplement leur ouverture.

En l'espèce, la complication découle de la situation unique du détenu. Son courrier est ouvert et lu

and read, not with a view to its use in a proceeding, but by reason of the exigencies of institutional security. All of this occurs within prison walls and far from a court or quasi-judicial tribunal. It is difficult to see how the privilege can be engaged, unless one wishes totally to transform the privilege into a rule of property, bereft of an evidentiary basis.

In my view, the statutory disciplinary régime, which I have earlier described, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant is seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

V

In aid of his main submission, resting upon privilege, counsel for the appellant argued faintly that the *Penitentiary Service Regulations* and Commissioner's Directive should not be construed and applied so as to abrogate, abridge, or infringe any of the rights or freedoms recognized in the *Canadian Bill of Rights* by s. 1(*b*) (the right of the individual to equality before the law and the protection of the law), 1(*d*) (freedom of speech) and 2(*c*)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). The authorities relied upon by counsel were, in the main, breathalyzer cases dealing with the right of a motorist to communicate with his counsel in private and without delay. These, and other cases cited, give little assistance to the resolution of the issue now before the Court, due to the difference in factual context and relevant considerations. The question in this case is whether the appellant's right to retain and instruct counsel is incompatible with the right of prison authorities to prevent threat to the security of the institution. In my view, there is no such incompatibility provided the exercise of authority is not greater than is necessary to support the security interest. This, as I read it, is precisely the effect of para. 7b. of Directive 219.

en raison des exigences de la sécurité de l'institution et non en vue d'être utilisé dans des procédures judiciaires. Tout ceci se passe à l'intérieur de la prison et, par conséquent, loin d'un tribunal ou d'un organisme quasi judiciaire. Il est difficile de voir comment cela met en jeu le privilège, à moins que l'on veuille totalement le transformer pour en faire une règle de propriété, dépouillée de tout fondement dans la preuve.

A mon avis, le régime disciplinaire établi par la législation, que j'ai décrit précédemment, ne déroge pas à la doctrine de *common law* portant sur le privilège entre avocat et client, dans sa conception actuelle, mais l'appelant cherche en l'espèce quelque chose qui va bien au-delà des limites du privilège malgré l'élargissement que lui ont donné les décisions récentes.

V

A l'appui de son allégation principale qui repose sur le privilège, l'avocat de l'appelant a fait timidement valoir que le *Règlement sur le service des pénitenciers* et la directive du Commissaire ne doivent pas être interprétés et appliqués de manière à supprimer, restreindre ou enfreindre l'un quelconque des droits ou libertés reconnus dans la *Déclaration canadienne des droits* aux termes de l'al. 1*b*) (le droit de l'individu à l'égalité devant la loi et à la protection de la loi), de l'al. 1*d*) (la liberté de parole) et du sous-al. 2*c*)(ii) (le droit d'une personne arrêtée ou détenue de retenir et constituer un avocat sans délai). La jurisprudence invoquée par l'appelant porte principalement sur des affaires d'alcootest qui traitent du droit d'un automobiliste de communiquer avec son avocat en privé et sans délai. Ces décisions, ainsi que d'autres citées, ne sont pas d'un grand secours pour résoudre la question litigieuse ici, vu la différence au niveau des faits et des considérations pertinentes. La question en l'espèce est de savoir si le droit de l'appelant de retenir et constituer un avocat est incompatible avec le droit des autorités carcérales d'empêcher que soit menacée la sécurité de l'institution. A mon avis, il n'y a pas d'incompatibilité à la condition que l'exercice du pouvoir n'aille pas au-delà de ce qui est nécessaire dans l'intérêt de la sécurité. C'est précisément l'effet, selon moi, de l'al. 7 b. de la directive n° 219.

With respect to s. 1(*b*) of the Bill, it has been held by this Court that equality before the law does not require "that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective": Martland J., giving the unanimous reasons of this Court in *Prata v. Minister of Manpower and Immigration*[19], at p. 382.

It is difficult to attack the validity of *Penitentiary Service Regulation* 2.18 or Directive 219 with a freedom of speech argument, having regard to the will of Parliament, as reflected in the *Penitentiary Act* and in the *Penitentiary Service Regulations*, which preserves a limited right of censorship by penitentiary authorities in the interests of security and, at the same time, affords inmates a right to communicate freely through uncensored channels with members of Parliament and provincial legislatures, and the many persons listed in para. 8 of Directive 219.

VI

One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.

In that context, the Court is faced with the interpretation of the *Penitentiary Service Regulations* and Commissioner's Directive No. 219. Section 2.18 of the Regulations, as earlier noted, undoubtedly reserves the authority of the institutional head to order censorship of correspondence to the extent considered necessary or desirable for the security of the institution. As a general rule, I do not think it is open to the courts to question the judgment of the institutional head as to what may, or may not, be necessary in order to maintain

[19] [1976] 1 S.C.R. 376.

En ce qui concerne l'al. 1*b*) de la Déclaration, cette Cour a jugé que l'égalité devant la loi n'exige pas «que toutes les lois fédérales doivent s'appliquer de la même manière à tous les individus. Une loi qui vise une catégorie particulière de personnes est valide si elle est adoptée en cherchant l'accomplissement d'un objectif fédéral régulier»: le juge Martland, qui a rendu le jugement unanime de cette Cour dans *Prata c. Le ministre de la Main-d'œuvre et de l'Immigration*[19], à la p. 382.

Il est difficile de contester la validité de l'art. 2.18 du *Règlement sur le service des pénitenciers* ou de la directive nº 219 en faisant valoir la liberté de parole, vu la volonté du Parlement, exprimée dans la *Loi sur les pénitenciers* et dans le *Règlement sur le service des pénitenciers*, de réserver aux autorités pénitentiaires un droit limité de censure dans l'intérêt de la sécurité et, en même temps, de donner aux détenus le droit de communiquer librement par l'intermédiaire de canaux non censurés avec les députés fédéraux et provinciaux et les nombreuses autres personnes énumérées au par. 8 de la directive nº 219.

VI

On peut s'écarter de la notion actuelle du privilège et aborder l'affaire dans une optique plus large, savoir, (i) le droit de communiquer en confidence avec son conseiller juridique est un droit civil fondamental, fondé sur la relation exceptionnelle de l'avocat avec son client et (ii) une personne emprisonnée conserve tous ses droits civils autres que ceux dont elle a été expressément ou implicitement privée par la loi.

Dans ce contexte, la Cour fait face à l'interprétation du *Règlement sur le service des pénitenciers* et de la directive du Commissaire nº 219. L'article 2.18 du Règlement, comme on l'a déjà noté, réserve indubitablement au directeur de l'institution le pouvoir d'ordonner la censure de la correspondance selon les modalités tenues pour nécessaires ou utiles à la sécurité de l'institution. En règle générale, je n'estime pas qu'il est loisible aux tribunaux de mettre en doute le jugement du chef de l'institution sur ce qui peut être nécessaire ou

[19] [1976] 1 R.C.S. 376.

security within a penitentiary. On the other hand, it is to be noted that *Penitentiary Service Regulation* 2.18 and Commissioner's Directive No. 219 speak in general terms, in their reference to the reading of correspondence and to other forms of censorship, without express mention of solicitor-client correspondence. The right to privacy in solicitor-client correspondence has not been expressly taken away by the language of the Regulations and the Directive.

Most prisons are sufficiently remote that the mail constitutes the prime means of communication to an inmate's solicitor. Nothing is more likely to have a "chilling" effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date. I do not understand counsel for the Crown to dispute the importance of these considerations.

The result, as I see it, is that the Court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, the scale must ultimately come down in favour of the public interest. But the interference must be no greater than is essential to the maintenance of security and the rehabilitation of the inmate.

The difficulty is in ensuring that the correspondence between the inmate and his solicitor, whether within the doctrine of solicitor-client privilege or not, is not cloaking the passage of drugs, weapons, or escape plans. There must be some mechanism for verification of authenticity. That seems to be generally accepted. Yet, no one has so far suggested what third party mechanism might be adopted, or by what authority the courts could impose such a mechanism upon penitentiary authorities.

non au maintien de la sécurité dans un pénitencier. Par contre, il convient de noter que l'art. 2.18 du *Règlement sur le service des pénitenciers* et la directive du Commissaire nº 219 traitent en termes généraux de la lecture de la correspondance et d'autres formes de censure sans mentionner expressément la correspondance entre avocat et client. Le droit au secret en ce qui concerne la correspondance entre avocat et client n'a pas été expressément enlevé par les termes du Règlement et de la directive.

La plupart des prisons sont suffisamment à l'écart pour que le courrier constitue le moyen principal de communication d'un détenu avec son avocat. Rien ne peut probablement autant «glacer» l'échange et la divulgation franches et libres de confidences, qui devraient caractériser les rapports entre un détenu et son avocat, que de savoir que ce qui a été écrit sera lu par un tiers, et peut-être utilisé à l'encontre du détenu ultérieurement. Je ne comprends pas pourquoi le ministère public conteste l'importance de ces considérations.

Il en résulte, selon moi, que la Cour se trouve dans l'obligation de peser l'intérêt public qui veut le maintien de la sécurité et de la sûreté de l'institution carcérale, de son personnel et de ses détenus, et l'intérêt représenté par la protection de la relation avocat-client. Même si l'on reconnaît pleinement le droit d'un détenu de correspondre librement avec son conseiller juridique et la nécessité d'en déroger au minimum, la balance doit, en fin de compte, pencher en faveur de l'intérêt public. Mais l'intervention ne doit pas aller au-delà de ce qui est essentiel au maintien de la sécurité et à la réadaptation du détenu.

La difficulté est de s'assurer que la correspondance entre le détenu et son avocat, qu'elle relève ou non de la doctrine du privilège entre avocat et client, ne dissimule pas la transmission de drogues, d'armes ou de plans d'évasion. Il faut un mécanisme pour en vérifier l'authenticité. Il semble que ce soit généralement admis. Pourtant, personne n'a encore suggéré quel mécanisme de contrôle par un tiers pourrait être adopté ni en vertu de quel pouvoir les tribunaux pourraient l'imposer aux autorités pénitentiaires.

Counsel for the Crown submits there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution:

(a) he may nonetheless permit the letter to be delivered unopened and unexamined to the inmate;

(b) he may suspend the inmate's privilege to receive mail, in respect of that letter, pursuant to sections 2.17 and 2.18 of the *Penitentiary Service Regulations*.

(c) he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege.

Counsel contends that to interpret the Regulations as requiring the first of these alternatives is to leave the institutional head without the authority he requires to control the potential passage of contraband, or of correspondence which may endanger the safety of the institution, under the guise of confidential communications passing between inmate and solicitor. I agree. I would also reject the second as providing no solution. I agree that the third alternative represents that interpretation of the scope of the Regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

In my view, the "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary

L'avocat du ministère public fait valoir trois interprétations possibles de la portée des art. 2.17 et 2.18 du Règlement qui peuvent déterminer l'étendue du pouvoir du chef d'une institution face à une enveloppe qui paraît provenir d'un avocat ou lui être adressée, dans les cas où il a des motifs de croire que la transmission sans restriction et sans examen du courrier adressé à un détenu en particulier ou envoyé par ce dernier présente un risque pour la sécurité et la sûreté de l'institution:

a) il peut quoi qu'il en soit permettre que la lettre soit livrée au détenu sans avoir été ouverte et examinée;

b) il peut suspendre le privilège du détenu de recevoir du courrier, relativement à cette lettre, conformément aux articles 2.17 et 2.18 du *Règlement sur le service des pénitenciers*;

c) il peut ordonner que l'enveloppe soit ouverte et examinée dans la mesure minimale jugée nécessaire pour établir si son contenu relève effectivement du privilège entre avocat et client.

L'avocat fait valoir qu'appliquer la première interprétation au Règlement revient à enlever au chef de l'institution le pouvoir dont il a besoin pour contrôler la transmission éventuelle d'objets de contrebande ou de courrier qui puisse mettre en danger la sécurité de l'institution, sous le couvert du caractère confidentiel des communications entre un détenu et son avocat. Je suis d'accord. Je suis également d'avis de rejeter la deuxième interprétation parce qu'elle n'offre aucune solution. Je conviens que la troisième présente l'interprétation de la portée du Règlement qui donne à un détenu le maximum de possibilités de communiquer avec son avocat par courrier, tout en étant compatible avec le maintien de la sécurité de l'institution.

A mon avis, la «mesure minimale jugée nécessaire pour établir si son contenu relève effectivement du privilège entre avocat et client» doit être interprétée de manière que (i) le contenu d'une enveloppe puisse être inspecté pour déceler la contrebande, (ii) dans des cas limités, la communication puisse être lue pour s'assurer qu'elle renferme effectivement une communication à caractère confidentiel entre l'avocat et son client aux fins de consultation ou d'avis juridiques; (iii) la lettre ne soit lue que s'il existe des motifs raisonnables et probables de croire le contraire et, dans ce cas,

to determine the *bona fides* of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication. Paragraph 7c. of Directive 219 underlines this point.

The appellant has failed to establish entitlement to a declaration in any of the three forms he has advanced in these proceedings. The appeal must be dismissed. The respondent is entitled to costs in this Court.

The following are the reasons delivered by

ESTEY J.—I have had the opportunity of reading the reasons for judgment of my brother Dickson and I concur therein. I only wish to add to item (iii) in his catalogue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege". Item (iii) reads as follows:

(iii) the letter only should be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to confirm the *bona fides* of the communication;

In my respectful view, any procedure adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law. Any mechanics adopted for their examination should, subject only to special circumstances indicating an overriding necessity for intervention by the authorities, safeguard communications flowing under the protection of the privilege so as to ensure that the privilege is left in a practical, workable condition; for example, a covering letter from a solicitor forwarding a sealed communication which the solicitor states to be a communication of legal advice should ordinarily shield the enclosure from examination by the authorities. I would dispose of the appeal as proposed by Dickson J.

Appeal dismissed with costs.

uniquement dans la mesure nécessaire pour déterminer la bonne foi de la communication; (iv) le fonctionnaire compétent du pénitencier qui examine l'enveloppe, après s'être assuré que cette dernière ne renferme rien qui enfreigne la sécurité, ait l'obligation légale de garder la communication confidentielle. L'alinéa 7c. de la directive n° 219 souligne ce point.

L'appelant n'a pas réussi à établir son droit à un jugement déclaratoire selon l'une des trois formules qu'il a mises de l'avant dans ces procédures. Le pourvoi doit être rejeté. L'intimée a droit à ses dépens dans cette Cour.

Version française des motifs rendus par

LE JUGE ESTEY—J'ai eu l'avantage de lire les motifs de jugement de mon collègue le juge Dickson et j'y souscris. Je désire simplement faire un commentaire sur le point (iii) figurant dans sa liste des considérations afférentes à l'interprétation de la phrase «dans la mesure minimale jugée nécessaire pour établir si son contenu relève effectivement du privilège entre avocat et client». Le point (iii) porte que:

(iii) la lettre ne soit lue que s'il existe des motifs raisonnables et probables de croire le contraire et, dans ce cas, uniquement dans la mesure nécessaire pour déterminer la bonne foi de la communication;

A mon avis, toute procédure visant l'examen de lettres échangées entre un avocat et son client devrait, lorsque c'est raisonnablement possible, reconnaître le privilège entre avocat et client depuis longtemps ancré dans nos principes de droit. Tout mécanisme adopté en vue de leur examen devrait, sous réserve uniquement de circonstances spéciales indiquant la nécessité primordiale de faire intervenir les autorités, sauvegarder les communications qui passent sous la protection du privilège de façon à garantir qu'il reste utile et utilisable; par exemple, une lettre explicative d'un avocat dans laquelle se trouve une communication scellée que l'avocat déclare être un avis juridique devrait ordinairement protéger cette communication de tout examen par les autorités. Je suis d'avis de régler le pourvoi comme le propose le juge Dickson.

Pourvoi rejeté avec dépens.

Solicitor for the plaintiff, appellant: David P. Cole, Toronto.

Solicitor for the defendant, respondent: Roger Tassé, Ottawa.

Procureur du demandeur, appelant: David P. Cole, Toronto.

Procureur de la défenderesse, intimée: Roger Tassé, Ottawa.

Les Terrasses Zarolega Inc., Joseph Zappia, Gérald Robinson, René Lépine and Andrew Gaty *Appellants*;

and

La Régie des installations olympiques *Respondent.*

1980: November 4; 1981: February 3.

Present: Laskin C.J. and Martland, Ritchie, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Civil procedure — Declaratory judgment — Expropriation of Olympic Village — Jurisdiction of arbitration committee — Act respecting the Olympic Village, 1976 (Qué.), c. 43, ss. 6, 10, 27 — Civil Code, art. 407 — Code of Civil Procedure, art. 453.

The case arose following expropriation of the Olympic Village, as a result of which respondent was made owner of the Olympic Village and of accessory assets and rights as of April 6, 1976. Appellant Zarolega had agreed in the fall of 1974 with the *Comité organisateur des jeux olympiques* (COJO) to build and finance the Olympic Village. Following meetings of a Parliamentary Commission in January 1975, COJO and Zarolega were invited to negotiate a new agreement. A letter of intent was signed on February 4, 1975. They were again asked to renegotiate and a new agreement was drawn up in January 1976, but this agreement was not signed by all the parties. The expropriation then took place, terminating relations between the parties, making respondent subject to a number of obligations, releasing COJO from its obligations to appellant and creating an arbitration committee to determine the expropriation compensation to which appellant was entitled. Before the committee was even created, appellants applied to the Superior Court for a declaratory judgment on seven questions relating to:

(a) determining the agreement in effect between the parties at the time the Act was passed (Question I);

(b) the action before the arbitration committee (Questions II and III);

(c) the relations between Zarolega and COJO, and the latter's obligations regarding claims brought by creditors against Zarolega (Question IV);

Les Terrasses Zarolega Inc., Joseph Zappia, Gérald Robinson, René Lépine et Andrew Gaty *Appelants*;

et

La Régie des installations olympiques *Intimée.*

1980: 4 novembre; 1981: 3 février.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Estey, McIntyre, Chouinard et Lamer.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit administratif — Procédure civile — Jugement déclaratoire — Expropriation du Village olympique — Juridiction du Conseil d'arbitrage — Loi concernant le village olympique, 1976 (Qué.), chap. 43, art. 6, 10 et 27 — Code civil, art. 407 — Code de procédure civile, art. 453.

Le litige fait suite à l'expropriation du Village olympique, en vertu de laquelle l'intimée est devenue propriétaire du Village olympique ainsi que des biens et droits accessoires, à compter du 6 avril 1976. L'appelante Zarolega avait convenu, à l'automne 1974, avec le Comité organisateur des jeux olympiques (COJO), de construire et financer le Village olympique. A la suite des séances de la Commission parlementaire de janvier 1975, le COJO et Zarolega furent invités à négocier une nouvelle convention. Une lettre d'intention fut signée le 4 février 1975. Ils furent de nouveau appelés à renégocier et une nouvelle convention fut préparée en janvier 1976, convention qui ne fut pas signée par toutes les parties. Vint alors l'expropriation, qui mit fin aux relations entre les parties, imposa de nombreuses obligations à l'intimée, dégagea le COJO de ses obligations envers l'appelante et établit un conseil d'arbitrage dont le mandat était de déterminer l'indemnité d'expropriation à laquelle l'appelante avait droit. Avant même que ce conseil ne soit constitué, les appelants se sont adressés à la Cour supérieure pour obtenir un jugement déclaratoire sur sept questions ayant pour objet:

a) la détermination de l'entente en vigueur entre les parties au moment de l'adoption de la Loi (question I);

b) le recours devant le conseil d'arbitrage (questions II et III);

c) les rapports entre Zarolega et le COJO, et les obligations de ce dernier en ce qui concerne les réclamations de créanciers dirigées contre Zarolega (question IV);

(d) the relations between Zarolega and respondent and the latter's obligations regarding claims brought by creditors against Zarolega (Questions V, VI and VII).

Held: The appeal should be dismissed, except as to Question III.

The Court concluded that it is to say the least premature to speak of confiscation, since the arbitration committee has not yet even been created, and it answered the questions presented as follows:

—Question I: not on appeal;

—Question II: the Court of Appeal properly found that the Superior Court lacked jurisdiction to decide what the compensation should include and therefore no answer should be given to this question;

—Question III: by its very form Question III only requires an answer if Question II has been answered in the negative: the Court varied the decision of the Court of Appeal and gave no answer to this question;

—Question IV: affirming the Court of Appeal, the Court concluded that COJO was released from any obligation to compensate Zarolega;

—Question V and VI: the Court answered in the negative, adopting the reasons of the lower courts;

—Question VII: the Court gave no answer, since this question only required an answer if an affirmative answer was given to Questions V and VI.

Anisminic Ltd. v. Foreign Compensation Commission et al., [1969] 1 All E.R. 208; *Duquet v. Town of Sainte-Agathe-des-Monts*, [1977] 2 S.C.R. 1132; *Vachon v. Attorney General of the Province of Quebec*, [1979] 1 S.C.R. 555; *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756; *Barraclough v. Brown*, [1897] A.C. 615; *City of Lethbridge v. Canadian Western Natural Gas, Light, Heat and Power Co. Ltd.*, [1923] S.C.R. 652; *Cassidy v. Stuart*, [1928] 3 D.L.R. 879; *Towah Interest Ltd. v. Procureur général du Québec*, [1968] R.P. 378; *Société québécoise d'exploitation minière v. Hébert et al.*, [1974] C.A. 78; *Bertho v. Hôpital de Chicoutimi*, [1976] C.A. 154; *Campisi v. Procureur général du Québec*, [1978] C.A. 520, referred to.

APPEAL from a decision of the Court of Appeal of Quebec[1], varying a judgment of the Superior Court. Appeal dismissed, except as to Question III.

[1] [1979] C.A. 497.

d) les rapports entre Zarolega et l'intimée, et les obligations de cette dernière en ce qui concerne les réclamations de créanciers dirigées contre Zarolega (questions V, VI et VII).

Arrêt: Le pourvoi est rejeté, sauf quant à la question III.

Après avoir conclu qu'il est pour le moins prématuré de parler de confiscation, puisque le conseil d'arbitrage n'est pas encore constitué, la Cour répond comme suit aux questions posées:

—Question I: non portée en appel.

—Question II: la Cour d'appel a raison de conclure que la Cour supérieure n'a pas juridiction pour déterminer ce que doit comprendre l'indemnité. En conséquence aucune réponse ne doit être donnée à cette question.

—Question III: par sa formulation même, cette question ne requérait une réponse que si la question II recevait une réponse négative. La Cour modifie l'arrêt de la Cour d'appel et ne répond pas à cette question.

—Question IV: confirmant la Cour d'appel, la Cour conclut que le COJO est dégagé de toute obligation d'indemniser Zarolega.

—Questions V et VI: la Cour y répond par la négative, faisant siennes les raisons des cours inférieures.

—Question VII: la Cour n'y répond pas, puisque cette question n'appelait de réponse que si une réponse affirmative était donnée aux questions V et VI.

Jurisprudence: *Anisminic Ltd. v. Foreign Compensation Commission et al.*, [1969] 1 All E.R. 208; *Duquet c. Ville de Sainte-Agathe-des-Monts*, [1977] 2 R.C.S. 1132; *Vachon c. Procureur général de la province de Québec*, [1979] 1 R.C.S. 555; *Bell c. Ontario Human Rights Commission*, [1971] R.C.S. 756; *Barraclough v. Brown*, [1897] A.C. 615; *City of Lethbridge c. Canadian Western Natural Gas, Light, Heat and Power Co. Ltd.*, [1923] R.C.S. 652; *Cassidy v. Stuart*, [1928] 3 D.L.R. 879; *Towah Interest Ltd. c. Procureur général du Québec*, [1968] R.P. 378; *Société québécoise d'exploitation minière c. Hébert et autre*, [1974] C.A. 78; *Bertho c. Hôpital de Chicoutimi*, [1976] C.A. 154; *Campisi c. Procureur général du Québec*, [1978] C.A. 520.

POURVOI contre un arrêt de la Cour d'appel du Québec[1], qui a modifié un jugement de la Cour supérieure. Pourvoi rejeté, sauf quant à la question III.

[1] [1979] C.A. 497.

Mitchell Klein, *Pierre Pinard* and *Sylvain Lussier*, for the appellants.

Lorne Giroux, *Mireille Zigby* and *Gilles Jolicœur*, for the respondent.

English version of the judgment of the Court delivered by

CHOUINARD J.—This appeal is from three decisions of the Court of Appeal of Quebec, on as many appeals from a judgment of the Superior Court on appellants' motion for a declaratory judgment pursuant to art. 453 *C.C.P.*

The case arose following expropriation of the Olympic Village by the *Act respecting the Olympic Village*, 1976 (Que.), c. 43. By that Act, the *Régie des installations olympiques* (RIO) was made the owner of the Olympic Village and of accessory assets and rights as of April 6, 1976. The Olympic Village was the facility provided to accommodate athletes, their trainers and representatives of national delegations who came to Montreal specifically for the 1976 Olympic Games.

The following summary of the facts is taken from the opinion of Turgeon J.A. who rendered the judgment of the Court of Appeal:

[TRANSLATION] In October and November 1974, two agreements were concluded between the *Comité organisateur des jeux olympiques 1976* (hereinafter referred to as COJO) and Zarolega, the object of which was the construction and financing of the Olympic Village (Exhibits P-1 and P-2).

The first, so-called "principal" agreement was not financially very advantageous to COJO. Under this agreement, Zarolega was to make an investment of four million dollars, and further undertook to obtain private financing for a loan on first hypothec of some twenty million dollars. The difference of six million between the cost of the project, then estimated at about thirty million, and the investment made by Zarolega, plus the first hypothec, was to be assumed by COJO and guaranteed by a second hypothec.

The recovery of COJO's investment was directly linked to the profits made by Zarolega, over a five-year period, from operation of the project after the Olympic Games.

Mitchell Klein, *Pierre Pinard* et *Sylvain Lussier*, pour les appelants.

Lorne Giroux, *Mireille Zigby* et *Gilles Jolicœur*, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE CHOUINARD—Ce pourvoi est à l'encontre de trois arrêts de la Cour d'appel du Québec rendus sur autant d'appels d'un jugement de la Cour supérieure sur la requête des appelants pour jugement déclaratoire suivant l'art. 453 *C.p.c.*

Le litige fait suite à l'expropriation du Village olympique par la *Loi concernant le village olympique*, 1976 (Qué.), chap. 43. Par cette loi, la Régie des installations olympiques (RIO) est devenue propriétaire du Village olympique ainsi que des biens et droits accessoires, à compter du 6 avril 1976. Le Village olympique était cet ensemble destiné à loger les athlètes, les entraîneurs et les représentants des délégations nationales venus participer aux jeux olympiques de 1976 à Montréal.

Le résumé suivant des faits est extrait de l'opinion du juge Turgeon qui a rendu le jugement de la Cour d'appel:

Au cours des mois d'octobre et de novembre 1974, deux conventions intervinrent entre le Comité organisateur des jeux olympiques 1976 (ci-après appelé COJO) et Zarolega, lesquelles avaient pour objet la construction et le financement du Village olympique (pièces P-1 et P-2).

La première de ces conventions, dite principale, n'était pas très avantageuse financièrement pour le COJO. En vertu de cette convention, Zarolega devait effectuer une mise de fonds de quatre millions de dollars et s'engageait de plus à obtenir en financement privé un prêt en première hypothèque de l'ordre de vingt millions. La différence de six millions entre le coût du projet estimé alors à environ trente millions et la mise de fonds de Zarolega, plus la première hypothèque, devait être assumée par le COJO et garantie par une seconde hypothèque.

La récupération de l'investissement de COJO était directement reliée aux profits réalisés par Zarolega, sur une période de cinq ans, provenant de l'exploitation du projet après les jeux olympiques.

At COJO's request, a Parliamentary Commission was formed to review the range of problems relating to the holding of the 1976 Olympic Games. At that time, the estimated cost of the project had risen from thirty to fifty million dollars. Under P-1, COJO had to make up the financing discrepancy between Zarolega's investment and the cost of the project, and it became clear that marketing such a costly residential project reduced COJO's earning potential.

It should be noted that under Exhibit P-3, Les Terrasses Zarolega had purchased from the City of Montreal the land on which the Olympic Village was to be built.

Following meetings of the Parliamentary Commission in January 1975, construction work was temporarily suspended and COJO and Zarolega were invited to renegotiate a new agreement.

A letter of intent (P-4) was negotiated between COJO and Zarolega and submitted to the Parliamentary Commission in February 1975. The parties were then asked to prepare by July 1975 a new agreement, which would incorporate the provisions of the letter of intent of February 4, 1975.

Between February and July 1975, cost estimates continued to rise to a figure of seventy-four million dollars.

At meetings of the Parliamentary Commission in July 1975, COJO and Zarolega were invited to again renegotiate their earlier agreements. Fresh negotiations resulted in a second letter of intent (Exhibit P-5), which was submitted to the Parliamentary Commission in July 1975. It was then agreed that a new agreement would be prepared based on this second letter of intent, the effect of which would be to improve COJO's position, since it would be assured of recovering a large part of its investment through a purchase option given to it. The January 1976 agreement (Exhibit P-6), the "Comprehensive Agreement", was the outcome of negotiations which lasted throughout 1975. This agreement was not signed by all the parties in the matter.

This was followed by the *Act respecting the Olympic Village*, assented to on April 30, 1976, making the RIO owner of the Olympic Village as of April 6, 1976.

This terminated negotiations between the parties, as their respective rights and obligations were now subject, as a result of this Act, to a new legal frame of reference.

Sur l'initiative de COJO, une commission parlementaire fut formée pour étudier l'ensemble des problèmes relatifs à la tenue des jeux olympiques de 1976. A cette époque, les coûts estimés du projet étaient passés de trente à cinquante millions. COJO devant, selon P-1, combler l'écart de financement entre l'investissement de Zarolega et le coût du projet, il devenait évident que la commercialisation d'un projet domiciliaire aussi coûteux réduisait la possibilité de récupération de COJO.

Il faut souligner que par la pièce P-3, Les Terrasses Zarolega avaient acquis de la ville de Montréal le terrain où devait s'élever le Village olympique.

A la suite des séances de la Commission parlementaire de janvier 1975, les travaux de construction furent momentanément suspendus et COJO et Zarolega furent invités à renégocier une nouvelle convention.

Une lettre d'intention (P-4) fut négociée entre COJO et Zarolega et déposée devant la commission parlementaire en février 1975. Il fut alors demandé aux parties de préparer, pour le mois de juillet 1975, une nouvelle convention qui tiendrait compte des dispositions de la lettre d'intention du 4 février 1975.

Entre février et juillet 1975, les prévisions des coûts ne cessèrent d'augmenter pour atteindre 74 millions.

Lors des séances de la commission parlementaire de juillet 1975, COJO et Zarolega furent invités à renégocier à nouveau leurs conventions antérieures. De nouvelles négociations donnèrent lieu à une seconde lettre d'intention (pièce P-5) qui fut déposée devant la commission parlementaire de juillet 1975. Il fut alors convenu qu'une nouvelle convention serait préparée à partir de cette dernière lettre d'intention qui avait pour effet d'améliorer la situation de COJO puisque celui-ci se voyait assuré de récupérer une bonne partie de son investissement par le biais d'une option d'achat qui y était consentie. La convention de janvier 1976 (pièce P-6) «Comprehensive Agreement» fut l'aboutissement des négociations qui se déroulèrent au long de l'année 1975. Cette convention ne fut pas signée par toutes les parties en cause.

Vint ensuite la *Loi concernant le village olympique* sanctionnée le 30 avril 1976, faisant de la RIO le propriétaire du Village olympique à compter du 6 avril 1976.

Cela mit fin aux négociations entre les parties dont les droits et obligations respectifs se trouvèrent soumis à un nouveau régime juridique par l'effet de cette loi.

The RIO was made subject to a number of obligations which will be dealt with below. The City of Montreal and COJO, for their part, were released from their obligations to the former owner Zarolega under the contracts entered into between them and the latter, and relating to the Olympic Village.

The Act further provides (s. 10) that "The former owner shall receive as compensation the sums determined by the arbitration committee contemplated in Division III". Sections 15 to 25 of Division III provide for the composition and procedure of the arbitration committee, and ss. 26 to 34 deal with the arbitration committee's award.

Before the arbitration committee was created, and it still has not been, appellants applied to the Superior Court for a declaratory judgment on the following points:

I—Which agreement was the agreement in force between Zarolega and COJO immediately prior to the passage of Bill 25, the Development Agreement, Exhibits P-1 and P-2, or the Comprehensive Agreement, Exhibit P-6(A)1 and ancillary documents?

II—Is the indemnity to which Plaintiffs are entitled in virtue of the passage of Bill 25 limited to the items set forth in Section 27 thereof?

III—If the answer to II above is no, upon which agreements are Plaintiffs entitled to indemnity?

(a) The Development Agreement and

(i) Clause 7 of the February 4, 1975 Letter of Intent, Exhibit P-4 which deals specifically with expropriation and which clause was confirmed by collateral letter on the occasion of the execution of each of the ELEVEN (11) Deeds of Loan signed before the 29th day of January 1976, the date of the Comprehensive Agreement (See Exhibit P-8, letter agreements dated June 6, 1975, September 23, 1975, and January 15, 1976, each of which annexed the letter of February 19, 1975, which in Section 3 thereof confirmed Clause 7 of the Letter of Intent); or

(b) The Comprehensive Agreement.

IV—Has Bill 25 released COJO from the obligation to indemnify ZAROLEGA with respect to claims of

La RIO se voit imposer de nombreuses obligations dont il sera traité plus loin. La ville de Montréal et le COJO sont pour leur part dégagés de leurs obligations envers le propriétaire antérieur Zarolega en vertu des contrats intervenus entre eux et ce dernier et ayant trait au Village olympique.

La Loi stipule par ailleurs (art. 10) que «Le propriétaire antérieur reçoit, à titre d'indemnité, les sommes déterminées par le conseil d'arbitrage visé à la section III». Les articles 15 à 25 de la section III pourvoient à la composition et au fonctionnement du conseil d'arbitrage tandis que les art. 26 à 34 traitent de la sentence du conseil d'arbitrage.

Avant que le conseil d'arbitrage ne soit constitué, il ne l'est pas encore, les appelants se sont adressés à la Cour supérieure pour obtenir un jugement déclaratoire sur les questions suivantes:

[TRADUCTION]

I—Quelle était l'entente en vigueur entre Zarolega et COJO, immédiatement avant l'adoption de la Loi 25, le contrat d'aménagement, pièces P-1 et P-2 ou le contrat général, pièce P-6(A)1 et les documents accessoires?

II—L'indemnité à laquelle les demandeurs ont droit en vertu de l'adoption de la Loi 25 est-elle limitée aux chefs énumérés à l'art. 27?

III—Si la réponse à la question II est négative, en vertu de quelles ententes les demandeurs ont-ils droit d'être indemnisés?

a) Le contrat d'aménagement et

i) La clause 7 de la lettre d'intention du 4 février 1975, pièce P-4, qui traite particulièrement de l'expropriation et qui a été confirmée par une lettre concomittante à la signature de chacun des onze (11) contrats de prêt signés avant le 29 janvier 1976, date du contrat général (voir pièce P-8, lettres d'entente en date des 6 juin 1975, 23 septembre 1975 et 15 janvier 1976, dont chacune est annexée à la lettre du 19 février 1975, laquelle confirme à son article 3, la clause 7 de la «lettre d'intention»); ou

b) Le contrat général.

IV—Le projet de loi 25 a-t-il libéré COJO de l'obligation d'indemniser ZAROLEGA relativement aux

unpaid creditors pursuant to agreements executed between Zarolega and such creditor(s) with the approval of COJO, where such claims result from services rendered, work done and/or materials supplied on or before the 30th day of April 1976?

V—Is RIO bound to indemnify Zarolega with respect to claims of unpaid creditors pursuant to agreements executed between Zarolega and such creditor(s), with the approval of COJO where such claims result from services rendered, work done and/or materials supplied on or before the 30th day of April 1976?

VI—Is RIO bound to indemnify Zarolega with respect to claims of unpaid creditors pursuant to agreements executed between Zarolega and such creditor(s) with the approval of COJO where such claims result from " ... the performance of obligations undertaken by the contractors, subcontractors, suppliers of materials and lessors of goods or services for work done, materials supplied and goods or services leased to the Olympic Village"?

VII—If the answer to V and/or VI above is yes, is Zarolega entitled to be relieved from the contestation of the claims of such creditors, as provided in Section 220 C.P.?

These questions, in my view, have a fourfold purpose: (a) determining the agreement in effect between the parties at the time the Act was passed (Question I); (b) the action before the arbitration committee (Questions II and III); (c) the relations between Zarolega and COJO, and the latter's obligations regarding claims brought by creditors against Zarolega (Question IV); (d) the relations between Zarolega and RIO, and the latter's obligations regarding claims brought by creditors against Zarolega (Questions V, VI and VII).

Counsel for the appellants informed the Court that there are against Zarolega some four million dollars in claims relating to the Olympic Village.

The questions presented by appellants are not all interrelated and must be examined separately.

First, however, I think it is proper to dispose of appellants' argument that the *Act respecting the*

réclamations des créanciers impayés par suite des contrats intervenus entre Zarolega et ce(s) créancier(s) avec l'approbation de COJO, lorsque ces réclamations résultent de services rendus, de travaux effectués et(ou) de matériaux fournis jusqu'au 30 avril 1976?

V—RIO doit-il indemniser Zarolega relativement aux créances de créanciers impayés par suite des contrats intervenus entre Zarolega et ce(s) créancier(s) avec l'approbation de COJO, lorsque ces réclamations résultent de services rendus, de travaux effectués et(ou) de matériaux fournis jusqu'au 30 avril 1976?

VI—RIO doit-il indemniser Zarolega relativement aux réclamations des créanciers impayés par suite des contrats intervenus entre Zarolega et ce(s) créancier(s) avec l'approbation de COJO, lorsque ces réclamations résultent de « ... l'exécution d'obligations auxquelles s'étaient engagés les entrepreneurs, les sous-entrepreneurs, les fournisseurs de matériaux, et les locateurs de biens et de services pour les travaux effectués, les matériaux fournis et les biens ou services loués au Village olympique»?

VII—Si la réponse à l'une ou l'autre des questions V et VI susmentionnées est affirmative, Zarolega peut-elle être mise hors de cause comme le prévoit l'article 220 du C.P.?

Ces questions me paraissent avoir quatre objets: (a) la détermination de l'entente en vigueur entre les parties au moment de l'adoption de la Loi (question I); (b) le recours devant le conseil d'arbitrage (questions II et III); (c) les rapports entre Zarolega et le COJO, et les obligations de ce dernier en ce qui concerne les réclamations de créanciers dirigées contre Zarolega (question IV); (d) les rapports entre Zarolega et la RIO, et les obligations de cette dernière en ce qui concerne les réclamations de créanciers dirigées contre Zarolega (questions V, VI et VII).

Les procureurs des appelants nous ont fait part qu'il y a quelque quatre millions de dollars de réclamations contre Zarolega se rapportant au Village olympique.

Les questions posées par les appelants ne sont pas toutes reliées entre elles et il convient de les aborder une à une.

Mais auparavant, il me paraît opportun de disposer de la prétention des appelants à l'effet que la

Olympic Village is a confiscatory statute, which carries out an expropriation without compensation.

Their factum states:

Inherent in all of the Questions before this Honorable Court ..., is the pretention of [Appellants] ... that the Act is confiscatory, and should be interpreted to result in expropriation without indemnification.

It is to say the least premature to speak of confiscation, before the arbitration committee has even been created, or has given any ruling whatever regarding the compensation to which Zarolega is entitled under this Act.

Respondent properly wrote:

[TRANSLATION] ... Bill 25, far from confiscating private property without compensation, on the contrary expressly provides that the former owner will receive compensation for loss of the property.

Further:

[TRANSLATION] In the case at bar, the Quebec legislator saw fit to intervene by a special statute and expropriate the Olympic Village himself. Accordingly, Bill 25 creates a special system of rights and obligations between RIO, COJO and the former owners. In particular, this special legislation provides for the payment of compensation to the former owner. For the purpose of determining the sums of this compensation, the legislator has provided a special, complete and self-contained procedure apart from the general law. The legislator clearly and specifically intended for this matter to be determined by an arbitration committee, and took care to indicate the composition, powers, procedure, decision deadlines and implementation of the award of that committee. The procedure which the Act provides for the committee is complete, self-contained and capable of providing the parties with satisfaction.

QUESTION I

The trial judge held that at the time the *Act respecting the Olympic Village* was passed the agreement in effect was the "Comprehensive Agreement". No appeal was brought from this part of the judgment, which is now *res judicata*.

QUESTION II

The question of whether the compensation to which appellants are entitled is limited to the items

Loi concernant le village olympique est une loi de confiscation qui effectue une expropriation sans indemnité.

On lit dans leur factum:

[TRADUCTION] Dans toutes les questions à cette honorable Cour ..., se trouve la prétention des [appelants] ... que la Loi vise la confiscation, et qu'on doit y voir une expropriation sans indemnité,

Il est pour le moins prématuré de parler de confiscation avant même que le conseil d'arbitrage ne soit constitué et se soit prononcé sur quoi que ce soit relativement à l'indemnité à laquelle Zarolega a droit en vertu de cette loi.

L'intimée a raison d'écrire:

... la Loi 25, loin de confisquer la propriété privée sans indemnité, prévoit au contraire, et de façon expresse, que le propriétaire antérieur recevra compensation pour la perte de la propriété.

Et ailleurs:

Dans le présent cas, le législateur québécois a jugé bon d'intervenir par loi spéciale pour exproprier lui-même le Village Olympique. C'est ainsi que la Loi 25 crée un régime spécial de droits et d'obligations entre R.I.O., COJO et les propriétaires antérieurs. En particulier, cette législation spéciale prévoit le paiement d'une indemnité en faveur du propriétaire antérieur. Pour la détermination des sommes constituant cette indemnité, le législateur a prévu une procédure particulière, complète et autonome en marge du régime général. Le législateur a clairement et spécifiquement voulu que cette question soit déterminée par un tribunal d'arbitrage dont il prévoit avec soin la composition, les pouvoirs, la procédure, les délais pour rendre décision et l'exécution de la sentence. La procédure prévue devant le tribunal par la loi est complète, autonome et de nature à donner satisfaction aux parties.

QUESTION I

Le juge de première instance a décidé qu'au moment de l'adoption de la *Loi concernant le village olympique* l'entente en vigueur était le «Comprehensive Agreement». Il n'a pas été interjeté appel de cette partie du jugement qui est maintenant chose jugée.

QUESTION II

Poser la question de savoir si l'indemnité à laquelle les appelants ont droit est limitée aux

set forth in s. 27 of the Act is equivalent to asking whether the word "include" preceding this list has a limiting effect.

Section 27 reads as follows:

27. The compensation shall include the investments of the former owner, the true value of the promotional and managerial services he has rendered respecting the construction of the Olympic Village and interest at the rate and from the dates fixed by the arbitrators.

Respondent pleaded at the outset that the Superior Court lacked jurisdiction to decide this question, and that it should be disposed of by the arbitration committee.

The Superior Court judge took the opposite view, and proceeded to dispose of the matter, finding that the word "include" in s. 27 does not have a limiting effect, and that appellants could present to the arbitration committee other items in addition to those listed.

Respondent appealed from this judgment concurrently with the judgment on Question III. These judgments were the subject of the first decision of the Court of Appeal disputed by the appeal at bar. I will deal with Question III below.

The Court of Appeal found for the respondent on Question II and held that, under the *Act respecting the Olympic Village*, the Superior Court lacked jurisdiction to decide this matter, which must remain unresolved.

I agree with the Court of Appeal that no answer should be given to Question II.

Turgeon J.A. undertook a review of the Act and its principal provisions:

[TRANSLATION]The *Act respecting the Olympic Village* provides that the Board becomes owner of the Olympic Village as of April 6, 1976, of movable property found on the premises, of movable property acquired with the sums of money deposited in any bank account opened jointly by the organizing committee and the former owner, of the equipment, machinery and vehicles which have served, serve or are to serve for the construction of the Olympic Village and were owned by the former owner, of the former owner's claims arising from contracts made with the City of Montreal or the

chefs de réclamation énumérés dans l'art. 27 de la Loi, c'est en somme demander si le mot «comprend» qui précède cette énumération est limitatif.

L'article 27 se lit comme suit:

27. L'indemnité comprend les investissements du propriétaire antérieur, la valeur réelle des services de promotion et de gérance qu'il a rendus relativement à la construction du Village olympique et les intérêts au taux et à compter des dates fixés par les arbitres.

L'intimée a plaidé au départ que la Cour supérieure n'a pas juridiction pour se prononcer sur cette question et qu'il appartient au conseil d'arbitrage d'en disposer.

Le juge de la Cour supérieure étant d'avis contraire procéda à en disposer et détermina que le mot «comprend» à l'art. 27 n'est pas limitatif et que devant le conseil d'arbitrage les appelants pourront faire valoir d'autres chefs de réclamation en plus de ceux énumérés.

L'intimée en a appelé de ce jugement en même temps que du jugement sur la question III. Ces jugements font l'objet du premier arrêt de la Cour d'appel attaqué par le présent pourvoi. J'aborderai la question III plus loin.

La Cour d'appel donna raison à l'intimée sur la question II et décida qu'aux termes de la *Loi concernant le village olympique* la Cour supérieure n'avait pas juridiction pour se prononcer sur cette question qui doit rester sans réponse.

Je suis d'accord avec la Cour d'appel qu'aucune réponse ne doit être donnée à la question II.

Le juge Turgeon procède à une revue de la Loi et de ses principales dispositions:

La Loi concernant le Village olympique décrète que la régie devient propriétaire du Village olympique, à compter du 6 avril 1976, des biens meubles se trouvant sur les lieux visés, des biens meubles acquis grâce aux sommes d'argent déposées dans tout compte de banque ouvert conjointement par le comité et le propriétaire antérieur, de l'équipement, de l'outillage et des véhicules ayant servi, servant ou devant servir à la construction du Village olympique et appartenant au propriétaire antérieur, des créances du propriétaire antérieur nées de contrats conclus avec la ville de Montréal ou le comité

committee, or in connection with these contracts or with construction work and the negotiable instruments issued in connection with them, of the rights of the former owner regarding any sum of money deposited in any bank account opened jointly by it and by the committee, and of the rights of the former owner regarding sums of money paid or payable by the committee under the terms of the hypothecary loan contracts made by it with the former owner.

Section 10 of the said Act provides that the former owner shall receive as compensation the sums determined by the arbitration committee contemplated in Division III.

Division III provides that the arbitration committee shall consist of three members appointed by the Lieutenant-Governor in Council, in accordance with the procedure, formalities and conditions indicated in the Act.

Section 26 further states that the arbitration committee's award shall state reasons and be signed by the members who concur in it.

Section 27 indicates what the compensation shall include, namely the former owner's investments, the true value of the promotional and managerial services it has rendered, and interest at the rate and from the dates fixed by the arbitrators.

Under s. 34, the arbitration committee's award may be executed by the authority of the court having jurisdiction, upon proceedings instituted by one of the parties.

. . .

The arbitration committee contemplated by the Act constituting the Olympic Village is a body created by legislation, exercising quasi-judicial powers. This committee corresponds to the criteria for a judicial body, because its decision directly affects the ownership right of respondents and it has a duty to act judicially. Thus, s. 20 requires it to hold public hearings, it has the power to summon witnesses, compel them to appear and testify, and it must give reasons for its award, which may be implemented by authority of the court having jurisdiction. The chairman has the powers of a judge of the Superior Court for the conduct of hearings of the committee. All these aspects of its functions empower the committee to act judicially and ensure that it meets the principal criteria of quasi-judicial operation in exercising its jurisdiction.

The opinion of the Court of Appeal is well summed up in the following two passages, which I quote:

ou nées à l'occasion de ces contrats ou des travaux de construction et des effets de commerce émis à leur occasion, des droits du propriétaire antérieur dans les sommes déposées dans tout compte de banque ouvert conjointement par lui et le comité, des droits que possède le propriétaire antérieur aux sommes d'argent versées ou à être versées par le comité aux termes des contrats de prêt hypothécaire consentis par ce dernier en faveur du propriétaire antérieur.

L'article 10 de ladite loi décrète que le propriétaire antérieur reçoit, à titre d'indemnité, les sommes déterminées par le conseil d'arbitrage visé à la section III.

Il est dit à cette section III que le conseil d'arbitrage est constitué de trois membres nommés par le lieutenant-gouverneur en conseil suivant la procédure, les formalités et les conditions que la loi stipule.

L'article 26 ajoute que la sentence du conseil d'arbitrage doit être motivée et signée par les membres qui y concourent.

L'article 27 détermine ce que doit comprendre l'indemnité, soit les investissements du propriétaire antérieur, la valeur réelle des services de promotion et de gérance qu'il a rendus et les intérêts au taux et à compter des dates fixées par les arbitres.

En vertu de l'article 34, la sentence du conseil d'arbitrage peut être exécutée sous l'autorité du tribunal compétent, sur poursuite intentée par une partie.

. . .

Le tribunal d'arbitrage visé par la Loi constituant le village olympique est un organisme législativement constitué, exerçant des pouvoirs quasi-judiciaires. Ce tribunal d'arbitrage rencontre les critères d'identification de la fonction judiciaire parce que sa décision affecte directement le droit de propriété des intimés et qu'il a le devoir d'agir de façon judiciaire. Ainsi, il doit siéger en séances publiques en vertu de l'article 20, il a le pouvoir d'assigner des témoins, de les contraindre à comparaître et témoigner et il doit rendre une sentence motivée qui peut être exécutée sous l'autorité du tribunal compétent. Le président possède les pouvoirs d'un juge de la Cour supérieure pour la conduite des séances du conseil. Ce sont tous là des éléments imposant au tribunal le pouvoir d'agir judiciairement et établissant que celui-ci rencontre les principaux critères d'identification de la fonction quasi-judiciaire dans l'exercice de sa juridiction.

L'opinion de la Cour d'appel est bien résumée par les deux passages suivants que je cite:

[TRANSLATION]I am of the view that the Superior Court should not intervene by a declaratory judgment when the legislator has specifically provided that the matter is to be decided by some other tribunal. Both English and Canadian precedents would appear to lead to this conclusion.

. . .

I think it can be said that Canadian authorities is to the effect that the Superior Court should not use its declaratory power when a lower tribunal has been created by the legislator to decide on some particular issue.

The difficulty with appellants' argument stems from the distinction which they would have this Court make between the sums that are to be included in the compensation and the extent or scope of the compensation, in particular the items on which these sums are to be based. This is the foundation of their entire argument.

Thus, they suggest that the arbitration committee only has the power to determine the sums, while it is for the Superior Court to determine the items for which those sums may be awarded.

In their factum they state:

It is clear from the terms of Section 10 that the arbitration committee has only been granted jurisdiction to determine the sums to which Appellants are entitled to as compensation.

The Act, however, does not grant the arbitration committee the right to decide the scope, or extent, of the indemnity to which Appellants are entitled.

The Act does not state "the former owner shall receive compensation for such matters, and in such amounts, as the board, in their sole discretion, shall decide", or similar language implying absolute discretion, or jurisdiction.

The Act simply states that the former owner "shall receive as compensation the sums determined by the arbitration committee . . ."

and they further state:

In the present case, the Legislature has granted the arbitration committee jurisdiction to establish sums—but nothing more. It is for the Courts to determine the extent, or scope, of the jurisdiction granted the arbitration committee by the Act.

Je suis d'opinion que la Cour supérieure ne doit pas intervenir par jugement déclaratoire quand le législateur a spécifiquement prévu un autre tribunal pour décider d'une question. La jurisprudence anglaise et la jurisprudence canadienne me semblent à cet effet.

. . .

Je crois que l'on peut affirmer que la jurisprudence canadienne est à l'effet que la Cour supérieure n'utilisera pas son pouvoir déclaratoire lorsqu'un tribunal inférieur a été créé par le législateur pour adjuger sur une question particulière.

La difficulté engendrée par l'augmentation des appelants provient de la distinction qu'ils voudraient que la Cour fasse entre les sommes devant être comprises dans l'indemnité et l'étendue ou la portée de l'indemnité, ou plus précisément les chefs de réclamation donnant droit à ces sommes. C'est le fondement même de toute leur argumentation.

Ainsi, le conseil d'arbitrage ne serait habilité qu'à déterminer les sommes tandis qu'il serait de la juridiction de la Cour supérieure de déterminer à quel titre des sommes peuvent être accordées.

Ils s'en expriment ainsi dans leur factum:

[TRADUCTION] Il se dégage clairement du texte de l'art. 10 que le conseil d'arbitrage détient seulement le pouvoir de déterminer les sommes auxquelles les appelants ont droit à titre d'indemnité.

Toutefois, la Loi ne permet pas au conseil d'arbitrage de décider de la portée ou de l'étendue de l'indemnité à laquelle ont droit les appelants.

La Loi ne dit pas «le propriétaire antérieur reçoit une indemnité sous tels chefs, dont les sommes sont déterminées par le conseil dans l'exercice de son pouvoir discrétionnaire», ou n'emploie pas de mots semblables qui impliquent une compétence ou un pouvoir discrétionnaire absolu.

La Loi dit simplement que le propriétaire antérieur «reçoit à titre d'indemnité les sommes déterminées par le conseil d'arbitrage».

Et encore:

[TRADUCTION] En l'espèce, la législature a accordé au conseil d'arbitrage le pouvoir de fixer les sommes—mais rien de plus. Il appartient aux tribunaux de déterminer l'étendue ou la portée du pouvoir accordé au conseil d'arbitrage par la Loi.

I cannot accept this interpretation. When s. 10 states that: "The former owner shall receive as compensation the sums determined by the arbitration committee contemplated in Division III", these sums must obviously relate to something, to certain items claimed; and in order for sums to be determined in conjunction with items claimed, these items must be determined. There is no basis in the Act for concluding that the legislator intended to make any court other than the arbitration committee responsible for determining the items claimed, on the basis of which various sums are to be determined for inclusion in the compensation to be paid. On the contrary and the reason is precisely because the legislator intended to make the arbitration committee responsible for determining the compensation and the items included in it.

Accordingly, appellants were not asking the Superior Court to determine the arbitration committee's jurisdiction, but rather to supplant the latter and determine what the Act requires the arbitration committee to determine.

For this reason, the House of Lords decision in *Anisminic Ltd. v. Foreign Compensation Commission et al.*[2] and the other cases cited to the same effect can have no application in the case at bar.

I also do not believe that the following cases relied upon by appellants have the effect suggested by them: *Duquet v. Town of Sainte-Agathe-des-Monts*[3], *Vachon v. Attorney General of the Province of Quebec*[4] and *Bell v. Ontario Human Rights Commission*[5].

In *Duquet*, a taxpayer was asking that a taxation by-law, under which the city was preparing to have his property sold, be declared *ultra vires* and void. The Court rejected the distinction between a preventive and a curative action, and held the declaratory procedure admissible, as being within the scope of art. 453 *C.C.P.*

[2] [1969] 1 All E.R. 208.
[3] [1977] 2 S.C.R. 1132.
[4] [1979] 1 S.C.R. 555.
[5] [1971] S.C.R. 756.

Je ne puis accepter cette interprétation. Lorsque l'art. 10 stipule que: «Le propriétaire antérieur reçoit, à titre d'indemnité, les sommes déterminées par le conseil d'arbitrage visé à la section III», il faut bien que ces sommes se rapportent à des objets, à des chefs de réclamation. Et pour que des sommes puissent être déterminées en fonction de chefs de réclamation, il faut bien que ces chefs soient déterminés. Rien dans la Loi ne permet de conclure que le législateur ait entendu confier à un tribunal autre que le conseil d'arbitrage la détermination des chefs de réclamation en fonction desquels des sommes doivent être déterminées pour constituer l'indemnité à être versée. Au contraire et c'est précisément parce que le législateur a voulu confier à ce conseil d'arbitrage la responsabilité de déterminer l'indemnité et les éléments qui doivent la composer.

Ce n'est donc pas de déterminer la juridiction du conseil d'arbitrage que les appelants ont demandé à la Cour supérieure mais plutôt de se substituer à ce dernier et de déterminer ce que la Loi demande au conseil d'arbitrage de déterminer.

Pour cette raison l'arrêt de la Chambre des Lords dans *Anisminic Ltd. v. Foreign Compensation Commission et al.*[2] et les autres arrêts cités dans le même sens ne peuvent trouver application en l'espèce.

Je ne crois pas davantage que les arrêts suivants sur lesquels les appelants s'appuient aient le sens qu'ils leur attribuent: *Duquet c. Ville de Sainte-Agathe-des Monts*[3]; *Vachon c. Le procureur général de la province de Québec*[4] et *Bell v. Ontario Human Rights Commission*[5].

Dans *Duquet*, un contribuable demandait que soit déclaré *ultra vires* et nul un règlement de taxation en vertu duquel la Ville s'apprêtait à faire vendre sa propriété. La Cour a mis de côté la distinction entre une demande préventive et une demande curative et a jugé la procédure déclaratoire recevable, celle-ci étant comprise dans le cadre de l'art. 453 *C.p.c.*

[2] [1969] All E. R. 208.
[3] [1977] 2 R.C.S. 1132.
[4] [1979] 1 R.C.S. 555.
[5] [1971] R.C.S. 756.

In *Vachon*, an application was made to have declared void Social Aid regulations under which the appellants' benefits were reduced.

In *Bell*, the case concerned the Ontario Human Rights Commission's jurisdiction to hear the complaint brought before it.

The case at bar does not concern regulatory nullity nor the lack or excess of jurisdiction of the arbitration committee, all cases recognized by art. 846 *C.C.P.* and by judicial authority as being subject to the exercise of the supervisory and controlling power of the Superior Court.

Rather, the question is whether the Superior Court may intervene when the issue is one which the law has confided to an arbitration committee.

As Turgeon J. observed, the House of Lords held in *Barraclough v. Brown*[6] that there is no basis for a declaratory judgment when the matter has been confided to a lower court, and I quote the following passages from Lord Herschell at p. 620, passages which were cited by appellants:

> . . . I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right.
>
> It was argued for the appellant that, even if not entitled to recover the expenses by action in the High Court, he was, at all events, entitled to come to that court for a declaration that on the true interpretation of the statute he had a right to recover them. It might be enough to say that no such case was made by appellant's claim. But apart from this, I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover—the very matter relegated to the inferior Court—determined. Such a proposition was not supported by authority, and is, I think, unsound in principle.

Counsel for the appellants pointed out that Turgeon J.A. did not cite the first paragraph of the foregoing passage, and sought to distinguish this case by arguing that in the case at bar appellants'

[6] [1897] A.C. 615.

Dans *Vachon*, il s'agissait d'une demande à l'effet de déclarer nuls les règlements de l'Aide sociale en vertu desquels les appelants avaient vu leurs prestations diminuées.

Dans *Bell*, il s'agissait de la juridiction de la Ontario Human Rights Commission d'entendre la plainte portée devant elle.

Dans la présente cause il ne s'agit pas de nullité de règlement, ni de défaut ou d'excès de juridiction du conseil d'arbitrage, qui sont tous des cas reconnus par l'art. 846 *C.p.c.* et la jurisprudence comme étant sujets à l'exercice du pouvoir de surveillance et de contrôle de la Cour supérieure.

Il s'agit plutôt de déterminer s'il y a lieu à intervention de la Cour supérieure quand la question en est une que la loi a confiée à un conseil d'arbitrage.

Comme l'a signalé le juge Turgeon, dans *Barraclough v. Brown*[6] la Chambre des Lords a décidé qu'il n'y a pas ouverture à un jugement déclaratoire lorsque le sujet a été confié à un tribunal inférieur et je cite les passages suivants de Lord Herschell à la p. 620, passages cités par les appelants:

> [TRADUCTION] . . . Je ne crois pas que l'appelant puisse demander recouvrement en vertu de la loi et en même temps soutenir qu'il peut le faire par des moyens non prévus par la loi qui seule confère le droit.
>
> On a prétendu au nom de l'appelant que même s'il ne pouvait pas recouvrer ses dépenses par action devant la Haute Cour, il pouvait, en tout état de cause, demander à la cour une déclaration portant que selon l'interprétation correcte de la loi, il avait le droit de les recouvrer. Il suffirait peut-être de dire que l'appelant n'a pas réussi à établir sa réclamation. Mais à part cela, je crois qu'il serait très pernicieux de dire que lorsqu'une partie doit aux termes de la loi s'adresser à un tribunal inférieur elle peut d'abord venir devant la Haute Cour pour obtenir une décision sur son droit de recouvrer—ce qui est l'objet même de la délégation au tribunal d'instance inférieure. Une telle proposition n'est pas appuyée par la jurisprudence et est, à mon avis, erronée quant aux principes.

Les procureurs des appelants ont fait observer que le juge Turgeon n'avait pas cité le premier alinéa du passage ci-dessus et ont voulu distinguer cette cause en plaidant que dans le présent cas le

[6] [1897] A.C. 615.

remedy is not based exclusively on the *Act respecting the Olympic Village*, but as well on art. 407 *C.C.*, which reads as follows:

407. No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.

The principle stated in art. 407 is beyond question a part of the civil law of Quebec: the *Act respecting the Olympic Village* constitutes an application of this principle, but I do not see how appellants could claim to exercise a remedy above and beyond this special statute.

In *City of Lethbridge v. Canadian Western Natural Gas, Light, Heat and Power Co. Ltd.*[7], this Court held that even assuming that it had the power to do so, the Court should not intervene when the legislator has seen fit to create a lower court with jurisdiction to dispose of the matter on which a declaratory judgment has been sought.

I quote Anglin J., at p. 659:

... Out of respect to the legislature and to carry into effect the spirit, if not the letter, of its policy, as expressed in the Public Utilities Act, the courts, although they may not have been denuded of jurisdiction to entertain such an action as that now before us, should, I think, decline to exercise that jurisdiction, if they possess it, and should relegate the parties to the board which the legislature has constituted to deal with such cases and has clothed with powers adequate to enable it to do full and complete justice in the premises.

and Mignault J. at p. 663:

... there can be no doubt, even admitting that the respondent violated its contract with the appellant, that the court should not exercise its extraordinary powers and grant such an injunction, if another convenient and equally effective remedy is available to the appellant.

Finally, a declaratory judgment will not be rendered when it will serve little or no purpose.

In *Cassidy v. Stuart*[8], Masten J. observed at p. 883:

[7] [1923] S.C.R. 652.
[8] [1928] 3 D.L.R. 879.

recours des appelants n'est pas fondé exclusivement sur la *Loi concernant le village olympique*, mais aussi sur l'art. 407 *C.c.* qui se lit comme suit:

407. Nul ne peut être contraint de céder sa propriété, si ce n'est pour cause d'utilité publique et moyennant une juste et préalable indemnité.

Le principe énoncé par l'art. 407 fait partie sans conteste du Droit civil du Québec: la *Loi concernant le village olympique* en constitue une application, mais je ne vois pas comment les appelants pourraient prétendre exercer un recours en dehors du cadre de cette loi spéciale.

Dans *City of Lethbridge c. Canadian Western Natural Gas, Light, Heat and Power Co. Ltd.*[7], cette Cour a décidé que même à supposer qu'elle ait le pouvoir de le faire, la Cour ne devrait pas intervenir lorsque le législateur a jugé à propos de créer un tribunal inférieur compétent à disposer de la question sur laquelle on demande d'exercer le pouvoir déclaratoire.

Je cite le juge Anglin à la p. 659:

[TRADUCTION] ... Par respect pour la législature et afin de respecter l'esprit de sa politique, sinon la lettre, formulée dans la Public Utilities Act, bien que les tribunaux n'aient peut-être pas perdu leur compétence pour connaître d'une action comme celle qui nous est soumise, ils devraient, à mon avis, refuser de l'exercer, s'ils la possèdent, et renvoyer les parties devant le tribunal créé par la législature pour connaître de telles affaires et à qui elle a donné les pouvoirs nécessaires pour lui permettre de rendre justice en ce domaine.

et le juge Mignault à la p. 663:

[TRADUCTION] ... il ne peut y avoir de doute, même si l'on admettait que l'intimé a violé son contrat avec l'appelant, que la cour ne doit pas se servir de ses pouvoirs extraordinaires pour accorder une telle injonction si l'appelant a d'autres recours convenables et efficaces.

Enfin, un jugement déclaratoire ne sera pas rendu lorsqu'il aura peu ou pas d'utilité.

Dans *Cassidy v. Stuart*[8], le juge Masten écrit à la p. 883:

[7] [1923] R.C.S. 652.
[8] [1928] 3 D.L.R. 879.

... the jurisdiction will not, as a rule, be exercised where the declaration would be useless or embarrassing or where some other statutory mode of proceeding is provided.

And Professor de Smith, in *Judicial Review of Administrative Action*, 4th ed., London, Stevens & Sons Limited, 1980, at p. 513:

... the broadest judicial discretion may be exercised in determining whether a case is one in which declaratory relief ought to be awarded ...

... The court must be satisfied that the award of a declaration will serve a useful purpose, ...

As the Court pointed out to counsel for the appellants at the hearing, the declaratory judgment they are seeking in the case at bar could only be of very limited usefulness in the circumstances. Question II is so formulated that the finding could only be that the word "include" in s. 27 of the *Act respecting the Olympic Village* does not have a limiting effect. This would leave the issue unresolved respecting each of the items individually which appellants might wish to submit to the arbitration committee, so that the declaratory proceeding might have to be begun again for each of these.

As to this, see also the following decisions of the Quebec courts: *Towah Interest Ltd. v. Procureur général du Québec*[9]; *Société québécoise d'exploitation minière v. Hébert et al.*[10]; *Bertho v. Hôpital de Chicoutimi*[11]; *Campisi v. Procureur général du Québec*[12].

For these reasons, therefore, I conclude like the Court of Appeal that no answer should be given to Question II.

QUESTION III

On the question of the agreement under which appellants were entitled to compensation, as the trial judge had already found that the "Comprehensive Agreement" was the one in effect between the parties at the time the *Act respecting the Olympic Village* was adopted, he similarly held

[9] [1968] R.P. 378.
[10] [1974] C.A. 78.
[11] [1976] C.A. 154.
[12] [1978] C.A. 520.

[TRADUCTION] ... en principe, la compétence ne sera pas exercée lorsque le jugement déclaratoire serait inutile ou gênant ou lorsqu'il existe d'autres recours prévus par la loi.

Et le professeur de Smith dans *Judicial Review of Administrative Action*, 4e éd., London, Stevens & Sons Limited, 1980, à la p. 513:

[TRADUCTION] ... les tribunaux ont la plus grande discrétion pour décider s'il s'agit d'une affaire où le jugement déclaratoire demandé devrait être accordé ...

... Le tribunal doit être convaincu de l'utilité du jugement déclaratoire, ...

Comme la Cour l'a signalé aux procureurs des appelants lors de l'audition, le jugement déclaratoire recherché en l'espèce ne saurait être dans les circonstances que d'une utilité limitée. La question II est ainsi formulée que la déclaration ne pourrait être qu'à l'effet que le mot «comprend» dans l'art. 27 de la *Loi concernant le village olympique* n'est pas limitatif. Le débat resterait entier quant à chacun des chefs de réclamation individuellement que les appelants pourraient désirer faire valoir devant le conseil d'arbitrage de sorte que la procédure déclaratoire pourrait être à recommencer sur chacun d'eux.

Voir aussi sur le sujet les arrêts suivants des tribunaux du Québec: *Towah Interest Ltd. c. Procureur général du Québec*[9]; *Société québécoise d'exploitation minière c. Hébert et autre*[10]; *Bertho c. Hôpital de Chicoutimi*[11]; *Campisi c. Procureur général du Québec*[12].

Pour ces motifs, je suis donc d'avis, comme la Cour d'appel, qu'aucune réponse ne doit être donnée à la question II.

QUESTION III

A la question de savoir en vertu de quelle entente les appelants ont droit à une indemnité, le juge de première instance ayant déjà conclu que c'est le «Comprehensive Agreement» qui était en vigueur entre les parties au moment de l'adoption de la *Loi concernant le village olympique*, a jugé

[9] [1968] R.P. 378.
[10] [1974] C.A. 78.
[11] [1976] C.A. 154.
[12] [1978] C.A. 520.

that appellants were entitled to be compensated in accordance with this agreement.

The Court of Appeal, reversing the judgment of the Superior Court, found that there was no connection between the interpretation to be given to s. 27 of the Act and the agreements placed in evidence by appellants.

However, by its very form, Question III only requires an answer if Question II has been answered in the negative; but, as we have seen, no answer should be given to Question II.

Further, as it will be the responsibility of the arbitration committee to interpret the various relevant provisions of the Act, in order to determine the sums which shall be included in the compensation, I feel it should also be responsible for answering this question if need be.

Thus, I would vary the decision of the Court of Appeal to state that no answer should be given to Question III.

QUESTION IV

This question was dealt with by the second decision of the Court of Appeal against which this appeal is brought.

As the Superior Court answered in the negative, the appeal was brought by COJO and was allowed.

In my opinion, the answer to this question is contained in s. 6 of the Act, which reads as follows:

6. The City of Montreal and the organizing committee are released from their obligations towards the former owner and his assignees under contracts made between them and the former owner concerning the Olympic Village; such obligations are maintained in favour of the board.

Any recourse the organizing committee may have against the former owner pursuant to contracts made between him, the organizing committee and the City of Montreal or as a consequence of the construction of the Olympic Village are transferred to the board.

In view of such a clear provision, I can only conclude that if COJO was under an obligation to

de même que c'était en vertu de cette entente que les appelants avaient droit d'être indemnisés.

Infirmant le jugement de la Cour supérieure, la Cour d'appel a déclaré qu'il n'y a pas de lien entre l'interprétation à donner à l'art. 27 de la Loi et les conventions mises en preuve par les appelants.

Cependant, par sa formulation même, la question III ne requérait une réponse que s'il était répondu à la question II par la négative. Mais, comme nous l'avons vu, aucune réponse ne doit être donnée à la question II.

D'autre part, comme il appartiendra au conseil d'arbitrage d'interpréter les diverses dispositions pertinentes de la Loi, aux fins de déterminer les sommes devant composer l'indemnité, il me semble qu'il devra lui appartenir de répondre à cette question s'il y a lieu.

Aussi, suis-je d'opinion de modifier l'arrêt de la Cour d'appel pour dire qu'aucune réponse ne doit être donnée à la question III.

QUESTION IV

Cette question fait l'objet du deuxième arrêt de la Cour d'appel attaqué par ce pourvoi.

La Cour supérieure ayant répondu par l'affirmative, c'est le COJO qui interjeta appel et dont l'appel fut accueilli.

La réponse à cette question se trouve à mon sens dans l'art. 6 de la Loi qui se lit comme suit:

6. La Ville de Montréal et le Comité sont dégagés de leurs obligations envers le propriétaire antérieur et ses ayants droit en vertu des contrats intervenus entre eux et ce dernier et ayant trait au Village olympique; ces obligations subsistent en faveur de la Régie.

Sont transportés à la Régie les recours que le Comité peut posséder contre le propriétaire antérieur en vertu des contrats conclus entre ce dernier et le Comité et la Ville de Montréal ou en conséquence de la construction du Village olympique.

Devant un texte aussi clair, je ne puis que conclure que s'il existait de la part du COJO une

compensate the former owner, Zarolega, for claims made by unpaid creditors, pursuant to their contracts with the latter, this obligation is among those from which COJO is released by s. 6, and for this and the other reasons stated by Turgeon J.A. I would dismiss the appeal.

QUESTIONS V, VI AND VII

These questions were dealt with by the third decision of the Court of Appeal concerned in this appeal.

The Superior Court and the Court of Appeal answered Questions V and VI in the negative.

As Question VII only required an answer if an affirmative answer was given to Questions V and VI, the Superior Court left it unanswered. The Court of Appeal nonetheless thought it advisable to state that the *Act respecting the Olympic Village* [TRANSLATION] "in no way creates a formal surety arrangement for Zarolega", and I agree with this.

Appellants referred to several passages from Turgeon J.A.'s opinion, in which he indicates an apparent mistrust of them by the legislator at the time this Act was adopted. These observations in no way affect the merits of Turgeon J.A.'s opinion, which I adopt as the basis for my own finding that the appeal should be dismissed.

With regard to the appeal against decision No. 09-000899-773 of the Court of Appeal, relating to Questions II and III, I would allow this appeal and vary the decision to find that no answer should be given to Question III. The appeal is dismissed as to the remainder.

I would dismiss the appeal from decision No. 09-000919-779 of the Court of Appeal regarding Question IV.

Finally, I would dismiss the appeal from decision No. 09-000926-774 of the Court of Appeal regarding Questions V, VI and VII.

As in the Superior Court and the Court of Appeal, I would not award costs.

Appeal dismissed, except as to Question III.

obligation d'indemniser le propriétaire antérieur Zarolega relativement aux réclamations des créanciers impayés, en vertu de leurs contrats avec celui-ci, cette obligation fait partie des obligations dont le COJO est dégagé par l'art. 6 et pour ce motif et les autres motifs exposés par le juge Turgeon je suis d'avis de rejeter le pourvoi.

QUESTIONS V, VI ET VII

Ces questions font l'object du troisième arrêt de la Cour d'appel visé par ce pourvoi.

Et la Cour supérieure et la Cour d'appel ont répondu par la négative aux questions V et VI.

Comme la question VII n'appelait de réponse que si une réponse affirmative était donné aux questions V et VI, la Cour supérieure l'a laissée sans réponse. La Cour d'appel a néanmoins cru à propos de préciser que la *Loi concernant le village olympique* "ne crée en aucune façon de régime de garantie formelle en faveur de Zarolega", ce avec quoi je suis d'accord.

Les appelants ont fait état de divers passages de l'opinion du juge Turgeon où il évoque une certaine méfiance à leur endroit qui aurait animé le législateur au moment de l'adoption de cette loi. Ces remarques n'affectent en rien le bien-fondé des motifs du juge Turgeon que je fais miens pour conclure au rejet du pourvoi.

En ce qui concerne le pourvoi à l'encontre de l'arrêt n° 09-000899-773 de la Cour d'appel relatif aux questions II et III, je suis d'avis de l'accueillir pour modifier cet arrêt et déclarer qu'aucune réponse ne doit être donnée à la question III. Le pourvoi est rejeté quant au reste.

Je suis d'avis de rejeter le pourvoi à l'encontre de l'arrêt n° 09-000919-779 de la Cour d'appel relatif à la question IV.

Enfin, je suis aussi d'avis de rejeter le pourvoi à l'encontre de l'arrêt n° 09-000926-774 de la Cour d'appel relatif aux questions V, VI et VII.

Tout comme la Cour supérieure et la Cour d'appel, je n'accorderais pas de frais.

Pourvoi rejeté, sauf quant à la question III.

Solicitors for the appellants: Phillips & Vineberg, Montreal; Viau, Bélanger & Associates, Montreal.

Solicitors for the respondent: Grondin, Lebel, Poudier, Isabel, Morin & Gagnon, Quebec; Zigby, Panet-Raymond, Jolicoeur, Lecours, Ouellet & Gingras, Montreal.

Procureurs des appelants: Phillips & Vineberg, Montréal; Viau, Bélanger & Associés, Montréal.

Procureurs de l'intimée: Grondin, Lebel, Poudier, Isabel, Morin & Gagnon, Québec; Zigby, Panet-Raymond, Jolicœur, Lecours, Ouellet & Gingras, Montréal.

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

Consolidation Period: From January 1, 2011 to the e-Laws currency date.

Last amendment: O. Reg. 436/10.

This is the English version of a bilingual regulation.

WHERE AVAILABLE

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
SCHEDULE B

Consolidation Period: From June 6, 2011 to the e-Laws currency date.

Last amendment: 2011, c. 9, Sched. 27, s. 34.

Gas storage areas

36.1 (1) The Board may by order,

(a) designate an area as a gas storage area for the purposes of this Act; or

(b) amend or revoke a designation made under clause (a). 2001, c. 9, Sched. F, s. 2 (2).

Transition

(2) Every area that was designated by regulation as a gas storage area on the day before this section came into force shall be deemed to have been designated under clause (1) (a) as a gas storage area on the day the regulation came into force. 2001, c. 9, Sched. F, s. 2 (2).

Case Name:

Bentpath Pool (Re)

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, c. 332;
AND IN THE MATTER OF certain applications to the Ontario Energy Board in respect of the Bentpath Pool to make determinations pursuant to s.21 of the Act and to rescind or vary Orders E.B.O. 46 and E.B.O. 64.

1982 LNONOEB 1

No. E.B.O. 64(1)&(2)

Ontario Energy Board

Panel: S.J. Wychowanec, Q.C., Vice-Chairman and Presiding Member;
J.C. Butler, Member

Decision: July 16, 1982.

(281 paras.)

Appearances:

Appearances*

J.A. Giffen, Q.C. - for the Applicants, with the exception of the Higgs family.

J.J. Robinette, Q.C., L.G. O'Connor, Q.C., J.B. Gee, Q.C. - for Union Gas Limited ("Union").

P.Y. Atkinson - for the Consumers' Gas Company Ltd. and Tecumseh Gas Storage Limited ("Tecumseh").

J.A. Ryder, Q.C. - for the City of Kitchener.

B. Carroll - for the Industrial Gas Users Association.

M. Robb on behalf of W.E. Tennyson - for certain landowners in the Payne Pool and the Waubuno Pool.

Ms. Francoise Bureau - for Gaz Metropolitain, inc.

Byron Young - for himself.

C.E. Woollcombe, Q.C., L. Graholm - for the Ontario Energy Board ("the Board").

REASONS FOR DECISION

PART I

The Applications

1 By Board Order dated November 4, 1981, applications under dockets E.B.O. 64(1), S.B.O. 64(2) and E.B.O. 64(1)&(2)-C were consolidated under docket E.B.O. 64(1)&(2) bearing the style of cause set out above and a commencement date of December 1, 1981 was set for hearing the consolidated applications. These Reasons for Decision pertain to all the applications consolidated by that Order.

2 A historical background and a brief summary of the various applications filed is necessary for a better understanding of the issues involved in this hearing.

3 The Bentpath Pool is situated in the Township of Dawn in the County of Lambton and lies under some 7 67.43 acres of land that had been designated as a gas storage area by O. Reg. 585/74 made August 7, 1974 and filed August 19, 1974. By Board Order E.B.O. 64 dated August 19, 1974 the Board authorized Union to inject gas into, store gas in and remove gas from, the Bentpath Pool and to enter into and upon the designated lands and to use them for such purpose.

4 The process began with an application filed on July 26, 1977 on behalf of George Arthur Higgs, Walter Reginald Higgs and Ruth Maxine Higgs, in her personal capacity and as executrix of the Estate of the late Gordon Wesley Higgs, under section 21(3) of the Ontario Energy Board Act ("the Act"). This application ("the Higgs Application") was assigned docket number E.B.O. 64(1). It recited the progress of the negotiations which began in October 1974 between certain landowners, including the Higgs family, and Union with respect to gas storage rights in the Bentpath Pool.

5 The Higgs Application stated that negotiations had ended in failure and, since there was no gas storage agreement between the Higgs family and Union, requested the Board to determine compensation payable for storage rights pursuant to section 21(3) of the Act.

6 The Board directed that the Higgs Application be served on Union, Tecumseh, the Township of Dawn, the Ministry of Natural Resources and all persons having an interest in the northwest quarter of Lot 30, Concession 5, in the Township of Dawn.

7 On November 18, 1977, Union responded to the Higgs Application with a Demand for Particulars in which it stated that it intended to file an Answer, but that the application was defective in that it did not set forth the relief or remedy to which the Higgs family claimed to be entitled. This was the first move in a long procedural battle which took place over several years between all the Applicants and Union and which, from the vantage point of the Board, would often have been unnecessary had the parties in this hearing shown a degree of co-operation one with the other and greater care in preparing their material.

8 Mr. R.A. Blackburn, counsel for the Higgs family, did not reply to the Demand for Particulars until April 1978. Union found the reply to be unsatisfactory and brought a motion requiring the Higgs to file full particulars of the relief or remedy sought.

9 Eventually the Higgs family submitted that "fair, just and equitable compensation" for gas storage

rights in the Bentpath Pool should be an annual payment by Union of 2 percent of the residential retail price of natural gas per thousand cubic feet multiplied by the number of thousand cubic feet of storage capacity of the pool apportioned to the Higgs on the basis of the percentage that the lands owned by them bears to the total lands in the pool. In addition a well payment of $500 per year was claimed. All such payments were to be calculated on January 1 in each and every year and be payable on or before February 1 in each year.

10 It is not necessary for purposes of these Reasons for Decision to mark every milestone of the Higgs Application. Suffice to say that it was not until April 9, 1979, that Union filed its Answer to the Higgs formula and stated that fair, just and equitable compensation was $7.00 per acre per year as determined in Board Order E.B.O. 46 and paid to the Higgs since 1974. Union also pointed out that, as there were no wells on the Higgs property, the payment of $500 per well per year was irrelevant.

11 Although by Notice of Hearing dated July 19, 1979, the Board appointed September 25, 1979, for hearing the Higgs Application, that hearing was aborted and in lieu thereof, the Board heard argument relating to an application, contained in several "Answer and Notice of Intention to Intervene" filed by Mr. Giffen on behalf of numerous landowners in various storage areas in southwestern Ontario, to add such persons as respondents and to adjourn the hearing to January or February, 1980.

12 Before the Board could dispose of Mr. Giffen's application, he filed another application dated February 28, 1980, on behalf of the following landowners ("the Kimpe Applicants") who are all landowners in the Bentpath Pool:

Achiel Kimpe

Keith Anderson Turner and Florence Annie Helen Turner

Mary Turner Graham, Allen Turner, Neil Grant Turner and Anna Mae Webster (formerly Turner)

Donald Camerson Sanderson and Audrey Bernice Sanderson

Frank Mathew Pomajba and Geraldine Frances Pomajba

George Andrew Thompson and Ella Marie Thompson

Max McFadden, Doreen McFadden, Douglas McFadden and Lois Jean McFadden

Larry Gordon Richards and Mary Jo Richards

Jack Ralph Smit and Melva Jeannette Smit

The Corporation of the Township of Dawn

Fredrick E. Sole and Jean M. Sole

William L. Thomas and Evelyn M. Thomas

13 This application was assigned docket number E.B.O. 64 2). The relief requested was for a determination by the Board of fair, just and equitable compensation for the loss of oil and gas rights, gas storage rights and compensation for any damages necessarily resulting from the exercise of the authority given to Union by the Board under Board Order E.B.O. 64. The application set out the details of the compensation claimed and requested interest on the amounts awarded as provided in section 33 of The Judicature Act, R.S.O. 1970, c. 228 as amended.

14 A few days later another application was filed with the Board by Mr. Giffen which was substantially the same as the February 28 application but which, in addition, included a claim for costs of the application from Union on a solicitor and client basis using the Supreme Court scale. To differentiate between the two applications, the later one was designated by the Board as the 'Corrected' Application.

15 Numerous demands for particulars and notices of motion were issued by both Union and the Kimpe Applicants and eventually on July 30, 1980, the Board issued an ex parte order respecting the Board's practices and procedures in this case, and in particular it consolidated the application brought on behalf of the Higgs family E.B.O. 64(1) with that brought by Mr. Giffen on behalf of the Kimpe Applicants in the Bentpath Pool E.B.O. 64(2) under docket number E.B.O. 64(1)&(2).

16 Union's answer to the Corrected Application was filed on August 14, 1980. Interrogatories, replies, refusal to reply to certain interrogatories, motions to require replies, a motion to state a case to the Divisional Court and scores of letters passing between the Applicants and Union followed upon Union's answer. It is not necessary to detail the claims and counterclaims, however, the Board again observes that many of the difficulties, particularly those between Union and the Kimpe Applicants could have been avoided or settled by the parties talking to one another rather than writing, by working in a spirit of cooperation instead of obstruction and by using some common sense.

17 In addition, on March 18, 1981, Mr. Giffen, having previously abandoned a motion brought for this purpose, filed a further application on behalf of the Kimpe Applicants wherein he requested that pursuant to section 31 of the Act now section 30) the Board rescind or vary the Orders made by it in E.B.O. 46 (the Board's unitization order for Bentpath) and E.B.O. 64 (the Board's authorization to inject order). In addition, the Kimpe Applicants requested costs of the application on a solicitor and client basis.

18 This application was given docket number E.B.O.64 (1)&(2)-C and is hereafter referred to as "the Application to Rescind". Union's answer to this application was filed on July 13, 1981.

19 On June 24, 1981, Mr. Giffen filed on behalf of his clients an "Amendment to Application of February 28, 1980". In these Reasons for Decision this application is referred to as the "Kimpe Application". The amendments to the earlier application were significant. The Kimpe Applicants now chose to rely on the report prepared by Messrs. Havlena, Freidenberg and Ruitenbeek (subsequently filed as Exhibit 63 and referred to as the "Havlena Report") as the basis of their claim for compensation for storage rights and abandoned all other alternatives for calculating such compensation.

20 On July 13 Union filed an amended answer in response to the Kimpe Application in which, among other things, it reiterated that the Kimpe Applicants' claims for compensation were exorbitant and calculated contrary to the Expropriations Act or, if that act was not applicable, to the common law rules of expropriation, and denied any alleged misrepresentation on its part.

21 On November 4, 1981, as previously noted, the Board issued an order whereby the applications under dockets E.B.O. 64 (1), E.B.O. 64(2) and E.B.O. 64(1)&(2)-C were consolidated under docket E.B.O. 64(1)&(2) and a date for the commencement of the hearing was set for December 1, 1981.

22 During the course of the hearing, Mr. Giffen, on January 4, 1982, filed a "Second Amendment to Application of February 28, 1980," in which he added, as a basis of valuation of storage rights compensation, the principles followed by the Board in E.B.R.O. 365 and the method-ologies used by Union, Tecumseh, and The Consumers' Gas Company Ltd. for purposes of deciding whether or not to obtain gas storage rights from other companies. On March 16, Mr. Giffen filed a "Third Amendment to

Application of February 28, 1980", in which he added clause (h) which reads "In accordance with the evidence adduced herein and the exhibits thereto." This finally concluded the pleadings between the Kimpe Applicants and Union.

The Hearing

23 In August 1981, prior to appointing a date for the hearing to commence, the Board invited the parties of record at that time to a meeting to discuss, among other matters, a mutually convenient commencement date and the site of the hearing. The Board offered to hold all or part of the hearing in London or Sarnia, but pointed out the logistic problems in doing so. By letter dated September 9, Mr. Giffen advised that his clients had agreed to the entire hearing being held in Toronto commencing December 1, 1981. As both the site and date had been discussed and accepted by those parties attending the August meeting, the Board issued a procedural Order dated November 4, 1981, wherein a hearing date of December 1 was set and the following persons were considered to be respondents in the consolidated application:

- Union
- Tecumseh
- the Township of Moore
- those represented by Mr. Tennyson
- those represented by Mr. Giffen who were not applicants
- the storage customers of Union, and
- those intervenors who had appeared in Union's rate case E.B.R.O. 380.

A Notice of Hearing bearing the same date was also issued confirming the commencement date of the hearing and providing that the following matters would be dealt with by the Board at the hearing:

- compensation payable under section 21 of the Act to the Higgs family and the Kimpe Applicants; and

- whether Board Orders E.B.O. 46 and 64 should be rescinded or varied.

24 The hearing commenced on schedule and, pursuant to an agreement amongst counsel, the first part was limited to the issue of alleged misrepresentation to Messrs. Kimpe, McFadden, Pomajba, Richards, Thompson and Turner by representatives of Union in connection with the negotiations of Gas Storage Agreements, Gas Storage Lease Agreements and oil and gas leases.

25 This phase of the hearing lasted four days. The witnesses called by Mr. Giffen and appearing on their own behalf were:

Achiel Kimpe

Douglas McFadden

Max McFadden

Frank M. Pomajba

Larry G. Richards

G. Andrew Thompson

Florence A. H. Turner

The witnesses called by Union were:

Ross M. Day - Manager, Lands Department, Union

John W. Thompson - former employee Lands Department, Union, now retired.

26 At the conclusion of this phase, the hearing was adjourned to January 11, 1982. It continued thereafter with some interruptions to March 4, 1982. The second phase dealt primarily with the issue of compensation payable under section 21 of the Act.

27 The witnesses called on behalf of the Kimpe Applicants by Mr. Giffen were:

H. Jack Ruitenbeek, Applied Economics Research Associates'

Z. G. Havlena - President D. G. Havlena, Hydro-carbon Consultants Limited

W. Brent Friedenberg, President, Brent Friedenberg & Associates Limited and copartners of Applied Economics Research Associates.

J. Andrew Domagalski, Attorney at law, State of Michigan, U.S.A.

Dalen Ferns, Policy Development Director, Ontario Federation of Agriculture

Philip W. Bowman, Partner, Price Waterhouse

The witnesses called by Union were:

Ross M. Day - recalled

Gary D. Black, Manager, Gas Supply, Union

David W. Patterson, Manager of Engineering and Planning, Union

Henry B. Arndt, Vice President, Utility Accounting, Union

Arthur C. Newton, Manager, Geology, Union

Oliver B. Rayment, Senior Lands Agent, Union

Jack R. Elenbaas, Petroleum Engineer, Consultant

Robert L. Warwick, Real Estate Appraiser, Primesite Appraisal Service

W. J. Elliott, Real Estate Appraiser

The witnesses called by Board counsel were:

Robert Mason, Senior Partner, Central Ontario Appraisals

Gary T. Kylie, Appraiser, Central Ontario Appraisals

28 As noted earlier, no one appeared on behalf of the Higgs family. By letter to the Board dated January 22, 198 2, Mr. R.A. Blackburn advised the Board that:

> "I am therefore content to withdraw his (Walter R. Higgs) pre- filed evidence in support of the application. I am not withdrawing the Higgs application and am relying on the evidence called by Mr. Giffen to support the Higgs application."

29 Subsequently, in response to a letter of Board counsel, Mr. Blackburn, in a letter dated March 30, 1982, advised that "... I am supporting and in fact relying on Mr. Giffen's argument in support of the Higgs application."

30 The taking of evidence concluded on March 4, 1982. Written argument was requested by the Board and final reply argument by Mr. Giffen was filed on May 14, 1982.

31 The Board received arguments on behalf of the following:

- the Kimpe Applicants
- Union
- Board staff
- Industrial Gas Users Association
- Gaz Metropolitain, inc.
- Payne Pool Landowners and Harold and Dorothy Williams

32 Essentially, the Higgs family and the Kimpe Applicants are concerned with the determination by the Board of two issues - how much money are they entitled to for their storage rights, and who is entitled to receive such amount. However, in addition to these two fundamental questions, numerous sub-issues were raised as well. Consequently, the hearing lasted for some twenty days during the course of which 110 exhibits were filed. There were in addition, over 250 interrogatories issued and answered. Further, with respect to the Application to Rescind Board Orders E.B.O. 46 and 64, Counsel for the Kimpe Applicants and for Union filed statements of fact and law in which each set forth the positions to be taken by them in argument.

33 A verbatim transcript of the proceedings extending over 2,000 pages was made and is available for public scrutiny. It is therefore not necessary to summarize the evidence or submissions in detail. The entire record was considered in deciding the issues.

Introduction

34 The Board does not believe that Union deliberately set out to create an atmosphere of confusion and misunderstanding in the minds of the landowners in the Bentpath Pool. Nevertheless, the evidence before the Board indicates that this atmosphere, however created, did exist throughout the period in question. A brief summary of events surrounding the leasing of drilling and storage rights in the Bentpath Pool is necessary for a better understanding of the situation. Exhibit 40, Item D15, prepared by Union, identified the landowners in the Pool, the type of leases they have given and the payments being made. The relevant parts of that exhibit are attached as Appendix "A".

35 It appears that the first lease taken in the designated area was a lease entered into between Union and Archibald Turner in May 1951. These lands are now owned by Mary Turner Graham, Allen Turner, Neil Grant Turner and Anna Mae Webster, and the lease is referred to as the "Graham Turner Lease". This was an oil and gas lease which included gas storage provisions. The next lease taken was an oil and gas lease with gas storage provisions, signed in 1956 between Union and the Andrew Thompsons. In

1963 Imperial Oil Enterprises Ltd. ("Imperial") moved into the area and signed some eight landowners to oil and gas leases, but with no provision for storage. These leases were with the Pomajbas, the Deightons (now Kimpe), the McFaddens, the Atchisons (now Gall), Russell Patterson (now the Richards), the Soles, the Turners and the Sandersons.

36 Union re-entered the picture in 1969. Donald Cameron Sanderson and Audrey Bernice Sanderson and Casper Edwin Atchison and Albert Anslow Atchison (now Edith Vera Gall) signed oil and gas leases with gas storage provisions. The Jacques (now the Smits), the Higgs and the Pattersons (now the Thomases) signed oil and gas leases without gas storage rights. In April 197 0 the Pattersons (now the Thomases) signed a Gas Storage Lease Agreement which leased the gas storage rights to Union.

37 Between April 27, 1970 and May 5, 1970 those land-owners with Imperial leases signed Gas Storage Agreements with Union. Attached to the Gas Storage Agreement was a Gas Storage Lease Agreement and a Lease and Grant Agreement. The net result was that all landowners within the Bentpath pool area, with the exception of the Township of Dawn, have leased their rights for drilling and production of oil and gas, and all landowners with the exception of the Township of Dawn, the Higgs and the Smits have signed leases for their gas storage rights.

38 There are significant differences in terms and conditions among the various gas storage agreements. The Graham Turner Lease provided, among other things, that the term of the lease was for 20 years and was to continue as long as production continued in "paying quantities" and so long as the lands were being "used for storage of gas", that a notice of determination of the storage area would be given in writing, and that Union would pay the lessors $100 per year per well situated on the property.

39 The Gas Storage Agreement signed with those land-owners who had leased oil and gas rights to Imperial provided for a 10 year term with automatic renewal in perpetuity at Union's option upon payment of the storage rental ($5 per acre per year payable in advance on the anniversary date); a prohibition against the extension of the Imperial lease without prior notice to Union; the execution of a Lease and Grant in the form attached to the Gas Storage Agreement; and the execution of a Gas Storage Lease Agreement also attached to the main agreement. Both the Gas Storage Lease Agreement and the Lease and Grant were initialled by the Lessors. The Gas Storage Agreement also contained the provision that the lessors would not oppose any application brought by Union to have the lands designated for storage.

40 The Gas Storage Lease Agreement signed by the Pattersons (now the Thomases) provided for a term of ten years subject again to automatic renewal in perpetuity on the same terms and conditions on the part of Union; for payment of $1.00 per acre per year payable in advance on the anniversary date of the agreement; for no injection of gas into the Pool without ten days notice (the injection notice) whereby Union would notify the lessors of the commencement date of injection and the amount of additional storage rental Union was prepared to pay; for arbitration before the Board if the lessor and Union could not agree on the rental payment following injection; for payment of $100 for each well per year on the property and for the payment of $5.00 per acre per year for storage rights after the date specified in the injection notice.

41 The Gas Storage Lease Agreements initialled by those who signed Gas Storage Agreements did not specify the annual amounts that would be paid before and after injection.

42 Donald Cameron Sanderson executed a Union Oil and Gas Lease Agreement and the Unit Operation Agreement which was later approved by the Board in Order E.B.O. 46. For immediate purposes the details of these two agreements are not necessary.

43 Shortly before the last storage agreement was signed, the first discovery well was drilled on the

McFadden property and some six months later, on December 7, 1970, gas was first produced from the Bentpath Pool. It is not clear when Imperial assigned all its oil and gas leases to Union, but it appears that it was during July 1972.

44 The next event of importance which is alleged by Union to affect the gas storage rights of the landowners in the Bentpath Pool is the Board's unitization order E.B.O. 46 which was issued pursuant to section 24 (c) of the Act on March 6, 1972. The Board will deal with this Order and Board Order E.B.O. 64 in greater detail later in these Reasons for Decision. However, it is important to note that, among other things, the interests of the landowners in the Pool were joined and regulated by the Board for the purpose of drilling and operating wells and the carrying out of various matters, more particularly provided for in the Unit Operation Agreement, as if they and each of them had agreed to terms and conditions set forth in that agreement and that such joining and regulation be in accordance with the terms and conditions in the Unit Operation Agreement.

45 The Board's Order stated that it was to take effect only upon revocation of Ontario Regulation 396/70. Attached to the Order was the Unit Operation Agreement. The section which Union claims amended the Gas Storage Agreements is paragraph 4 which is reproduced in full below.

> "4. Notwithstanding anything to the contrary expressed or implied in the said lease:
>
> (a) It is understood and agreed that in respect of each calendar year hereafter the Lessee shall pay or tender to the Lessor in lieu of all payments under the said lease:
>
> (1) that proportion of the following royalties which the Lessor's acreage from time to time in the participating section of the unit area bears to the total acreage at such respective times in the participating section of the unit area;
>
> (i) Two cents ($.02) per MCF for all gas produced, saved and marketed by the Lessee from the participating section of the unit area as measured by the Lessee;
>
> (ii) Twelve and one-half per cent (12 1/2%) of the current market value at the point of measurement of crude oil produced, saved and marketed by the Lessee from the participating section of the unit area;
>
> which royalties shall be paid or tendered to the Lessor monthly not later than the last day of the month following the month during which production is taken; provided that if the total of such royalties paid or tendered to the Lessor during any calendar year hereafter is less than an amount which taken along with the amount per acre per annum of any payment the Lessor also received during such calendar year from any source for underground gas storage rights in the said lands will total the sum of Seven Dollars ($7.00) for each and every acre of the said lands which during such year has been included in the participating section of the unit area, the Lessee shall, not later than the thirty-first day of January next following, pay or tender to the Lessor and the Lessor shall accept in respect of such calendar year an amount sufficient to bring the total amount payable to the Lessor under this sub-clause (a) (1) during

such calendar year, up to the said total sum of Seven Dollars ($7.00) per acre;

(2) an amount for each and every acre of the said lands which during such calendar year has been retained by the Lessee under the said lease and/or this Agreement and which has not been included in the participating section of the unit area during such year, which taken along with the amount per acre per annum of any payment the Lessor also received during such calendar year from any source for underground storage rights in the said lands will total the sum of Seven Dollars ($7.00) for each and every acre of the said lands not included in the participating section of the unit area during such year, which sum shall be paid or tendered to the Lessor not later than the thirty-first day of January next following;

(3) the sum of Five Dollars ($5.00) for each and every acre of the Lessor's lands which during such calendar year has been retained by the Lessee under the said Lease and which has not been included in the said lands during such year, which sum shall be paid or tendered to the Lessor not later than the thirty-first day of January next following?

and as long as the payments in this sub-clause (a)provided are made or tendered, the leased substances shall be deemed to be produced from, and operations for the recovery of same shall be deemed to be conducted by the Lessee on the said lands under the said lease, and the said lease as hereby amended shall remain in full force and effect as to all of the Lessor's lands retained by the Lessee under the said lease and/or this Agreement.

Provided further that any royalties or rentals paid in advance under the said Lease in respect of any period within the effective term of this Agreement and which under the provisions of this sub- clause (a) would not have been required to be paid, shall be deducted from the payments aforesaid.

And provided further that in the calendar year in which this Agreement becomes effective the minimum payments under this sub- clause (a) shall be that proportion of the aforesaid minimum payments which the unexpired term of the said calendar year bears to the full calendar year.

(b) This Agreement shall be deemed to become effective on the first day of December, A. D. 1970."

46 According to Union this section superseded any agreement relating to payment for storage rights and thereafter Union paid to the landowners $7.00 per acre per year in arrears, claiming this included payment under gas storage agreements, and made necessary adjustments retroactive to December 1, 1970.

47 Production of gas from the Bentpath Pool ceased in August 1972 with estimated recoverable reserves remaining in the Pool of 466,216 Mcf.

48 In August 1974 the Board issued its Order E.B.O. 64 which allowed Union to inject and store gas in the Bentpath Pool. In June of that year Union offered Gas Storage Lease Agreements to those landowners holding its Gas Storage Agreements but the payment offered was $7.00 per acre per year,

the same amount Union had paid from the effective date in the Board's Order E.B.O. 46. All the landowners refused to sign the new agreements and although negotiations continued thereafter for some period of time, no new agreements were signed.

49 To add to the confusion caused by the proliferation of different types of agreements and the changes in method and amount of payment, Union sent injection notices to the Kimpes, the McFaddens, the Pomajbas, the Richards and the Turners in February 1975. Those notices included offers to purchase the residual gas at 2 cents per Mcf, increase the acreage rental for storage to $12.36 per acre per year and pay $100 per year per well to those with wells on their property. The offers were not accepted by any of the landowners and were withdrawn in 1978. The Thomases, who should have received notice under the terms of the Gas Storage Lease Agreement before injection of gas could begin, did not receive the injection notice until February 27, 1975. An amended notice was sent to them in January 1978.

50 Notices of Determination, required under certain of Union's combined oil, gas and storage leases, should have been issued in 1974 at the time the Pool was being designated for storage, but these were not sent until December 28, 1977. No well payments were made to these landowners for the intervening years even though the pool was being used for storage. Subsequent to December 28, 1977, well payments were made to these landowners and, in addition, were gratuitously made to other landowners whose agreements contained no provision for well payments.

51 All in all it must be said that Union's rather slap- dash dealings with the owners in the Bentpath Pool have neither been conducive to good public relations nor in keeping with sound business practice.

PART II

Applicants With Standing Before The Board

Jurisdiction of the Board

52 Section 13, subsection 1 of the Act provides that:

> "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact."

53 Section 21, subsection 2 of the Act reads as follows:

> "Subject to any agreement with respect thereto, the person authorized by an order under sub-section (1),
>
> (a) shall make to the owners of any gas or oil rights or of any right to store gas in the area fair, just and equitable compensation in respect of such gas or oil rights or such right to store gas; and
>
> (b) shall make to the owner of any land in the area fair, just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by such order."

54 It was common ground amongst the parties that three of the Applicants, namely the Higgs, the Smits, or their predecessors on title, and the Township of Dawn have never executed agreements purporting to lease or assign or grant storage rights to Union. Kimpe, the McFaddens, the Pomajbas, the Richards, the Thompsons and the Turners have executed documents, which Union claimed have the effect of vesting storage rights in Union, and which Mr. Giffen categorized as "pieces of paper".

55 It was Union's position that those Applicants who have signed agreements with Union are bound by them, and that the Board lacks jurisdiction to look behind the agreements to determine their validity or enforcability.

56 Mr. Giffen, on the other hand, argued that the Board does have the jurisdiction to determine the validity of the contracts and in fact must do so before the Board can exercise its jurisdiction to determine fair, just and equitable compensation.

57 Board counsel supported Mr. Giffen's position.

58 In support of its contention. Union cited Board decision E.B.O. 57, dated July 1973, wherein the Board declined to exercise jurisdiction to declare certain contracts invalid. In that decision the Board said "the Board considers that if there is doubt as to the validity of the agreements, the proper place for the parties to obtain redress is in the courts." The Board agrees with Board counsel that E.B.O. 57 did not affect those customers with agreements. It also notes that that decision was delivered in 1973, well before the recent pronouncements by the Supreme Court of Canada on the jurisdiction of provincially appointed tribunals, which are referred to later herein.

59 Union also referred the Board to various exchanges between Mr. Kimpe and the then presiding member during the Bentpath designation hearing, E.B.O. 64, in Sarnia, and again pointed out that the Board declined jurisdiction to review the methods used by Union in obtaining the Gas Storage Agreement with Mr. Kimpe.

60 The Board notes that Union attempted to distinguish the case of Re: Wellington v. Imperial Oil Limited [1970] 1 O.R. 177 on the basis that the Court had in issue before it compensation, not the validity of the contract. A similar distinction can be made with respect to the Bentpath designation hearing since that application was brought under section 21, subsection 1 of the Act, and Mr. Kimpe's agreement or contract was not an issue in any way in those deliberations.

61 Union also claimed that the Board lacks jurisdiction in this matter on constitutional grounds. Union maintained that the Board's jurisdiction to declare written agreements relating to interests in land invalid or unenforcable would be ultra vires on the ground that such jurisdiction has been exercisable solely by judges of superior, district or county courts since 1867. Union agreed that the Provincial Legislature may confer on a provincially appointed tribunal the right to decide incidental questions of law within that tribunal's jurisdiction. Union stated however that the Provincial Legislature cannot confer on a provincially appointed tribunal a power vested in superior or county courts to determine the validity of an agreement when the validity or otherwise of such agreement is a condition precedent to the jurisdiction of such tribunal. In support of this submission, Union cited the Reference re: The Residential Tenancies Act, (1980) 26 O.R. (2d) 609, affirmed by the Supreme Court of Canada (1981) 37 N.R. 158 ("The Residential Tenancies case").

62 The same Supreme Court decision was cited by Board counsel to support an opposite view, that the Board does have jurisdiction, in the particular circumstances, to determine whether the agreements are valid.

63 Mr. Giffen's submission in relation to this issue was based on the statutory powers contained in the Act and several decisions of the Ontario Courts, including the Wellington case, which generally have held that the Board has been invested with broad general powers relating to matters specifically assigned to it by the Legislature.

64 The Wellington case was decided in 1969 and dealt with the Board's powers to interpret an

agreement for purposes of section 21, of The Ontario Energy Board Act, 1964, which was the predecessor of section 21 (1) of the Act. In that decision, Pennell, J. said at Page 183:

> "It is to be observed that the Legislature imposed upon a board of arbitration, in the event of a dispute, the duty of deciding the amount of compensation. It may well be that in the discharge of its duty, the board of arbitration may become involved in a matter of law as well as a matter of fact. In such cases it seems to me, having regard to s. 21, the board of arbitration will have to ascertain the law and also ascertain the facts. I do not say that a board of arbitration has jurisdiction to determine an abstract point of law. But it seems to me that in many cases where a dispute arises as to the amount of compensation, the first thing the board of arbitration has to do is to enquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such enquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied."

65 Since that time, the Courts have taken an even more liberal view of a provincial tribunal's power to exercise a jurisdiction of the superior court.

66 Dickson, J. in The Residential Tenancies case reviews the liberalization process and concluded that:

> "I do not think it can be doubted that the courts have applied an increasingly broad test of constitutional validity in upholding the establishment of administrative tribunals with-in provincial jurisdiction. In general terms, it may be said that it is now open to the provinces to invest administrative bodies with "judicial functions" as part of a broader policy scheme."

67 The Court then formulated a three-step test to be applied in determining whether powers conferred on a tribunal by a Provincial Legislature constituted an invasion of the federal power to appoint judges under s. 96 of the B.N.A. Act. In this regard the Court had the following to say:

> "The jurisprudence since John East leads one to conclude that the test must now be formulated in three steps. The first involves consideration, in light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. This temporary segregation, or isolation, of the impugned power is not for the purpose of turning back the clock and restoring Toronto v. York, as the governing authority, an approached deplored in Mississauga. It is rather the first step in a three step process.
>
> "If the historical enquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 courts, that is the end of the matter. ...If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 courts at Confederation, then one must proceed to the second step of the enquiry.
>
> "Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a 'judicial' function? In addressing the issue it is important to keep in mind the further statement by Rand, J., in Dupont

> v. Inglis that '...it is the subject matter rather than the apparatus of adjudication that is determinative'. Thus the question of whether any particular function is 'judicial' is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'.
>
> "...If, after examining the institutional context, it becomes apparent that the power is not being exercised as a 'judicial power,' then the enquiry need go no further, for the power within its institutional context, no longer conforms to a power or jurisdiction exercisable by a s. 96 court and the provincial scheme is valid. On the other hand, if the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the third and final step in the analysis and review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context. The phrase - 'it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangement in which it appears' - is the central core of the judgement in Tomko. It is no longer sufficient simply to examine the particular power or function of a tribunal and ask whether this power or function was once exercised by s. 96 courts. This would be examining the power or function in a 'detached' manner, contrary to the reasoning in Tomko. What must be considered is the 'context' in which this power is exercised. ...It may be that the impugned 'judicial powers' are merely subsidiary or ancillary to general administrative functions assigned to the tribunal... or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature. ... In such a situation the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (Farrah) so that the tribunal can be said to be operating 'like a s. 96 court'.

68 The Court then reviewed the functions of the Residential Tenancies Commission in detail. The Court noted that the primary purpose and effect of the 1979 act was to transfer jurisdiction over a large and important body of law affecting landlords and tenants from the s. 96 courts, where it had been administered since Confederation, to a provincially appointed tribunal. The Court concluded that the primary role of the Commission was not to administer policy or to carry out administrative functions, but was to adjudicate. The Court stated that:

> "In the instant case the impugned powers are the nuclear core around which other powers and functions are collected... the whole of a s. 96 court's jurisdiction in a certain area, however limited, has been transferred to provincially appointed officials."

The Court therefore declared that in the particular circumstances the statutory provision conferring superior court powers upon a provincial tribunal was ultra vires and therefore invalid.

69 In the instant case the Board is being asked by a number of Applicants to determine fair, just and equitable compensation under section 21, subsections 2 and 3 of the Act. Before the Board can make such determination, it must ascertain what the subsisting rights of the parties are and in order to do this, it must ascertain if there are valid agreements in effect. If the agreements are valid the Board has no jurisdiction to determine compensation in respect of these Applicants. In short, the issue is: does the Board have jurisdiction to determine the validity of a written contract, a power usually reposing in a s. 96 court.

70 The Board's powers were reviewed at some length by the Divisional Court in Union Gas Limited v. Township of Dawn 15 O.R. (2d) 722. The judgment of the Court was delivered by Keith, J. At page 731, he states:

> "In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under exclusive jurisdiction of the Ontario Energy Board..."

71 In the Board's view it cannot be said, as was said in The Residential Tenancies case that:

> "...the impugned powers are the nuclear core around which other powers and functions are collected".

72 The Board also finds comfort in words of Pennell, J. in Wellington already referred to.

73 In the Board's opinion the exercise of the power to determine the validity of a contract for purposes of section 21, subsection 2 and 3 of the Act, is a power which "is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure." According to The Residential Tenancies case only if the impugned power forms a dominant aspect of the function of the tribunal is the conferral of such power ultra vires.

74 Based on the decisions in the Wellington case and The Residential Tenancies case, the Board concludes that it does have the power, as part of its broader administrative function, to determine the validity of contracts for purposes of making a determination under section 21, subsections 2 and 3 of the Act.

Effect of Section 22 of the Act

75 Mr. Giffen argued that any agreement relating to gas storage rights in the Bentpath Pool that was signed after January 1, 1965, is invalid because it had not received Board approval under section 22, subsection 2, of the Act.

76 At the time the Gas Storage Agreements were signed in 1970, section 22(2) read as follows:

> "No storage company shall on or after the first day of January 19 65, enter into any agreement or renew any agreement with a transmitter or distributor with respect to the storage of gas unless,
>
> (a) the parties to the agreement or renewal;
> (b) the period for which the agreement or renewal is to be in operation; and
> (c) the storage that is subject to the agreement or renewal,
>
> have first been approved by the Board with or without a hearing."

77 In 1973 this subsection was amended by section 7 of The Ontario Energy Board Amendment Act, 1973. The amendment struck out the words "a transmitter or distributor" and inserted in lieu thereof "any person".

78 The Board is of the opinion that section 22, subsection 2 is not applicable to the issues before it. The agreements before the Board deal with property rights in gas storage facilities and not with the

matter of storage of gas for others which is the subject matter of subsection 2 of section 22.

The Plea of Non est factum

79 Exhibit 34 in these proceedings contains the individual pre-filed evidence of Messrs. Kimpe, McFadden, Pomajba, Richards, Turner and Thompson. The pre-filed testimony was supplemented by evidence given at the hearing by each of these Applicants with the exception of Mr. Turner. In the case of the Turners, Mrs. Turner adopted the evidence of her husband and gave testimony in his place. (The Board had been informed that Mr. Turner was too ill to testify and although Mr. Giffen undertook to provide a medical certificate to that effect, none was produced during the proceedings.)

80 Generally, the pattern of the pre-filed evidence was that the landowners had not known that they were executing a gas storage lease and that they had relied upon the representations of Mr. J. W. Thompson of Union as to the nature of the documents.

81 Mr. Giffen entered a plea of non est factum on their behalf and in addition alleged misrepresentation and unconscionability on the part of Mr. Thompson and Union in their dealings with these Applicants.

82 It appears that at the present time the law in Ontario is as set out in the decision of the Supreme Court of Canada in Prudential Trust Co. v. Cugnet et al (1956), S.C.R. 915; 5 D.L.R. (2d) 1. This is the conclusion reached by the Ontario Courts, albeit somewhat reluctantly in both Horvath v. Young (1980), 15 R.P.R. 266, and Marvco Colour Research Limited v. Harris et al (1980), 107 D.L.R. (3d) 632.

83 The unrefuted evidence in the Cugnet case was that a Mr. Hunter called upon Edward Cugnet at his home and told him that he wanted an option in respect of certain mineral rights and offered to pay Mr. Cugnet $32 on quarter section for an option to take a petroleum an natural gas lease, such lease to take effect upon expiration of the leases previously granted to other companies, and a further $32 yearly rental for each quarter section when the option was exercised an petroleum and natural gas lease granted. After apparently a short conversation Mr. Cugnet signed a entitled "assignment" wherein he transferred an un one- half interest in ail petroleum, natural gas related hydrocarbons in and under his lands, subject to a petroleum and natural gas lease covering the lands, and agreed to deliver a registerable transfer of such interest. He also granted an exclusive option acquire a petroleum and natural gas lease covering the said lands for a term of 99 years and at the same time executed a transfer in favour of Prudential of an undivided one-half interest in all mineral rights, excluding coal.

84 In the Cugnet case, Nolan, J. determined that the principle contained in Carlisle & Cumberland Banking v. Bragg [1911] 1 K.B. 489 should be applied rather than the one contained in the case of Howatson v. Webb [1908] 1 Ch. 1. The principle in the Carlisle case is stated in the judgment of Buckley, L.J. as follows:

> "The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying "this is a conveyance of your property," or "this is your lease," and he does not inquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by them whatsoever they are. If, on the other hand, he is materially mislead as to the contents of the document,

then his mind does not go with his pen. In that case it is not his deed. As to what amounts to materially misleading there is of course a question."

85 The Carlisle case has been overruled by the House of Lords in Saunders v. Anglia Building Society [1971] A.C. 1004. Nevertheless both the Horvath case and the Marvco case have held that the Carlisle case continues to apply. The question before the Board therefore is, did the Applicant know the nature and character of the document which he signed, that is, did he know he was leasing his gas storage rights and was that his intention.

86 The document which each party executed consisted first of a seven page document entitled in bold type "Gas Storage Agreement" to which was attached an eight page document entitled "Lease and Grant" and another eight page document entitled "Gas Storage Lease Agreement." The title of each of the attached documents is in bold type and with the possible exception of Douglas McFadden and Mrs. Turner the first page of each was initialled by the Applicant, and his wife when necessary. The two attached documents are referred to in clauses 3 and 4 of the Gas Storage Agreement.

87 It should be noted that the first page of the Gas Storage Agreement had been completed by Union prior to presentation in that the names of the lessors had been typed in as well as the description of the properties, specific reference to the underlying Imperial oil and gas lease affecting the property and the amount of consideration paid. Page 2 of the said agreement also had typed in the annual rental rate. The Lease and Grant and the Gas Storage Lease Agreement were incomplete as no names or property descriptions had been inserted.

88 The Gas Storage Agreement contains 14 clauses in all. The first clause which appears in part on page 1 reads as follows:

"1. Subject to the third party lease,

(a) the Lessor does hereby demise and lease unto the Lessee, its successors and assigns, all strata, formations and horizons in and under the surface of the said lands together with the exclusive rights to bring gas from any source obtained into, to introduce, to inject and to store such gas at will in all or any part or parts of such strata, formations and horizons and to keep or remove at will all or any part of such gas by pumping or otherwise through any well owned by the Lessee now existing or hereafter drilled in the said lands or in lands adjoining the said lands or in the vicinity thereof and with the exclusive right to use such strata, formations and horizons for the protection of gas stored in the said lands and/or within a gas storage area designated by law of which the said lands are part,

(b) the Lessor also grants and confirms unto the Lessee the right from time to time and at all times to enter upon the said lands to drill wells, to rework, operate or abandon any and all wells hereafter drilled by the Lessee in the said lands, to lay down, construct, operate, maintain, inspect, remove, replace, reconstruct, keep and use pipes, pipelines, well-heads, tanks, stations, structures and equipment necessary or incidental to the operations of the Lessee under this Agreement and including equipment necessary for the cathodic protection of the Lessee's pipelines, wells or well-head equipment at any time hereafter located on or in the said lands, together with the right of entry upon and of using and

occupying so much of the surface of the said lands as may be necessary or convenient to carry on such operations and together with the right to fence in any portion of the surface of the said lands so used by the Lessee."

89 Clause 2 provides that the term of the agreement is for ten years subject to further automatic renewal for a further ten years on the same terms and conditions including the right to further renewal.

90 Clause 6 provides that the Lessors will not oppose any designation of the property as a storage area, Clause 7 provides that in the event that a Lease and Grant and a Gas Storage Lease Agreement are not entered into by the parties, the Gas Storage Agreement continues to apply at the same rental.

91 The Gas Storage Lease Agreement contains a number of provisions significantly different from those in the Gas Storage Agreement. Of particular importance are clauses 3, 4 and 6(b) which are set out below:

> "3. The Lessee shall not inject gas for storage into the said lands under this Agreement or use the said lands for the protection of gas stored within a gas storage area designated by law of which the said lands are part, until it has given the Lessor at least ten (10) days advance written notice ("the injection notice") specifying,
>
> (a) the date upon which the said lands will first be used for the injection, storage and removal of gas or the protection of gas stored within a gas storage area designated by law of which the said lands are part;
>
> (b) the amount of additional acreage rental per acre per annum the Lessee is willing to pay to the Lessor in respect of the use or uses mentioned in paragraph (a);
>
> (c) the total surface acreage of the designated gas storage area of which the said lands are part, the total surface acreage of the participating area of the said designated gas storage area ("the participating acreage", meaning the surface acreage of the estimated productive area of the gas storage pool contained within the said designated gas storage area), "the Lessor's participating acreage", meaning the number of surface acres of the said lands contained in the participating acreage of the Pool, and, the total volume of residual gas above a reservoir pressure of 50 p.s.i.a. bottom-hole on the date mentioned in paragraph (a) in the storage pool contained within the said designated gas storage area, and,
>
> (d) the amount of an offer to purchase from the Lessor ("the purchase price") the Lessor's royalty interest in any residual gas in the said lands on the date mentioned in paragraph a) above a reservoir pressure of 50 p.s.i.a. bottom-hole at a price of 2 cents per m.c.f. such interest to be that percentage of the total volume of residual gas above the reservoir pressure aforesaid on the date above mentioned in the storage pool contained within the designated gas storage area of which the said lands are part, which the Lessor's participating acreage on such date bears to the total participating acreage in such designated gas storage area, taken on a surface acreage basis.

4. Upon receipt of the injection notice, the Lessor shall within thirty (30) days advise the Lessee in writing that he disputes any or all of the additional acreage rental, the participating acreage, the Lessor's participating acreage or the total volume of residual gas specified in the injection notice and in default of such notice of dispute, the Lessor shall be deemed to have agreed to such matters as specified in the injection notice and the same shall become final and binding upon the Lessor and the Lessee. In the event that the Lessor gives such notice of dispute, then any of the items of the additional acreage rental, the participating acreage, the Lessor's participating acreage or the total volume of residual gas so disputed shall be determined by arbitration in the manner provided for in The Ontario Energy Board Act, 1964 and the Regulations thereunder or under any Act or Regulations in amendment or substitution therefor, with right of appeal as therein provided for.

6. From and after the date specified in the injection notice,

(b) the Lessee shall pay to the Lessor a well payment of One Hundred Dollars ($100.00) per annum per well for each well drilled and retained in the said lands for the injection and withdrawal of gas, for so long as such well is so retained; with respect to any such well in existence on the date specified in the injection notice, the first well payment shall be due and payable within thirty (30) days of such date but the Lessee shall be given credit for the unearned portion of any well payment with respect to such well under the said lease and thereafter, each succeeding annual payment shall be due and payable annually in advance on the anniversary of the date specified in the injection notice; with respect to any such well completed after the date specified in the injection notice, the first well payment shall be due and payable on the first anniversary of the date specified in the injection notice following the date of completion of such well and succeeding payments shall be due and payable annually in advance on the anniversary dates thereof;"

92 The provisions of the Lease and Grant would give Union the usual oil and gas drilling rights for a term of ten years and so long thereafter as "these substances or any of them are produced or deemed produced from the said land, subject to the other provisions herein contained".

93 It is evident from the foregoing that the documents clearly are neither simple nor likely to be immediately and totally comprehensible to the average person.

94 The Board is faced with the unenviable task of determining whose evidence is to be given greater weight, the landowners or Mr. J. W. Thompson of Union since the evidence is often contradictory. The difficulty is compounded because the evidence relates to events which took place twelve years ago, and in one case over twenty-six years ago. Subsequent events may to some degree have coloured the witnesses' recollections. Mr. Thompson of Union perhaps was most candid in an exchange with Mr. Giffen at page 440 of the transcript:

Q. (by Mr. Giffen)... you have no recollection of the specific questions asked by Mr. Kimpe, nor the specific answers given by you?
A. No, sir, not after almost twelve years, I don't, on anything.
Q. On anything?
A. Including Mr. Kimpe.

and with Mr. Woollcombe at page 499 in the following exchange:

> Q. With hindsight, would you agree with me that looking at these three documents might create confusion in the minds of even a well- educated person?
> A. I would certainly go along with that, sir, unless you're familiar with them.
> Q. And you were familiar with them?
> A. Absolutely, sir.
> Q. You attempted to make the landowners familiar with them?
> A. That I did, sir.
> Q. And there may still have been some confusion on their part?
> A. Absolutely, sir; still is, I think on some.

95 It is necessary to review the evidence of each individual Applicant, for purposes of ascertaining whether or not the plea of non est factum is available to him.

96 We will begin with Mr. Kimpe.

97 Mr. Kimpe came to Canada in 1958 from Belgium. In August 1968, he purchased lands situate in the Bentpath Pool which were already subject to an oil and gas lease in favor of Imperial. The Gas Storage Agreement with Union was signed by him on or about the first day of May 1970. At that time Mr. Kimpe said his understanding of the English language was "limited" and that he was "confused by a number of words." Mr. Kimpe's evidence is contained in Exhibit 34, Tab 1, and transcript pages 28 through 112. The cross-examination of Mr. Kimpe runs from pages 49 to 112. Mr. Kimpe's answers to questions 13, 14, 15, 16 and 17, under Tab l, contain the gist of his recollection of the discussion that took place between himself and Mr. Thompson at the time the Gas Storage Agreement was signed. In essence, Mr. Kimpe stated that he did not read the document, did not understand it because of his limited English, did not consult anybody about it, and he relied "totally on the representations of Mr. Thompson in connection therewith and in connection with its contents." According to Mr. Kimpe, Mr. Thompson told him that the Gas Storage Agreement would "bring up-to-date" or replace the existing Imperial lease; that he and his neighbours would all have "the same thing"; that it was not a Gas Storage Agreement and that in the event gas was found, another document would have to be signed. The discussion between Mr. Thompson and Mr. Kimpe apparently lasted about one hour with Mrs. Kimpe present most of the time. (Mrs. Kimpe was not called upon to give evidence.)

98 At page 8 of Exhibit 43, Mr. Thompson stated:

> "Mr. Kimpe did not read the entire Agreement with its attachments, page by page. However, I explained to him the substance of the Agreement and its attachments, and we discussed the entire document and its effect. I answered any of his questions and explained any matter which he questioned. He did not ask to read over the entire agreement, nor did he ask me to read it over to him. He seemed quite satisfied."

99 Notwithstanding that he had received a letter from Union dated May 12, 1970, which stated in the first paragraph, "Thank you for granting this company a Gas Storage Agreement over the above-mentioned property.", Mr. Kimpe said that he was not aware that he had signed a lease for gas storage until some time in the fall of 1970 or early 1971, after a discussion with his neighbour, the late Mr. Jacques. Following this conversation with Mr. Jacques, Mr. Kimpe attended at the registry office in Sarnia, checked the leases of some of his neighbours including Mr. Jacques' against his own and found that they were not the same. Mr. Jacques' property was subject to an oil and gas lease only.

100 The Board agrees with its counsel that in view of the time lapse the more reliable evidence would be any written evidence.

101 Exhibit 46 consists of three pages of hand-written notes prepared by Mr. Kimpe, apparently as an aide memoire for a meeting with his solicitor, Mr. Steele, which took place about April 27, 1972. These notes were based on notes prepared by Mr. Kimpe for himself some time after his conversation with Mr. Jacques, either in late 1970 or early 1971. The latter consists of two pages that were entered as Exhibit 47. Exhibit 47 states in part that "Thomas [sic] mentioned that this was not a storage agreement and when gas was founded I would have to sign a paper where I would receive $20 an acre." Mr. Robinette took the position that these two exhibits were not admissible because they were not made concurrently with or within a reasonable time of the events being described. In weighing this evidence, the Board has taken Mr. Robinette's objection into account. Under Tab 8 of Exhibit 34, there is a letter of objection to the application in E.B.O. 64, dated June 3, 1974, addressed to the Board. Mr. Kimpe in paragraphs 7, 8, 9 and 10 asked the Board to "check into the manner in which the leases have been signed" and stated that the language is confusing, the term is too long, and the price is too low. During the hearing of that application, Mr. Kimpe told the Board that "I am irritated about the way Union Gas has been approaching us about signing leases." It should be noted that prior to that hearing Union had attempted to have the landowners sign Gas Storage Lease Agreements at the same rental as provided in the Gas Storage Agreement. Union was unsuccessful in this regard. The Board is not sure whether Mr. Kimpe's reference to the manner of signing related to the Gas Storage Agreement or the Gas Storage Lease Agreement or both. In 1976, Mr. Kimpe wrote to the Ombudsman. (Exhibit 34, Tab 14.) He stated "On the 2 May, 1976, [sic] under the false pretense and threats of property expropriation, I signed a lease with Union Gas Limited..." and later in the same letter "I know I have been taken by Union Gas Company...". The Ombudsman declined to act because of his limited statutory jurisdiction in these matters.

102 After an evaluation of the evidence, the Board has no doubt that Union believed it had obtained a valid and binding Gas Storage Agreement from Mr. Kimpe. Certainly its letter of May 12, 1970, and the comments on the vouchers accompanying the cheques indicated this. However, Mr. Kimpe is adamant that at the time he signed the Gas Storage Agreement he believed it to be a drilling lease only. Certainly in the period since signing he has made repeated attempts to correct the situation through representation to this Board and to others. Mr. Thompson's recollection of the discussion with Mr. Kimpe in May of 1970, is unclear. In some respects he confirms Mr. Kimpe's testimony, and in others contradicts it. The Board accepts that Mr. Thompson tried to help Mr. Kimpe by explaining the Gas Storage Agreement and the attachments. Nevertheless, as indicated earlier herein the Board considers that the Union agreements are not easily understood and, on the evidence before it, has concluded that Mr. Kimpe did not understand the nature and character of the document that he signed, that he believed it would be replaced by the Gas Storage Lease Agreement when storage was needed by Union, that he would have the opportunity of negotiating a higher rental and that he did not intend to grant the gas storage rights to his property to Union when he executed the Gas Storage Agreement. Accordingly the plea of non est factum must succeed with this Applicant. The Board has also considered whether laches or estoppel would apply in these circumstances and concludes that they do not. The Board having reached this conclusion does not need to make a finding as to misrepresentation or unconscionability with respect to Mr. Kimpe.

103 The next Applicants to put forward a plea of non est factum are Douglas McFadden and Max McFadden, two brothers who jointly own property in the Bentpath Pool area. Their prefixed evidence is found in Exhibit 34, Tabs 20 and 21, and transcript pages 112 to 164. Douglas McFadden recalled signing the Gas Storage Agreement but did not remember initialling or seeing or discussing the Gas Storage Lease Agreement and the Lease and Grant. In his profiled testimony he stated that Mr.

Thompson of Union offered $5.00 an acre for the lease "which I under-stood to be for drilling and production".

104 Max McFadden had little recollection of the relevant facts including initialling the two documents attached to the Gas Storage Agreement but said that the initials M. M. "could be mine".

105 During examination Douglas McFadden recalled that Mr. Thompson discussed storage and that he, McFadden, said, "This is funny; you are asking me to sign the storage lease [emphasis added] when you haven't even got gas." According to Mr. McFadden, Mr. Thompson replied that it was not really a Storage Agreement but a "working agreement". At page 134, in response to Mr. Robinette, Douglas McFadden admitted that gas storage had been discussed with Mr. Thompson and that he had probably been aware of the title Gas Storage Agreement. In response to a question of the Presiding Member of the Board:

> "Q. Did you not question each other: Do you understand what this is all about?
>
> A. Maybe I did. I don't really recall now. I trusted Mr. Thompson, and he said that it was about storage agreement and, as I said before, he said it was a working agreement, and he needed our signature...".

106 The agreement according to Max McFadden was left with the McFaddens and discussed between themselves before they and their wives signed it.

107 Mr. Thompson discussed his meeting with the McFaddens in Exhibit 43. Although he later amended his testimony as to the place where the agreement was finally signed by the McFaddens and their wives, he maintained throughout his examination that he told the McFaddens that storage rights were the subject of the agreement.

108 Again, as with Mr. Kimpe, there is some conflicting evidence as to what took place.

109 The Board found Douglas McFadden to be a shrewd, if somewhat less than candid individual. He appears to be the dominant of the two brothers, and the Board believes that it would have been his decision which carried the most weight. The Board concludes from his testimony that he knew that what Union wanted to lease was the gas storage rights on the property. Max McFadden was of little help to the Board as he readily admitted that he had little recollection of the events that transpired when the agreement was signed on or about April 29, 1970.

110 The Board concludes from the testimony that neither of the McFaddens, nor Mr. Thompson, had a clear or accurate recollection of what specifically was said when the agreement was brought to the McFaddens for signature, but in this instance the Board is satisfied that the McFaddens knew the nature and character of the document which they executed, that is, they knew they were leasing their gas storage rights and they intended to do so. Under these circumstances the plea of non est factum must fail. The Board does not find that there was any misrepresentation on the part of Mr. Thompson in the negotiations, indeed none was alleged. The Board also finds that the plea of unconscionability fails with respect to all the Kimpe Applicants for reasons detailed later herein. Accordingly the Board finds that the agreement between the McFaddens and Union is valid and binding, therefore these Applicants have no standing before the Board with respect to section 21, subsections 2 and 3 of the Act.

111 Mr. Pomajba, the next Applicant, was 31 years old with four years of high school and two years of agricultural school when he signed the Gas Storage Agreement. His prefiled testimony is under Tab 22, Exhibit 34. He stated there that he thought that Union was getting no more than Imperial already had under its oil and gas lease with him, and that the offer of $5.00 was an improvement over the $1.00

being paid by Imperial at that time. Mr. Pomajba said he thought Imperial already had storage rights. Mr. Pomajba's written evidence is confusing. He stated at page 3 of his prefiled testimony "I felt, because of my loss at the hearing regarding the assignments that I had to now sign these agreements." The Board takes from this evidence that Mr. Pomajba was referring to the unitization hearing which did not take place until October 1971, some considerable time after the Gas Storage Agreement was signed.

112 Mr. Pomajba was obviously uncomfortable during his appearance before the Board; however, the Board considers his answers to be truthful to the best of his knowledge. During examination by his counsel, Mr. Pomajba became confused, partially, in the Board's view, because of the manner in which Mr. Giffen posed his questions. Mr. Pomajba admitted that Mr. Thompson told him that the Agreement was for storage rights. Although he repeated that he thought Imperial already had such rights under its agreement, this testimony was reversed in cross-examination by Mr. Woollcombe. Mr. Pomajba also stated that he had the document in his possession for a couple of days in order that he and his father could look it over and, with the concurrence of his father, he signed it.

113 Again applying the principle in the Cugnet case the Board concludes, based on Mr. Pomajba's testimony that he knew the nature and character of the Gas Storage Agreement which he was signing. While he may have been confused as to the term and may have had some reservations as to the price, he knew that he was leasing his storage rights to Union and intended to do so. There-fore, the plea of non est factum fails, and the Pomajbas have no standing before the Board with respect to section 21, subsections 2 and 3 of the Act. The Board also finds that there was no misrepresentation on the part of Mr. Thompson in obtaining the Gas Storage Agreement such as to render it voidable.

114 Mr. Richards was 26 years old with four years of high school when he signed the Gas Storage Agreement in 1970. His prefiled testimony is found in Exhibit 34, Tab 23. It appears from this evidence that Mr. Richards relied upon Mr. Thompson's representation. He stated in examination-in-chief that it was his understanding from Mr. Thompson that "if gas was discovered and if they [Union] wanted land for storage later, we would negotiate it at a later date." It appears that Mr. Richards had the Gas Storage Agreement in his possession for a week before he signed it. He admitted reading it, and discussing it with his wife, but he stated that he did not understand it or what gas storage was and that he was under the impression that it was a drilling lease.

115 Mr. Thompson denied that he told Mr. Richards that the Gas Storage Agreement was a drilling lease. He maintained that he told Mr. Richards that he, Mr. Thompson, was there to lease the storage rights on his farm, and that the document which was discussed was clearly a Gas Storage Agreement not an oil and gas production lease.

116 In this instance, as with Mr. Kimpe, there is a direct conflict of evidence between Mr. Richards and Mr. Thompson of Union. Unlike the case of Mr. Kimpe, there is no written evidence to indicate that Mr. Richards believed that he had been induced to sign an agreement under false pretences, nor that he did not know what he was signing; nor did he make any effort in the intervening years to redress any injustice which he now claims that he suffered. The Board does not disbelieve Mr. Richard's recollection of the events in 1970. It concludes from the evidence, however, that although Mr. Richards likely expected to sign a further agreement when the pool was used for storage, and although he may not have known precisely what gas storage was or how it worked at the time he signed the Gas Storage Agreement, he did know that he was leasing his gas storage rights to Union and that he intended to do so. Under these circum-stances the plea of non est factum must fail and the Board finds that the Gas Storage Agreement is not voidable on the grounds of misrepresentation. The Richards, therefore, have no standing before the Board with respect to section 21(2) and (3) of the Act.

117 As noted earlier Mrs. Turner adopted the prefiled evidence of her husband, Keith Turner, and she gave evidence at the hearing. In Exhibit 34, under Tab 28, Mr. Turner stated that Mr. Thompson had

said in effect "we might as well sign these now, I'm here. If anything is wrong it can be straightened out later." He also said:

> "Mr. Thompson was very select in what he pointed out regarding this document. My counsel has informed me that these documents may be construed to go on forever. We were very shocked when we learned this. We never understood these documents, which Mr. Thompson must have known. We also did not realize that this document was for storage which Mr. Thompson did not point out to us. We think he took advantage of us."

At page 21 of Exhibit 43 Mr. Thompson responded to the above and stated:

> "This is definitely not correct. I well recall my meeting with Mr. Turner on that occasion. Mr. Turner was one of those persons who insisted on complete discussion. I clearly recall spending considerable time with him in discussing the details of the Gas Storage Agreement I was presenting to him and they were discussed in considerable detail. We spent considerable time doing so, and I certainly did not tell him to sign and we'd straighten out anything later. We had a detailed discussion."

118 Mr. Thompson went on to say that this discussion took place before the agreement was signed and that Mr. Turner seemed to quite understand what he was signing.

119 In addition to farming the land in the Bentpath Pool, Mr. Turner is currently employed as a stationary engineer. He has three years of high school. Mrs. Turner completed high school and has a year of business school.

120 Mrs. Turner admitted that she and her husband knew about "the whole idea of storage" and that they were aware at the time the Agreement was signed of "serious problems that had been encountered in other pools." She also admitted that the discussion with Mr. Thompson easily lasted a couple of hours. She insisted, however, that "we do not recall discussing storage with Mr. Thompson at all.".

121 When cross-examined by Mr. Robinette with respect to the Gas Storage Agreement, particularly with reference to the heading and the granting clause she insisted that she could not recall seeing either of them at the time the document was signed and finally said that she and her husband had read the Lease and Grant and "thought we were signing that." In response to the question by Mr. Robinette whether she thought there had been either an accidental or a fraudulent transposition of papers, Mrs. Turner did not answer the question but again averred "we thought we were signing a lease and grant to drill on our property".

122 The Board has considerable difficulty with Mrs. Turner's evidence. Mrs. Turner is clearly an intelligent woman with some business experience. According to Mr. Thompson, Mr. Turner is a person who wants to know all the facts. Mrs. Turner confirmed this when she agreed with Mr. Woollcombe that her husband insists on a complete discussion before he signs anything. The Turners had themselves executed the Lease and Grant with Imperial in 1968; therefore, they knew their drilling rights had already been leased to that company. Since the Turners had heard that there had been problems with Union with respect to storage rights, one would expect that they would have been very careful in their dealings with Union. Under these circumstances the Board finds it impossible to believe that there was nothing said about storage during the two hours that Mr. Thompson was at the Turners' home. The Board also has difficulty in believing that neither Mr. nor Mrs. Turner saw the heading "Gas Storage Agreement" on the document they executed. Mr. Turner initialled the first page of the Lease and Grant, and the Gas Storage Lease Agreement, but both he and Mrs. Turner signed the Gas Storage Agreement. Mrs. Turner says that she and her husband would have had to have been "stupid" or "idiots" to sign the

Gas Storage Agreement. The Board certainly did not see either of these traits in Mrs. Turner during the hearing. No action was taken by the Turners subsequent to the execution, to right what they now allege to have been a wrong. Mr. Turner appeared before the Board at the designation hearing E.B.O. 64, and his primary concern at that time was the noise and odour from a nearby dehydrator. He made no mention of any misrepresentation with respect to the Gas Storage Agreement. The correspondence between the Turners and both Union and Imperial, found in Exhibit 38 does not show any allegation of misrepresentation as to the nature of the agreement although dissatisfaction with the level of compensation is expressed.

123 The Board, after carefully weighing the evidence of the Turners and Mr. Thompson, concludes that the evidence of Mr. Thompson is to be preferred. It finds the Turners were told that the Gas Storage Agreement would convey the gas storage rights to Union and they signed the Agreement knowing this to be the case. The Board finds that there was no misrepresentation and that the plea of non est factum is not supported by the evidence. Accordingly the Turners have no standing before the board with respect to section 21, subsections 2 and 3.

124 The last Applicant to rely on the plea of non est factum was Andrew Thompson. Andrew Thompson signed an agreement with Union in April 1956, (Exhibit 24, tab 4) which granted Union oil and gas rights and storage rights for a term of 20 years and so long thereafter as any of the said substances are produced in paying quantities or the lands are used for underground storage of gas.

125 Andrew Thompson has been farming since he was 15 years old, and he has a public school education. He recalled in his prefiled testimony Exhibit 34, Tab 24, that Mr. Reaume of Union told him that the agreement was a petroleum and natural gas lease and that he relied solely on Mr. Reaume to explain the document to him.

126 In response to a question from the Board, Andrew Thompson agreed that while he did not understand all the words in the Agreement, he understood that storage rights were being granted to Union. He added that at that time he was in need of money. Under the circumstances the plea of non est factum fails. There was no misrepresentation alleged by Andrew Thompson with respect to the Union Agreement.

127 In the alternative, Andrew Thompson pleaded that the agreement dated April 24, 1956 had expired.

128 The term of the agreement is contained in the following clauses;

> "The rights hereby granted shall continue for a term of twenty years from the date hereof and so long thereafter as any of the said substances is or are produced in paying quantities from the said lands or any part of them and/or so long as the Lessee continues operations on the said lands or any of them and/or so long as the said lands, or any part thereof, are used for underground storage of gas as aforesaid.
>
> In order to provide for the storage of gas underground and for the purpose of protecting the said gas so stored the Lessee shall have the right at any time, and from time to time, to determine that any lands covered by grants or leases held by it shall be a storage area. Notice of such determination shall be given in writing to the owner for the time being of each parcel of land included in the said storage area. Should the lands above described at any time be included in any such storage area and notice be given as aforesaid then the rights and privileges granted by this Indenture, as same exist at the time of said notice, and subject to all covenants and conditions, including the amount then being paid as rental, at that time binding upon the Lessee, shall

continue as long as gas is being stored in the designated area or for any part thereof."

129 Therefore the basic term of the Thompson lease would normally have expired April 24, 1976. According to Exhibit 36 (new) Group 1-38, final production ceased in the Bentpath Pool on August 16, 1972. First injection, though unauthorized, commenced July 31, 1974. Board authority to inject was granted on August 19, 1974 by Board Order E.B.O. 64.

130 Mr. Giffen argued that, regardless of the facts of the matter, Union did not designate the Bentpath Pool as a storage area until it sent out a Notice of Determination as required in the agreement. This notice was not sent to the Thompsons until December 28, 1977, and consequently the basic term had expired. Further, Mr. Giffen alleged that no payments on account of storage were ever made under the Thompsons' lease. He submitted that there is no storage agreement affecting the Thompsons' land, and that therefore the Andrew Thompsons have standing before the Board with respect to section 21(2) and (3) of the Act.

131 Union argued that Board Order E.B.O. 46 which was issued by the Board March 16, 197 2 effective March 20, 1972 had a "fundamental effect" on the agreement because that Order provided through the Unit Operation Agreement that so long as payments under the latter agreement were made or tendered, the leased substances were deemed to be produced and the lease was deemed to remain in full force and effect. It was Union's position that all payments called for in E.B.O. 46 have been duly and properly made or tendered and have been accepted, therefore, the basic term of the original lease has been extended and continued.

132 The Board does not accept Mr. Giffen's argument that the effective date of designation of the storage area is that given by Union in its Notice of Determination. Union was clearly remiss in failing to inform the Thompsons that the pool was to be designated as a storage area, but it was Ontario Regulation 585/74 which designated the pool as a storage area on August 8, 1974, not Union's notice. At the date of expiry of the basic term, that is April 21, 1976, the lands in question were being used for storage and therefore under the provisions of the agreement of 1956, the term was extended and continued so long as the lands are used for storage. The Board therefore finds the agreement to be valid and binding and that the Andrew Thompsons have no standing before the Board with respect to section 21 (2) and (3) of the Act.

Expiry Dates of Other Leases

133 The Donald Cameron Sanderson lease with Union, in the same form as that signed by the Andrew Thompsons, is found at Tab 11, Exhibit 24. This agreement dated July 7, 1969 had a basic term of five years. It was amended by an Oil and Gas Grant Amending Agreement dated September 25, 1970, which essentially only amended the payments under the original agreement. The basic term of the agreement would have expired July 7, 1974. The arguments of Mr. Giffen and Union are the same with respect to Mr. Sanderson as they were with respect to the Thompsons. On the date that the basic term would have expired, there was no production from the Bentpath Pool nor had the area been designated or used for storage purposes. Board Order E.B.O. 46 incorporating the Unit Operation Agreement was issued on March 6, 1972. The Board agrees with Board counsel that paragraph 4 of the Unit Operation Agreement kept the Sanderson lease alive beyond the basic term provided in the original lease. Therefore the Sandersons cannot be considered to be Applicants before the Board for the purposes of section 21(2) and (3).

134 On May 18, 1951 Archibald Turner executed an Oil and Gas Grant with Union, again in the same form as that signed by Andrew Thompson. The primary term was for 20 years, and unless there was production in paying quantities or storage the term would expire on May 18, 1971. The Graham Turners obtained their land subject to this agreement the "Graham Turner Lease").

135 Exhibit 88 shows the production history of the Bentpath Pool. As indicated earlier, first production commenced December 7, 1970 and continued during the months of January, February, and March 1971. On April 1, 1971 the pool was apparently shut down for stabilization. There was no production from the pool between April and October 1971 inclusive. Production resumed for the months of November and December, ceased in January and February and resumed in March and continued to August 16, 1972. On the specific date of May 18, 1971 no gas was being produced from the pool.

136 Mr. Giffen argued that this lease expired on that date and that order E.B.O. 46 could not revive it. On the other hand Union submitted that since a producing gas well had been completed on the Graham Turner property in January 15, 1971, it would be appropriate to construe "gas produced" as equivalent to or meaning the same thing as "completion of a well capable of production in paying quantities". On this basis Union argued that the Graham Turner Lease was in fact a valid and subsisting lease on the effective date of the issuance of the Board E.B.O. 46 and was continued in full force and effect pursuant to the terms of that order.

137 Some background is necessary to place the events relating to the operation of the Bentpath Pool in perspective.

138 Union was prohibited by Ontario Regulation 396/70 from producing the pool without the consent of the Minister of Mines and Northern Affairs (Exhibit 27, Tab 33). By letter dated October 14, 1970 Union was authorized on behalf of that Ministry to produce gas from the pool providing that all the interests of the parties were joined not later than April 30, 1971. Union produced gas during the months of January, February and March 1971, as previously noted, with cumulative production of 3.078 Bcf. The April 30 date was extended by letter from the Ministry dated April 8, 1971 which was filed as Exhibit 24 in the E.B.O. 46 hearing. The letter reads in part as follows:

> "1. Production from the Bentpath pool commenced 7 December 1970 and was temporarily terminated 1 April 1971. Production from this pool will commence again on or about 1 November 1971.
>
> 2. This Department's instructions to you, dated 14 October 1970, include the condition that all the interests in the pool shall be joined for the purpose of producing the well or wells not later than 30 April 1971. In view of the difficulties which are being experienced in respect of complying with The Ontario Municipal Act, this date is being extended to 15 June 1971. If unitization of the pool has not been voluntarily agreed to by all parties concerned, the matter is to be referred to the Ontario Energy Board for compulsory unitization.

139 Why the period was extended to only June 15, 1971, when Union apparently had no intention of recommencing production until November 1, 1971 was not explained at that hearing.

140 Union did not apply to the Board for unitization until July 30, 1971. The matter was heard in Sarnia on October 28, 1971 and was resumed again on December 14, 1971. Reasons for Decision approving unitization were issued on February 16, 1972 followed by an Order dated March 6, 1972.

141 Meanwhile by letter dated November 9, 1971, the Minister again extended the time for production, this time to December 15, 1971. Apparently production resumed upon receipt of that letter and continued to December 15, 1971. No subsequent production took place until the Board Order was issued in March, 1972.

142 There were two periods, therefore, when Union had no authority to produce gas from the

Bentpath Pool -- the first June 15 to November 9, 1971, inclusive, and the second December 15, 1971 to March 6, 1972 inclusive. During those periods production did not take place. Between April 30 and June 15, 1971, Union could have produced gas from the pool, nevertheless it decided not to do so. When Mr. Newton was asked during E.B.O. 46 hearing for the reason for this, he replied as follows:

> "Under our contract we were negotiating with other interested parties, at that time we had in mind under that contract trying to establish production figures in the order of 3 BCF of gas. We had reached slightly over that 3 BCF by the end of March 31, 1971, and that was, having that in mind, we shut it in and we had fulfilled the obligations we had intended to execute at that time."

143 The situation therefore is that on May 18, 1971 Union could have produced gas from the pool in paying quantities, and it was in a position to do so until June 15, 1971. Thereafter, without Board Order or further Ministerial authorization, Union was prohibited from producing gas from that pool. The Board is not impressed with Union's ingenious argument and in the Board's view the hiatus following June 15 was sufficient to terminate the Graham Turner Lease. The Board agrees with its counsel that Board Order E.B.O. 46 could not revive a lease which had already expired and therefore the Graham Turners do not have a storage agreement with Union. The Graham Turners therefore have standing before the Board with respect to an application to determine fair, just and equitable compensation under section 21 (2) and (3) of the Act. In the circumstances of this agreement, the Board finds that neither estoppel nor laches applies.

144 Subject to the above findings the Board agrees that the Union oil and gas leases which contained storage provisions have been extended by Board Order E.B.O. 46 so long as payments provided in the Unit Operation Agreement were made.

The Plea of Unconscionability

145 Mr. Giffen's argument on unconscionability was short and his pleadings were silent on this issue. Nevertheless the Board takes from his argument and the cases cited by him that the Gas Storage Agreements were unconscionable because the rental payment offer was unreasonably low, Union's bargaining position was much stronger than the landowners, and Union induced the landowners to sign the Gas Storage Agreements with promises that were not kept and by misrepresentation as to the nature and content of the agreement. Mr. Tennyson supported Mr. Giffen's argument on this issue.

146 In support of the allegation of unconscionability Mr. Giffen cited the evidence, which he stated is uncontradicted, that fair market value of the least cost alternative to Union would be $1,950 per acre per annum in 1980 and that in contrast Union is paying the Applicants a mere $7.00 per acre per annum in perpetuity. For reasons detailed in Part III hereof the Board does not agree with Mr. Giffen's submission as to fair market value. His reliance on this evidence to support the allegation of unconscionability is, therefore, ill-founded and his argument is rejected by the Board.

147 An analysis of the table prepared by the Central Ontario Appraisals (Exhibit 103) indicates that in the period 1972 to 1974 Union's payment of $5.00 per acre per annum to landowners in the Bentpath Pool was neither the highest nor lowest payment among lessees for gas storage rights in Lambton County, nor was it the highest or lowest paid by Union to its lessors. The Board does not find that "the total facts in this matter shriek of unconscionability." It cannot be said that the landowners were coerced into signing the agreement, in any way, or prevented from obtaining independent advice, or that the amounts paid to them under the various lease agreements were out of line with payments being made to other landowners in the same general vicinity for the same type of rights at that time. In short, the Board concludes that the evidence does not support a finding of unconscionability.

148 The parties having standing before the Board on the issue of compensation therefore are the Higgs, the Smits, the Township of Dawn, Achiel Kimpe, and the Graham Turners.

PART III

Compensation

Effect of Board Order E.B.O. 46 on Storage Payments

149 It was claimed on behalf of the Kimpe Applicants that certain payments that they were entitled to under the various leases and agreements had not been received and as such the agreements should be declared void. Evidence was submitted detailing the payments made by Union to each landowner and in addition, Mr. Giffen called Mr. Bowman, who had analyzed payments made to the McFaddens, Thomases and Turners.

150 The evidence before the Board is that although several of the Applicants had expressed their concern that the payments were insufficient, there was no evidence filed to show that they had in fact objected to Union changing the payments from 'in advance' to 'in arrears', or that they considered that payments were not being made at all under any lease or the Gas Storage Agreements. In any event, the Gas Storage Agreement has no penalty in the event of failure of the Lessee to comply with the terms of the agreement. And under the Union oil and gas leases which included storage, the lessor was required to give Union thirty days notice of any default so that it could be removed before the lease could be declared void. Since such notice was not given by the lessors prior to this proceeding, the Union lease agreements cannot be considered void for reasons of non-payment. The Board concludes, therefore, that none of the leases or the Gas Storage Agreements is voidable on the grounds of non-payment.

151 The Act requires the Board to determine the amount of compensation payable to the owner of storage rights which are not subject to agreement. The Board agrees with its counsel that the Board is not a collection agency, but since the landowner's storage rights were taken as of July 31, 1974, the date of first injection, the period from 1974 to 1982 must be considered and recognition must be given to payments that have already been made by Union. A determination of outstanding compensation due to an Applicant necessitates an analysis of payments to determine under which leases, agreements or Board Orders they were made.

152 In reviewing the amounts that have been paid by Union under the various agreements, it appears that payments were made in full under the individual agreements prior to Board Order E.B.O. 46 being issued and also under Union's interpretation of the Unit Operation Agreement that formed part of Board Order E.B.O. 46. However, it is questionable whether payments under the Gas Storage Agreements have actually been made by Union.

153 The Gas Storage Agreements assigned the storage rights to Union with compensation set at $5.00 per acre per year, payable annually in advance, on the anniversary date of the agreement. Five out of the eight Gas Storage Agreements were dated May 1, 1970, two on May 5, 1970 and one on April 29, 1970. Payments were made in accordance with these agreements for the periods 1970 to 1971 and 1971 to 1972.

154 Board order E.B.O. 46 was issued on March 6, 1972, and, the Board, at page 12 of its Reasons for Decision in E.B.O. 46, made reference to Union's proposed payments under the Unit Operation Agreement and noted that:

> "These payments are in substitution for all payments under the petroleum and gas

> production leases and gas storage agreements and appear to have been designed to remove the inequity between the Union and Imperial lessors arising from the fact that the Union lessors signed away their storage rights for no present consideration other than the holding rental under the production leases, whereas the Imperial lessors are compensated not only by the holding rental under the production leases, but also by the separate storage rental under the Union gas storage agreement."

155 Union concluded that the Board Order amended both oil and gas leases and Gas Storage Agreements so that payments were no longer made in accordance with the agreements that had been signed, but were now made in accordance with Union's interpretation of the terms of the Unit Operation Agreement (See page 19 herein). Those landowners with acreage in the participating area received royalties as gas was produced and those outside the participating area received the minimum annual rental, in arrears. It will be noted from page 19 herein that the applicable section of the Unit Operation Agreement requires that the lessors be paid by the lessee not later than the 31st day of January, next following, an amount per acre that will bring the total received from royalties and any payments for underground storage rights from any source up to a minimum of $7.00 per acre per year for that land within the unit area and $5.00 per acre per year for land outside the unit area. This does not amend the Gas Storage Agreements but provides for a common minimum payment to all landowners.

156 It should be noted that neither the Board's Reasons for Decision nor the Order in E.B.O. 4 6 amended the Gas Storage Agreements or specifically approved or required any adjustment to the timing of payments under the Gas Storage Agreements. This is not surprising, since Union had indicated during the course of that proceeding that it considered storage and compensation for storage to be outside the Board's jurisdiction in that particular proceeding. In the subsequent proceeding that dealt with the designation of the Bentpath Pool as a storage area, E.B.O. 64, the agreements were referred to, but again neither the Board's Order, nor the Reasons for Decision altered or amended those existing Gas Storage Agreements.

157 Reference to the remittance vouchers used by Union, show that prior to 1977, the terminology used was "Expires indef. Not advanced. Unit agreement Bentpath Pool Unit." From 1977 onwards, the terminology is similar, except the words "unit agreement" are replaced with "storage payment", followed by the Gas Storage Agreement number for each landowner. Although the terminology changed in 1977, the amount paid by Union to the landowners was still calculated in accordance with the Unit Operation Agreement approved in E.B.O. 46.

158 The evidence before the Board, therefore, is that the Gas Storage Agreements have not been amended by any action of the Board or the lessors, and as such $5.00 per acre per annum should have been paid to the lessors in advance. Nor does the evidence show that the level of compensation for storage rights was set at $7.00 per acre per annum as alleged by Union. Oil and Gas leases taken by Union that included storage were amended by E.B.O. 46 and as such it appears that payment was made under those leases. The landowners without storage agreements have in fact, received payments under the Unit Operation Agreement. Since the Unit Operation Agreement established the minimum payment under the oil and gas leases, but could not establish compensation for storage since that matter was not before the Board, then these landowners have not received any payment for storage from July 31, 1974 to date.

159 In summary then, the Board finds that Board Order E.B.O. 46 did not amend or alter the payments to be made for gas storage rights to those landowners who had signed Gas Storage Agreements, nor did it directly or indirectly set the level for gas storage compensation at $7.00 per acre per year.

Principles of Compensation

160 The Applications by the landowners were made pursuant to section 21 of the Act. That section provides that an appeal from a determination of compensation by the Board must be to the Divisional Court under section 33 of the Expropriations Act R.S.O. 1980 C. 148.

161 Since the above acts include several cross-references one to the other, it became an issue in this proceeding whether the Board should make its decision on compensation solely on the basis of the Ontario Energy Board Act, or whether the Expropriations Act, or particular sections of that act, or the common law should influence its decision.

162 Union noted that the Board, in at least two Reasons for Decision issued in designation proceedings, has stated that approving the designation of an area for storage has the effect of expropriating storage rights from those within the area who had not signed a storage agreement. Union argued that these Board decisions together with section 2 of the Expropriations Act, require that the determination of compensation by the Board be undertaken using the general principles of compensation as set out in section 14 of that act. Union also argued that the procedural requirements relating to storage matters before the Board were governed by section 35 of the Ontario Energy Board Act.

163 Mr. Giffen, for the Kimpe Applicants, considered that the Board, having been given the widest powers by the Legislature to deal with compensation and such matters as agreements, should determine fair, just and equitable compensation without recourse to the principles that are intended to govern the determination of compensation under the Expropriations Act.

164 He submitted that Union was not in a position to ask the Board to take the Expropriations Act into consideration since Union had not complied with the procedures specified in that act. He pointed out that the courts in the past have required a strict compliance with the procedural requirements of expropriation statutes and argued that since Union had not complied with the procedures set out in the Expropriations Act it would have to start the process all over again if it wished to apply any portion of the Expropriations Act to the determination of compensation.

165 The difference between the "taking" of property, generally dealt with in expropriation proceedings, and the "entering" and "use" terminology used in section 21 of the Ontario Energy Board Act, was noted by Mr. Giffen. He argued that "entering and use" was not an expropriation and that the Board should set "fair, just and equitable compensation" as required by section 21(2). He agreed with Union that the procedural requirements for storage matters were governed by section 35 of the Ontario Energy Board Act.

166 Mr. Tennyson's submission on behalf of certain landowners in the Payne Pool area generally endorsed the arguments of Mr. Giffen and in particular dealt with the principles of compensation. He submitted that the Board should consider all the issues of compensation and not limit itself solely to the narrow grounds of the law of expropriation. These landowners were concerned that the Legislature, through the provisions of the Ontario Energy Board Act, has "taken away the rights of the private landowners to sell this gas storage resource to the highest bidder in a free and open market". They, therefore, asked the Board to take the statutory limitations imposed by the Act on their ability to sell their rights into consideration when fixing fair, just and equitable compensation.

167 Board Counsel traced the numerous amendments to both acts and concluded that the Ontario Energy Board Act governs as far as the procedure to be followed is concerned, but that the principles set down in sections 13 and 14 of the Expropriations Act should be followed in establishing the level of compensation.

168 The Board having reviewed the evidence and the arguments of all counsel, concludes that it has

two issues to decide in order to establish what principles or precedents should guide it in setting compensation. The first is whether the taking of the landowners storage rights constitutes expropriation, the second is the extent to which the relevant statutes and the common law should be considered by the Board in determining compensation.

169 The Board, in Reasons for Decision E.B.O. 64, stated that the granting of Union's application had "the effect of expropriating the storage rights" of two private land-owners and the Township of Dawn. It would therefore seem that the Board, at that time, considered that the taking of storage rights was akin to an expropriation.

170 Subsequent to the designation of an area as a storage pool, a Board Order appoints an exclusive operator. In the case of Bentpath, it was Union. Once such an order has been issued storage rights that have not been assigned to the operator have no value to the landowner because he cannot independently use them. In effect they have been taken from the landowner without his consent. The definition of "expropriation" in the Expropriations Act includes "the taking of land without the consent of the owner by an expropriating authority". In the same act, "land", is defined to include "any right or interest in, to, over or affecting land". In this case the subject is a "right or interest in" land, and Union is in effect the expropriating authority through the approval of the Board.

171 The Board has concluded that the distinction between "entry and use" and "taking" referred to by Mr. Giffen is really a distinction without a difference in this case and that for all practical purposes the landowner's rights have been expropriated.

172 The sections of the Expropriations Act that appear to have relevance in this matter are section 2 (1) and (4), section 4(1) and (2) and section 12. These are as follows:

Section 2:

> "(1) Notwithstanding any general or special Act, where land is expropriated or injurious affection is caused by a statutory authority, this Act applies.
>
> "(4) Where there is conflict between a provision of this Act and a provision of any other general or special Act, the provision of this Act prevails."

Section 4:

> "(1) An expropriating authority shall not expropriate land without the approval of the approving authority as determined under section 5.
>
> "(2) Subsection (1) does not apply to an authorization of the Ontario Energy Board under the Ontario Energy Board Act in respect of storage of gas in a gas storage area or to an expropriation authorized under section 49 of that Act."

Section 12:

> "Section 21 of the Ontario Energy Board Act applies in respect of the use of designated gas storage areas."

173 The Board considers that section 2 expresses the intent of the Legislature that the Expropriations Act should apply in all cases where a property owner could be deprived of property, or rights associated with that property.

174 The Board is also satisfied that sections 4 and 12 of the Expropriations Act would preclude any application under that act with respect to matters associated with the storage of gas. Those sections also establish the Board as the approving authority for gas storage designation and pipeline expropriations. Mr. Giffen is, therefore, in error in suggesting that Union would have to start expropriation proceedings under the Expropriations Act before the remaining applicable provisions of that act can be considered.

175 Section 21(1) of the Ontario Energy Board Act establishes the Board's power to authorize a person to inject, store, and remove gas and section 35 of the Act sets out the procedures to be followed with respect to the designation of a gas storage area. Since the application by Union that resulted in the designation of the Bentpath Pool as a storage area was brought under these two sections of the Act, the Board concludes that the correct procedures have been followed and that those procedures do not preclude the consideration of the Expropriations Act in this proceeding.

176 Section 21(4) of the Act is as follows:

> "(4) An appeal within the meaning of section 33 of the Expropriations Act lies from a determination of the Board under subsection 3 to the Court of Appeal, in which case that section applies and section 32 of this Act does not apply."

177 This section makes it clear that the Legislature intended that an appeal from a determination of compensation by the Board would be to the Divisional Court under section 33 of the Expropriations Act.

178 On the basis of the foregoing the Board has concluded that the determination of fair, just and equitable compensation must include recognition of the principles contained in the Expropriations Act.

179 During this proceeding many cases were cited by the participants, with a view to establishing the state of the common law with respect to the determination of compensation for an expropriation. The Board does not consider it is necessary to summarize the various cases that were cited but believes that the case of Farlinger Developments Ltd. v. Borough of East York (1973), 5 L.C.R. 95, 127 (LCB); varied (1975), 8 L.C.R. 112 contains one of the most recent and perhaps the most explicit interpretation of section 14 (1) of the Expropriations Act that has been expressed by the courts. In that case the Ontario Court of Appeal held that "In an expropriation there are really two fundamental steps, the first is to determine the highest and best use of the property expropriated and the second is to fix the compensation awarded to the owner based on such use." The definition of "highest and best use" was quoted from a previous hearing of the Ontario Land Compensation Board as "the highest economic use to which a buyer and seller, each willing and knowledgeable, would reasonably anticipate the lands would probably be put."

180 In this proceeding the issue is of course the compensation that should be payable for storage rights rather than the outright acquisition of land. Nevertheless, the Board is satisfied that recognition must also be given to the established common law with respect to expropriation matters.

181 With respect to the probability of the use of those storage rights, it must be remembered that the application by Union in 1974 was for the designation of the Bentpath Pool area as a natural gas storage area. It was, therefore, almost a certainty rather than a probability that the highest and best use of the subterranean void under the designated area would be for the storage of natural gas.

Bentpath Compensation

182 It is clear in this proceeding that the Applicants are dissatisfied with the treatment accorded them by Union. This dissatisfaction apparently results from their belief that the payments for storage rights

received to date, the offer made when they were asked to sign the Gas Storage Lease Agreement and the subsequent offer of $12.36 per acre per year, were all inadequate.

183 Section 21, subsections (2) and (3) of the Act, which provide for a landowner's right to compensation for gas storage rights, read as follows:

> "(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),
>
> (a) shall make to owners of any gas or oil rights or of any right to store gas in the area fair, just and equitable compensation in respect of such gas or oil rights or such right to store gas; and
>
> (b) shall make to the owner of any land in the area fair, just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by such order.
>
> (3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount thereof shall be determined by the Board."

184 Under Part II of these Reasons for Decision the Board has concluded that Kimpe, the Graham Turners, the Higgs, the Smits and the Township of Dawn all have standing before the Board in this proceeding and as such they are entitled under section 21(3) to have the Board determine the amount of compensation that should be paid for their rights to store gas. Those landowners that have agreements have no standing before the Board in this proceeding, and Union is legally required only to pay the amount of compensation required by such agreements. For obvious reasons it is desirable that all landowners in a pool be treated equally and the Board would encourage Union to adopt a uniform treatment for all landowners in the Bentpath Pool. It recognizes, however, that it does not have the jurisdiction to order Union to do this.

185 In weighing the evidence and determining the amount of compensation that should be paid, the Board has taken into consideration the requirements of the Act that such compensation should be "just, fair and equitable".

186 The Board has also accepted that the principles established in the Expropriations Act should be considered in its determination of the compensation payable to the landowners. The sections of that act which contain those principles are sections 13 and 14 which are as follows:

> "13.(1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.
>
> (2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,
>
> (a) the market value of the land;
> (b) the damages attributable to disturbance;
> (c) damages for injurious affection; and
> (d) any special difficulties in relocation,
>
> but, where the market value is based upon a use of the land other than the existing

use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use.

14.(1) The market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

(2) Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner intends in good faith to relocate in similar premises, the market value shall be deemed to be the reasonable cost of equivalent reinstatement.

(3) Where only part of the land of an owner is taken and such part is of a size, shape or nature for which there is no general demand or market, the market value and the injurious affection caused by the taking may be determined by determining the market value of the whole of the owner's land and deducting therefrom the market value of the owner's land after the taking.

(4) In determining the market value of land, no account shall be taken of,

(a) the special use to which the expropriating authority will put the land;

(b) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation; or

(c) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health."

187 During these proceedings a number of methods of determining compensation, or the market value of storage rights, were proposed by those participating. As a result, the Board was presented with an extremely wide range of possible values, each being supported by a witness who was considered to be an expert in his field.

188 Union submitted that the calculation of the market value should be based on the report prepared by the Board and submitted to the Lieutenant Governor in Council in 1964. In that report the Board concluded that compensation should be based on the performance rating of a pool and suggested three ratings; excellent, good and fair. The value proposed per million cubic feet of capacity for each of these ratings was 30 cents, 27.5 cents and 25 cents respectively, with the total value being distributed to the landowners in proportion to the land owned by each to the productive acreage in the designated area. Union, having rated the Bentpath Pool as "good", had determined that $12.36 per acre per annum should be offered. Revising the rating to "excellent" caused Union, in its argument in this proceeding, to increase the offer to $13.48 per acre per annum.

189 Throughout the hearing the Kimpe Applicants relied heavily on the value as presented in the Havlena Report prepared by their consultants, Messrs. Friedenberg, Havlena and Ruitenbeek. The Havlena Report, filed as Exhibit 63, included a determination of the annual rental value for storage rights in the Bentpath area and a value for purchasing the property including storage rights. Values were calculated for each of the years 1974 to 1981 and the annual rental per acre varied from a low of $425 in

1976 to a high of $3,049 in 1979. The outright purchase price per acre varied from a low of $4,192 in 1976 to a high of $28,818 in 1979.

190 In argument the Kimpe Applicants still favoured the Havlena method but now suggested that other methods which were not presented to the Board during the hearing might be acceptable. Seven methods were proposed by Mr. Giffen and in his order of preference these required that the Board:

1) either accept the Havlena Report as filed with the rental calculated for each year being reduced by one-half to provide for an equal sharing between the landowners and Union's customers (i.e. for 1981 the Havlena calculated rental rate of $1797.00 per acre per year would be reduced to $898.50), or use that Report as the basis for determining the appropriate annual compensation for each year;

2) determine compensation essentially as 1) above except that the amount would be determined for a three-year period instead of each year;

3) base compensation on the sales by one company to another of operating pools such as Wilkesport and Terminus, with the compensation so determined being adjusted to reflect inflation for each year in question;

4) recognize that Union has storage capacity to meet some 40 percent of its annual gas sales and on this basis, instead of halving the annual amounts produced by the Havlena Report, reduce them to 40 percent;

5) allow compensation to track changes in amounts paid for oil and gas leases. It was claimed that since oil and gas leases have increased from $1 per acre in the 1960's to approximately $25 today, the $7.00 per acre currently being paid for Bentpath should be increased by 25 times to $175 per acre per year. Further adjustments should be made in the future as changes in oil and gas leases occur and for any inflationary trends;

6) update the recommendations in the Board's 1964 report. It was suggested that an escalation equal to the increase in the price of natural gas in Eastern Canada since 1964 would produce appropriate rental figures for today. They calculate that the $13.48 would be increased to $94.54 per acre per year for Bentpath at current gas price levels. The figure would, of course, increase as the price of natural gas increases;

7) alternatively, update the 1964 report using an assumed rate of inflation for the years since that report was issued. They suggest 10 percent per year inflation would be a reasonable average and on this basis the Kimpe Applicants calculated a rate for Bentpath of $7 5 per acre per year for 1982. This would of course be increased annually in accordance with the annual rate of inflation.

191 Board counsel filed a study that had been prepared by Central Ontario Appraisals and called Mr. Mason and Mr. Kylie of that company to testify. The study examined several approaches but finally recommended a method for the determination of what the authors considered to be fair, just and equitable compensation for the rights to store gas in the Bentpath Pool. This method consisted essentially of determining the fee simple value for the property based on other property sales in the area and an annual rental rate based on that fee simple value. Mr. Mason considered that the annual rental payable for storage rights should be a maximum of 50 percent of the fee simple rent. For the year 1981,

the Central Ontario Appraisals method produced a fee simple rental of $67.92 to $84.90 per acre per year so that the maximum storage rate would be $33.96 to $42.45 per acre per year.

192 Throughout the proceedings, Mr. Giffen characterized his clients as being uninformed and without bargaining power at the time that they signed agreements with respect to storage. He suggested that lack of knowledge caused his clients to sign agreements which provided for an inadequate level of compensation. In this respect it is interesting to note that having now received the opinions of several experts on the subject, the Board is faced with a somewhat astonishing range of proposals for compensation, all deemed by knowledgeable people to be appropriate for the Bentpath Pool area.

193 Mr. Giffen, who has now had over two years' experience and the advice of numerous experts, presented the Board with seven alternatives for 1981 ranging from $68.13 to $898.50 per acre per year. Union, although it has been in the business of storing gas for many years, did not express any corporate opinion, but chose to rely on the Board's 1964 report on storage in Ontario. Board Counsel submitted that the Mason evidence be used as a guide only and, on the basis of the increase in rates paid by Tecumseh and changes in the Consumer Price Index, they recommended that the compensation range found by the Board in 1964 be increased. They also submitted that the Board should determine the level of compensation for two periods, and recommended that it should be between $15.00 and $25.00 from July 31, 1974 to July 31, 1982 and between $25.00 and $40.00 from July 31, 1982 to July 31, 1987.

194 It is apparent that the "knowledge" that Mr. Giffen alleged was not previously available to his clients is subjective in that the evidence now before us indicates that its aquisition does not lead to one irrefutable value but, depending on the viewpoint, to a very wide range of possible values. The Board can only conclude that lack of knowledge was in reality a minor factor in the total dissatisfaction of the landowners.

195 The wide variation of expert opinions now faced by the Board in this case is not unique. In the appeal arising from Runnymede Development Corporation v. The Minister of Housing, (1978) 20 O.R. (2d) 559, affirmed 18 L.C.R. 65 [C.A.]. The court at page 564 referred to the Land Compensation Board's difficulty;

> "The Board finds it difficult to comprehend how two sets of knowledgeable appraisors having the same information as to planning and services, and having available the same records of sales which may be relevantly comparable to the subject properties, can arrive at values for 413 acres of raw land, which, taking the higher and lower of the values in evidence, shows a difference of almost $5 million."

196 The Court in its decision noted that "it was the Board's responsibility to weigh the conflicting evidence and act upon the evidence that it found to be credible and persuasive." It also pointed out that the Land Compensation Board was not obliged to accept the whole of the evidence of any witness and could refuse to accept part of the opinion of certain witnesses. The court concluded that the inferences made by the Land Compensation Board "were reasonable in the face of the difficult and conflicting body of evidence it had to deal with," and dismissed the appeal.

197 In weighing the evidence before it, this Board must now examine each of the alternatives proposed by the participants, in light of the principles and common law referred to in the preceding section.

198 Section 13 of the Expropriations Act requires that landowners receive compensation based on the market value of the land, but where the market value of the land is based upon the use of the land other than existing use, no compensation shall be paid for damages attributable to disturbance. Section 14 of that act defines the market value of the land as the amount that a willing seller might expect if the land

were to be sold to a willing buyer in the open market. The determination of market value of land, however, cannot take account of any special use to which the expropriating authority will put the land, or to the effect on value of the imminence of any development. Section 13 clearly recognizes that market value can be based on a use other than the existing use, whereas section 14 specifically bars the value of land being based on the special use intended by the exproriating authority, or the change in the value resulting from the imminence of such a development.

199 The relevent principle in common law has been referred to as the Pointe Gourde Rule the purpose of which was stated in Wilson et al v. The Liverpool City Council, [1971] 1 All E.R. 628 as being:

> "... to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition."

200 This rule, however, is not interpreted by the courts as restricting the determination of market value to that of value to the owner, or to eliminate consideration of the future potential for the land. In Fraser v. The Queen, [1963] S.C.R. 455, Richie J. referred to the decisions in Cedars Rapids Manufacturing and Power Co. v. Lacoste; Fraser v. City of Fraserville; and Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendant of Crown Lands as the leading authorities usually quoted in support of the contention that potential value over bare ground could not be considered if solely related to the purpose for which the land was expropriated. He went on to say:

> "None of these cases is, in my opinion, authority for the proposition that a hitherto undeveloped potentiality of expropriated property is to be entirely disregarded in fixing the value of that property for compensation purposes on the ground that the expropriating authority is the only present market for such potentiality and that it has developed a scheme which involves its use. These cases do, however, make it plain that the amount fixed by way of compensation must not reflect in any way the value which the property will have to the acquiring authority after expropriation and as an intregral part of the scheme devised by that authority."

201 With respect to the seven proposals submitted by the Kimpe Applicants for determination of market value, the Board notes that the first two are based on the Havlena Report. This Report established for each year what the authors termed the "value" of the Bentpath Storage Pool by an economic analysis of the market conditions and the alternative methods that Union might use to meet the demands of its customers if storage were not available. They concluded that purchasing from TransCanada PipeLines under various rate schedules would be the least cost alternative and calculated the cost addition that would be involved were Union to adopt that alternative. This additional cost was considered to be the value of storage and the annual value or rental was determined from this on a per acre basis and the purchase value was determined by discounting the yearly value by rate of return.

202 The Board considers that the values produced in the Havlena Report are a measure of the gross margin, or contribution, to Union as a result of the use of storage. This margin could not be realized without Union's distribution system and Union's customers. It clearly is a calculation of the value of the storage rights to the expropriating authority, namely Union. It has been noted that the consultants made no claim that the value determined in the Havlena Report was that which might be paid in the open market to a willing seller by a willing buyer.

203 The methodology used in the Havlena Report was largely unchallenged in this proceeding and the Board does not propose to deal with it in detail. It should be noted, however, that the application of that methodology to other companies, such as Tecumseh which purchases no gas other than for compressor fuel, or Consumers' Gas Company Ltd., which has little storage, would produce substantially different

values for storage rights, even in the same area.

204 The Board concludes that the methodology used in the Havlena Report is limited in application and fails to comply with the principles established both in the statute and in common law and as such cannot be used for the determination of the market value or of compensation for storage rights.

205 The Kimpe Applicants' third preference requires that the Board determine compensation on the basis of a comparison with prices that are being paid by storage companies to acquire pools from other companies. Mr. Giffen also requested the Board to recognize the one case in Michigan where landowners organized and forced the utility to pay a higher price. The Kimpe Applicants claim that the prices paid by a storage company for gas storage rights reflect the market value and point out that in such a sale both parties are knowledgeable.

206 The Board will disregard the Michigan case for two reasons. First, the transaction was not between willing parties, rather the utility was "driven" to meet the demands by the circumstances of that time. Second, the law in Michigan is different from the law in Ontario.

207 The Board is of the opinion that there is no similarity between the outright purchase by one company from another of an assembled pool area or an operating pool area, and the rental of storage rights from a land-owner. In acquiring new storage rights from a landowner in an unexplored area it is the operating company, not the landowner, that incurs a risk that the area may not be suitable for storage, that market conditions may not permit economic development and use of the area for storage, or that after development the costs involved with operation of the particular pool may be too high. However, when a company purchases an assembled area most, if not all, of this risk has already been borne by others. The purchasing company generally has available to it geological information, the drilling experience associated with the pool and data relating to the production and operation of the pool. This information normally forms part of the sale from one company to the other and it can effectively eliminate much of the initial risk associated with development of the pool for storage. The value that the two companies place on the geological and operating data, the assembly of a pool area, or any residual risks appears to the Board to be quite separate from the annual rental paid to landowners for storage rights, which rental continues to be paid to landowners regardless of change of ownership.

208 From the above it is apparent that the price paid by one company to another for the right to operate a particular pool has no bearing on the market value of storage rights. The Board, therefore, rejects this as a method of determining market value.

209 The Kimpe Applicants' fourth method of fixing compensation again relied on the Havlena Report and for reasons stated above the Board rejects this as a reasonable method of determining market value or compensation.

210 With respect to the fifth method proposed by the Kimpe Applicants, it should be noted that when the Board approved $7.00 per acre per year in E.B.O. 46, it pointed out that it was to be a total figure including all payments received for oil and gas rights and storage. In addition there is no evidence before the Board that demonstrates that the rental for oil and gas rights is related to the rental for storage rights. It would, therefore, be inappropriate to use the $7.00 as the base figure, and to increase this in the manner proposed by the Kimpe Applicants.

211 In view of the variation in payments required under the original oil and gas leases and since E.B.O. 46 specifically amended these leases, the Board considers this approach to be inappropriate in the circumstances.

212 The sixth method proposed by the Kimpe Applicants seems to suggest a link between the value of

storage rights and the price of natural gas in Eastern Canada. The price of gas at the Toronto city gate is now set by the Canadian Government under the Petroleum Administration Act and is outside the control of both Union and TransCanada PipeLines. The Board cannot accept that changes in the level of tax imposed on all Canadians through gas sales, or the imposition of a Canadianization tax, should have any impact on the value of storage rights in Ontario, nor that increases in the cost of gas should impact directly on storage rights or their value.

213 The Board can find no support for the claim that there is such a relationship between the price of gas and the market value of storage rights and so rejects this proposal.

214 The seventh and final method proposed by the Kimpe Applicants suggests that Union's offer of $13.48 per acre per year be increased annually on the basis that the annual average rate of inflation has been about 10 percent for the 1974 to 1982 period. There was, however, no evidence filed to show that market value of storage rights has any relationship with the rate of inflation or with changes in the Consumer Price Index. The Board, therefore, rejects this approach as a method of determining compensation for storage rights.

215 The study prepared by Central Ontario Appraisers and submitted by Board counsel in this proceeding contained the recommendation that the market value of storage rights should be determined by the Board using the rental rate developed from fee simple value of the land. Implicit in this method is the assumption that the value of storage rights bears some relationship with the value of the land. In argument, Board counsel did not recommend that the Board adopt the approach proposed by Central Ontario Appraisers but suggested that it could be of some guidance to the Board.

216 The Board has reviewed the method recommended by Central Ontario Appraisers and concludes that there is no justification for the assumption that there is any correlation between the fee simple value of the land and the market value of the storage rights. It is understood from the evidence before the Board that none of the properties in the Bentpath Pool area was purchased for the storage potential but for the use of the top few centimetres of the land and any buildings thereon. That oil and gas was later discovered under such property must be considered a windfall to a landowner who has incurred no expense, expended no effort, and has not been exposed to any financial risk. Similarly, if the pool should later prove to be suitable for storage then this must be considered as an additional windfall. The use of the top few centimetres of soil has not been affected in any way, except for those landowners where wells have been drilled, and in those cases only a few square metres of surface are required.

217 The evidence presented by the real estate appraisers suggested that the difference in value per acre for land located in a storage pool area, compared to land located outside a storage pool area, is insignificant. The Board, therefore, concludes that the presence of storage is not detrimental to land values, and that a reasonable level of rental rates for storage rights does not cause land values to inflate.

218 The Board agrees with its counsel that the Central Ontario Appraisers method is not suitable for the purposes of determining compensation in these circumstances.

219 The Board's responsibility in this procedure is to determine the compensation that would have been fair, just and equitable at the time that the storage rights were effectively expropriated from the landowners, that is July 31, 1974. The Board considers that it must also determine if the compensation continues to be fair, just and equitable as of the present and to make any adjustments that it considers necessary.

220 The offer made by Union to the landowners of the Bentpath Pool was based on the Board's 1964 report; a report that was based on data that was some ten years out of date as of the date of expropriation of the storage rights, and is currently some 18 years out of date. Since much of the basic rationale with

respect to storage remains unchanged, the Board's report is of considerable assistance. However, it must be recognized that values in general have increased during the intervening years.

221 When considering the Board's 1964 report, it should also be recognized that the report was the response to a reference of the Lieutenant Governor in Council that required the Board "to adjudicate on and examine and report on the following questions respecting energy:

> "1. Payments with respect to storage of gas in designated gas storage areas.
>
> 2. Terms and conditions of Gas and Oil Leases.
>
> 3. The Gas and Oil Leases Act."

222 The Board was, therefore, not dealing with a question of expropriation of rights and due compensation, and was not constrained by the requirements of any statutes. The Board, in fact, declined to set specific compensation for any pool, because the fixing of rates for certain landowners in Dawn No. 15 6 Pool was to be the subject of arbitration before the Board at a later date and an appeal to the Ontario Municipal Board with respect to the Payne Pool had yet to be heard.

223 In essence, the Board in that report noted that earlier settlements for storage rights represented an annual rental of approximately 16 cents per million cubic feet of capacity and the latest one prior to the 1964 report had increased to approximately 19 cents per year per million cubic feet. Using this as a basis and giving "a good deal of weight to the increased use and usefulness of storage during the past thirteen months," the Board considered that rates should be substantially higher. It concluded that pinnacle reef pools should be categorized according to the performance ratings, namely; excellent, good and fair, and that the rates per million cubic feet of storage capacity, should at 30 cents, 27.5 cents and 25 cents respectively. The figure of 30 cents per million cubic foot of storage capacity was used by Union to calculate the figure of $13.48 per acre per annum which has now been offered to the Bentpath Pool landowners.

224 It is interesting to note that in 1964, the Board was aware of a growing requirement for gas storage and that it gave weight to this in recommending the rental payments. This growing requirement appears to have been reflected in some of the rental rates paid in Ontario. Rates for the pools referred to as Dawn 1 and 2, designated formally in 19 5 0, were apparently the subject of prolonged negotiation between Union and the landowners; subsequently resulting in an adjustment to $7.50 and $6.00 per acre per annum respectively in 1957, made retroactive to 1951. Union later responded voluntarily to the Board's 1964 report by increasing rates to all pools it operated for storage in accordance with the Board's recommendations. The increase varied from $3.60 to $8.88 per acre per year but Union did not respond to the May 4, 1964 report until August 1, 1967. No further increases in rental rates have been made by Union since 1967.

225 Tecumseh, on the other hand, appears to have shown a greater willingness to adjust rental rates. The land-owners in the three pools originally used by Tecumseh -Kimball-Colinville, Seckerton and Corruna - received an increase from $5.00 per acre to $6.00, $8.75 and $8.60 respectively in 1964. Although these rates did not exactly correspond to those suggested in the Board's report, being somewhat higher, they appeared to represent a voluntary acceptance of the Board's concern that unit capacity and quality of each pool should be recognized in the pricing structure. In 1976 however, these rates were voluntarily increased again to a uniform $15.00 per acre, and in 1981 they were again voluntarily increased to a uniform $21.50 per acre. Apparently Tecumseh concluded that a differential based on pool performance was no longer justified.

226 In course of the study undertaken by Central Ontario Appraisers, a survey was made of gas storage lease agreements entered into between landowners and various companies in Lambton County. They concluded that the wide range of acreage rates paid was such "that no logical conclusion as to 'fair, just and equitable compensation' can be obtained from the leases." The Board agrees with this observation, but considers that the survey data does produce some useful information. Of significance is that there were some eleven companies actively seeking storage rights in the county during the years covered by this survey. In addition, while there is a considerable variation in the rental rates being paid prior to actual use of the storage areas, there is an indication in the agreements that the rates that will be paid when and if pools are used for storage have been increasing during the years covered by the survey. For example, earlier agreements taken by McClure Oil Company carried a provision that use for storage would result in a renegotiation of annual payments within the range of $5.00 to $13.00 per acre, whereas by 1976 the range had increased to $15.00 to $30.00 per acre. Dow Chemical signed agreements between 1977 and 1980, which contained a requirement that the rental rate would be renegotiated between $20.00 and $30.00 per acre per year when the area is to be used for storage.

227 The number of companies that are or have been in the market place, the increase in the rental rates currently being paid, or that will be paid when the pools are used for storage, supports the observation by counsel for IGUA that there is in fact a market in existence and that market forces are causing rental rates to increase.

228 The Board concludes that direct reliance cannot be placed on the rates found appropriate by the Board in its 1964 report. In that report the Board appeared to recognize the existence of a market, in that the recommendations of that report were apparently based on the rates actually being paid in Southwestern Ontario at that time and trends that were perceived by the Board as to the future use and usefulness of gas storage. It is noted that the latter point could be considered as introducing an element of "use to the taker" or reflecting the scheme for which the property was expropriated. However, the Board is satisfied that some recognition can be given to the potential for land or rights without specific consideration of the value that might be ascribed to the storage as a result of the expropriation. The Board also recognizes that, as pointed out by Consumers' Gas during the hearing that led to the Board's 1964 report, a porous rock formation under a landowner's property is an asset that is reusable, unlike minerals which once removed are gone forever. The landowner in this case has lost the right to use the asset, not the title to the asset.

229 The right to use the asset can of course be relinquished by the operating company and perhaps for this reason the most accepted form of compensation for storage rights in Ontario is the annual rental per acre. The Board accepts the annual rental as being the most appropriate method of compensation in such cases.

230 On the basis of the foregoing, the Board believes that the appropriate method to determine compensation for landowners in the Bentpath Pool that will be fair, just and equitable is to use the market at a point in time, and to recognize any relevant trends which are evident for the future.

231 The Board can determine a rental rate that would be appropriate for 1974, but is then faced with the knowledge that changes in circumstances since that date are such that the rate should be higher now. The concern expressed by Union that the Board should only determine compensation on a "once and for all basis" has been noted. The Board considers, however, that while such a determination may well be appropriate for an expropriation of land where title is transferred, it would not be appropriate where the issue is the compensation to be paid pursuant to a Board Order. The Board also takes comfort from section 16 of the Act which reads:

"16. The Board in making an order may impose such terms and conditions as it considers proper, and an order may be general or particular in its application."

232 The Board, while not sharing Union's view that rates should be set once and for all, does agree that some stability is required and that adjustments should not be made at too frequent intervals. The Board will, therefore, set a rental rate for the period 1974 to 1982 inclusive and a rate from 1983 to 1990 inclusive. Both rates will be somewhat higher than the rate considered appropriate for 1974 and for 1983, but are not necessarily the average of the two periods in question.

233 The Board, having reviewed carefully the evidence placed before it including the 1964 report issued by the Board and the many submissions, recommendations and proposals in this proceeding; having concluded that there is a market operating in Ontario with respect to gas storage rights; having examined the rates most recently accepted by landowners in the market place and noting the trends; having noted the adjustments made to rates by Tecumseh from 1960 to present, concludes that fair, just and equitable compensation for the Bentpath Pool for the period 1974 to 1982 inclusive will be $18.50 per annum per acre, and for the period 1983 to 1990 inclusive, it will be $24.00 per annum per acre.

234 The Board notes that E.B.O. 46 amended the oil and gas leases held by landowners so that differences between the agreements would be eliminated and all would receive $7.00 per acre per year, including income from storage agreements.

235 The Applicants with standing before the Board in this hearing are those who do not have agreements, either because agreements were never signed, were void ab initio, or expired by the date of first injection. The annual amount paid to each of these landowners pursuant to Board Order E.B.O. 46 has therefore been totally on account of oil and gas rights. The Board has determined the compensation to be paid for storage rights to these Applicants to be $18.50 per acre per annum up to and including 1982 and $24.00 per acre per annum from 1983 up to and including 1990. These amounts shall be paid in advance on or before the 15th day of January of the subject year and shall be in addition to the payments provided in Board Order E.B.O. 46 for the oil and gas rights. Compensation in respect of storage rights beyond 1990 will be renegotiated taking into consideration the circumstances of that time. In the event that the parties cannot agree on compensation and there are no agreements subsisting at that time between the parties, either can again apply to the Board under section 21 of the Act, or any successor act, to have the Board determine future compensation.

236 The above compensation or rental rates shall be paid to the landowners who do not have valid agreements with Union for storage, namely the Higgs, the Smits, Kimpe, the Graham Turners, and also to The Township of Dawn. As indicated earlier the Board believes that it would be appropriate if Union, in the interests of fairness, equity and good public relations, offered the same compensation to all other landowners in the Bentpath Pool.

237 The Board has considered the provisions of section 35(1) and (4) of the Expropriations Act and has concluded that interest should be paid to the above named landowners on all outstanding amounts from July 31, 1974 to the date of payment at the rate of 11.98 per cent per annum, not compounded.

Compensation For Gas or Oil Rights

238 Mr. Giffen, on behalf of the Kimpe Applicants, claimed that compensation for the gas remaining in the Bentpath pool at the time injection commenced for storage (the residual gas) should be priced at 12.5 percent of the now current gas price. He further claimed that all of the gas in the pool was the property of the landowners so that residual gas volumes should be calculated down to zero psia, not to 50 psia bottom-hole as used by Union.

239 Board Order E.B.O. 46 approved a Unit Operation Agreement that provided for payment to the lessors of 2 cents per Mcf for all gas produced, saved and marketed. The evidence before the Board is that there remained in the pool at the time of the injection a further 466,216 Mcf of gas that could have been produced, saved and marketed. The Board is satisfied therefore that the only loss suffered by the landowners is that these volumes were not produced in 1974, and as a result of the pool being used for storage, it is unlikely that they will ever be produced.

240 The Board is not persuaded by Mr. Giffen's arguments. The submission that residual volumes should be calculated to zero psia is rejected since the evidence before the Board is that below a bottom-hole pressure of 50 psia gas cannot be economically produced, saved and marketed. The residual gas that could have been economically produced in 1974, but it wasn't. Union could have offered payment prior to 1982 but apparently didn't. The appropriate penalty to Union is to require payment of interest rather than adjust the unit cost to reflect the current price which no longer bears any resemblance to the cost of production but has been inflated by the action of governments.

241 The Board will, therefore, require Union to pay to the lessors the appropriate amounts in proportion of their land in the participating area to the total participating acreage less that held by the Township of Dawn, as if the residual volumes of 466,216 Mcf had been produced on July 31, 1974. The rate to be used in calculating the payments shall be 2 cents per Mcf. Union will also pay interest on the outstanding amount for each landowner at the non-compounded interest rate of 11.98 per cent per year for the period that the amount has been outstanding.

242 Since the Township of Dawn was prohibited from participating in royalty payments for gas produced from the Bentpath Pool, it should not receive any portion of the amount to be distributed in payment for the residual gas.

Compensation for Damages

243 The only damages claimed by the Kimpe Applicants are in respect of the annual payments for well sites located in the pool area. Currently, the payment being made to landowners by Union is $100 per well per year, and it is the Kimpe Applicants' contention that this should be increased to $1,000 per well per year. They support this claim on the basis that the value of property in the area has increased at least ten times since Union first used $100 per well per year in the Bentpath area.

244 Most landowners do not have wells on their property. Those that are affected in the Bentpath Pool are the McFaddens and Donald Cameron Sanderson, each having three wells located on their property, the Turners and the Graham Turners, each having one well.

245 Board Counsel pointed out that of the above, all are covered by valid agreements with the exception of the Graham Turners whose agreement expired and as such the Board has no jurisdiction to make changes in compensation except for the Graham Turners. Board Counsel made no comment on the Applicants' claim that the rate should be changed from the current levels, but they did recommend that payment should be made for all wells, for the period from July 31, 1974 to December 28, 1977, and that interest should also be paid on the outstanding amounts.

246 Well payments that have been made by Union have been made under the terms of agreements with Mr. Sanderson and the Graham Turners. The well payments to the McFaddens and to the Turners have been made gratuitously, since the oil and gas lease entered into between these landowners and Imperial and the Gas Storage Agreement entered into with Union contain no provision for well payments. The Board understands Union decided to make the payments gratuitously in order to maintain uniformity throughout the pool area.

247 The clause in the Union Agreement of Lease that relates to well payments permits Union to determine which lands covered by leases held by it shall be included in a storage area and requires that notice of such determination shall be given in writing to the owners of such land. When notice has been given then the rights and privileges granted by the agreement continue as long as gas is being stored in the designated area or any part thereof. The agreement states that "the Lessee shall pay to the landowner $100 per year per well for each well drilled for the storage of gas during the term of this lease and such extension thereof."

248 In the case of the Bentpath Pool, Union commenced storage operations in August 1974 but failed to give any Notice of Determination until December 28, 1977. Well payments have been made since the date of the Notice of Determination but not for the period August 1974 to December 28, 1977. Union's witnesses could not explain why the Notice of Determination had been delayed, or why December 28, 1977 was deemed to be the appropriate date for such notices and for the commencement of the well payments.

249 The Board notes that Union, in applying to the Board for designation of the area, had exercised its right to determine that land covered by these leases was to be included in the storage area. The Board finds great difficulty in understanding why, when the Board approved designation, Union did not comply with its own agreement and issue a Notice of Determination. It appears evident that in this case the landowners have suffered a financial loss because of the failure of Union to comply with the terms of its own agreement. The Board will require Union to make payment in the amount hereafter determined to the Graham Turners for one Well, B7, from first injection to December 28, 1977, together with annual interest at 11.98 percent, not compounded, for the period involved, and would urge Union to make similar payments to the other landowners with wells on their property.

250 The Board notes from Exhibit 62-1 that Tecumseh had established a payment for surface use, for whatever reason, at $150 per acre or part thereof and that this amount had been voluntarily increased in 1978 to $250 per acre or part thereof. On the basis of this information and the evidence as to the increase in land values it is apparent that the $100 per well site per year is inadequate under current conditions. Because of the minimal impact on a landowner's property, the Board does not consider it necessary to increase the rental rates by the factor proposed by the Kimpe Applicants; neither does it consider that an annual adjustment should be made between 1974 and 1982 as suggested by them. Accordingly the Board will require that the $100 rate remain in effect up to and including 1981.

251 The well payment of $100.00 per well per year was established as long ago as 1951 in the Bentpath area and since the Board is now increasing the storage rate by a factor of about 2 from 1964 when the Board's report was issued, it would appear equitable to increase the well payment rate somewhat more than the storage rate. Also recognizing the level of well payments being made by others the Board concludes that well payments should be at the rate of $300.00 per year per well for the period from 1983 to 1990 inclusive. Again, this rate will apply to the Graham Turners, but the Board would urge that this rate be applied to all other landowners in the Bentpath Pool with wells located on their property.

PART IV

Application to Rescind or Vary E.B.O. 46 and E.B.O. 64

252 As previously noted, in an Application dated March 18th, 1981 ("The Application to Rescind"), the Kimpe Applicants requested the Board to rescind or vary orders made by it in E.B.O. 46 and E.B.O. 64. Nine grounds were stated in support of this application.

253 Board Order E.B.O. 46 ("the Unitization Order") made pursuant to section 2 4 of the Act, was issued March 6, 1972. The Order provided that Union would be the manager of the unit operation; that the oil and gas interests of those persons having an interest in land in the Bentpath Pool area were all joined and regulated. . .

> "... for the purpose of drilling an operating well and the carrying out of the various matters more particularly provided for in the Unit Agreement as if they and each of them had reached agreement on the terms and conditions set forth in the Unit Agreement and that such joinings and regulations be in accordance with and subject to the terms and conditions set forth in the Unit Agreement";

that the Township of Dawn be specifically excluded from sharing in the benefits of the unit operation; that the boundaries of the unit area could not be altered without Board approval; and that the Order would take effect "only upon revocation of Ontario Regulation 396/70 and shall take affect forthwith upon such revocation". It should be noted, however, that the Unit Operation Agreement, referred to in the Order as the Unit Agreement, which was attached to and formed part of the Order was deemed to have come into effect on December 1, 1970.

254 It is a matter of record that all the Kimpe Applicants or their predecessors on title were served by Union's Application in E.B.O. 46; that by letter the majority of the landowners in the Bentpath Pool area stated their opposition to Union's Application; that an opportunity was given to the landowners or their representatives to participate in that hearing; that since the issuance of Order E.B.O. 46 no appeal has been taken and until this Application to Rescind, no attempt had been made to rescind or vary that Order.

255 Board Order E.B.O. 64 ("the Injection Order") made pursuant to section 21 1) of the Act was issued August 19, 1974. The Order authorized Union to inject gas into, store gas in and remove gas from the Bentpath Pool which had been designated as a storage area by Ontario Regulation 585/74, and to enter upon such lands and to use them for such purposes.

256 Again, it is a matter of record that all the Kimpe Applicants or their predecessors on title were served by Union's Application in E.B.O. 64; that objections to the Application were received from the Turners, Max McFadden, and Achiel Kimpe; that the Township of Dawn advised the Board of its By-law 40, 1973, but did not object to the Application; that an opportunity was given to the landowners to participate and Messrs. Kimpe, Richards and Turner did participate; that since the issuance of Order E.B.O. 64 no appeal has been taken; and that until the Application to Rescind, no attempt was made to rescind or vary that order.

257 To expedite matters, counsel for the Kimpe Applicants and for Union filed a factum or a statement of law and fact relating to this application during the course of the hearing.

258 Basically, Mr. Giffen submitted that the Board exceeded its jurisdiction with respect to the Unitization Order E.B.O. 46 because that order purported to deal with storage rights and was retroactive to December 1, 1970. Mr. Giffen argued that, in exceeding its jurisdiction, the Board adversely affected the rights of; the Higgs and the Smits by in fact establishing the level of compensation to them for storage at $7 per acre per year in perpetuity; the Graham Turners and the Thompsons by keeping alive their leases which would have otherwise expired; and the remaining applicants by changing the payment dates for storage from payment in advance to payment in arrears. Mr. Giffen also raised the technical matter of the incorrect reference to Ontario Regulation 396/70 as well as several other matters which the Board does not consider material or relevant to the issue.

259 Mr. Giffen asked the Board now to rescind or vary Order E.B.O. 46 to provide that such order and the storage payments allegedly made thereunder should not affect compensation or the level of compensation for purposes of the determination made under section 21 of the Act.

260 The Board has already determined that the Unitization Order did not affect storage rights, the level or timing of payments for storage rights or the lease of the Graham Turners. For these purposes then, there is no need to rescind or vary the order in the manner proposed by Mr. Giffen.

261 The argument relating to the error in referring to Ontario Regulation 396/70 which was consolidated and renumbered as Regulation 258 R.R.O. 1970 is, in the Board's view, not sufficient ground for rescinding the order. The correctly identified regulation was revoked by regulation 134/72 which was filed on March 20, 1972. That is the date upon which the Board's order took effect. The order was not retroactive as alleged by Mr. Giffen and interpreted by Union. Again, Mr. Giffen has failed to show sufficient cause to justify the rescinding or varying of the Order.

262 Board Counsel submitted that the Unitization Order should be varied to limit the term of the Order to the period of time during which production of gas took place or to rescind it effective the date Board Order E.B.O. 64 was issued, namely August 19, 1974. Board Counsel pointed out that the purposes for which the Order was issued have now ceased to exist and therefore there is no need to continue it. In support of this submission, the Aldborough Pool Decision E.B.O. 93 decided in December 1979, was cited. In that case the Board decided first that provided production started within 12 months, the term of the Order would be for ten years or the period required to produce the gas reserves, whichever was less; and second that any existing oil and gas leases should continue except to the extent that they were amended or superseded by the unit operating agreement approved by the Board and that the unit operating agreement could be amended or superseded by any Order of the Board. In that case there were apparently no storage leases granting storage rights to any persons whereas at the date of the Bentpath Unitization Order, storage rights had been obtained by Union from the majority of the landowners in the Bentpath Pool area and there was an intent on Union's part, assuming conditions were appropriate, to use the pool for gas storage at some date after the cessation of production. Accordingly, the Board finds the Aldborough decision distinguishable from this case.

263 In the Board's view it is not unreasonable to protect gas storage rights leased from others through an underlying and concurrent oil and gas lease. Union clearly intended to have this protection because Clause 3 of the Gas Storage Agreement provides that the landowner shall not lease oil and gas rights to any person upon the expiration of the Imperial lease, other than to Union. The clause also provides that at Union's request, at any time after the expiration of the Imperial lease and during the lifetime of the Gas Storage Agreement, the landowner shall enter into the Lease and Grant Agreement with Union in the form attached to the Gas Storage Agreement. It appears therefore, that even if the oil and gas rights reverted to the landowners by the revocation of the Unitization Order, Union could require those landowners who signed the Gas Storage Agreement to execute the Lease and Grant and again obtain these rights. The same situation may not apply in a case where Union has a combined oil and gas and storage agreement. The Board is not certain what effect, if any, the revocation of the Unitization Order would have on these leases. The Board agrees with Union that so long as the oil and gas rights are held by Union no one else may drill in the area of the Bentpath Pool. The Board considers this exclusive right to be reasonable under the circumstances. Union's rights to enter upon the lands for purposes of working on the wells and laying field lines are incorporated in the Gas Storage Agreements held by Union, but not everyone signed such Agreement. These rights of Union should also be protected. The Board is aware that, for the most part, the need for the Unitization Order expired when production ceased and the pool was designated for gas storage. The fact remains, however, that with the revocation of the Unitization Order, the Unit Operation Agreement would also terminate, which could result in the loss of

oil and gas rights. The Board accepts that this would not be desirable under the existing circumstances.

264 The Board is aware, as was pointed out by the Board Counsel, that the prolongation of the Unitization Order continues the different levels of payments being made to the various landowners for their oil and gas rights. The Board expects that with the issuance of these Reasons for Decision the difficulties between Union and the land-owners will be resolved and, as noted earlier, hopes that Union will conclude a satisfactory arrangement with the landowners to pay the same rental for oil and gas rights and storage rights to all the landowners in the Pool.

265 The Board therefore concludes that it would be imprudent at this time to vary or rescind Board Order E.B.O. 46.

266 Mr. Giffen, in his Statement of Fact and Law also asked the Board to rescind Board Order E.B.O. 64 until Union offered to the lessors in the Bentpath Pool a Gas Storage Lease Agreement amended in a manner set out by him in his Statement. The lessors were also to be given 30 days in which to execute such agreement. Apparently, under Mr. Giffen's suggestion, once the Gas Storage Lease Agreements were signed, the Board would determine compensation in the present hearing on the basis of the amended Gas Storage Lease Agreement for all landowners who are Applicants. This submission appears to have been altered somewhat in Mr. Giffen's reply argument dated May 14, 1982 where on Page 64 he states:

> "I continue to take the position that those orders were obtained by Union's misrepresentation and they should be rescinded or at least varied to provide that compensation on the basis found in these proceedings in favour of the Township of Dawn, for example, would be extended to all other applicants in the Bentpath Pool."

267 Board Counsel submitted that to rescind the Injection Order would work an injustice on both Union and its customers as it would deprive Union of its rights to use the pool for storage purposes. However, they pointed to the inequity which would result if Union were to comply with a Board Order issued pursuant to this hearing only with respect to those Applicants whom the Board finds to have standing before it. Accordingly, Board Counsel suggested that the Board reserve its decision in respect to rescinding or varying Board Orders E.B.O. 46 and 64, give Union 90 days in which to offer all the landowners the same compensation as is determined in this hearing and then, depending on what happens in the interim, decide this issue.

268 Union objected to both submissions but its major concern was that rescinding E.B.O. 64 would deprive it of its benefit and investment in the Bentpath Pool which, it argued, would not be in the public interest.

269 The Board believes that it is useless to speculate on what would have happened if Union had offered more than $7 per acre per year when it returned to the landowners to have the Gas Storage Lease Agreements signed because, in the final analysis, it was the landowners who refused to sign these agreements which would have given them standing in this proceeding. The Board is disturbed by the fact that it was not fully apprised by the parties of the difficulties that existed between Union and the landowners at the time of the E.B.O. 64 hearing. The Board's understanding of the situation at that time is outlined in its Reasons for Decision E.B.O. 64 dated August 9, 1974 wherein it states on Page 6:

> "The Applicant in this case has offered a new uniform storage agreement to all private landowners in the pool and has undertaken to negotiate an agreement with the Township of Dawn similar to outstanding agreements. The new storage agreement offered to the private landowners (Exhibit 19) provides for the negotiation of compensation, and, in effect, puts all landowners who enter into such agreement in a

position where, failing agreement as to the amount of compensation, the amount would be determined by this Board in accordance with section 21 (4) of the Act. The Township of Dawn is similarly in a position of having the amount of compensation determined by the Board if the agreement cannot be reached."

270 Not only did Union fail to bring the expected events to fruition in so far as the agreements with the landowners and the Township of Dawn were concerned, Union also ignored the statutory and contractual requirements in a number of instances with respect to the operation of this pool. These instances are well documented in Board Counsel's argument. The issue before the Board is whether Union's actions before, during and subsequent to the injection hearing E.B.O. 64 would justify the rescission or variation of the order issued thereunder.

271 On this issue the Board has weighed the interests of the landowners as against the interest of Union, and more particularly against the interest of Union's customers, if the order is rescinded and concludes that to rescind the Injection Order would not be in the general public interest. The Board, having reached this conclusion, sees no purpose in reserving its decision on this issue. Accordingly, the Board will not rescind Board Order E.B.O. 64. In these Reasons for Decision the Board has determined fair, just and reasonable compensation for storage rights for those landowners who have no agreements with Union. As noted earlier the Board has no authority to require that this level of compensation be paid to the balance of the landowners in the Pool. The Board agrees with Union that to vary Board Order E.B.O. 64 in the manner proposed by Mr. Giffen would be an attempt to do indirectly what it cannot do directly and therefore, it will not vary the Order in the manner proposed by Mr. Giffen.

PART V

Costs

272 Section 28 of the Act reads as follows:

> "28 (1) The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed in any case at a sum certain or may be taxed.
>
> (2) The Board may order by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.
>
> (3) The Board may prescribe a scale under which such costs shall be taxed.
>
> (4) In this section, the costs may include the costs of the Board, regard being had to the time and expenses of the Board."

273 Mr. Giffen asked that costs be awarded to the Kimpe Applicants on a solicitor/client basis, regardless of results. Although he recognized that the Act invests the Board with discretionary powers relating to costs, he submitted that the criteria set out in section 3 4 of the Expropriations Act should be applied in this instance, that is, that "the reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable" be paid by the expropriating authority, in this case, Union.

274 Mr. Blackburn, in his letter to the Board dated March 30, 1982, stated that it was his position that his clients, the Higgs, are also entitled to costs should the decision of the Board "be in their favour". Mr. Blackburn pointed out that he was involved in negotiations with Union in 1974 and that he commenced the original application on behalf of the Higgs family.

275 Union submitted that the only Applicants with any status before the Board are the Higgs, the Smits, and The Township of Dawn and that all other Applicants should not be entitled to any costs. With respect to the Higgs, Union counterclaimed for costs against them because Union was put to the effort and expense of developing a defence to their application and then found that the basis of the claim was not prosecuted. It was Union's position that if costs are to be awarded against it, the costs should be determined by the Board in a lump sum, however, Union urged that a decision should not be made at this time and requested the opportunity to make further submissions on this issue after the Board has handed down its Reasons for Decision.

276 Board Counsel recommended that those Applicants who are successful should have their costs on a solicitor/ client basis and that such costs should be taxed by the Taxing Master at Toronto. Those costs would be paid by Union together with the Board's costs resulting from this hearing.

277 The Board has considered the argument of counsel and has concluded that pursuant to section 28 of the Act, costs should be awarded to the successful Applicants on a solicitor/client basis and should be taxed rather than fixed in a sum certain.

278 The Applications carried by Mr. Giffen were in essence a class action on behalf of most landowners in the Bentpath Pool. The Board requires Mr. Giffen first to segregate the solicitor/client costs related to the determination of who is entitled to status before the Board from those related to the determination of the level of compensation. The Board further requires Mr. Giffen to remove from the first category those costs related to the unsuccessful applications of Messrs. McFadden, Pomajba, Richards, Thompson and Turner, including the costs of preparing their evidence and attendance before the Board on their behalf. Insofar as the costs relating to the level of compensation are concerned, it is the view of the Board that these would have been incurred whether or not there was one or more Applicant, therefore, solicitor/client costs related to this aspect of the hearing will be allowed in full. The Board, although it has rejected the applicability of the Havlena Report is of the opinion that reasonable costs incurred in relation to the preparation and presentation of that Report and the attendance of the authors at the hearing should be recovered, as should the costs relating to the other expert witnesses called by Mr. Giffen. With respect to the Higgs, they too are entitled to claim solicitor/client costs in this matter. However, their solicitor took no part in the hearing once it began and certainly did not make any contribution to a better understanding of the issues before this Board. In the Board's view only those costs relating to the actual preparation of the Higgs' Application and the costs incurred by Mr. Blackburn's actual appearances before the Board should be allowed. Costs relating to negotiations in 1974 and the preparation of evidence, which was withdrawn, should not be allowed. The Board rejects Union's claims for costs against the Higgs in connection with this matter.

279 The Board will not award or charge costs of the Application to Rescind to any participant. Such costs are also to be segregated and deleted by Mr. Giffen.

280 Subject to the directions set forth above the Board orders Union to pay to those successful Applicants the reasonable legal, appraisal and other costs actually incurred by them for purposes of determining their status before the Board; also reasonable legal, appraisal and consultants costs in relation to the determination of compensation payable. The Board also orders that the determination of the amount of such costs be referred to a Taxing Officer of the Supreme Court of Ontario for taxation. The costs and expenses of the Board in this hearing will be charged to Union.

Order

281 An order, in accordance with these Reasons for Decision, will issue in due course.

DATED at Toronto this 16th day of July, 1982.

ONTARIO ENERGY BOARD

S.J. Wychowanec
Vice Chairman

J.C. Butler
Member

* * * * *

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* 1. The appearances do not include appearances before the Board in preliminary hearings or on Motions relating to any of the applications or the consolidated application.

2. Messrs. Atkinson, Ryder, Robb and Tennyson and Ms. Bureau did not actively participate in the hearing.

3. The Higgs family was not represented at the hearing.

* The evidence given by Mr. Ruitenbeek during the hearing was adopted by Messrs. Havlena and Friedenberg.